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HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) 5124/2014 & W.P.(C) 5127/2014

Decided on : 29th June, 2015

W.P.(C) 5124/2014

MADHU TRANSPORT COMPANY PVT LTD & ANR.

..... Petitioners

Through: Mr. Prateek Jalan,
Mr. Surendra Dube,
Mr. Ankit Yadav,
Ms. Sonia Dube,
Mr. Shatadru Chakraborty,
Ms. Kanchan Yadav &
Mr. Anurag Singh, Advocates.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Jagjit Singh,
Ms. Manita Verma,
Ms. Nisha &
Mr. Shivanshu Bajpai, Advs.

W.P.(C) 5127/2014

JAI BALAJI INDUSTRIES LIMITED & ANR.

..... Petitioners

Through: Mr. Prateek Jalan,
Mr. Surendra Dube,
Mr. Ankit Yadav,
Ms. Sonia Dube,
Mr. Shatadru Chakraborty,

Ms. Kanchan Yadav &
Mr. Anurag Singh, Advocates.

versus

UNION OF INDIA & ORS. Respondents

Through: Mr. Jagjit Singh,
Ms. Manita Verma,
Ms. Nisha &
Mr. Shivanshu Bajpai, Advs.

CORAM:
HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J.

1. In both these writ petitions, the challenge has been laid to orders dated 13.06.2014 & 18.06.2014 respectively passed by Respondent No.3, Member Traffic, Railway Board rejecting the request of the petitioners terminating the contract entered into by them with the respondents on the ground that there is no addition or alteration in the agreement arrived at between the parties and consequently, there was no occasion for giving rise to cause of action in favour of the petitioners to terminate the agreements on various dates entered between the parties under Wagon Investment Scheme ('WIS Scheme' for short) and also seeking a direction to the respondents to purchase the wagons at the agreed terms and conditions.

2. Though the orders in the two writ petitions which are assailed are of different dates, but essentially they are on the same lines and the agreements entered between the parties are also containing the same terms and conditions and, therefore, for facility of reference, the facts of WP(C) No.5124/2014 only are being referred to and the reasoning and the conclusion which is arrived at on the basis of the said facts will be equally applicable *mutatis mutandis* to the facts of WP(C) No.5127/2014.

3. Coming back to the facts of WP(C) No.5124/2014 titled Madhu Transport Company Pvt. Ltd & Anr. Vs. Union of India & Ors., it may be pertinent here to mention that this is a third round of litigation initiated by Madhu Transport Company Pvt. Ltd against UOI on the basis of the agreement dated 18.07.2006 under the WIS Scheme.

4. In the first round of litigation, the petitioners filed WP(C) No.123/2014 which was disposed of with the consent of the parties directing respondent No.2 to consider the representation dated 11.09.2013 submitted by the petitioners for the purpose of arriving at a settlement, if possible, so far as the termination of the agreement dated

18.07.2006 and the consequent purchase of wagons by the respondents is concerned.

5. In the second round of litigation initiated by the petitioners {WP(C) No.2446/2014} it was again prayed that the respondents be directed to purchase the wagons at a price offered by them being the depreciated value thereof under the Indian Railway Financial Code or on any other mutually agreed price or rates offered to similarly placed WIS Investors. The said writ petition was disposed of on 22.04.2014 with directions to respondent Nos.1 & 2 to take a decision on the representation of the petitioners by a reasoned order and communicate the same to the petitioner within 10 days. The petitioners were also permitted to make oral submissions before the concerned officer in this regard.

6. As a consequence of this order passed by the Court on 22.04.2014 that the Member Traffic, Railway Board has passed the impugned order dated 13.06.2014 rejecting the request of the petitioners for termination of the agreement dated 18.07.2006 between the parties and further observing that the Railways is not bound to purchase wagons of the

petitioners. It is this order dated 13.06.2014 passed by the respondents that has been challenged in the present writ petition.

