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

Reserved on : 13.04.2023

Date of Decision : 12.07.2023

IN THE MATTER OF:

W.P.(C) 5985/2019 and CM APPL. 31798/2022 (direction)

M/S REAL APT SOLUTIONS ..... Petitioner

Through: Mr. P.D. Gupta, Sr. Advocate with Mr. Abhishek Gupta, Advocate

Versus

UNION OF INDIA AND ORS. ..... Respondents

Through: Mr. Ruchir Mishra, Mr. Sanjiv Kr. Saxena, Mr. Ramneek Mishra, Mr. M.K. Tiwari, Ms. Poonam Shukla and Ms. Reba Jena Mishra, Advocates
Ms. Divya Rana, Advocate for respondent No.3

AND

W.P.(C) 4917/2019, CM APPL. 21872/2019 (Interim Relief) and CM APPL. 49891/2022 (direction)

M/S SHATABDI SALES PVT. LTD. ..... Petitioner

Through: Mr. P.D. Gupta, Sr. Advocate with Mr. Abhishek Gupta, Advocate

versus

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UNION OF INDIA AND ORS. ..... Respondents

Through: Mr. Ruchir Mishra, Mr. Sanjiv Kr. Saxena, Mr. Ramneek Mishra, Mr. M.K. Tiwari, Ms. Poonam Shukla and Ms. Reba Jena Mishra, Advocates

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J.

1. By way of present petitions filed under Article 226 of the Constitution of India, the petitioners seek setting aside of orders dated 04.01.2019 passed by respondent No.1, whereby their representations dated 18.09.2018 were rejected. Additionally, the petitioners have sought directions for return of wagons as well as for payment of the user charges/rentals after expiry of the primary lease period. As common contentions have been raised in both the petitions, the same are taken up together for consideration and disposal.

2. The facts in a nutshell are that in the year 1994-95, the Indian Railways/respondent, while exploring alternate sources of funding, had floated an NIT for procuring 4000 wagons on Built-Own-Lease Transfer (BOLT) Scheme.

For the purposes of the present case, it is noteworthy that a Letter of Intent dated 18.03.1996 was issued by the respondent(s) in favour of one *Cimmco Birla Ltd.* (now known as *Cimmco Ltd.* and hereafter, referred to as "Cimmco") for procurement of 1200 wagons, out of which 1000 were BOXN wagons and 200 were BCNA wagons. Admittedly, Cimmco

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Signing Date:13.07.2023
11:10:14

manufactured and supplied 1200 wagons to respondent(s) on lease under financing from four financial institutions, namely IDBI, SBI, SBI Cap and Development Credit Bank (DCB). The financial institutions and Cimmco entered into four Principal Lease Agreements (PLAs) and in turn, Cimmco entered into four Sub-Lease Agreements (SLAs) with the respondent(s). The primary period of lease was ten years with an option of entering into a secondary lease.

3. While the petitioner-*M/s Real Apt Solutions* claims to be successor-in-interest of DCB on the strength of submission that it had purchased 107 wagons on 22.05.2009, the petitioner-*M/s Shatabdi Sales Pvt. Ltd.* claims to be successor-in-interest of SBI Cap, having purchased 206 wagons on 27.11.2009. Statedly, the sale transactions were entered into after the above two financial institutions cancelled the lease with Cimmco. It is the case of the petitioners that after the expiry of the primary lease period, both the financial institutions duly conveyed their unwillingness to extend the primary lease period by entering into a secondary lease vide letters dated 03.11.2008 and 07.12.2009/15.02.2010 respectively. Reportedly, the respondent(s) were also informed that the petitioners would be entitled to recover the secondary period lease rentals as well as to take possession of the wagons in question.

