Kuoni Travels (India) Pvt. Ltd vs Pharmaco Flavours And Fragrances Pvt. ... on 14 July, 2015

Author: R.D. Dhanuka

Bench: R.D. Dhanuka

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.743 OF 2012

Kuoni Travels (India) Pvt.Ltd.)
a company incorporated under)
the Companies Act, 1956,)

having its registered office at 8th floor,)
Urmi Estate, Lower Parel (West),)
Mumbai - 400 013.) .. Petitioners

Vs.

Pharmaco Flavours and Fragrances Pvt.Ltd.)

a company incorporated under)
the Companies Act, 1956,)
having its registered office at 301,)

th

Mangal Simran, 28 Road,)
Off. Turner Road, Bandra (West),)
Mumbai - 400 051.) .. Respondents

Mr.E.P. Bharucha,Senior Advocate a/w Mr.Naushad Engineer, Ms.Kirtida Chandarana and Mr.Soovankur Das i/by M/s.Mahernosh Humranwala for

the petitioners.
Mr.Pravin Samdhani, Senior Advocate a/w Ms.Pooja Kshirsagar, Mr.Ishwar Nankani, Mr.Jagdish Chaudhary and Ms.Rutuja Pol i/by M/s.Nankani & Associates for the respondents.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 23rd June, 2015.
PRONOUNCED ON : 14th July, 2015.

Judgment :-

. By this petition filed under Section 34 of the Arbitration &

Conciliation Act, 1996 (for short the said "Arbitration Act"), the petitioners seek to challenge the arbitral award dated 9 th July 2011 passed by the learned arbitrator allowing some of the claims made by the ppn 2 arbp-743.12 (j).doc respondents. The petitioners were the original respondents in the arbitral proceedings whereas the respondents herein were the original claimants. Some of the relevant facts for the purpose of deciding this petition are as under :-

> 2. In the month of July 2008, the petitioners issued an advertisement inviting persons who might be interested in entering into franchise agreement with the petitioners. Under the said franchise agreement, it was required to arrange the premises in which the franchisee was required to open a Kuoni outlet and was required to engage staff for the outlet who would be trained by the petitioners.

The petitioners were to appoint a branch in-charge to supervise the operations of the outlet. On 25th September 2008, both the parties entered into a franchise agreement recording various terms and

conditions therein. The petitioners appointed the respondents as their independent sole franchisee for the territory of Bandra.

3. Under clause 6.2 of the said agreement, the petitioners agreed to pay to the respondents commission at the rate or amount categorically stipulated in the 'commission disbursement structure' introduced and intimated by the petitioners to the respondents prior to the launch of a Tour for all bookings received by the petitioners from the respondents. In the said clause, the petitioners were given sole discretion to revise the 'commission disbursement structure' at any time during the term and agreed to communicate the revised structure to the respondents. It was agreed that the service tax, if any, in relation to the said agreement shall be initially paid by the respondents to the concerned authority and thereupon the amount so paid by the respondents ppn 3 arbp-743.12 (j).doc was agreed to be reimbursed by the petitioners to the respondents.

Clause 6.4 of the agreement provided that if either party fails to make any payment of any amounts due or payable under the said agreement to other party within the periods prescribed therein, interest @ 12% p.a. on the amounts due and outstanding would be paid by the defaulting party to the non-defaulting party from the due date of payment till the full amount so received by the non-defaulting party.

4. Prior to the date of entering into the said franchise agreement with the respondents, the petitioners by an email dated 15 th September 2008 had communicated the commission structure to the respondents which is extracted as under:

> "Commission Structure :
>
> FIT Land package (Direct) : 10% FIT Land package (Channel) : 2% INR services : 2% (subject to change) FIT Special promotional packages:as defined by Kuoni Holidays."

It is the case of the petitioners that the respondents did not seek any clarifications in respect of the commission structure or insist that any minimum guarantee be introduced as a term of the agreement between the parties.

5. Clause 7.3 of the said franchise agreement provided for termination of the said agreement on the happening of any of the events mentioned therein. Clauses 14.1 and 14.5 of the said agreement which are relevant for the purpose of deciding this petition are extracted as under:-

> "14.1 This Agreement contains the entire agreement and understanding between the parties relating to the subject matter ppn 4 arbp-743.12 (j).doc hereof and cancles and supersedes all and any other prior arrangements, agreements and understanding between the parties and no other term or promise or condition or obligation, oral or in writing shall be pleaded as agreed upon between the parties relating to this Agreement unless evidenced in writing and signed on behalf of each party.

14.5 Any modification or amendment of any of the terms of this Agreement shall be valid and binding only if done by a written document signed by or on behalf of the parties."