7. The Central Government had published Wagon Investment Scheme (WIS) in the year 2005 with the objective to encourage public private partnership in procurement of wagons to meet with the anticipated incremental freight traffic in the coming years. The petitioners in order to avail of the benefit of the said Scheme known as WIS applied for four rakes and accordingly four agreements dated 18.07.2006 were executed between petitioners and Railways/R-2 & R-3 although there are seven respondents. The important terms and conditions of the agreement which provided certain preferential rights to the petitioners are contained in clauses 7.3, 7.10, 10.1 & 12 & 13 of the said agreement.

8. It may be pertinent to reproduce the contents of the said clauses for facility of reference.

7.3 CATEGORY II – BOX’N WAGONS¹

Freight rebate of 10% shall be granted for 10 years and guaranteed supply of wagons at the

¹ Contained in Clause 2.5, 2.6, 5.2 and 5.4 of the agreement dated 18.07.2006.

rate of 6 rakes per month. In addition, a guaranteed supply of two bonus rakes will be made without freight concession. (For customers opting for EOL Scheme 2 further additional bonus rakes will be supplied without freight concession).

7.10 OWNERSHIP OF WAGONS²

Ownership of wagons procured under Wagon Investment Scheme (WIS) shall get transferred to Indian Railways after 10 years for BOXN rakes, 15 years for BCN rakes, 9 years for BTPN rakes, 15 years for BRNA rakes, 7 years for BOST and 7 years for BOBRN rakes.

10 FAILURE TO MAINTAIN/CONSUME GUARANTEED SUPPLY OF WAGONS³

10.1 The guaranteed supply of wagons will be monitored on a monthly basis.

12. TERMINATION OF AGREEMENT

In the event of termination of the arrangement by the Investor on account of liquidation/merger with other company or due to any alteration/deletion in the scheme, the ownership of wagons would remain with the Investor. However, the Investor shall have the option to sell the wagons to Indian Railways at a mutually agreed price.

² Contained in clause 5.6 of the agreement.

³ Contained in clause 7.1 of agreement.

13. CHANGES IN THE SCHEME

Terms of the scheme (WIS) may be altered by mutual consent of both parties.”

9. Thus, a perusal of the aforesaid clauses of the agreement would show that following salient rights were provided in favour of the petitioners.

- a. The investor guaranteed 6 rakes per month with freight rebate and 2 additional rakes were also guaranteed EOL without freight rebate.
- b. Ownership of the wagons would remain with the investor for 10 years and would thereafter be transferred to the Railways.
- c. The guaranteed supply of wagons will be monitored on monthly basis.
- d. In the event of termination of the agreement by the investor on account of merger/liquidation or due to any alteration/deletion in the scheme, the ownership of the wagons would remain with the investor who shall have the option to sell the wagons to the Indian Railways at a mutually agreed price.
- e. That terms of the WIS may be altered with mutual consent only.

10. All the four agreements were identical in nature and were providing for supply of six rakes to the petitioners. The system worked well for some time, however, the petitioners allege that the respondents started issuing circulars unilaterally and arbitrarily which in fact had changed the terms and conditions of the agreement entered into between the petitioners and the respondents. These terms and conditions were following in nature.

a) The original WIS in terms of para 7.3 of the WIS provided for eligibility of 8 rakes per month and monitoring on monthly basis while as the respondents issued a circular dated 26.09.2008 by virtue of which it modified monthly quota of guaranteed rakes to a fortnightly quota. Thus, the period for which the respondents were to supervise the availability of rakes made to the petitioners on monthly basis was reduced to fortnightly basis. It was specifically made clear in the circular that in case fortnightly indent was not placed in time, it would result in forfeiture of the said quota and in no case it would be permitted to carry forward to ensuing fortnight.

b). It is alleged that a further circular was issued on 03.02.2011 by virtue of which instead of guaranteed four rakes per month, the

respondents arbitrarily and unilaterally reduced the quota or rather converted the quota of monthly rakes to one rake after every five days thereby the monitoring which was done on monthly basis firstly got reduced to fortnightly basis and then to almost five days or so to say weekly basis.

c). Vide a circular dated 27.07.2012, the respondents are alleged to have unilaterally withdrawn the Terminal Incentive Cum Engine on Load Scheme (TIELS) and consequently, the petitioners' monthly entitlement was unilaterally reduced by two rakes.

d). It was alleged that earlier practice of permitting changes of loading station to the petitioners by the respondents was stopped by issuance of a circular dated 01.08.2013 which imposed various restrictions in the event of loading and unloading station being changed.

