

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 10th February, 2014

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LPA No.971/2013 & CM No. 20515/2013

M/S TITAGARH WAGONS LTD.

..... Appellant

Through: Mr. Sandeep Sethi, Sr. Adv. along
with Mr. Ashish Verma and Mr.
Rahul Malhotra, Adv.

Versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. R.V. Sinha, Adv. for
Railways.
Mr. S. Ganesh, Sr. Adv. along with
Mr. P.K. Bansal, Adv. for R-3

AND

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LPA No.949/2013 & CMs No. 19843/2013 & 1674-76/2014

M/S JUPITER WAGONS LTD.

..... Appellant

Through: Mr. U. Hazarika, Sr. Adv. with Mr.
Vineet Tayal & Mr. Suvradal
Choudhary, Adv.

Versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr. R.V. Sinha, Adv. for
Railways.
Mr. S. Ganesh, Sr. Adv. along with
Mr. P.K. Bansal, Adv. for R-2.

CORAM :-
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. Both intra-court appeals impugn the order dated 3rd April, 2013 of the learned Single Judge of this Court in W.P.(C) No.7695/2012 preferred by the respondent No.2 in LPA No.949/2013 and respondent No.3 in LPA 971/2013 namely M/s Modern Industries. Both the appellants were not parties to the writ petition and filed review petitions No.472/2013 and 473/2013 for review of the order dated 3rd April, 2013. However the learned Single Judge vide order dated 4th October, 2013 dismissed the said review petitions. Aggrieved from the said orders, these intra-court appeals have been filed.

2. M/s Modern Industries filed the writ petition, from which these appeals arise, for a direction to the respondent Railways to immediately release in its favour order for manufacture of 'remaining 885 wagons', pleading:

- (i) that the respondent Railways had placed an order dated 16th January, 2012 upon it for supply of 1771 VUs Wagons;
- (ii) that as per Clause 1.1 of the said order / Contract, the release order for manufacture and supply of 886 wagons was issued

immediately and as per Clause 2 of the said order / Contract, the release order for manufacture of the balance 885 wagons was to be placed, provided the said M/s Modern Industries had supplied at least 50% of the total outstanding RSP orders as on 1st August, 2011 and current orders placed against the subject tender during February, 2012 to July, 2012;

- (iii) that though the said M/s Modern Industries had complied with the condition for the release order for the balance 885 wagons but the respondent Railways did not issue the said release order.

Accordingly, the writ petition with the relief aforesaid was filed.

3. The writ petition was entertained and notice thereof issued. On 5th March, 2013, the counsel for the respondent Railways informed the learned Single Judge that the matter pertaining to the release of the second tranche of railway wagons to the said M/s Modern Industries was under active consideration and was likely to be decided within few days.

4. The writ petition was disposed of vide impugned order dated 3rd April, 2013 on the following terms:

“1. Learned counsel for the Respondents has placed on record a communication dated 02.04.2013 whereunder the Railway Board has released the second tranche of railway

wagons to the Petitioner to the extent of 703 railway wagons as against the 885 railway wagons claimed by the Petitioner.

- 2. Counsel for the Parties jointly state on instructions that the dispute with respect to the balance 182 railway wagons be referred to arbitration pursuant to the Arbitration Clause contained in the Agreement being Clause No.18.*
- 3. It is accordingly directed that the General Manager/Member of the Railway Board shall refer the dispute in terms of the said Arbitration Clause to the sole arbitration of a person to be appointed by him. It is understood that the Petitioner will have no objection if the Arbitrator is a Government Servant.*
- 4. The Arbitrator shall give his award at the earliest and latest within three months from the date of entering upon the reference. Till then the subject matter of the dispute, viz., the 182 railway wagons withheld by the Railway Board, shall not be released by the Respondents to any third party.*
- 5. It is clarified that the aforesaid order is being passed without prejudice to the rival claims and contentions of the Parties.*
- 6. Writ Petition stands disposed of with the aforesaid directions.”*