6. On 17th September 2008, the respondents addressed an email to the petitioners and referred to the commission structure which was mentioned by the petitioners in their email dated 15 th September 2008. It is the case of the petitioners that even in the said email, the respondents did not seek any clarification from the petitioners that the petitioners would pay any minimum guaranteed commission to the respondents under the said agreement proposed to be entered into between the parties.

It is the case of the petitioners that in the second week of November 2008, the respondents commenced their franchise business from their premises at Bandra.

7. Under clause 3.1 (e), the respondents undertook and agreed that unless specified to the contrary in said agreement, the respondents shall bear all costs relating to the conduct of the franchised activity.

Under clause 3.1 (j), the respondents agreed to recruit requisite number of staff at their own expenses as specified by the petitioners from time to time and to ensure that such staff recruited by the respondents shall have the necessary experience, expertise and would successfully undergo the training/induction program designed by the petitioners before they could be confirmed.

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8. By an email dated 16th February 2009, the respondents alleged that prior to the signing of franchise agreement, the respondents were consistently told that the business potential was huge. The quantum of business alleged to have been assured by the petitioners was 600-650 passengers with an average spend of Rs.80,000-85,000/-. The respondents requested the petitioners to hold meeting with the respondents.

9. On 2nd March 2009, the respondents sent an email to the petitioners and referred to the alleged discussions that took place between the parties in the meeting held on 25 th February 2009.

According to the said report on discussions referred to in the email, it was decided that there would be placement of Branch in charge Kuoni Bandra by 1st week of March 2009 who had good product, knowledge, a team builder and had a flair and experience in the field of marketing and had been in the travel industry. It was also stated in the said email that it was decided that the target in terms of profitability and number of passengers sent through Kuoni Bandra were at least 50 passengers per month average commission receivable at Rs.8,000/- on each passenger when signing the agreement with the petitioners.

10. On 29th March 2009, the petitioners sent an email to the respondents stating that the petitioners would like to share progress and activities done so far both in print media and BTL for

Bandra specifically in the month of March 2009 to build up query bare and business for the peak season.

11. By their email dated 20th July 2010, the respondents informed the petitioners that the commissions received and receivable ppn 6 arbp-743.12 (j).doc were causing immense concern. It is alleged that as per the figures of the petitioners in the first seven months, the respondents had so far an average of Rs.40,000/- per month which was a far cry from the figure of Rs.5,00,000/- a month which was promised. The respondents informed the petitioners that the problem of earning issue shall be solved in the meeting proposed to be held on that day.

12. On 22nd June 2009, the respondents addressed an email to the petitioners and reminded the petitioners that the respondents were nowhere close to cease the business as per their deal with Kauoni when signing the franchisee agreement in September 2008. It was alleged assurances given by the petitioners to the respondents by repeatedly falling short terms of revenue and number of passengers booked even in the peak season. It was alleged that the respondents had barely covered their day to day costs for the months since they had commenced operations. The respondents awaited a positive response from the petitioners. The petitioners by their email dated 24th June 2009 informed the respondents that the petitioners shall appoint business in charge for Bandra store at the earliest.

13. On 16th July 2009, the parties called a meeting. In the said meeting, various discussions took place between the parties. According to the said discussions recorded in the Minutes of Meeting, the same were forwarded to the petitioners vide their email dated 17 th July 2009. According to the said Minutes of Meeting, it was agreed that a capable Branch in charge at the Bandra Kuoni franchisee outlet would be appointed by 31st July 2009 who would be responsible to generate ppn 7 arbp-743.12 (j).doc minimum business of Rs.3,05,000/- per month to meet with the outlets monthly outflow. It was decided that the said amount was only for the current year i.e. 2009 post which profits had to increase to the original promise levels of Rs.8,500/- passengers per month. The respondents alleged that the commission to the Bandra outleet was to the tune of Rs.4,25,000/- per month and Rs.51,00,000/- lacs a year.

14. The respondents by their email dated 21st July 2009 to the petitioners recorded that the respondents did not seek potential business and earnings of 650 passengers at an average of Rs.8,500/- realization per passenger amounting to more than Rs.55 lacs. It was alleged that the petitioners had shown rosy picture to the respondents about the return of income.

15. The respondents by their email dated 3 rd August 2009, once again alleged that the petitioners had informed the respondents that service would be improved in terms of competitive prices, quick response to the customers, generate enough inquiries etc.

16. The petitioners by their email dated 7 th August 2009 to the respondents placed on record pointed out the action points discussed between the parties on the previous day. According to the said email, the petitioners would ensure to get 50 passengers booked in one month's time till 7th September 2009. On 10th August 2009, the respondents sent an email to the petitioners recording

that Ms.Kashmira Commissariat, representative of the petitioners had made a commitment assuring the respondents about bookings of 50 passengers @ Rs.8,000/- commission ppn 8 arbp-743.12 (j).doc per passenger as an ongoing endeavour of Kuoni to the petitioners to ensure that Bandra Kuoni would become a profitable branch and would be pulled out of current financial crisis.