11. It has been alleged by the petitioners that the respondents on account of this unilateral and arbitrary action on their part changed the terms and conditions of the WIS Scheme and consequently the agreement which necessitated issuance of letter dated 11.09.2013 by the petitioners terminating the agreement. It has also been alleged that despite the agreement having been terminated, the Railway Authorities

neither handed over the wagons to the petitioners nor did they offer to purchase the same in terms of WIS.

12. It has been stated that in terms of WIS Scheme, the investment in the wagons has been made by the petitioners and the agreement envisages that for all practical purposes, the petitioners will continue to own the wagons and by retaining the wagons illegally, the respondents have indulged in unlawful and illegal action. It has been alleged that since there was no response to the communication sent by the petitioner to the respondents, they were constrained to file WP(C) No.123/2014 which was disposed of by this court vide order dated 16.01.2014 with the consent of the parties, directing the respondent No.2 to consider the representation dated 11.09.2013 submitted by the petitioners for the purpose of arriving at a settlement, if possible. The court further directed the petitioners to appear before Director (Freight), Railway Board for making oral submissions in support of the representation on 20.01.2014 at 4 P.M.

13. It has been alleged since the respondents did not take the decision despite the aforesaid order of the court and the oral submissions having been made by them on 20.01.2014, they were constrained to file another

WP(C) No.2446/2014 which was disposed of on 22.04.2014 directing the respondent Nos.1 & 2 to pass a reasoned order and communicate to the petitioners within a period of 10 days with liberty to the petitioners to seek such remedy in accordance with law as may be permissible.

14. It has been alleged that it is in consequence of the disposal of WP(C) No.2446/2014 vide order dated 22.04.2014 that the respondents have passed the impugned order rejecting the request of the petitioners to treat the agreement between the parties as having been terminated and also refused to purchase the wagons at an agreed price. Hence, the petitioners were constrained to file the present writ petition.

15. The respondents have filed their counter affidavit in response to the show cause notice and have taken the plea that the writ petition is not maintainable. It has been alleged by them that clause 15 of the agreement between the parties contained an arbitration clause and, therefore, the petitioners ought to have invoked the arbitration clause rather than filing the present writ petition.

16. Secondly, it has been alleged by the respondents that the termination letter purported to have been issued by the petitioners to the respondents is totally illegal and uncalled for. It has been stated that a

close perusal of the Circulars dated 26.09.2006, 29.10.2007, 26.09.2008, 03.02.2011, 27.07.2012 and 01.08.2013 make it abundantly clear that there had been no change in WIS Scheme and these circulars are purported to have been issued by respondents in terms of clause 6.1 (c) and clause 14 of the agreement between the parties and they are alleged to be clarificatory in nature.

17. It has been alleged by the respondents there is no liquidation/merger with other company or any alteration/deletion in WIS which as per clause 12 of the agreement would give rise to an occasion in favour of the petitioners to terminate the agreement.

18. It has also been contended by the respondents that in a similar case titled Aviral Minerals Pvt.Ltd v.UOI which is sub judice before the Apex Court, a committee was constituted to look into the whole issue. It has been stated that the said committee concluded that para 12 of the agreement is not attracted in the said case of similarly placed person as the petitioners. It has been stated that the said case is still pending in the Supreme Court and, therefore, this case may either be clubbed with the said case or decision in the said case be awaited.

19. It has also been contended that the allegation made by the petitioners that they entered into a loan-cum-hypothecation agreement with M/s SREI Equipment Finance Private Limited with respect to the wagons purported to be owned by them was without the consent of the respondents and, therefore, the same cannot be binding on the respondents. It has been contended that the writ petition of the petitioners is totally misconceived and accordingly the same deserves to be dismissed.

