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

Date of decision: 21.11.2023

+ **W.P.(C) 10711/2021& CM APPL. 33066/2021**

**AVIRAL MINERALS PRIVATE LIMITED. AND
ANOTHER**

..... Petitioners

Through: Mr.Shatadru Chakraborty, Adv.
(through VC) with Ms.Sonia
Dube, Ms.Surbhi Anand,
Ms.Kanchan Yadav,
Mr.Tanishq Sharma and
Ms.Saumya Sharma, Advs.

versus

**UNION OF INDIA THROUGH ITS PRINCIPAL
SECRETARY MINISTRY OF RAILWAYS AND OTHERS
& ORS.**

..... Respondents

Through: Mr.Mukul Singh, CGSC with
Ms.Ira Singh and Ms.Pranjal
Mathur, Advs. for R-1 to R-4.

**CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA**

NAVIN CHAWLA, J. (ORAL)

1. This petition has been filed by the petitioners praying for the following reliefs:

“(a) Issue a writ of mandamus or writ/order/direction in the nature of mandamus directing the Respondent Railways to tender to the Petitioners the residual value of rakes as determined by them vide the letter

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dated 30.11.2018 (Annexure P-13 to the writ petition) with liberty to initiate appropriate steps for referring the dispute for arbitration.

(b) If necessary, issue consequential direction that the dispute with regard to determination of balance value of rakes may be referred to arbitration in terms of the judgment and order dated 04.09.2018 passed by this Hon'ble Court in WP (C) Nos. 11586 of 2017."

2. It is the case of the petitioners, that pursuant to the Wagon Investment Scheme (in short, 'WIS') floated by the Ministry of Railways/respondent no.1 herein in the year 2005, the petitioners had entered into two identical Agreements dated 18.07.2006 with the respondents, whereby and whereunder the petitioners agreed to induct 2 rakes of 61 BOXN wagons each in consideration of the assured supply of 6 rakes per month with freight rebate of 10%. Clause 12 of the Agreement provided that in the event of the Railways altering the scheme, the investor would have the option of selling the wagons to the Railways at a mutually agreed price.
3. The petitioners claim that by a series of Circulars dated 26.09.2008, 03.02.2011 and 27.07.2012, the respondents altered and modified the WIS, thereby entitling the petitioners to terminate the Agreement in terms of Clause 12 of the WIS. Accordingly, on 05.09.2012, the petitioners exercised their option to terminate the Agreements and called upon the respondents to either purchase the rake of wagons from the

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petitioners at Rs. 16,73,14,286/-, being the depreciated value thereof, or in the alternative, to return the same to the petitioners.

4. The petitioners had filed an earlier Writ Petition, being W.P.(C) 11586/2017, before this Court *inter alia* praying for the following relief:

“Issue a writ of mandamus or pass an order/direction in the nature of Mandamus to return the subject wagons to the Petitioners in terms of paragraph 12 of the Scheme or to purchase the subject wagons from Petitioner No.1 at the price offered by the Petitioners vide letter dated September 05, 2012 or at a mutually agreed price.”

5. The said Writ Petition was disposed of by the Order dated 04.09.2018 of this Court, with the following directions:

“5. The learned counsel appearing for the parties request that the present petition be also disposed of in the aforesaid terms. Mr Singh, the learned counsel appearing for the contesting respondent parties further states that the respondent no.1 would offer the value of the wagons as determined by the Committee appointed for the said purpose.

6. In view of the above, the present petition is disposed of by directing the respondents to tender the value for purchase of the wagons in questions within a period of three months from today. In the event, the petitioner is not satisfied by the said price, the petitioner is at liberty to initiate appropriate steps for referring the disputes for arbitration.”

6. Pursuant to the above directions, the respondents issued the Impugned Communication dated 30.11.2018. By the Impugned Communication, the respondents assessed the residual value of

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the rakes of the petitioners as Rs.6,76,59,360.73, however, refused to pay the same by observing as under:

“It is observed that you have placed indents and consequently loaded only 273 rakes against 1296 rakes for which you were eligible for freight rebate. Also the actual average lead of the traffic for all the rakes together was only 486 km. compared to 700 km. as was admissible as per the policy for freight rebate. This under utilization of the rakes by the investor reflects lack of marketing initiative and demand from their side. It is worth mentioning that railways revenue have also been adversely affected due to this lack of marketing initiative and less demand from the investor. Due to less utilization by 1023 rakes by the party as compared to anticipated as per the policy guidelines Indian Railways suffered revenue loss of about Rs.257.98 Crore.

It is very evident from the above that by adjusting the Railways’ aforesaid loss with the valuation of the WIS rake as per aforesaid calculation, no amount is found to be payable to you.

*As the residual value of the WIS rake i.e. **Rs. 6,76,59,360.73** (as per calculation table at Page 2) has been surpassed by the loss of revenue caused to the Railways by you, the Railways will be constrained to file claim for the said loss after adjustment of **Rs.6,76,59,360.73.**”*

7. The learned counsel for the petitioners submits that while disputing the claim of the respondents, even otherwise, the respondents have no power to withhold the rakes and/or the value thereof from the petitioners against their purported claim. He submits that in the absence of any such power, the withholding of the rakes and/or the value thereof by the respondents would be



arbitrary, unreasonable, and deserves to be quashed. In support, he places reliance on the judgment of the Supreme Court in ***Union of India v. Raman Iron Foundry***, (1974) 2 SCC 231.

