

GAHC010100832022



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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/3482/2022

M/S TNS EXPRESS PVT. LTD.
A COMPANY INCORPORATED UNDER THE COMPANIES ACT 1956 AND
HAVING ITS REGISTERED OFFICE AT OFFICE NO. 5E, SHAZADA BAGH,
INDUSTRIAL AREA, NEW DELHI-110035
AND ALSO HAVING OFFICE AT-
1ST FLOOR, SUKHDEV BHAWAN, NEAR VISHAL MEGA MART, A.T ROAD,
GUWAHATI-781001
REP. BY SUBODH KUMAR SINGH, AUTHORIZED SIGNATORY
S/O- LATE SHYAMNANDAN SINGH

VERSUS

THE UNION OF INDIA AND 4 ORS
THROUGH THE MINISTRY OF RAILWAYS
RAIL BHAWAN, SANSAD MARG
NEW DELHI-110001

2:THE GENERAL MANAGER
NORTH EAST FRONTIER RAILWAY
MALIGAON
GUWAHATI
ASSAM-781011.

3:PRINCIPAL CHIEF COMMERCIAL MANAGER
NORTH EAST FRONTIER RAILWAY
MALIGAON
GUWAHATI
ASSAM-781011.

4:SENIOR DIVISIONAL COMMERCIAL MANAGER
LUMDING DIVISION
NORTH EAST

FRONTIER RAILWAY
LUMDING-782447

5:DIVISIONAL RAILWAY MANAGER (COMMERCIAL)
LUMDING DIVISION
NORTH EAST
FRONTIER RAILWAY
LUMDING-78244

Advocate for the Petitioner : MR. D DAS SR. ADV, MR. N N B CHOUDHURY,MR. N SARKAR,MR P K BASU,MR K TALUKDAR,MS S SHARMA

Advocate for the Respondent : SC, RAILWAY, MS. B SARMA (C.G.C.)

BEFORE
HONOURABLE MR. JUSTICE KARDAK ETE

JUDGMENT

Date : 13.12.2024

Heard Mr. NNB Choudhury, learned counsel for the petitioner. Also heard Ms. B. Sarma, learned CGC appearing for the respondents.

2. By filing this petition, the petitioner has challenged the letter of termination dated 17.03.2022 issued by the Divisional Railway Manager (Commercial), Lumding, N.F. Railway, by which, a leasing contract of one 23 tone Parcel Van by train No.15601/02 (14037/38) Poorvottar Sampark Kanti Express, Silchar-New Delhi-Silchar (Ex. SCL-NDLS-SCL) on round trip basis for 05 (five) years has been terminated and the security deposit of the petitioner forfeited with immediate effect.

3. The case of the petitioner, in brief, is that upon the tender process vide tender notification No. C/03/2018 dated 23.03.2018, the railway authorities accepted the tender offered by the petitioner vide letter of allotment dated 27.06.2018 for leasing of One 23 tone Parcel Van by train No.15601/02

(14037/38) Poorvottar Sampark Kanti Express, Silchar-New Delhi-Silchar (Ex. SCL-NDLS-SCL) and the same was accepted at Rs. 300701/- per round per VP for a period of 5 (five) years in terms of the arrangement contained therein. Subsequent thereto, a contract agreement was executed between the petitioner and the respondent railway authorities on 20.12.2018 laying down the terms and conditions between the parties.