20. I have heard the learned counsel for the parties. I have also thoughtfully considered the submissions made by the respective sides and have also gone through the record.

21. The question which arises in the instant case is as to whether in the first instance the writ petition is entertainable or not. In this regard, it may be pertinent here to mention that the respondents have taken a preliminary objection regarding maintainability of the writ petition on the ground that there is an arbitration clause contained in the WIS Scheme and, therefore, the writ petition would not be maintainable.

22. This contention of the respondents that the High Court would not be competent to entertain the writ petition on account of arbitration

clause has been contested by the petitioners. It has been contended by them that merely because there is an arbitration clause, it would not be a ground for not entertaining the writ petition.

23. The learned counsel for the petitioners has placed reliance on Union of India v. Tania Construction Pvt.Ltd: (2011) 5 SCC 697, ABL International v. Export Credit Guarantee Corporation of India Ltd.; (2004) 3 SCC 553, Chandana Kedia Sole Proprietor, M/s. Adinath Industries v. Union of India; 2010 II AD (Delhi) 757 and Kishan Freight Forwarders v.Union of India; 181 (2011) DLT 547 to contend that despite there being an arbitration clause and hence an alternative remedy being available in case the action of the state authority is arbitrary, illegal and violative of right of a party, it can be challenged under Article 226 of the writ jurisdiction..

24. The clause 15 of the WIS Scheme reads as under:

15.0 Arbitration

15.1 In the event of question, dispute or difference between the parties hereto relating to any matter arising out of or quoted 'with this' agreement, such dispute or difference shall be referred for the award of three arbitrators. One arbitrator is to be nominated by the Investor, the other by the Railways and the third arbitrator to be

nominated by mutual agreement between the parties and, in the event of non agreement, the third arbitrator shall be appointed in accordance with the provisions of the Arbitration and Conciliation Act, 1996.”

25. There is no dispute about the fact that there is an arbitration clause between the parties as contained in WIS agreement dated 18.07.2006 and, therefore, there is an alternative remedy available to the petitioners. It is also not in dispute that before filing of the present writ petition, there were two rounds of litigations between the parties which were summarily disposed of by this court directing the respondents to take a informed decision and pass a reasoned order. It has not been shown to the court by the respondents as to whether in these two earlier writ petitions they had taken any such plea regarding existence an arbitration clause in the agreement between the parties and therefore seeking reference of disputes between the parties to arbitration. Even if it is assumed that such a plea was taken by the respondents in the counter affidavit, still, at least in the orders, it is clearly shown that this plea of the respondents that there being an arbitration clause between the parties and in view thereof writ petition was not entertainable, was not accepted by the court and, therefore, prima facie, I feel that to relegate

the parties now to arbitration despite this court having entertained two sets of writ petitions earlier between the parties with regard to the grievance raised by the petitioners, would only be an exercise of tossing around the ball and it would only delay the adjudication of the dispute between the parties. Therefore, I do not accept this contention of the learned counsel for the respondents.

26. In addition to this, merely because there is an arbitration clause between the parties is no ground per se not to entertain the writ jurisdiction. Each and every case where such a clause exists between the parties they should be relegated to arbitration must be able to show and convince the courts that this is the best course available under the circumstances.

27. There have been cases where one of the parties has taken a plea with regard to availability of arbitration clause, yet the court in the interest of justice has entertained the writ petition and passed appropriate orders. Reliance in this regard can be placed on the judgments in Tania Construction Pvt.Ltd's case (supra), ABL International's case (supra), Chandana Kedia's case (supra) and iv) Kishan Freight Forwarders's case (supra).

