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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 15.10.2015

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Pronounced on: 03.11.2015

+ **LPA 685/2015 & CM No.22383/2015**

UNION OF INDIA & ORS

..... Appellant

Through: Mr.Jagjit Singh, Sr.Standing Counsel
with Ms. Shipra Shukla, Advocate for
Railways.

Versus

JAI BALAJI INDUSTRIES LTD & ANR

..... Respondent

Through: Mr.Prateek Jalan, Mr.Saurabh Seth,
Ms.Sonia Dube, Mr.S.Chakraborty,
Mr.R.Kriplani, Mr.A.Yadav and
Mr.K.Yadav,Advs. for the respondent.
Mr.Santanu Ghosh, Adv. for the
caveator/SREI Equipment Finance Pvt.
Ltd

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. The present appeal is filed seeking to impugn the order dated 29.06.2015 passed by the learned Single Judge. Vide said order the learned Single Judge disposed of W.P.(C) No. 5124/2014 titled as Madhu Transport Co. Pvt. Ltd. & Anr. vs. UOI & Ors. and W.P.(C) 5127/2014 titled as Jai Balaji Industries Ltd. & Anr. vs. UOI & Ors.

2. The brief facts of W.P.(C) 5127/2014 (*Jai Balaji Industries Ltd. v.*

Union of India) are stated herein as parties had made submissions in this appeal. The brief facts which led to filing of the writ petition are that the appellant, i.e. Indian Railways floated a Wagon Investment Scheme (hereinafter referred to as 'WIS') dated 30.03.2005 with the objective of encouraging public private partnership in procurement of wagons. Under the said Scheme, an investor could purchase at his own cost as many rakes or wagons and give them to the railways to be used by it in a common pool of wagons. In return, in case of BOX'N type of wagons (the wagon which is subject matter of the present dispute), the investor was entitled to guaranteed allotment of six rakes per month with 10% rebate in freight. This facility was available for a period of 10 years.

3. The appellant and respondent entered into four agreements, two of which were dated 27.02.2006 and balance two were dated 26.04.2006. The appellant inducted the BOX'N wagons invested in by the respondent.

4. The Agreements provided that the investor/respondent would be guaranteed six rakes per month with freight rebate which would be monitored on monthly basis. The ownership of the wagons was to remain with the respondent/investor for 10 years and would thereafter stand transferred to the appellant Railways. The Scheme contained a termination clause i.e. Clause 12. Termination of the Agreement was permissible on account of liquidation/merger of the investor or due to any alteration/deletion in the Scheme. In the eventuality of termination, the ownership of the wagons was to remain with the investor/respondent. However, the respondent had the option to sell the wagons to Indian Railways at a mutually agreed price.

5. It is the stand of the respondent that the appellants have unilaterally

altered the terms of the WIS and the Agreements to the detriment of the respondent. In the writ petition, respondent placed reliance on the circular dated 26.09.2008 issued by the appellant which stipulated that 50% of the indents under the Scheme against the monthly quota was to be placed by the 15th day of each month. Meaning thereby, that six rakes which were earlier available over time in the month to the respondent would now have to be used in equal proportion within 15 days. Another amendment was made in the Scheme vide circular dated 03.02.2011. Under the said circular, the Railways may direct the customers to place indents at equal spacing on the basis of the monthly quota i.e. as the respondent had a quota of six guaranteed rakes, the respondent became obliged to utilise one rake within a period of five days.

6. It was the case of the respondent that the two circulars dated 26.09.2008 and 03.02.2011 tantamount to change in the terms and conditions of the WIS Scheme and as per Clause 12 of the Agreement/Scheme, the respondent is entitled to terminate the Scheme.

7. The respondent on the basis of its stand that the appellants have unilaterally and arbitrarily altered the Scheme, terminated the Agreement vide letter dated 21.03.2014 and exercised the option under Clause 12 of the WIS Scheme to sell the wagons to the Railways at a mutually agreed price and alternatively, the respondent sought possession of the wagons which remained their property as per the Scheme. However, pursuant to the said communication of the respondent, there was no response from the appellants who continued to use and retain the wagons despite termination of the contract by the respondent.

8. According to the appellant, the notifications dated 26.09.2008 and

03.02.2011 relied upon by the respondent do not and cannot be treated to be modification or alteration of the WIS scheme. The appellant urges that the two circulars in question relied upon by the respondent were only clarificatory in nature and did not alter or change the Scheme whatsoever. It is stated that the appellant Railways were entitled to rationalisation of the Scheme and the respondent could have possibly no objection to the same.

