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

+ **FAO(OS) (COMM) 317/2019**

**M/S BETA EXIM LOGISTICS PVT. LTD.** ..... Appellant  
Through: Mr. Anil Sapra, Sr. Advocate with Mr.  
Anil Nag, Ms. Akanksha Choudhary and Mr.  
Sarthak Katyal, Advocates.

Versus

**CENTRAL RAILSIDE WAREHOUSE COMPANY LIMITED**  
..... Respondents  
Through: Mr. Saurabh Agrawal, Mr. Ashish  
Tiwari and Mr. Rajat Kapoor, Advocates.

**CORAM:**  
**HON'BLE MS. JUSTICE HIMA KOHLI**  
**HON'BLE MS. JUSTICE ASHA MENON**

**ORDER**  
% **08.11.2019**

**C.M. No.48438/2019 (exemption)**

Allowed, subject to all just exceptions.

**FAO(OS) (COMM) 317/2019 & C.M. No.48437/2019**

1. A challenge has been laid by the appellant/petitioner to the judgment dated 11.9.2019, passed by the learned Single Judge, dismissing a petition filed by it under Section 34 of the Arbitration & Conciliation Act, 1996 (in short '**the A & C Act**'), assailing the Award dated 11.3.2019, passed by the learned Sole Arbitrator.
2. A brief reference to the relevant facts as recorded in the impugned judgment is necessary. The appellant/petitioner is a Company based in

Cochin, State of Kerala. The respondent, Central Railside Warehouse Company Limited (in short, 'CRWC'), is a subsidiary of the Central Warehousing Corporation (CWC) that provides transit warehousing facilities to the Rail borne traffic at RWCs located near the Railway goods-shed across India. On 16.5.2014, the respondent/CRWC bagged an Award in respect of lease rights from the Southern Railways for operating Parcel Cargo Express Train (in short, 'PCE Train') from Chalakudi to Moga, on round trip basis. On 27.2.2015, a formal agreement was executed between the respondent/CRWC and the Southern Railways, upon the former furnishing a Bank Guarantee in favour of the latter, in accordance with the Letter of Award (LoA). The leasing rights granted under the agreement were valid from 15.10.2014 to 15.1.2018.

3. The value of the contract on a round trip basis from Chalakudi to Moga, was Rs.41,12,832/-, besides freight charges, development charges and service tax, which were also payable by the respondent/CRWC to the Southern Railways. It was agreed between the parties that the respondent/CRWC would make available guaranteed supply of parcel van/SLR under normal circumstances. However, in the event of certain unavoidable circumstances or operational exigencies, Southern Railways shall not be bound to fulfil its commitment qua the respondent/CRWC. The parties had also agreed that 50% of the lump-sum lease amount shall be paid by the respondent/CRWC to the Southern Railways at the time of loading at the respective ends i.e., Chalakudi and Moga.

4. After the Southern Railways issued a LoA dated 16.5.2014 in favour of the respondent/CRWC, the appellant/petitioner agreed to act as its business associate for operating the said PCE Trains in terms of an

agreement executed on 6.1.2015. Under the said agreement, the appellant/petitioner was permitted to enter upon and use the services of the PCE Trains for a period of two years and nine months. It was further agreed between the parties that the appellant/petitioner would utilize the entire rake space of the PCE Trains w.e.f. 11.2.2015, as a facilitator and shall reimburse the freight charges, development charges and service charges to the respondent/CRWC in accordance with the charges levied by the Southern Railways for each round trip/operation of the PCE Trains. Over and above, the appellant/petitioner also agreed to pay 9% of the aforesaid charges to the respondent/CRWC alongwith service tax leviable thereon.

5. Under the agreement dated 6.1.2015, the appellant/petitioner agreed to pay freight charges for full load to and fro PCE Trains to the respondent/CRWC irrespective of the space remaining totally/partially unutilized during the contract period. It was also agreed that if the appellant/petitioner would fail to execute the contract or perform it unsatisfactorily, the respondent/CRWC would be entitled to realize the amount payable by it from the security deposit/Bank Guarantee furnished by the appellant/petitioner to the extent of the liability/damages, as may adjudicated upon or the said amount would be recovered by the Southern Railways due to the losses/damages suffered.