17. The respondents by their email dated 10 th August 2009, once again recorded that Ms.Kashmira Commissariat had given a commitment and assurance for booking of 50 passengers @Rs.8,000/- commission per passenger.

18. The respondents by their email dated 14 th September 2009 to the petitioners, once again alleged that Ms.Kashmira Commissariat and Mr.Sriram Rajmohan had assured a minimum 50 passengers bookings @Rs.8,000/- commissionable to the respondents per passenger. It was alleged that when the parties had signed the contract, the respondents were guaranteed 50 passengers per month @ Rs.8,000/-

per passenger.

19. The respondents by their email dated 9th November 2009, once again alleged that the petitioners had given an assurance of minimum 50 passengers bookings @Rs.8,000/- commission per passenger. According to the respondents, the petitioners placed the respondents ranking at Serial No.1.

20. By a letter dated 18th January, 2010, addressed by the respondents to the petitioners, the respondents made a demand to the extent of Rs.45,38,142/- and called upon the petitioners to pay the said amount immediately.

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21. By their advocate's letter dated 16th February, 2010, the petitioners denied the allegations made in the letter dated 18 th January, 2010 except the allegations which were expressly admitted in the said letter dated 16th February, 2010.The petitioners terminated the said franchise agreement and called upon the respondents to hand over all promotional material and to discontinue the booking from the customers in the name of the petitioners.

22. The respondents by their advocate's letter dated 4th March, 2010, replied to the said letter dated 16 th February,2010 and denied the allegations made therein. The respondents protested against the termination of the franchise agreement effected by the petitioners.

23. The respondents thereafter filed the statement of claim before the learned arbitrator inter-alia praying for an amount of Rs.85,17,649/- with interest at the rate of 18% p.a from the date of filing the claim till payment and costs of the arbitration proceedings. The said claim of the respondents was opposed by the petitioners by filing the written statement. The petitioners also made the counter claim before the learned arbitrator in the sum of Rs.39,76,301/- with interest at the rate of 18% p.a. On 9th July, 2011, the learned arbitrator made an award directing the petitioners to pay the

respondents sums of Rs.72,25,000/-, Rs.6,11,910/- and Rs.8,77,015/- with interest at the rate of 18% p.a. from the date of termination of the franchise agreement i.e. 16 th February, 2010 till payment. The learned arbitrator also directed the petitioners to pay a sum of Rs.6,15,000/- towards the arbitration costs to the respondents. This award of the learned arbitrator has been impugned by the petitioners in this petition filed under section 34 of the Arbitration Act.

ppn 10 arbp-743.12 (j).doc Claim No.1 - Alleged balance minimum guaranteed commission

24. Mr.Bharucha, learned senior counsel for the petitioners invited my attention to the relevant part of the pleadings, documents relied upon by both the parties before the learned arbitrator and also the relevant part of the impugned award. Insofar as the claim made by the respondents towards the alleged balance commission in the sum of Rs.72,25,000/- awarded by the learned arbitrator is concerned, it is submitted that there was no provision in the agreement entered into between the parties which provided for payment of any minimum guaranteed commission to the respondents. He submits that on the contrary in clause 6.2, it was expressly provided that the petitioners would be entitled to revise commission disbursement structure at any time during the tenure of the agreement. He submits that under clause 14.1 of the said franchise agreement, it was clearly stipulated that the said agreement contained the entire agreement and understanding between the parties relating to the subject mater thereof and the said agreement cancelled and superseded all and any other prior arrangements/ agreements and understandings between the parties.

25. It is submitted that no other term or promise or condition or obligation, oral or in writing shall be pleaded as agreed upon between the parties relating to this agreement unless evidenced in writing and signed on behalf of each party. Reliance is placed on clause 14.5 of the agreement and it is submitted that in view of the said clause which provided that any modification or amendment or of the terms of the ppn 11 arbp-743.12 (j).doc agreement shall be valid and binding only if done by the written document signed by or on behalf of the parties, the learned arbitrator could not have awarded the said claim contrary to the terms of the agreement. He submits that the learned arbitrator has re-written the contract which is not permissible in law.

26. Learned senior counsel submits that the respondents were clearly precluded from making any claim based on the alleged prior alleged oral agreement for minimum guaranteed commission / return on investment. The learned arbitrator has allowed the said claim for the minimum guaranteed commission contrary to the terms of the agreement and the award is in conflict with the public policy. He submits that the learned arbitrator could not have permitted the respondents to set up an oral agreement contrary to the terms of the franchise agreement, which was in writing entered into between the parties. In support of this submission, learned senior counsel placed reliance on the judgment of the Supreme Court in the case of Roop Kumar vs. Mohan Thedani, (2003) 6 SCC 595 and in particular paragraphs 16, 17 and 21 and it is submitted that since the parties had entered into agreement in writing, it was presumed between the parties that they had intended that such writing was to form a full and final settlement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith and treacherous memory.