5. The appellants herein applied for review of the aforesaid order, pleading; i) that they were also engaged in manufacture and supply of wagons; ii) that the respondent Railways had on 16th January, 2012 placed orders for manufacture and supply of VUs wagons on all the eligible manufactures / suppliers of wagons including the appellants; iii) that as per the said Contract, upon any of the manufacturer / supplier failing to satisfy

the condition of placement of a release order of the second tranche of wagons, the order therefor shall be placed on the other eligible manufacturers / suppliers as per their performance; iv) that upon the respondent Railways having found M/s Modern Industries not eligible for placement of a release order for 182 Railway Wagons out of the second tranche, the respondent Railways under the Contract aforesaid with the appellants was liable to place the order therefor on the appellants; v) however the direction of this Court in the order dated 3rd April, 2013 supra that till the decision of the dispute between M/s Modern Industries and the Railways, the order for manufacture and supply of 182 railway wagons shall not be released by the respondent Railways to any third party was causing prejudice to the appellants. The appellants thus sought clarification that the pendency of the dispute between the respondent Railways and M/s Modern Industries shall not come in the way of the respondent Railways placing any additional order upon the appellants for supply of additional quantities of railway wagons as per their entitlement.

6. The learned Single Judge dismissed the review petitions aforesaid observing that the appellants being not parties to the writ petitions filed by M/s Modern Industries had no locus to seek review and if prejudiced by the

order dated 3rd April, 2013 in any manner, had a right to challenge the same in appropriate proceedings including arbitration proceedings.

7. Notice of these appeals was issued and vide orders dated 13th / 20th December, 2013, the interim stay of the order dated 3rd April, 2013 of the learned Single Judge was granted.

8. During the hearing on 27th January, 2014, we were informed that the respondent Railways has till now not placed any order for the 182 wagons on the appellants or on any other manufacturer. On enquiry as to the fate of the arbitration pursuant to the order dated 3rd April, 2013 supra, we were informed that no progress was made in the arbitration proceedings before the nominee Arbitrator of the Railways and M/s Modern Industries has filed a petition for change of Arbitrator and which petition is pending before a Single Judge of this Court. On the contention of the counsels for M/s Modern Industries that the controversy between M/s Modern Industries and the respondent Railways is within a narrow compass and only entails interpretation of the Contract, we had on 27th January, 2014 asked the counsel for the respondent Railways to take instructions whether the respondent Railways are agreeable to appointment of a retired Judge of this Court as the Arbitrator to settle the dispute at the earliest.

9. The counsel for the respondent Railways on 30th January, 2014 informed us that the respondent Railways are not agreeable to the arbitration of any other person save their nominee. Per contra, the senior counsel for M/s Modern Industries stated that M/s Modern Industries is not agreeable to arbitration of the nominee of the Railways. The said question will accordingly have to be decided by the learned Single Judge before whom the arbitration petition filed by M/s Modern Industries for change of Arbitrator is pending.

10. The senior counsels for the appellants have argued:

(a) that the appellants were necessary and proper parties to the writ petition and M/s Modern Industries ought to have impleaded the appellants as parties to the writ petition and mischievously did not make the appellants a party to the petition, to obtain an order in the said writ petition behind the back of the appellants and to the prejudice of the appellants;

(b) that upon the appellants filing the application for review of the order dated 3rd April, 2013 disposing of the writ petition, the learned Single Judge, for the aforesaid reason, ought to have recalled the order

and heard the writ petition afresh after giving an opportunity of hearing to the appellants;

(c) that upon M/s Modern Industries being held to be a defaulter by the respondent Railways, the appellants under the tender document and the contract in pursuance thereto were entitled to an order for manufacture and supply of wagons which M/s Modern Industries had forfeited;

(d) that the requirement of the respondent Railways of the said wagons is imminent and thus public interest is effected by the interim order under which neither M/s Modern Industries nor the appellants are to manufacture and supply the wagons;

(e) that M/s Modern Industries, if ultimately succeeds in the dispute with the respondent Railways, can be monetarily compensated;

(f) that alternatively, it is submitted that the appellants are willing to make a statement that in the event of M/s Modern Industries succeeding in the arbitration aforesaid, the said M/s Modern Industries can have the order for manufacture and supply of wagons out of the

appellants share of wagons in the future orders to be placed by the respondent Railways.