6. It is an admitted position that the appellant/petitioner was to commence the service by utilizing the rake space of the PCE Trains w.e.f. 18.2.2015. However, it could not operate the service on the said date, thereby compelling the respondent/CRWC to approach the Southern Railways with a request to re-schedule the PCE Train services from 18.2.2015 to 20.2.2015. However, even on 20.2.2015, the

appellant/petitioner did not load the rakes and the PCE Train ran empty from Chalakudi to Moga due to which, the respondent/CRWC had to pay a sum of Rs.20,83,360/- to the Southern Railways towards freight charges. Subsequently, on 25.2.2015, 4.3.2015 and 11.3.2015, yet again the appellant/petitioner approached the Southern Railways for deferment of the subsequent PCE Train services and therefore, the rakes were not placed on the said dates. As the said trips were not operated by the appellant/petitioner, the Southern Railways raised a demand on the respondent/CRWC holding that there was no ground for deferment/waiver of payment. Southern Railways also called upon the respondent/CRWC to remit the freight charges on or before 30.4.2015. Besides the above, the respondent/CRWC was threatened with termination of the agreement.

7. It is not out of place to mention here that aggrieved by the threat of termination of the agreement extended by the Southern Railways, the respondent/CRWC moved an application under Section 9 of the A & C Act before the High Court of Madras for seeking interim directions, which were duly granted. During the pendency of the aforesaid petitions, the appellant/petitioner herein agreed to pay the demanded charges for the round trips, which were not operated, in instalments, in terms of the letter dated 28.7.2015. The respondent/CRWC claimed that on the assurance given by the appellant/petitioner in the meeting held on 3.8.2015, it had withdrawn all the proceedings that were pending before the High Court of Madras. Vide letter dated 10.08.2015, the respondent/CRWC informed the appellant/petitioner that the Southern Railways had agreed to recommence the services of the PCE Trains w.e.f. 19.8.2015, subject to certain conditions that were agreed upon, including payment of the outstanding dues towards

freight charges for 3.5 trips, which the appellant/petitioner had failed to operate.

8. The respondent/CRWC also intimated the appellant/petitioner that it had paid a sum of Rs.20,82,360/- to the Southern Railways towards one-way freight for the rakes that were not loaded by the appellant/petitioner on 20.2.2015 and it called upon the appellant/petitioner to reimburse it towards the advance for two round trips. Vide reply dated 10.8.2015, the appellant/petitioner assured the respondent/CRWC that it would fulfil the aforesaid terms of the agreement arrived at between it and the Southern Railways, including payment of the demand raised by the latter. As the previous Bank Guarantee offered by the respondent/CRWC to the Southern Railways prior to executing the contract on 26.2.2015, had been invoked by the Southern Railways on the assurance given by the appellant/petitioner, the respondent/CRWC submitted a fresh Bank Guarantee dated 18.8.2015 for a sum of Rs. 64,85,450/-.

9. It is an undisputed position that after the PCE Train services were recommenced, the said services were operated by the respondent/CRWC in the outwards direction i.e. from Chalakudi to Moga on 21.3.2015 and 23.8.2015 and in the return direction from Moga to Chalakudi for one day on 27.9.2015. Contrary to the terms and conditions of the contract that required it to give two and a half months notice prior to termination, vide letter dated 31.8.2015, the appellant/petitioner proceeded to terminate the contract with the respondent/CRWC with immediate effect. As a consequence thereof, the respondent/CRWC was also compelled to terminate its contract with the Southern Railways since it was not viable for it to continue operating the service. This fact was duly intimated by the

respondent/CRWC to the appellant/petitioner, who was also told that it would be liable for the claims/damages that may be raised by the Southern Railways on account of premature termination of the contract as well as the commitments made by it with the Southern Railways in the meeting held on 3.8.2015.

10. As a consequence of the aforesaid termination, Southern Railways issued a notice dated 1.9.2015 to the respondent/CRWC informing it that it was proceeding to encash the Bank Guarantee offered by it for a sum of Rs.1,23,38,456/-, in terms of the agreement dated 27.2.2015. Vide letter dated 18.9.2015, Southern Railways raised a demand of Rs.1,43,94,912/- for the trips due on 20.2.2015, 25.2.2015, 4.3.2015 and 11.3.2015, from Moga to Chalakudi, which excluded development charges and service tax towards freight charges. Southern Railways reiterated that the appellant/petitioner had agreed to pay the said amount to it and it was on the basis of the said assurance, that the respondent/CRWC had in turn given an assurance of making payment to the Southern Railways vide letters dated 28.7.2015 and 10.8.2015.

11. On the Southern Railways encashing the Bank Guarantee submitted by the respondent/CRWC, the latter had in turn, encashed the Bank Guarantee submitted by the appellant/petitioner to it on account of breach of the agreement dated 6.1.2015. Vide letter dated 24.9.2015, the respondent/CRWC also raised a demand on the appellant/petitioner for a sum of Rs.1,46,82,810/-, with 2% development charges.