27. Learned senior counsel also placed reliance on the judgment of the Supreme Court in the case of Security Printing & Minting Corporation of India Ltd. & Anr. vs. Gandhi Industrial Corporation ppn 12 arbp-743.12 (j).doc (2007) 13 SCC 236 and in particular paragraph 16 and it is submitted that the binding agreement was entered into between the parties, the respondents could not have been permitted to refer to the correspondence entered into at the negotiations stage between the parties. He submits that once the concluded contract came in the existence, the offer made by and between the parties earlier could not have been referred as the terms and conditions of the concluded contract.

28. Learned senior counsel for the petitioners also placed reliance on the judgment of the Supreme Court in the case of Tamil Nadu Electricity Board & Anr. vs. N. Raju Reddiar & Anr., (1996) 4 SCC 551 and in particular paragraph 7, the judgment of the Supreme Court in the case of Bhandari Construction Co. vs. Narayan Gopal Upadhye, (2007) 3 SCC 163 and in particular paragraph 15 and also the judgment of this Court in the case of Larsen & Toubro Ltd. & Ors. vs. Grasim Industries Limited & Anr. 2008(2) Bom.C.R. 633 and in particular paragraphs 21, 24, 26 and 28 in respect of the aforesaid submissions.

29. In reply, Mr.Samdhani, learned senior counsel for the respondents on the other hand insofar as this claim is concerned, submits that the learned arbitrator has considered the entire evidence produced by both the parties and has rendered the findings of fact that the respondents were entitled to claim the minimum guaranteed commission from the respondents under the said franchise agreement and such findings of fact not being perverse, this Court cannot re-appreciate such findings of fact and cannot re-appreciate the evidence considered by the learned arbitrator ppn 13 arbp-743.12 (j).doc in the impugned award. He invited my attention to various correspondence referred to aforesaid and would submit that the petitioners had prior to the date of execution of the franchise agreement and even thereafter by various e-mails have made an assurance of minimum guaranteed commission. He submits that none of such e-mails sent by the respondents referring such assurances on the part of the petitioners were disputed by the petitioners by giving any response to those e-mails.

30. It is submitted that the business manager of the petitioners was complete in charge of the said business of the respondents. The respondents had responded to the advertisement issued by the petitioners.

He submits that there was no dispute that the premises in which the said business was carried on belonged to the respondents exclusively. All expenditure of the renovation of the premises was borne by the respondents. It is submitted that the petitioners had ensured healthy return of income to the respondents. He submits that the learned arbitrator has rightly interpreted the terms of the agreement and has appreciated the evidence led by both the parties which interpretation is a possible interpretation and thus this Court cannot substitute the possible interpretation of the learned arbitrator by another interpretation.

31. A perusal of clause 6.2 of the franchise agreement clearly indicates that the petitioner had agreed to pay commission for all bookings received by the petitioners from the respondents at the rate or

amount categorically stipulated in the 'commission disbursement structure' introduced and intimated by the petitioners to the respondents ppn 14 arbp-743.12 (j).doc prior to the launch of a Tour. The petitioners have also been given a right exclusively to revise the 'commission disbursement structure' at any time during the Term and to communicate the revised structure to the respondents. The said clause further provided that notwithstanding anything contained in the agreement, the commission payable to the respondents shall be as applicable and decided by the petitioners from time to time with prior written intimation by the petitioners to the respondents. Clause 14.1 of the said franchise agreement clearly provides that the said agreement contained the entire agreement and understanding between the parties relating to the subject matter thereof and cancelled and superseded all and any other prior arrangements, agreements and understandings between the parties. It further provides that no other term or promise or condition or obligation, oral or in writing, shall be pleaded as agreed upon between the parties relating to the said agreement unless evidenced in writing and signed on behalf of each party.

32. It is not in dispute that after execution of the said franchise agreement, both the parties have not entered into any further writing duly signed by both the parties thereby the petitioners having agreed to pay any minimum guaranteed commission to the respondents. Though in the correspondence exchanged between the parties after execution of the said franchise agreement, the respondents in some of the letters demanded minimum guaranteed commission at different rates, a perusal of the correspondence clearly indicates that the petitioners never agreed to such term in the franchise agreement and never agreed to pay any minimum guaranteed commission as claimed or otherwise. A perusal of clause 14.1 of the said agreement clearly indicates that all the understandings ppn 15 arbp-743.12 (j).doc between the parties relating to the subject matter of the said agreement were contained in the said franchise agreement in its entirety. It was thus clear that there was no provision for payment of minimum guaranteed commission in the said franchise agreement. It was not the case of the respondents that after execution of the said franchise agreement, the parties had entered into any further writing duly signed by both the parties thereby agreeing to the said terms and conditions of the franchise agreement.