4. Aggrieved with the fact that the respondent(s) illegally retained possession of the wagons beyond the primary lease period without payment of any lease rentals, writ petitions being W.P.(C) 8143/2014 and W.P.(C) 4805/2015 came to be filed by the present petitioners. The said petitions were disposed of vide orders dated 06.09.2018 thereby granting liberty to

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Signing Date:13.07.2023
11:10:14

the petitioners to make a representation to respondent No.2. The petitioners filed their respective representations but the same came to be rejected by the respondent(s) vide separate impugned orders, both dated 04.01.2019.

5. Mr. P.D. Gupta, learned Senior Counsel, while appearing for the petitioners, submitted that while the petitioners purchased 107 and 206 wagons respectively, the remaining 887 wagons were purchased by one *Titagarh Capital Pvt. Ltd.* from IDBI and SBI Leasing. He contended that on the expiry of primary lease period and in absence of extension of secondary lease, the act of respondent(s) in retaining the wagons is illegal. He further submitted that admittedly, the respondent(s) have not paid any lease rentals after the expiry of ten-year primary lease period. It was also submitted that after receiving communication regarding sale of wagons in favour of the petitioners by DCB and SBI Cap, the respondents raised no protest.

Learned Senior Counsel further drew the attention of the Court to the terms of the PLAs and SLAs especially clause 18.2 to contend that the provisions of SLAs superseded the provisions of bids documents and respondent's offer. It was contended that the respondents were throughout aware of the purchase of wagons by the petitioners as vide its letter dated 11.03.2010, the respondent Nos. 1 & 2 informed the petitioners that it was processing the case of extension of sub-lease for the secondary period. Vide its letter dated 16.03.2010, the petitioner-*M/s. Real Apt Solutions* also informed the respondents that primary lease having been cancelled by the respective financial institutions, no secondary lease agreement could be entered into.

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Signing Date:13.07.2023
11:10:14

6. Mr. Gupta, learned Senior Counsel also submitted that in the disputes relating to *M/s Titagarh Capital Pvt. Ltd.,* the Supreme Court vide order dated 17.09.2015 passed in SLP(C) 22751-22752/2015 appointed Justice S.S. Nijjar (Retd.) as the Sole Arbitrator who, vide Award dated 03.07.2019, dismissed the objections raised by the respondents and allowed the claim petition in favour of *M/s Titagarh Capital Pvt. Ltd.* It was urged that respondents had raised similar contentions as in the present petitions but the same were rejected. The Award passed on 03.07.2019 attained finality as the same was not challenged by the respondents.

It was further submitted that in September 2011, the Railway Board constituted a Committee of three executive directors with the following reference:

> *"To decide the best possible option to pursue for Indian Railways regarding sub-lease for the secondary period or otherwise for the 1200 wagons originally on sub-lease from M/s Cimmco Birla Ltd."*

The petitioners claim to have received the noting sheets under the Right to Information Act, 2005 and submitted that the recommendations of the Committee were approved by Member Mechanical as well as Member Traffic.

7. Mr. Ruchir Mishra, learned counsel appearing for the respondent(s), on the other hand, disputed the submissions made on behalf of the petitioners. It was contended that as per the financial terms and conditions of the bid documents, the respondents had the option to transfer the wagons to its nominee at the expiry of the primary lease period at a value equivalent to

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Signing Date:13.07.2023
11:10:14

1.0% of the total value of the wagons. He also contended that the petitioners being third party, have no privity of contract with the respondents.

8. In rejoinder, Mr. Gupta, learned Senior Counsel for the petitioners, submitted that the Award in favour of *M/s Titagarh Capital Pvt. Ltd.* came to be passed during the pendency of the present petitions and the findings having attained finality, are equally applicable to the facts of the present case. The respondents accepted the said Award.

9. Pertinently, with regard to the present petitions, the Principal Lease Agreements were entered into between Cimmco and Bank/Financial Institutions on 09.10.1997 and 08.09.1997, copies of which have been placed on record. Both the SLAs were entered into between Cimmco and the respondent(s) on 20.10.1997. While the primary lease period of 10 years in relation to the petitioner-*M/s Real Apt Solutions* came to an end on 31.01.2008/27.02.2008, in the case of petitioner-*M/s Shatabdi Sales Pvt. Ltd.* it came to an end on 02.01.2008.