12. On its part, vide letter dated 5.11.2015, Southern Railways informed the respondent/CRWC that it had adjusted the earnest money or Rs.10,00,000/- received in respect of some other tender towards outstanding

dues and further raised a demand for the balance sum of Rs.1,23,94,912/-. On account of the disputes and differences that had arisen between the parties, the respondent/CRWC invoked the arbitration clause governing the parties and raised the following claims: -

*“Claim No.1 was in respect of the demand of Rs.1,43,94,912/-.*

*Claim No.2 was advanced towards loss of profit aggregating to Rs.55,07,815/-.*

*Claim No.3 towards pre-reference and pendente lite interest.*

*Claim No.4 cost of the arbitration amount to Rs.3,40,339/-.”*

13. While resisting the aforesaid claims, the appellant/petitioner lodged six counter claims against the respondent/CRWC. By the Award dated 11.3.2019, passed by the learned Sole Arbitrator, it was held that the appellant/petitioner had committed a breach of the agreement and was solely responsible for the demands raised by the Southern Railways as well as the subsequent termination of the agreement between the parties. Consequently, while rejecting all the counter-claims filed by the appellant/petitioner, the learned Sole Arbitrator allowed Claim No.1 of the respondent/CRWC towards the demand of Rs.1,43,94,912/- raised by the Southern Railways in respect of 3.5 trips, towards development charges and service tax. The learned Sole Arbitrator awarded a sum of Rs.1,52,87,396/- in favour of the respondent/CRWC on the basis of the settlement arrived at between the parties wherein, the appellant/petitioner had agreed to pay a sum of Rs.1,52,87,396/- as recorded in its letters dated 28.7.2015, 10.8.2015 and

8.8.2015 towards the freight charges, development charges and service tax.

14. The challenge laid by the appellant/petitioner to the awarded amount under Claim No.1 has been turned down by the learned Single Judge on the ground that the learned Arbitrator ought not to have granted any amount besides the sum of Rs.1,23,38,496/- that had been recovered by the respondent/CRWC by invoking the Bank Guarantee. It was held that the Southern Railways had demanded a sum of Rs.1,43,94,912/- from the respondent/CRWC on invoking the Bank Guarantee for a sum of Rs.1,23,38,496/- and the amount awarded against the appellant/petitioner was only the sum that had to be paid by the respondent/CRWC to the Southern Railways and not more.

15. We see no reason to differ that the aforesaid view taken by the learned Single Judge of upholding the amount awarded in favour of the respondent/CRWC under claim No.1. There is no error in the findings returned by the learned Single Judge to the effect that communications addressed by the appellant/petitioner to the respondent/CRWC were a clear admission of its liability and the respondent/CRWC had agreed to pay the amount to the Southern Railways on the basis of the assurance given by the appellant/petitioner. Having failed to load the rakes on the PCE Trains on particular dates, the appellant/petitioner could not be permitted to wriggle out of the breaches committed by it. In any event, the findings returned by the Arbitral Tribunal while allowing the claim are based on an appreciation of the facts and the evidence led and do not deserve any interference in appeal.

16. Coming next to Claim No.2, for a sum of Rs.55,07,815/- raised by the respondent/CRWC towards loss of profit, the learned Arbitrator noted that in

terms of Clause 22 of the agreement, prior to exiting, the appellant/petitioner was required to give an advance notice of two and a half months to the respondent/CRWC, which would have translated into 10.5 round trips as per the schedule laid down in the terms of the agreement. However, all of a sudden, without giving any notice, the appellant/petitioner terminated the said contract. Further, noting that under Clause 12 of the agreement governing the parties, the respondent/CRWC was entitled to receive 9% as facilitation charges fee on each trip and adding 10.5 round trips to 3.5 trips that were not operated by the appellant/petitioner on different dates, the Sole Arbitrator awarded a sum of Rs.55,07,815/- in favour of the respondent/CRWC.

17. The challenge laid to the impugned Award under Claim No.2, was turned down by the learned Single Judge, in favour of the respondent/CRWC and it has been held that the amount awarded under the said claim was on the analogy of loss of profit which the respondent/CRWC could have earned had the petitioner operated all the 14 trips (10.5 trips + 3.5 trips).

18. Mr. Sapra, learned Senior Advocate appearing for the appellant/petitioner states that while allowing the said claim, the learned Single Judge fell into error and ignored the provisions of Sections 73 and 74 of the Indian Contract Act, which provides that a party complaining of breach of contract, is entitled to compensation only on proof of actual loss suffered by it which the respondent/CRWC had failed to prove. In support of the said submissions, he places reliance on the decision of a coordinate Bench in Ahluwalia Contract (India) Limited versus Union of India reported as **244 (2017) DLT 360 (DB)**. He submits that since the respondent/CRWC

as well as the Southern Railways did not actually suffer any loss as no rakes were loaded on the PCE Trains, therefore, no amount was payable to the respondent/CRWC under Claim No.2.