28. In Union of India and Ors. v. Tania Construction Private Limited; (2011) 5 SCC 697, the question which had arisen for adjudication before the apex court was with regard to the contractual obligation and specific relief on account of termination and discharge of contract between UOI and Tania Construction Private Limited. This case also involved an agreement between the Railways and private parties. One of the arguments which was taken up before the Apex Court was that the agreement between the parties provided for adjudication through arbitration in respect of all the disputes and differences of any kind arising between the parties out of or in connection with the contract whether during the progress of work or after its completion and whether before or after the termination of the contract, the same could be adjudicated by the arbitrator. Nullifying this submission, the Apex Court observed in para 33 and 34 as under:

33. Apart from the above, even on the question of maintainability of the writ petition on account of the Arbitration Clause included in the agreement between the parties, it is now well-established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such

alternative remedy, a writ petition would not be maintainable. The various decisions cited by Mr. Chakraborty would clearly indicate that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution.

34 We endorse the view of the High Court that notwithstanding the provisions relating to the Arbitration Clause contained in the agreement, the High Court was fully within its competence to entertain and dispose of the Writ Petition filed on behalf of the Respondent Company. We, therefore, see no reason to interfere with the views expressed by the High Court on the maintainability of the Writ Petition and also on its merits.

29. In ABL International Ltd.'s case (supra), one of the questions which had arisen before the Apex Court was whether the contractual obligations between a private party and State or its instrumentality can be subject matter of a writ petition or not.

30. The Hon'ble Apex Court observed that the aforesaid question is no more res integra and despite there being an alternative remedy by way of an arbitration clause available to a party, still the court can in exercise its powers under Article 226 of the Constitution of India,

examine the matter and give the aggrieved party requisite relief. It was held in para 27 of the said judgment as under:

“27. From the above discussion of ours, following legal principles emerge as to the maintainability of a writ petition :-

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of facts arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.”

31. Reliance in this regard was placed on the observations of the Apex Court in Gujarat State Financial Corporation v. Lotus Hotels (P) Limited; (1983) 3 SCC 379 which in turn had placed reliance on an earlier oft-quoted judgment in Ramana Dayaram Shetty v. International Airport Authority of India; (1979) 3 SCC 489.

32. Similarly, a learned single Judge of this court in Kishan Freight forwarders's case (supra) in a matter pertaining to Railways and its contract where a somewhat similar question with regard to termination

and extension of lease contract was involved, it was held that the writ petition was entertainable and maintainable notwithstanding the fact that there was an arbitration clauses and while arriving at such a conclusion, it had copiously referred to the judgment of the Apex Court in ABL International Ltd.'s case (supra) and Sanjana M.Wig v. Hindustan Petroleum Corporation Limited; 2005 (8) SCC 242 to conclude that where there is a question of public duty being performed by the respondents, a writ petition will be entertained.

33. Similarly, the learned single Judge in another judgment Chandana Kedia Sole Proprietor, M/s. Adinath Industries v. Union of India; 2010 II AD (Delhi) 757 has also expressed the same view that merely because there is an arbitration clause between the parties would not be a ground for the court to conclude that existence of an alternative remedy by way of an arbitration shall prevent the court from entertaining the writ petition and it observed that in appropriate cases, the court may exercise its discretionary jurisdiction in case there is a violation of any fundamental right or the party in question has been dealt with unfairly and it is a party which is placed at an disadvantageous position.

34. From the aforesaid discussion, it is clear that merely because there is an arbitration clause between the parties would not be a ground to oust the jurisdiction of this court and dismiss the writ petition on the ground of alternative remedy being available.

35. So far as the present case is concerned, the earlier two rounds of writ petitions have been entertained by the court without any credence to the objection of arbitration clause would show that the existence of arbitration clause between the parties is not a ground not to entertain the petition. Therefore, it will not be just and proper to reject the present petition on the ground of existence of arbitration clause between the parties.