33. A perusal of the impugned award in so far as this claim is concerned indicates that the learned arbitrator after referring to some of the emails addressed by the respondents observed that in this case, the written agreement was silent as to question of Return on Investment. The learned arbitrator observed that the respondents had made their premises available for the said business and had refurbished the same as per the requirements of the petitioners. The respondents had also deposited a sum of Rs.10 lacs with the petitioners and were spending on taxes of the premises, salary of staff, electricity, phone bills etc. It was held that the management and control of the business was with the petitioners. Employee of the petitioners was appointed as the business in charge who was in control of the office. Learned arbitrator accordingly held that it was impossible that under such circumstances, any prudent person would enter into an agreement unless he was assured a Return on Investment. It was held that the agreement may be silent on the question of Return on Investment, but significantly it did not provide that there would be no Return on Investment. It was held that an understanding that there would be a Return on Investment was not contrary to the written agreement.

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34. In paragraph 33 of the impugned award, the learned arbitrator held that the agreement was silent on what the commission would be. It was held that the 'commission disbursement structure' was missing from the agreement and this itself showed that inspite of what was stated in clause 14.1, it did not contain in the agreement all the understandings between the parties. Learned arbitrator held that all emails on record made it clear that there was such an understanding. Learned arbitrator held that the initial offer made by the petitioners itself contained a promise of a Return on Investment which was a positive act of promising 50 passengers in a month. It is held that the petitioners did not respond to any of the emails sent by the respondents and thus no inference could be drawn that they were doing so because they could not deny what was stated in the emails.

35. In paragraph 37 of the impugned award, the learned arbitrator held that the business was to be run by the business in charge appointed by the petitioners and the respondents were given an assurance that there would be a minimum guaranteed commission on Return on Investment. Such an assurance became a warranty and became part and parcel of the agreement between the parties which the petitioners were bound to honor.

36. In so far as quantification is concerned, the learned arbitrator allowed the amount claimed by the petitioners merely on the ground that if the case of the petitioners that there was no assurance is not accepted by the learned arbitrator, then he had no other option but to accept the case of the respondents. He held that the petitioners had not ppn 17 arbp-743.12 (j).doc given any other figure and thus the learned arbitrator had to accept the case of the respondents particularly when in the email after email the respondents had set out that what had been promised was 50 passengers per month at a commission of Rs.8,500/- per passenger.

37. A perusal of the award clearly indicates that though clause 14.1 clearly provided that understanding between the parties relating to the subject matter of the said franchise agreement was contained in the said agreement in its entirety and had canceled and superseded all and any other prior arrangements, agreements and understandings between the parties and further provide that no other term or promise or condition or obligation, oral or in writing shall be pleaded as agreed upon between the parties unless the same was evidenced in writing and signed by both the parties, the learned arbitrator, in my view, has re-written the agreement by allowing the claim for minimum guaranteed commission on the basis of some of the letters addressed by the respondents demanding minimum guaranteed commission charges. Learned arbitrator, in my view, has completely overlooked the fact that there was no variation in the franchise agreement duly signed by both the parties as was contemplated under clause 14.1 for the purpose of pleadings and for claiming novatio. In my view, the learned arbitrator has decided contrary to the terms of the agreement and thus the award in respect of claim no.1 is set aside.

38. In so far as the quantification is concerned, the petitioners had disputed the liability in respect of the said claim. A perusal of the ppn 18 arbp-743.12 (j).doc record clearly indicates that though the respondents had claimed different amounts for the said minimum guaranteed commission in correspondence, the learned arbitrator has allowed the entire claim as made by the respondents on

the ground that since the petitioners had not given any other figure and since the learned arbitrator had not accepted the case of the petitioners that there was no assurance of minimum guaranteed commission on Return on Investment, the leaned arbitrator had to accept the case of the respondents. In my view, this part of the finding is based on no evidence. Learned arbitrator had allowed the said claim in toto without any proof of the minimum guaranteed commission alleged to have been agreed by the petitioners. This part of the award deserves to be set aside on this ground also.

39. The Supreme Court in the case of Bhandari Construction Co. (supra) has held that when the terms of the transaction are reduced to writing, it is impossible to lead evidence to contradict its term in view of Section 91 of the Evidence Act. In the case of Tamil Nadu Electricity Board and Anr. (supra), the Supreme Court has held that the parties are bound by the terms and conditions of the agreement and once a contract is reduced to writing, by operation of Section 91 of the Evidence Act, 1872, it is not open to any of the parties to seek to prove the terms of the contract with reference to some oral or other documentary evidence to find out the intention of the parties. It is held that under Section 92 of the Evidence Act where the written instrument appears to contain the whole terms of the contract then parties to the contract are not entitled to lead any oral evidence to ascertain the terms of the contract.