9. It was in this background as the appellant did not respond to letter of termination dated 21.03.2014 that the respondent filed a writ petition before this court being W.P.(C) 3479/2014. This writ petition was disposed of by the learned Single Judge vide order dated 26.05.2014. Directions were issued to the appellant to ensure a response to the option exercised by the respondents as communicated in the letter dated 21.03.2014 i.e. the termination letter within four weeks.

10. Pursuant to the said order dated 26.05.2014 in W.P.(C) 3479/2014, the appellant passed a Speaking Order dated 18.06.2014 holding that the respondent's interpretation of the clarifications issued by the appellant as alteration in the policy was incorrect, fallacious and misleading. The order further held that the Railways can make rules and regulations to optimize their scarce resources and the clarifications issued were as per Clause 6.1(c) and (d) and Clause 14.0 of the Agreement and they do not create any new restrictions. The termination was stated to be contrary to Clause 12. The order concluded that the appellants are not bound to purchase the rakes of the respondent.

11. Hence, the writ petition in question was filed by the respondent seeking a writ of certiorari for quashing the reasoned order dated

18.06.2014 passed by the Railways and a writ of mandamus to the appellant Railways to either purchase the wagons from the respondent at a mutually agreed price or as per the rates offered to similarly placed WIS investors or to return the rakes or wagons to the respondent in terms of the Scheme. Other connected reliefs were also sought.

12. The learned Single Judge vide impugned order held that the changes in the WIS Scheme could by no stretch of imagination be said to be clarificatory in nature as the changes go to the root of the Scheme itself. The impugned order notes that the change of monitoring of rakes from monthly monitoring to fortnight and then to days with a sanction of forfeiture of the said benefit fundamentally tantamounts to alteration of the terms and conditions of the agreement between the parties and gives rise to an occasion to the respondent to avail the option of termination of the agreement in terms of Clause 12

13. The impugned order further held that the order dated 13.6.2014 of the Railways is unsustainable in the eyes of law and liable to be set aside. A Writ of Mandamus was issued to the appellant to return the wagons to the respondent within a period of one month from the date of the judgment or alternatively to purchase the wagons at an agreed price. The impugned order also held that as the price of the wagons would be a disputed question unless the same is mutually agreed upon, it will have to be adjudicated upon. The order hence noting that there is an arbitration clause appointed a retired Judge of this High Court to adjudicate the disputes for determination of price within a period of four months. The payment of fees and terms and conditions governing arbitration by the Delhi International Arbitration Centre were to apply.

14. A preliminary objection was raised by the appellant before the learned Single Judge that there existed an arbitration clause between the parties and hence, the present writ petition would not lie. The impugned order accepted the contentions of the respondent that an Arbitration Clause does not bar a Party from filing a writ petition. The impugned order endorsed reliance of the respondent on the judgment of the Supreme Court in the case of *Union of India & Ors. vs. Tania Construction Pvt. Ltd.*, (2011) 5 SCC 697, *ABL International & Anr. vs. Export Credit Guarantee Corporation of India Ltd. & Ors.*, (2004) 3 SCC 553 and of this High Court in *Chandana Kedia, Sole Proprietor, M/s. Adinath Industries vs. UOI*, 2010 II AD (Delhi) 757 to hold that despite there being an arbitration clause, in case the action of the state authorities is arbitrary, illegal and violative of the rights of a party, it can be challenged under Article 226 of the Constitution under writ jurisdiction.

15. We have heard the learned counsel for the parties and gone through the record.

16. Learned counsel appearing for the appellant has reiterated his contentions, namely, that there is no modification or alteration in the Scheme and that the appellants are only rationalising the Scheme. The circulars in issue are only clarificatory in nature and do not change the Scheme. Hence, it is stressed that the respondent have enjoyed the benefit under the Scheme for seven years and that on the lapse of three more years, the wagons would have become the property of the appellants but the respondents have unilaterally without any basis terminated the Agreement. Reliance is placed on Clause 6.1 of the agreement to contend

that the Railways are entitled to carryout rationalisation. The learned counsel has also stressed on the preliminary objection about maintainability of this petition as there is an alternative remedy available to the respondent, i.e. there being an arbitration clause in the Agreement.