36. Moreover, in addition to this, the contention of the learned counsel for the respondents that the cases involves disputes question of fact as to the interpretation of the various clauses which are relied upon by the petitioners is as a matter of fact mirage. It is only what the respondents are contending that there is a disputed question of fact. As a matter of fact, this question of interpretation as to whether the conditions existed which warranted invocation of termination of contract by the petitioners on account of the alleged unilateral and arbitrary

change of terms and conditions of the agreement or whether the circulars which are purported to have been issued by the respondents are more in the nature of interpretation of various clauses of the agreement rather than raising a disputed question of fact. Further in ABL International Ltd.'s case (supra), the apex Court has observed that merely because the respondent or for that matter one of the party raises a plea of the matter involving a disputed question of fact does not mean that it involves one and therefore the court will not have the jurisdiction. It is for the court to be convinced that the matter actually and really involves disputed question of fact and therefore the court should not invoke the writ jurisdiction. In my considered view, the submissions raised by the petitioners do not raise any disputed question of fact. It only raises a question as to whether the issuance of circular by the respondents tantamounts to changing the nature of the WIS Scheme. Therefore, the same can be gone into by this court under Article 226 of the Constitution of India.

37. The second submission made by the learned counsel for the respondents is to keep the present proceedings of the writ petitions in abeyance or alternatively direct the petitioners to move the hon'ble

Supreme Court for clubbing of the present writ petition before the Hon'ble Supreme Court to be heard along with SLP Nos.39097-39099/2012.

38. It may be pertinent here to mention that the parties had approached the Hon'ble Apex Court for the purpose of withdrawing the writ petition to be heard along with the matter pending before the apex court. The said request was disallowed and it was observed by the Hon'ble Apex Court that the High Court may decide the writ petition at an early date. Therefore, in the light of the direction passed by the Hon'ble Supreme Court, this contention of the learned counsel for the respondents to keep the proceedings of the present writ petition in abeyance till the decision of the apex court does not have any merit.

39. The next question and which is the core of the matter is as to whether the issuance of circulars from time to time by the respondents whereby the period of monitoring the wagons has been changed from month to fortnight and then to days and whether the forfeiture of the right of the petitioners to get a preferential treatment for a specified period on account of non booking is clarificatory in nature or is a unilateral action on the part of the respondents to change the terms of

the agreement? Whether the restriction imposed on the petitioners from doing loading and unloading at stations other than specified is similarly tantamounting to clarifying the general terms and conditions of booking or is it in violation of the agreement?

40. There is no dispute about the fact that the respondents have issued circulars from time to time. One of the circulars which has been issued by the respondents is with respect to modifying monthly quota of guaranteed rakes to a fortnightly quota. It has been further observed in the said circular that in case the rakes in question which are falling in a particular slot of fortnight are not availed of by the petitioners in that particular slot, then it will result in forfeiture of that facility for the ensuing fortnight meaning thereby that if out of four or six rakes to be availed of by the petitioners on preferential basis two each for the first fortnight and second fortnight are not availed of, the first two rakes cannot be carried forward to the second fortnight meaning thereby that in the second fortnight, they will be permitted to avail of only preferential quota of only two rakes and not four rakes as envisaged in the agreement.

41. This arrangement has been further reduced from fortnight basis to one rake each in five days meaning thereby five working days which would constitute one week with Saturday and Sunday either being prefixed or suffixed and since month is having four weeks, therefore, every week a rake must be booked by the petitioners on preferential basis in terms of the agreement failing which the default cannot be carried forward for the following and the subsequent weeks. The language used in these circulars is both negative as well as positive to bring home the question of sanction by way of forfeiture of this unavailed quota. Therefore, in my opinion, this fundamentally tantamounts to changing the terms and conditions of the WIS Scheme and is, therefore, in violation of clause 12 of the agreement.

42. These changes in the WIS Scheme could by no stretch of imagination be said to be a clarificatory in nature as they go to the root of the WIS Scheme itself. No doubt, the respondents have taken a stand that there is no liquidation or merger in the case of the petitioners but the petitioners are not claiming the termination of the agreement on the basis of liquidation or merger. Their case is hinged on the fact that there

is an alteration in the terms and conditions of the WIS agreement itself by the circulars issued by the respondents.

43. I have illustrated hereinabove that the change of rakes from monthly monitoring to fortnight and then to days with a sanction of forfeiture for the said benefit for the ensuring week or month is fundamentally tantamounting to alteration of the terms and conditions of the agreement between the parties and, therefore, it gives rise to an occasion to the petitioners to avail of the termination of the WIS agreement in terms of clause 12.