19. We do not find any merit in the aforesaid submission made by learned counsel for the petitioner in view of the fact that the amount awarded by the learned Sole Arbitrator in favour of the respondent/CRWC is based on a simple formula under the contract. The appellant/petitioner having unilaterally exited from the contract, the learned Sole Arbitrator simply calculated the number of trips that it was required to operate every week, in terms of the agreement, which tallied to 10.5 round trips and adding to that 3.5 round trips that the appellant/petitioner had failed to operate prior to terminating the contract, arrived at the total loss of profit that the respondent/CRWC had suffered on the basis of each round trip.

20. The learned Sole Arbitrator also awarded freight charges, development charges and service tax in favour of the respondent/CWRC in terms of the contract. None of the said heads can be treated as general loss of profit that required the respondent/CRWC to have led evidence to establish the loss suffered by it. We may note that the learned Single Judge has observed in para 17 of the impugned judgment that the aforesaid charges and service tax are different from facilitation charges, which the respondent/CRWC was not entitled to @ 9% in terms of Clause 12 of the agreement. In the facts and circumstances of this case, the decision in the case of Ahluwalia Contract (India) Limited (*supra*) cannot be of any avail to the appellant/petitioner. We do not find any error in the decision of the learned Single Judge of upholding the amount awarded to the respondent/CRWC under Claim No.2.

21. Coming to the third claim of the respondent/CRWC towards pre-reference and *pendente lite* interest, following were the observations made by the learned Single Judge:-

*“20. Insofar as the third claim is concerned, it is the submission of Mr. Nag that the learned Arbitrator has granted pre-reference, pendente lite and future interest @ 12% per annum but a perusal of paras 53 and 73, it is noted that pre-reference interest is granted from September 01, 2015 in Para 53 and whereas from September 06, 2015 in para 73. He also states that there is an anomaly in the figures, inasmuch as the amount depicted in para 53 is Rs.2,07,95,213/- whereas in para 73 it is Rs.2,46,23,101/-, I say nothing in this regard, appropriate for the petitioner was to file an application under Section 33 of the Act to get the correction / interpretation of the award. Having said that, I do not see any infirmity in the learned Arbitrator awarding the pre-reference, pendente lite and future interest at 12% per annum. Liberty shall be with the petitioner to seek clarification / interpretation of the award from the learned Arbitrator.”*

22. Mr. Sapra, learned Senior Advocate submits that the learned Single Judge has failed to appreciate that in para 53 of the award, the Sole Arbitrator had awarded interest for the pre-reference period and *pendente lite interest* @ 12% per annum payable with effect from the date of repudiation of the contract, i.e., from 1.9.2015 till 1.3.2019, the date of the Award whereas in para 73 of the contract, he has again awarded interest @ 12% on the principal amount adjudged under Claims No.1(A) and 2(B) by including the interest component and making the amount payable with effect from 06.01.2015, the date of the agreement, till the date of payment. He contends that the interest awarded deserved interference by the learned

Single judge, more so, when the amount and the dates mentioned in the operative para of Award cannot be treated as a mere clerical/typographical error or an error of the same nature for relegating the appellant/petitioner to the learned Arbitrator by moving an application under Section 33 of the Act.

23. In the course of arguments, Mr. Saurabh Agarwal, learned counsel for the respondents fairly states that instead of relegating the parties to the learned Arbitrator on the aspect of interest as argued above, this Court may clarify that the appellant/petitioner is required to pay to the respondents a total sum of Claim No.1(A) and Claim No.2(B), which comes to Rs.2,07,95,213/- with interest @ 12% per annum from the date of repudiation of the agreement, i.e., from 01.09.2015, till the date of payment.

24. In view of the above, with the consent of the parties, it is clarified that the appellant/petitioner shall pay to the respondents, a sum of Rs.2,07,95,213/- (Rupees Two Crores Seven Lakhs Ninety Five Thousand Two Hundred Thirteen Only) being the total sum of Claim No.1(A) allowed for Rs.1,52,87,398/- plus Claim No.2(B) allowed for Rs.55,07,815/- with interest @ 12% per annum from the date of repudiation of the agreement, i.e., 01.09.2015, till the date of payment, instead of the amount mentioned in para 73(i) of the impugned award.

25. The appeal is partly allowed on the above terms, while leaving the parties to bear their own expenses.

**HIMA KOHLI, J.**

**ASHA MENON, J.**

**NOVEMBER 8, 2019**

**NA/rkb**