17. Learned counsel has also submitted that the appointment of a retired Judge of this High Court as an Arbitrator to adjudicate upon the dispute regarding determination of the price of the wagon is contrary to the terms of the arbitration clause in the agreement between the parties. He submits that the arbitration clause provides that one Arbitrator is to be nominated by the appellant, one by the respondent and the two Arbitrators are to nominate a third Arbitrator by mutual agreement of the parties or in the event of non agreement their appointment shall be in accordance with the provisions of the Arbitration Act, 1996.

18. We may first look at some of the relevant clauses of the agreement between the parties.

19. Clause 6.1 of the Agreement which is relied upon by the appellant reads as follows:-

“6.1 The guaranteed clearance of traffic shall be subject to the following:

- (a) Rationalisation Scheme;
- (b) Preferential Traffic Schedule;
- (c) Conditions of Booking of Goods Traffic;
- (d) Central Govt. State Bans and restriction;
- (e) “Force majeure” such as natural calamities like breaches, floods, etc. over which Railways have no control.”

20. Clauses relied upon by the respondent are Clause 7.1 and Clause 12 which read as follows:-

“7.1 The guaranteed supply of wagons will be monitored on a monthly basis”

....

“12.0 TERMINATION OF AGREEMENT

In the event of termination of the agreement 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 be remained with the investor. However, the Investor shall have option to sell the wagons to Indian Railways at a mutually agreed price”

21. Clause 7.1 of the Agreement clearly stipulates that the guaranteed supply of the wagon is to be monitored on monthly basis.

22. On 26.09.2008, the appellant took out a circular relevant portion of which reads as follows:

“ii. Upto 50% of indents under WIS against entitled monthly quota should be placed by the 15th of each month. Failure to do so will lead to deduction of quota to that extent.”

23. Subsequently on 03.02.2011 another circular was issued, the relevant portion of which reads as follows:-

“Railways may direct WIS customers to place indents at equal spacing on the basis of the monthly quota. In case, WIS customer has failed to register indents in time then, he cannot demand carry forward of the guaranteed supply.”

24. The effect of the first circular dated 26.09.2008 was that the respondent was now obliged to utilise its monthly quota of wagons in equal proportion on bi-monthly basis i.e. 15 days for 50% of the quota. Similarly, the effect of the second circular dated 03.02.2011 was that from a monitoring of 15 days' basis, it was further reduced to equal

spacing within the month i.e. as the respondent had a quota of six rakes, it had to utilise one rake in a period of five days.

25. Clause 7.1 of the Agreement provides for monitoring on a monthly basis. The respondent was permitted as per this clause of the Agreement to utilise its quota of six rakes as per its convenience within a period of one month. This is sought to be first changed to ensure that the respondent utilises 50% of its quota of rakes i.e. 3 rakes within a spread of 15 days failing which its right to utilise the said quota would lapse. This is again sought to be changed whereby the respondent became obliged to use its rakes at the rate of one rake within a period of five days. Failure to do so implied deduction of the quota. Clearly, there were fundamental changes brought about in the Scheme by the appellants by its two circulars dated 26.09.2008 and 03.02.2011. These changes were also contrary to clause 7.1 of the Agreement. These changes cannot be termed as rationalisation.

26. The phrase '*Rationalize*' is defined in The Shorter Oxford English Dictionary (Sixth Edition) as follows:

"*Rationalize*- To make business etc. more efficient by reorganising it according to rational principles so as to reduce or eliminate waste of labour, time or materials."

The phrase '*Alter*' is defined in the Black's Law Dictionary (6th Edn. Page 77) as follows:

"*Alter*- To make a change in; to modify; to vary in some degree; to change some of the elements or ingredients or details without substituting an entirely new thing or destroying the identity of the thing affected. To change partially. To change in one or more respects, but without destruction of existence or identity of the thing changed; to increase or diminish..."

27. Can the circulars be termed as an act of rationalisation. The only explanation given to bring out the circular is stated as follows:

“That over the last two years, Government of India and the State Governments where iron-ore is mined, 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 treated as a loss due to the alleged changes in terms.”

This explanation is repeated in the speaking order dated 18.06.2014. There is no attempt to explain how the two circulars are rationalising the business of the appellant. On the other hand, the two circulars make the Scheme more onerous for the respondent by changing the period within which the guaranteed rates are to be used or utilised. The circulars change the monitoring period contrary to Clause 7.1 of the agreement which provides for monitoring on a monthly basis. There is a clear change of the elements or ingredients or details implying an alteration of the Scheme. There is a clear alteration/modification in the Scheme.