11. Per contra, the senior counsel for M/s Modern Industries has argued:

(I) that there was an obvious error in the decision of the respondent Railways to treat M/s Modern Industries as a defaulter and to not place the release order for the balance 885 wagons of M/s Modern Industries;

(II) this is evident from the fact that after the filing of the writ petition, the respondent Railways on its own agreed to place the release order for 703 out of the said 885 wagons;

(III) that there is no basis for withholding the order for the balance 182 wagons;

(IV) that M/s Modern Industries is still capable of and willing to execute the order for the balance 182 wagons also;

(V) that the appellants have no locus to challenge the order dated 3rd April, 2013 which is with the consent of the respondent Railways;

(VI) that the respondent Railways have not chosen to prefer any appeal against the order dated 3rd April, 2013.

12. The counsel for the respondent Railways has stated that the respondent Railways be allowed to place the order for the remaining 182 wagons on the appellants and any other eligible manufacturer.

13. We may at the outset state that the order dated 3rd April, 2013 in the writ petition filed by M/s Modern Industries is in the nature of a consent order. Even if, the part of the said order restraining the Railways from placing the order for supply of 182 wagons on any other manufacturer, were to be treated as without the consent of the Railways, the fact is that the respondent Railways has not appealed therefrom. We are constrained to observe that the respondent Railways, while on 3rd April, 2013 joined M/s Modern Industries in consenting to an order for reference of dispute qua the said 182 wagons to arbitration and to not place any order for the said 182 wagons on any third party, today is taking the side of the appellants.

14. The first question which arises is, whether the appellants were necessary and/or proper party to the writ petition and if so, whether non-impleadment of the appellants as parties to the writ petition can be labeled as motivated so as to disentitle M/s Modern Industries from the equitable relief under Article 226 of the Constitution of India.

15. The order / Contract dated 16th January, 2012 of the respondent Railways to M/s Modern Industries intimated M/s Modern Industries of allocation in its favour of 1771 wagons against the subject tender and further provided that out of the said allocation of 1771 wagons, it had been decided to release order for manufacture and supply of 886 wagons only and the balance 885 wagons would remain 'withheld on your account' and the respondent Railways reserved the right to place the order on M/s Modern Industries for manufacture and supply of the said 885 wagons against the subject tender at the end of six months i.e. by 31st July, 2012 provided M/s Modern Industries supplied at least 50% of the total outstanding RSP orders as on 1st August, 2011 and current orders placed against the said tender during February, 2012 to July, 2012. The said order / Contract further provided that if M/s Modern Industries failed to comply with the condition for release of second tranche of wagons, only 50% of the second tranche shall be released and the remaining 50% of the second tranche shall be released "to the respective firms in proportion to their supply performance during last six months by multiplying percentage compliance with 50% of second tranche and the remaining quantity shall be taken away for

redistribution amongst performing units, having more than 100% compliance.”

16. The appellants were nowhere named in the order / Contract dated 16th January, 2012 placed by the respondent Railways on M/s Modern Industries. The orders / Contracts placed by the respondent Railways on the appellants pursuant to the same tender were on the same terms. While the order on the appellant in LPA No.949/2013 was for 2181 wagons, the order on the appellant in LPA No.971/2013 was for 2699 wagons.

17. We are from the language of the order / Contract placed by the respondent Railways on the appellants and on M/s Modern Industries unable to find any right/entitlement in favour of any of them for the forfeited wagons of the other. We do not find any clause in the order / Contract placed by the respondent Railways on any of them under which any of them, could claim as a matter of right the forfeited quantity if any of wagons by the other. Each of them, under the order / Contract placed by respondent Railways on them, was entitled only to supply and recover price of the quantity of wagons ordered on each and could not compel the respondent Railways, even if withheld the complete second tranche of release order from any defaulting manufacturer, to place the order therefor on itself. Each

of them, at best had a mere likelihood to secure the order for manufacture and supply of wagon which the other had forfeited because of default / delay in supply.