44. The said alteration to the WIS agreement could have been done only in accordance with clause 15 which envisaged that the respondents could by a mutual consent by taking the petitioners into confidence that on account of certain exigencies of service or exigencies of public interest, it was necessary to change the terms and conditions of the agreement. Since this has not been done, therefore, admittedly, not only the aforesaid circulars are in violation of clause 12 of the agreement there being lack of consent on the part of parties especially the petitioners which is in violation of clause 15 of the agreement and, therefore, cannot be sustained.

45. The argument which has been set up by the respondents that under clause 6.1 (c) and clause 14 the agreement stands saved because clause 6.1 lays down that the guaranteed rakes of traffic shall be subject to following :

- a} Rationalization of scheme.
- b} Preferential traffic schedule.
- c} Conditions of booking of goods traffic.
- d} Central Government State bans and restriction and
- e) Force majeure such as natural calamities like breaches, floods, etc. over which Railways has no control.

46. So far as clauses (b), (d) and (e) are concerned, they on the face of it do not apply to the facts of the present case. So far as clause (c) is concerned, it deals with a condition of booking of goods traffic and if read in the light of clause (14) which lays down the applicability of rules and procedures of Indian Railways and envisages that this agreement will be subject to all the rules and regulations of Indian Railways in force made in pursuance to the Railways Act, 1989 then this modification of the terms and conditions or alteration in the agreement cannot be considered as saved by these two clauses. The reason for this

is that clause 6.1 (c) deals with the general conditions applicable to the customers/clients across the board and does not impinge upon specific incentives granted to the petitioners under the agreement. These conditions which are envisaged under clause 6.1.(c) would be conditions like the timings for booking of the rakes, the days on which the booking is to be done, the schedule for the purpose of loading and unloading of goods. Therefore, meaning thereby that section 6.1(c) which deals with the conditions of booking of goods traffic are of such a nature which are general and which do not go to the root of the agreement itself, so as to knock off one of the parties prejudicially as has been done in the instant case.

47. Similar would be the logic which would be applicable to the circulars/conditions which are envisaged under clause 14 of the agreement to all the customers across the board. Therefore, the aforesaid analysis of the terms and conditions of the agreement clearly, in my considered opinion, tantamount to respondents altering the basic structure of the agreement between the parties by modifying the essential terms and conditions of the incentives which are granted to the petitioners and same gives rise to a cause of action in favour of the

petitioners to terminate the agreement which, they have, in my considered opinion, validly done.

48. One of the arguments advanced on behalf of the respondents was that the apex court had constituted a committee to look into this very aspect as to whether the issuance of circulars by the respondents resulted in any change in the WIS Scheme or the agreement. The said committee had given its report that it does not result in any change.

49. My attention has not been drawn to any such committee report consequently I did not have the advantage of going through the reasoning for returning such a finding. I do not agree with the views of the expressed by the committee that the aforesaid issuance of circulars do not tantamount to alteration of basic structure of the agreement between the parties. The reason for holding so is that the circulars have changed the very monitoring pattern of the rakes from monthly to daily basis with a sanction of forfeiture of the said preferential rakes. Therefore, I feel that the petitioners were well within their rights to terminate the agreement.

50. Having held so, the only question which arises is with regard to sanction which is imposed under the agreement. It has been envisaged

that the respondents on account of the valid termination of the agreement by the petitioners would either return the wagons to the petitioners because the property in the wagons is still vested with the petitioners as the period of contract is still subsisting and the period of 10 years from the date of the agreement has not elapsed. The respondents were under an obligation to have returned the wagon on account of the termination of the agreement by the petitioners on 13.09.2013. Since it was not done, therefore, the petitioners were well within their rights to ask the respondents to purchase the wagons or the property in the said wagons at an agreed price which it had refused to do.

51. One of the arguments raised by the respondents is that with respect to issuance of these circulars, there has been no discrimination between the petitioners and other persons who are using the facilities of booking of rakes or wagons. In my considered opinion, this argument is of no consequence for the reason that the case of the petitioners is not based on the ground of discrimination.