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40. The Supreme Court in the case of Security Printing and Minting Corporation of India Limited and Anr. (supra) has held that once the contract had come into existence, there was no purpose to refer to the terms of the tender and what was binding was the completed contract and not the terms of offer of the advertisement. It is held that once the concluded contract had come into existence, then in that case the offer of advertisement cannot override the terms and conditions of the completed contract.

41. The Supreme Court in the case of Roop Kumar (supra) has held that when the parties had deliberately put their agreement into writing, it was conclusively presumed between themselves and their privies, that they intended the writing to form a full and final statement of their intentions and one which should be placed beyond the reach of future controversy, bad faith and treacherous memory. It is held that instruments in writing are in their own nature and origin, entitled to a much higher degree of credit than parol evidence. It is a policy because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence.

42. The Supreme Court in the case of Bank of India Vs. K.Mohandas and Ors. (supra) has held that the true construction of a contract must depend upon the import of the words used and not upon what the parties choose to say afterwards. It is held that subsequent conduct of the parties in the performance of the contract would not affect the clear and unambiguous words used in the contract. The ppn 20 arbp-743.12 (j).doc intention of the parties must be ascertained from the language they have used, considered in the light of the surrounding circumstances and the object of the contract. The nature and purpose of the contract is an important guide in ascertaining the intention of the

parties.

43. In my view, the parties had clearly intended and had accordingly recorded in the agreement and more particularly clause 14.1, all the understandings between the parties recorded therein in its entirety. Learned arbitrator thus could not have considered the correspondence exchanged ig between the respondents and petitioners subsequent to the execution of the franchise agreement to ascertain contrary intention of the parties. In my view, the principles laid down by the Supreme Court in the aforesaid judgments clearly apply to the facts of this case. The impugned award in so far as the claim no.1 is contrary to the principles laid down by the Supreme Court. The award is thus in conflict with the public policy. I am respectfully bound by the judgments of the Supreme Court. The award in respect of the claim no.1 is accordingly set aside.

44. In so far as the judgment of the Supreme Court in the case of Swan Gold Mining Ltd. Vs. Hindustan Copper Ltd., reported in 2014 (4) Arb.LR 1 (SC) relied upon by Mr. Samdhani, learned senior counsel for the respondents is concerned, it is held by the Supreme Court that the arbitral award can be set aside only if one of the conditions of Section 34(2) of the Arbitration and Conciliation Act, 1996 is satisfied. It is held that the arbitral award can be set aside only if the Court finds that such award is on the face of it erroneous and ppn 21 arbp-743.12 (j).doc patently illegal or in contravention of the provisions of the Act. It is held that the Court shall not ordinarily substitute its interpretation for that of arbitrator. The Supreme Court in the said judgment also held that when the parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract, then substituting new terms in the contract by the arbitrator or by the Court would be erroneous or illegal. In my view, the learned arbitrator has substituted the provisions of the franchise agreement by reading the provision of minimum guaranteed commission in the said franchise agreement which is not permissible in law and is illegal. In my view, since the learned arbitrator has acted contrary to the terms of the agreement and the award shows patent illegality, the Court can set aside such award under Section 34(2) of the Arbitration Act.

45. In so far as the judgment of the Supreme Court in the case of Bharat Petroleum Corporation Ltd. Vs. Great Eastern Shipping Co. Ltd., reported in (2008) 1 SCC 503 relied upon by the learned senior counsel for the respondents is concerned, it is held by the Supreme Court that under certain circumstances, offeree's silence, coupled with his conduct, which takes the form of a positive act, may constitute an acceptance of an agreement sub silentio. In this case, however, there is no silence on the part of the petitioners but the petitioners had denied the claims made by the respondents. There is no positive act on the part of the petitioners in accepting the demand made by the respondents. It was not the case of the respondents that the petitioners paid any minimum guaranteed commission in response to the demand made by the respondents. This judgment of the Supreme Court does not assist the case of the respondents.

ppn 22 arbp-743.12 (j).doc Claim No.2 - Refund of an amount of Rs.10 lacs

46. Mr.Bharucha, learned senior counsel for the petitioners submits that under clause 6 of the franchise agreement, the respondents were required to deposit the said amount as franchise fees which was to be one time non-refundable amount and the franchise agreement was to be for the

period of four years. He submits that upon termination of the said franchise agreement, the petitioners were not liable to refund the said deposit of Rs.10 lacs, which was admittedly non-refundable deposit. He submits that the learned arbitrator thus could not have directed refund of Rs.6,11,910/- in favour of the respondent purporting to be the refund for balance period beyond the period of 15 months when the franchise agreement was in force. He submits that the impugned award allowing the said claim is contrary to the terms of clause 6 of the franchise agreement and thus deserves to be set-aside.