10. Cimmco is impleaded as respondent No. 4 in the present petitions and has also filed its counter-affidavit, wherein it is categorically stated that both DCB and SBI Cap had transferred the wagons in question to the present petitioners, and informed about the same to the respondent(s) vide letters dated 22.05.2009 and 07.12.2009/15.02.2010 respectively.

11. The DCB also filed its counter-affidavit and, while referring to its earlier counter-affidavit filed in W.P.(C) 8143/2014, reiterated that it had sold 107 BOXN wagons to the petitioner-*M/s Real Apt Solutions*. SBI Cap, despite being served, did not file any counter-affidavit.

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By:NIJAMUDDEEN ANSARI
Signing Date:13.07.2023
11:10:14

12. It is the common case of the petitioners that vide letter dated 11.03.2010, the respondents informed the petitioners that it was processing the case of extension of sub-lease period for the secondary period. Further, after purchasing the respective wagons, the petitioners approached respondents with the request for renewal of lease agreements as well as payment of lease rentals.

13. Admittedly, the respondent(s) has neither taken steps for extension of the sub-lease for the secondary period nor for transfer of wagons in question in its name after paying the residual value of 1.0% of the original cost.

14. During the course of proceedings, the petitioner-*M/s Real Apt Solutions* also placed on record its letter/communication dated 27.09.2019 thereby demanding a sum of Rs.3,04,28,591/- towards unpaid lease rentals for the primary lease period.

15. Notably, Clause 18.2 of the SLA entered into between Cimmco and the respondents provided that the terms and conditions of the agreement would supersede the corresponding provisions in the bid documents and lessee's offer.

16. From the above conspectus of facts, it is borne out that on being declared the successful bidder, the petitioners' predecessor-in-interest i.e. Cimmco manufactured the wagons in question according to the specifications of the respondents. It entered into financial arrangements with four different banks/financial institutions, who under the said financial arrangements, became the owners of wagons whereafter the same were leased to Cimmco. The wagons were thereafter sub-leased by Cimmco to the

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By:NIJAMUDDEEN ANSARI
Signing Date:13.07.2023
11:10:14

respondents on the same terms and conditions as contained in the PLAs. In none of these agreements, there is any provision enabling the respondents to purchase the wagons at a residual value of 1.0 % of the original cost.

17. As noted hereinabove, the respondent(s) has not taken any steps for extension of the sub-lease after the expiry of the primary lease period or to purchase the wagons. It also did not raise any protest to the intimation received by it from the DCB and SBI Cap regarding sale of wagons to the present petitioners. The respondents have only relied on the bid documents to claim ownership. At this stage, the Court may profitably refer to the decision of the Supreme Court in Dresser Rand S.A. *v.* Bindal Agro Cam Ltd. and K.G. Khosla Compressor Ltd. reported as **(2006) 1 SCC 751** wherein the legal status of bid or NIT was encapsulated as under:-

> *"32. Invitation to bid by itself is neither an agreement nor contract (para 27). Parties agreeing upon the terms subject to which a contract will be governed when made is not the same as entering into the contract itself. Similarly, agreeing upon the terms which will govern a purchase when a purchase order is placed is not the same as placing a purchase order, a prelude to a contract should not be confused with the contract itself. The purpose of Revision no. 4 dated 10.06.1991 was that it and when a purchase order is placed by BINDAL, that would be governed by the "general conditions of purchase" of BINDAL, as modified by Revision no. 4. But when no purchase order was placed, neither the 'general conditions of purchase' nor the arbitration clause in the 'general conditions of purchase' became effective or enforceable…"*