18. Once that is found to be the position, we fail to see as to how the appellants could be said to be a necessary or a proper party to a challenge by M/s Modern Industries to the decision of the respondent Railways of treating M/s Modern Industries as a defaulter.

19. The Supreme Court in *Mumbai International Airport Pvt. Ltd. Vs. Regency Convention Centre and Hotels Pvt. Ltd.* (2010) 7 SCC 417 held that the fact that a person is likely to secure a right / interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance. It was clarified, that a person who expects to get a lease from the defendants in a suit for specific performance in the event of the suit being dismissed, cannot be said to be a person having some semblance of title in the property in dispute. In that case also, one of the contentions of the party seeking impleadment was that the interim order in the suit for specific performance was coming in the way of grant of lease of the suit land

by the defendant in the suit in its favour. The same was held to be no ground for impleadment.

20. The appellants also do not claim their presence to be necessary for adjudication of the dispute between M/s Modern Industries and the respondent Railways. Their only claim is that they are necessary and property party for the reason of being prejudiced by the interim order in the said dispute. In our view, the prejudice if any caused to a third party from an interim order in a proceeding cannot be the touchstone for determining whether such party is a necessary or a proper party to the lis.

21. We therefore do not find the non-impleadment of the appellants to the writ petition filed by M/s Modern Industries to be motivated, to disentitle M/s Modern Industries to any equitable relief in the writ petition.

22. The appellants at best had a chance of the respondent Railways placing the order for manufacture and supply of wagons forfeited from M/s Modern Industries on the appellants but such chance/contingencies cannot also be the test for deciding, whether the appellants were necessary or property parties to the writ petition.

23. As far as the contention of the senior counsels for the appellants, of the requirement of the wagons by the respondent Railways being imminent

and in public interest, all that we can say is that neither is there any material before us to accept such a contention nor has the respondent Railways shown any anxiety for expeditious resolution of the dispute. Though on the contention of M/s Modern Industries that the dispute could be resolved expeditiously, as is also evident from the learned Single Judge having granted three months time therefor, we had attempted to make the respondent Railways agree on arbitration of a retired Judge of this Court, however, the respondent Railways did not agree thereto. We cannot in these proceedings decide the said aspect particularly when the petition filed by M/s Modern Industries in this regard is being considered before the Roster Bench.

24. As far as the proposals given by the senior counsels for the appellants are concerned, we cannot on the basis of, future orders yet to be placed by the respondent Railways, deprive M/s Modern Industries of the benefit of the interim order in its favour with the consent of the respondent Railways.

25. Though on the asking of the counsel for the appellants, we had not immediately disposed of these appeals to enable the appellants to negotiate with the respondent Railways and M/s Modern Industries for settlement but

inspite of more than a week having passed, no settlement has been reported.

We have as such proceeded to pronounce judgment in the appeals.

26. We therefore do not find any reason to, at the instance of the appellants, interfere with the interim order granted by the learned Single Judge with the consent of M/s Modern Industries and the respondent Railways and dismiss the appeals. We however request the learned Single Judge before whom the petition filed by M/s Modern Industries for change of Arbitrator is pending to decide the said petition expeditiously to ensure early resolution of the dispute so that the order for the remaining 182 wagons, if still required by the respondent Railways, can be placed on deserving manufacturer. If for any reason, the said arbitration proceedings are delayed, we also give liberty to the respondent Railways to apply either under Section 9 or 17 of the Arbitration and Conciliation Act, 1996 for variation of the interim order granted by the learned Single Judge.

No costs.

RAJIV SAHAI ENDLAW, J.

CHIEF JUSTICE

FEBRUARY 10, 2014

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