52. One of the arguments which has been given by the respondents while rejecting the representation dated 11.09.2013 is that for the last

two years Government of India and the State Governments have imposed various restrictions to discourage iron-ore export and to stop illegal mining activities. Consequently, the quantum of iron ore mined and transported through Railways has substantially dwindled. This has affected most of the WIS and non-WIS customers except the established steel plants. Since the WIS agreement is subject to various Government restrictions as per clause 6.1(d) and business loss arising out of change in the Economic Policy of Government cannot be masked as loss out of alleged changes in terms. It was contended that issuance of circulars did not tantamount to altering the terms and conditions of the WIS Scheme. This submission made by the respondents is fallacious. If ban has been imposed by the Central or the State Governments on the export of iron ore with a view to stop illegal mining activities and it has resulted in quantum of iron ore being mined and transported through Railways substantially, then there was absolutely no ground for rescheduling the availability of rakes to the petitioner from monthly basis to fortnightly and then 5-day basis with two rakes and one rake each respectively. This is on account of the fact that the question of rationalization of making available preferential rakes to the petitioners

would arise only when there is an increased volume of goods to be transported and not when the volume has got reduced as is admitted by the respondents themselves. Therefore, this reasoning which has been given by the respondents does not fit in with the change in nature of the WIS Scheme by the respondents as there is no nexus between the reasoning given by the Member Traffic, Railway Board and the change in the WIS agreement which affects the rights of the petitioners prejudicially. Accordingly, this argument also has no merit.

53. For the reasons mentioned above, I feel that the order dated 13.06.2014 rejecting the representation of the petitioners terminating the agreement dated 18.07.2006 is totally unsustainable in the eyes of law. I feel that since there was a change/alteration in the terms and conditions of the WIS Scheme and consequently in the agreement dated 18.07.2006 unilaterally and arbitrarily without the consent of the petitioners which fundamentally changed the nature of WIS Scheme, so far as the preferential right of the petitioners is concerned, the petitioners were well within their right to terminate the agreement. The agreement having been terminated, the respondents were under an obligation to purchase the wagons from the petitioners at a fixed price in the event of

non returning the same to the petitioners as the property in wagons continued to vest with the petitioners. I accordingly hold that the order dated 13.06.2014 of the Member Traffic, Railway Board is unsustainable in the eyes of law and the same is liable to be set aside and a writ of mandamus is issued to the respondents to either return the wagons to the petitioners within a period of one month from today or alternatively to purchase the wagons at an agreed price. However, so far as the question of purchase of wagons by the respondents is concerned, the price has to be agreed between the parties and certainly what will be the price of the wagons will be a disputed question. Since this is a disputed question of fact as to what would be the price unless it is mutually agreed, it deserves to be adjudicated, it will be not proper to permit the parties to fix either of the price unilaterally so as to cause further delay in the final disposal of the matter and in such a contingency since there is an arbitration clause, I feel that this aspect of the matter deserves to be settled through arbitration.

54 It may be further pertinent here to mention that since the present order is disposing of two writ petitions, the reasoning and holding which has been arrived at in WP(C) No.5124/2014 shall be equally applicable

mutatis mutandis to the WP(C) No.5127/2014 and accordingly the impugned order dated 18.06.2014 of Member Traffic, Railway Board in the said writ petition is also set aside and as for the directions passed with respect to appointment of an arbitrator in WP(C) No.5124/2014, the same would also be equally applicable to WP(C) No.5127/2014.

55. For the determination of the price of the wagons, I appoint Mr.R.C.Chopra (Mobile: 9818097777), a retired Judge of this court, as an arbitrator to adjudicate the dispute within a period of four months from today. The learned arbitrator shall be governed by the rules and regulations as well as the payment of fees by the terms and conditions governing the arbitration by the Delhi International Arbitration Centre.

56. Accordingly the writ petitions stand allowed in the aforesaid terms.

V.K. SHALI, J.

JUNE 29, 2015
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