18. Later, in Bharat Sanchar Nigam Ltd. *v.* Telephone Cables Ltd. reported as **(2010) 5 SCC 213,** the Supreme Court reiterated the above observation in following terms:-

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By:NIJAMUDDEEN ANSARI
Signing Date:13.07.2023
11:10:14

"The bid documents did not constitute a contract or an agreement or an agreement to enter into a contract. It was merely an invitation to make an offer. It informed the prospective bidders, how they should make their bids; how the bids would be process by the appellant; how contracts would be entered by placing purchase order and what terms would govern the contracts, if purchase orders were placed. As per the scheme of bid documents there is clear division of the term that would govern the tender process and the terms that would govern the contract, when the bids are accepted."

19. Again, in Joshi Technology International Inc. *v.* Union of India & Ors. reported as **(2015) 7 SCC 728**, the Supreme Court observed as under:-

"The intention behind the aforesaid clauses is more than apparent, namely, not to look into any other document or correspondence which took place between the parties prior to the signing to the agreement."

20. This Courts takes note of the relevant clauses of the SLAs being:

"1.4 EQUIPMENT/SPECIFICATION:

The Wagons described in the Schedule(s) to this Agreement taken on lease from the Lessor & also manufactured by the Lessee as the Manufacturer and Sub-Leased to the Sub-Lessee and includes any individual items comprised in the Wagons and all alterations, replacements and/or additions to the Wagons or any item or part thereof during the period of this Agreement.

2.3.6 Sub Lessee's Obligation on Termination of Agreement

Upon termination of this Agreement by efflux of time, or otherwise, the Sub-Lessee shall, at its own cost and expenses, forthwith deliver or cause to be delivered to the Lessee the Equipment, at such time and place as may be directed by the

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Digitally Signed
By:NIJAMUDDEEN ANSARI
Signing Date:13.07.2023
11:10:14

Lessee, in good repairs, order and condition (subject to normal wear & tear).

4.2 <u>ADDITIONS/ALTERATIONS TO EQUIPMENT(s)</u>

4.2.1 Any additions/modifications/alterations except under Clause 5.0 to the equipment(s) shall be made by Sub-Lessee at their own cost and only after obtaining the prior written consent of Lessee. Any such additions/ modifications/alterations to the equipments made by Sub-Lessee shall belong to the Lessee/Lessor and be deemed to become part of the equipment(s) and shall be subject to the terms and conditions of this agreement.

8.0 <u>INDEMNITIES</u>:

8.1 Except as otherwise provided in this Sub-Lease, Sub-Lessee agrees to indemnify and keep indemnified the Lessee and Lessor against any loss or seizure of the equipment under distress, execution or other legal process, any claim or demand arising out of storage, installation, use, operation and maintenance of equipment(s) or any risk of liability for death or loss of life or limb of any person, whether employee of the Sub- Lessee or third party, or damage to any property of Sub-Lessee or of any third party and from any suits, proceedings, actions, claims, demands or prosecutions and/or the cost charges, expenses in relation to the liability and obligations suffered by the Sub- Lessee on account of any such equipment(s) by Sub-Lessee.

8.2 The indemnities contained herein above shall survive the termination of this agreement in so far as they pertain to events/occurrences that transpire during the period of Sub-Lease and any renewals thereof.

9.1.3 The Sub-Lessee undertakes to obtain and abide by all the conditions of any license, permit or other rules applicable to the Sub-Lessee's business or to the equipment. The Sub-Lessee affirms that save as otherwise provided in this agreement, no right, title or interest in the equipment(s) shall pass to the Sub-Lessee by virtue of these presents and that the Sub-Lessee

Signature Not Verified
Digitally Signed
By:NIJAMUDDEEN ANSARI
Signing Date:13.07.2023
11:10:14

shall not claim ownership of the equipment(s). The Sub-Lessee also agrees not to transfer, assign or otherwise dispose of or purport to transfer, assign or dispose of the Sub Lessee's rights or obligations or interest hereunder by way of mortgage, charge, sale or other assignment, hypothecation, pledge, hire, encumbrance, conducting arrangement, license or otherwise in any manner part with the possession of the Equipment or any part thereof or allow or purport to allow or create any lien, charge, attachment or other claim of whatever nature on the Equipment or any part thereof.