47. Mr.Samdhani, learned senior counsel for the respondents on the other hand submits that the said deposit was though described as non-

refundable, the said deposit was to be retained with the petitioners provided the period of four years under the said franchise agreement would have been completed. He submits that since the petitioners had unlawfully terminated the franchise agreement within a period of 15 months, the petitioners could not have retained the said deposit with the petitioners. He submits that the learned arbitrator has rendered a finding of fact that the termination of the franchise agreement by the petitioner was unlawful and has accordingly directed the petitioners to return the proportionate amount of the said deposit after deducting the amount for ppn 23 arbp-743.12 (j).doc the proportionate period when the franchise agreement was subsisting. He submits that the petitioners have not made out any case as to how the finding of the learned arbitrator insofar as termination of the agreement is concerned is illegal. He submits that this part of the award cannot be interfered with by this Court under section 34 of the Arbitration Act.

48. A perusal of the award indicates that the learned arbitrator after considering the evidence on record has rendered a finding that the respondents herein had not committed any breach of the franchise agreement and the termination of the agreement by the petitioners' advocate's letter dated 16th February 2010 was thus unwarranted and unjustified. It is held that the said termination was without any justification. After rendering such finding of fact, the learned arbitrator in so far as this claim is concerned rejected the submission made by the petitioners that the said amount of Rs.10 lacs deposited by the respondents as non-refundable deposit was not payable. Learned arbitrator has rendered a finding that the said deposit of Rs.10 lacs was a non-refundable deposit provided the franchise agreement lasted for 4 years. It is held that since the agreement was terminated by default on the part of the respondents, the petitioners could not have retained the said amount of deposit of Rs.10 lacs. The respondents had not claimed the refund for 15 months when the agreement was in force and had claimed a sum of Rs.6,11,910/- which would be for the balance period out of 4 years.

49. In my view, the finding of fact rendered by the learned arbitrator on the issue of termination is based on the appreciation of the ppn 24 arbp-743.12 (j).doc evidence produced by the parties and the same is not perverse. Mr. Bharucha, learned senior counsel for the petitioners could not convince this Court as to how the said finding on the issue of termination was perverse. In my view, this Court thus cannot interfere with such finding of fact under Section 34 of the Arbitration Act which is not perverse. Learned arbitrator has rightly allowed the claim of Rs.6,11,910/- in favour of the respondents and no interference is warranted with that part of the award.

50. I am not inclined to accept the submission of the learned counsel for the petitioners that the award in respect of the said claim is contrary to the terms of the agreement. Learned arbitrator has held that since the said amount of Rs.10 lacs was deposited under the said agreement which was agreed to be for a minimum period of 4 years, the petitioners having wrongly terminated the said agreement could not have retained the proportionate amount of the said deposit in view of the pre-mature termination of the said agreement. There is no infirmity with that part of the interpretation of the agreement by the learned arbitrator. Such interpretation is a possible interpretation and cannot be substituted by another interpretation by this Court. The said part of the award is thus upheld.

Claim No.3 -Expenditure on Renewal, renovation and re-furbishment of premises Rs.8,77,015/-

51. Insofar as claim No.3 is concerned, learned senior counsel for the petitioners submits that under the provisions of the franchise agreement, the respondents were liable to spend on repair, renovation and ppn 25 arbp-743.12 (j).doc re-furnishing the premises as per the requirement of the respondents and the same was not re-reimbursable by the petitioners. He submits that in any event the respondents had not supported the said claim by producing any proof. He submits that the learned arbitrator has allowed the said claim of Rs.8,77,015/- without any evidence and contrary to the terms of the agreement.

52. Mr.Samdhani, learned senior counsel for the respondents on the other hand submits that since various amounts were spent by the respondents on repair, renovation and re-furnishing the premises on the basis that the franchise agreement would be valid for four years and since the petitioners terminated the said agreement unlawfully on expiry of 15 months, the petitioners were liable to reimburse the said amount spent by the respondent which expenditure was infructuous insofar the respondents are concerned. He submits that in any event, the respondents had examined the witness to prove the said claim. Learned arbitrator has considered the oral evidence of the said witness while allowing the said claim of Rs.8,77,015/-. He submits that this Court cannot re-appreciate the evidence considered by the learned arbitrator while allowing the said claim.