8. On the other hand, the learned counsel for the respondents submits that the present Writ Petition, insofar as it seeks enforcement of contractual rights, is not maintainable. He further submits that the petitioners have an efficacious alternate remedy in form of a petition under Section 11 of the Arbitration and Conciliation Act, 1996 seeking appointment of an arbitrator in terms of the Order dated 04.09.2018 of this Court. He places reliance on the judgment of the Supreme Court in ***Deep Industries Ltd. v. Oil and Natural Gas Corporation Limited & Anr.*** (2020) 15 SCC 706.
9. To a pointed query of this Court whether under the Contract or in law, the respondents have any power to retain to itself the wagons supplied by the petitioners under the Contracts or the value thereof, the learned counsel for the respondents is unable to draw the reference of this Court to any such power.
10. This Court vide its Order dated 04.09.2018 had disposed of the petition filed by the petitioners in terms of the early judgment of the Division Bench of this Court in ***Union of India & Ors. v. Jai Balaji Industries Ltd. & Anr.***, 2015 SCC OnLine Del 13345, the operative part of which reads as under:

“39. As per the impugned order the appellants were to return the wagons to the respondents

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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.”

11. This Court had recorded the submission of the respondent no.1 that it would offer the value of the wagons as determined by the Committee appointed by it for the said purpose. This Court, therefore, directed the respondents to tender the said value for purchase of wagons to the petitioners within a period of three months of the said order, while reserving liberty with the petitioners to initiate appropriate steps for referring the dispute to arbitration in case it is aggrieved of such valuation.
12. The respondents by the Impugned Order have valued the wagons supplied by the petitioners at Rs.6,76,59,360.73. They have, however, not paid this amount on a purported claim of damages

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against the petitioners for alleged breach of certain contractual terms. The breach and the quantification of damages, if any, are yet to be ascertained in appropriate proceedings in law. In fact, the respondents, by its very Impugned Communication, had stated that they would be initiating such proceedings, however, as submitted by the learned counsel for the petitioners and not disputed by the learned counsel for the respondents, no such proceeding has been initiated till date.

13. The learned counsel for the respondents has also not been able to show any provision in the Contract, Scheme, or law which would entitle the respondents to retain the amount payable to the petitioners against its purported claim of damages for breach of Contract.
14. In ***Raman Iron Foundry*** (Supra), the Supreme Court has held that mere making of a claim would not impose a liability on the contracting party to pay the same or entitle one to claim a lien over the amount otherwise payable under the Contract. It was held that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages are assessed by a decree or order of the court or other adjudicating authority. When there is a breach of Contract, the party who commits the breach does not *eo instanti* incur any pecuniary obligation nor does the party complaining of the breach becomes entitled to a debt due from the other party; the only right which the party aggrieved by the breach of the Contract has is the right to sue for



damages. That itself is not an actionable claim. A claim for damages for breach of contract is, therefore, not a claim for a sum presently due and payable, and the party complaining of a breach of a Contract and claiming damages, is not entitled to recover the same by appropriating other sums due to the contracting party against whom such breach is alleged or claim for damages made.

15. In *Unitech Limited & Ors. v. Telangana State Industrial Infrastructure Corporation (TSIIC) & Ors.*, 2021 SCC OnLine SC 99, the Supreme Court has held that though the courts must be circumspect in using their plenary power under Article 226 of the Constitution of India when other remedies have been provided by the contract, however, where the state instrumentality violates its constitutional mandate under Article 14 of the Constitution of India to act fairly and reasonably, or its action is arbitrary or unfair, relief under the plenary powers of Article 226 of the Constitution of India will lie. Jurisdiction under Article 226 cannot be ousted only on the basis that the dispute pertains to the contractual arena.
16. In the present case, there is a direction of this Court to the respondents to pay to the petitioner the amount determined by the Committee for the rakes supplied by the petitioners under the contract. Such amount has been determined by the Committee, however, has been retained by the respondents without any authority of law. This would, therefore, be a fit case to exercise



jurisdiction under Article 226 of the Constitution of India as the action of the respondents is manifestly arbitrary and unreasonable.

17. Keeping in view the above, the retention of the amount determined as residual value of the rakes by the respondents, by way of its impugned communication dated 30.11.2018, is illegal and is hereby quashed. The respondents are directed to pay the said amount to the petitioners within a period of eight weeks from today.
18. At the same time, I find merit in the objection raised by the learned counsel for the respondents that the present petition, insofar as it prays for the reference of the disputes to arbitration, is liable to be rejected as the petitioners have an alternate efficacious remedy for the same.
19. Accordingly, the parties shall be at liberty to initiate appropriate legal proceedings for enforcement of their rights in accordance with law.
20. The petition is disposed of in the above terms. The pending application also stands disposed of.
21. There shall be no order as to costs.

NAVIN CHAWLA, J

NOVEMBER 21, 2023/ns

Click here to check corrigendum, if any

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