9.1.7 Pay to the Lessee all costs, charges and expenses incurred by the Lessee in connection with the Equipment (including inspection thereof as mentioned in Clause above and all other charges, if any) or for the preservation, protection or enforcement of the Lessee's rights or for retaking or repossessing of the Equipment together with interest thereon at the rate specified in Clause 2.3.5 hereof within a period of six months from the date of receipt of notice.

9.1.8 If the Sub-Lessee fails to pay the monies referred to in Clauses and above, the Lessee may pay the same and the Sub-Lessee shall reimburse all sums so paid together with interest thereon at the rate specified in Clause 2.3.5 hereof.

9.1.9 Sub Lessee's obligations to continue till Payment

The obligation of the Sub Lessee under Clauses above, shall continue to be in full force and effect until discharge by payment notwithstanding anything contained herein and notwithstanding the termination or expiration of this sub lease arrangement or the fact that the Sub Lessee may have fully paid all monies under or pursuant to this Agreement or may have otherwise fully discharged its other obligations hereunder.

9.2 <u>Lessee's Rights</u>:

On Sub-Lessee's default such as failure to pay due Sub-Lease rentals, breach of the Sub-Lease terms and conditions, the Lessee at their option may:

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By:NIJAMUDDEEN ANSARI
Signing Date:13.07.2023
11:10:14

a) Repossess the equipment subject to Clause 6.2, and

b) Recover from the Sub-Lessee of defaulted amounts and costs i.e. the entire amount of rentals already fallen due and in arrears together with interest, the entire amount of Sub-Lease rental for the unexpired period of the Sub-Lease discounted @ 12%, all other sum on account of default already accrued and all costs, charges and expenses incurred pursuant to the repossession of the equipment mentioned in para (a) above of this Clause and enforcing its remedies after giving credit and adjusting sale proceeds of the repossessed equipment(s) as provided in clause 12.1 (a).

18.1 Any changes to this agreement are valid only if agreed upon by the parties in writing. Should any provision herein prove to be ineffective, this shall not affect the validity of the remaining provisions.

18.2 The terms and conditions set forth in this agreement represent the entire agreement of Sub-Lease between the parties hereto and shall supersede the corresponding provisions, if any, in bid documents and Lessee's offer."

21. From a perusal of the SLA clauses reproduced, coupled with the expostulation of law extracted hereinabove, it is evident that the parties are bound only by the terms of the SLAs and not of the bid documents. Admittedly, the terms of the SLAs have not been amended by any agreement in writing. As such, the respondents' attempt to claim ownership of the wagons in question by paying residual value of 1.0% of the original cost is devoid of merits and contention based thereupon is rejected. Similarly, the contention raised on behalf of the respondent(s) that it does not recognize the petitioners as the owners of the wagons in question is meritless in light of the stand taken by both DCB and SBI Cap as well as

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Signing Date:13.07.2023
11:10:14

Cimmco in their respective communications to the respondent(s) as well as counter-affidavits filed in the present petitions.

22. Accordingly, this Court finds merits in the contentions raised on behalf of the petitioners and directs that the wagons in question be returned to the respective petitioners within a period of eight weeks from today.

23. In so far as prayers (iii) and (iv) of W.P.(C) 5985/2019 and W.P.(C) 4917/2019 respectively for payment of the user charges/rentals after expiry of the primary lease period are concerned, this Court finds no ground to entertain the said prayers. Accordingly, the same are dismissed.

24. Both the petitions are disposed of in the above terms.

(MANOJ KUMAR OHRI)
JUDGE

JULY 12, 2023
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