28. We see no reason to differ with the view taken by the learned Single Judge that the alteration carried out by the appellants tantamount to change in the fundamental terms of the Scheme and permits the respondent to exercise its option under Clause 12 of the Agreement for

termination of the Agreement.

29. Coming to the preliminary objection raised by the appellant about this petition being not maintainable due to availability of an alternative remedy to the respondent. The Supreme Court in the case of ***Union of India vs. Tania Construction Pvt. Ltd. (supra)*** in para 27 held as follows:-

“27. 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. 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.

30. Similarly, in the case of ***ABL International vs. Export Credit Guarantee Corporation of India Ltd. (surpa)***, the Supreme Court in para 29 held as follows:-

“29. 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. In view of the said legal position, we agree with the view expressed by the learned Single Judge that existence of an alternative remedy in the form of an arbitration Clause in the Agreement would not by itself prohibit the respondent from approaching a writ court.

32. There are hardly any disputed questions of fact in the present case. It is a pure interpretation of the two circulars issued by the appellants as to whether, they amount to only clarifications or amount to amendment in the scheme. In this background, we reject the preliminary objection raised by the respondent and hold that the Writ Petition is maintainable in the facts of this case.

33. Coming to the last submission of the learned counsel for the appellant, the learned Single Judge has appointed a retired Judge of this High Court as an Arbitrator to adjudicate upon the dispute on the price on which the appellants are to purchase the wagons. It was strenuously urged that this is contrary to the Arbitration clause.

34. Relevant clause of the Arbitration Agreement reads as follows:-

“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.”

35. The Supreme Court in *Northern Railway Administration, Ministry of Railway, New Delhi vs. Patel Engineering Company Limited, (2008) 10 SCC 240* held as follows:-

“11. A bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the Court may ask to do what has not been done. The court must first ensure that the remedies provided for are exhausted. It is true as contended by Mr. Desai, that it is not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations.

12. The expression 'due regard' means that proper attention to several circumstances have been focussed. The expression 'necessary' as a general rule can be broadly stated to be those things which are reasonably required to be done or legally ancillary to the accomplishment of the intended act. Necessary measures can be stated to be the reasonable steps required to be taken.

13. In all these cases at hand the High Court does not appear to have focussed on the requirement to have due regard to the qualifications required by the agreement or other considerations necessary to secure the appointment of an independent and impartial arbitrator. It needs no reiteration that appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements of Sub-section (8) of Section 11 have to be kept in view, considered and taken into account. If it is not done, the appointment becomes vulnerable. In the circumstances, we set aside the appointment made in each case, remit the

matters to the High Court to make fresh appointments keeping in view the parameters indicated above.

36. The above position was reiterated in *N.B.C.C.Ltd. vs. J.G.Engineering Pvt. Ltd.*, (2010) 2 SC 385.

37. In our view the directions in the impugned order appointing a retired Judge of this High Court as an Arbitrator and also directing that the arbitration shall be held as per rules and regulations of the Delhi International Arbitration Centre are contrary to the law laid down by the Supreme Court in the above noted judgments.

38. In view of the above, we upheld the directions passed in the impugned order except the directions appointing Mr. Justice R.C. Chopra, Retired Judge of this Court as an Arbitrator and directions that the Arbitration shall be governed by the rules and regulations of the Delhi International Arbitration Centre.

39. As per the impugned order the appellants were to return the wagons to the respondents within a period of one month from today or alternatively purchase the wagons at an agreed price. We extend the period of one month as stated in the impugned order, i.e. one month from today. If the appellant does not wish to purchase the wagons, it shall return the same within one month from today to the respondent. In case the appellant intends to purchase the wagons or fails to make any response within one month from today, the appellant would calculate the price of the wagons as per its norms under the scheme and tender the payment to the respondents within three months from today. When making payment, the respondent shall be informed about the basis of the calculation of price made by the appellant. The respondent may accept

the price being paid by the appellant without prejudice to its rights and contentions. If the respondent is not satisfied with the price or payment of other dues it may initiate appropriate steps for arbitration for adjudication of the price at which the appellant would be entitled to buy the wagons.

40. The present appeal is disposed of with the aforesaid modification in the impugned order. All pending applications also stand dismissed.

**(JAYANT NATH)
JUDGE**

(CHIEF JUSTICE)

**NOVEMBER 03, 2015
rb/n/v**