53. A perusal of the award in so far as this claim is concerned, clearly indicates that the respondents had led evidence before the learned arbitrator in support of this claim and had claimed a sum of Rs.20 lacs being the amount alleged to have been spent by them for repair, renovation and refurbishing the premises as per the requirements of the petitioners. A perusal of the record indicates that the learned ppn 26 arbp-743.12 (j).doc counsel for the petitioners had admitted before the learned arbitrator that the total of all bills, invoices etc. produced by the respondents was only to the tune of Rs.13,49,254.65p. which amount was not disputed by the learned counsel for the respondents. Learned arbitrator has rendered a finding that in answer to the questions 46 to 63 given by the witness examined by the respondents, he did not dispute that those amounts were spent for repair, renovation and refurbishing the premises as per the requirements of the petitioners. Learned arbitrator has considered 35% depreciation on the amount of Rs.13,49,254.65p. and awarded only a sum of Rs.8,77,015/-.

54. In my view, since the learned arbitrator found that termination of the franchise agreement was unlawful and unwarranted, the respondents who spent various amounts on repair, renovation and refurbishing the premises were entitled to recover the proportionate amount from the petitioners. Since the finding of the learned arbitrator that the agreement was unlawfully terminated is upheld, in my view, no infirmity can be found with this part of the award allowing the proportionate amount of the expenditure incurred on account of repair, renovation and refurbishing the premises which was for the purpose of running the business under the said franchise agreement. Learned arbitrator has allowed only such amount which was proved by the witness examined by the respondents and that also by deducting the depreciation amount. In my view, the learned arbitrator has appreciated the evidence while recording the said finding of fact which is not perverse. Such finding of fact which is not perverse cannot be interfered with by this Court. I am not inclined to accept the submission of the ppn 27 arbp-743.12 (j).doc learned counsel for the petitioners that such part of the claim is contrary to the terms of the agreement. There is no bar under the franchise agreement against the respondents from claiming any such amount even if the agreement is lawfully terminated by the petitioners. This part of the award is accordingly upheld.

Claim for Interest

55. Mr.Bharucha, learned senior counsel for the petitioners submits that though clause 6.4 of the franchise agreement provides for interest at the rate of 12% p.a. the learned arbitrator has allowed interest at the rate of 18% p.a. in favour of the respondents which is contrary to the terms of the agreement. In reply, learned senior counsel for the respondents submits that the said clause 6.4 would apply only if either party would have failed to make any amount due and payable under the said agreement i.e. minimum guaranteed commission amount and would not apply to any other claim.

56. In my view, there is no substance in this submission of learned senior counsel for the respondents. In my view, the said clause would apply to any amount due and payable under the franchise agreement by either party between the periods prescribed. It is not the case of the respondents that any of the claims made by it were made outside the contract. In my view, the learned arbitrator could not have granted interest at the rate of 18% p.a. contrary to the agreed rate of 12% p.a. under clause 6.4 of the agreement. Insofar the award of interest at the rate of 18% p.a. thus awarded by the learned arbitrator is concerned, the rate of interest is reduced from 18% p.a. to 12% p.a. being contrary to the terms of agreement on the claims which are upheld by this Court.

Arbitration Costs

57. In so far as the arbitration costs is concerned, learned

counsel for the petitioners submits that the learned arbitrator has not only allowed the claim contrary to the terms of the contract in the impugned award but has also awarded exorbitant costs of Rs.6,15,000/-

against the petitioners. That part of the award deserves to be set aside. Mr.Samdhani, learned senior counsel, on the other hand, supported this part of the award and submits that no interference with this part of the award allowing the costs of Rs.6,15,000/- is permissible.

58. In so far as the arbitrator costs in the sum of Rs.6,15,000/-

awarded by the learned arbitrator is concerned, since the substantial part of the award by the learned arbitrator is set aside, the award of costs can be reduced to 50 % of the amount awarded and is accordingly reduced to Rs.3,07,500/-. This part of the award is accordingly modified.

59. Insofar as the rejection of the counter claim which was made by the petitioners by the learned arbitrator is concerned, Mr.Bharucha, learned senior counsel for the petitioners did not seriously pursue the challenge to that part of the award and thus that part of the award is upheld.

60. I, therefore, pass the following order :-

a) Arbitration petition is partly allowed.
b) The award in respect of claim no.1 is set aside.
c) The award in respect of claim nos.2 & 3 is upheld.

d) The award in respect of arbitration costs is partly set aside. The

petitioner would be liable to pay Rs.3,07,500/- to the respondent.

e) The award in respect of interest is reduced from 18% to 12% on the claims awarded.

f) Since the claim no.1 is set aside in toto, the interest awarded on the said claim is also set aside.

g) There shall be no order as to costs.

R.D. DHANUKA, J.

Learned counsel for the petitioners seeks stay of the operation of this order. Application for stay is rejected.

R.D. DHANUKA, J.