4. It is the contention of the petitioner that with the emergence of Covid-19 pandemic, the operation of the train stood suspended w.e.f. 22.03.2020. As a result, the petitioner could not operate the process of leasing parcel space in parcel van in train No.15601-15602 and therefore, there was no earning of revenue by the petitioner. It is only on 21.07.2021, the petitioner was intimated by the respondent authorities that they had visited to re-start the loading operation of leasing VP by train No.15601/15602. Difference has arisen between the petitioner and the respondents' decision to resume the services of train. Vide letter dated 21.07.2021, the respondent authorities had intimated that train service of train No.15601/15602 would start from 22.07.2021 and the petitioner was requested to start the leasing operation immediately. In response, the petitioner had apprised the respondent authorities vide its letter 22.07.2021 that due to the prevailing Covid-19 situation and the SOP declared by the Govt. of Assam regarding inter-district lock down and restriction of train hour, it would not be possible to start the operation immediately. On 30.07.2021, the petitioner filed representation before the respondent authorities that it would require at least two months time to resume the operation and if the respondent authorities insisted to start the operation immediately, the petitioner would have no other option to surrender the lease of train No.15601/15602.

5. It is contended that vide letter dated 21.12.2021, the respondent authorities had decided that in case the petitioner failed to re-start the leasing service, then they would be bound to act under Para No.20.4 of the Comprehensive Parcel Leasing Policy and Clause 7.2 of the Contract Agreement. It is further contended that the petitioner made several correspondences to the respondent authorities to consider the difficulties faced by the petitioner to re-start the leasing service in respect of train No.15601/15602. The request of the petitioner was rejected by the respondent authorities and once again reminded the petitioner that they would take action in the light of para 20.4 of the Comprehensive Parcel Leasing Policy and Clause 7.2 of the contract agreement. In view of such contemplated action from the respondent authorities, the petitioner vide communication dated 24.12.2021 reiterated its earlier decision to surrender the lease in the event if its genuine grievance are not looked into. Despite such request for consideration of the grievance of the petitioner in such circumstances, the respondent authorities have issued impugned termination letter dated 17.03.2022 by which, the leasing contract has been terminated and the security deposit of the petitioner has been forfeited.

6. Mr. NNB Choudhury, learned counsel for the petitioner, submits that the respondent authorities have intimated the petitioner to resume the operation w.e.f. 22.07.2021 by depositing advance lump sum lease freight one day advance without providing VP. Since the work pertains to carrying on business dealing in cargo by establishing, maintaining and operating logistics agencies for transportation cargo parcel etc., it would not be possible to resume the services immediately due to ongoing Covid-19 pandemic. While referring to the correspondences dated 24.07.2021, 30.07.2021, 18.11.2021, 01.12.2021 and 21.12.2021, Mr. NNB Choudhury, learned counsel submits that the petitioner has

placed its grievances before the respondent authorities in view of Covid-19 situation. The petitioner has assured to resume the operation, in case the authority assured that the non-operation period will not be counted in the contract period and the same is deducted. While the respondent authority rejected the petitioner's request for deduction of non-operational period from contractual period vide letter date 24.12.2021, the petitioner has issued intimation within 60 days notice surrendering the lease of the VP and requests for refund. However, the same has not been considered by the respondent authorities violating the Comprehensive Parcel Leasing Policy.

7. Mr. NNB Choudhury, learned counsel, submits that the impugned action has been taken by referring to para 20.4 of the Comprehensive Parcel Leasing Policy without considering the petitioner's grievance in a proper perspective by the respondent authorities. He submits that the letter of termination and forfeiture of security deposit have vested the petitioner with adverse civil consequences and there is clear violation of the principle of natural justice. He submits that the rights and obligation of the parties are governed by the contract agreement dated 20.12.2018 and not only by the Comprehensive Parcel Leasing Policy. The respondent authorities ought to have acted in terms of Clause 21.0 and 21.1 and since the procedure prescribed in 21.1 has not been adhered to, the impugned letter of termination is arbitrary and bad. He submits that even the Comprehensive Parcel Leasing Policy requires the issuance of notice before action of termination is taken. However, no notice has been issued therefore, the same is not sustainable.

8. Mr. NNB Choudhury, learned counsel for the petitioner has placed reliance on the following Judgements:-

- i. **Unitech Ltd. vs. Telangana State Industrial Infrastructure Corpn.**, reported in **(2021) 16 SCC 35.**
- ii. **Maharashtra Chess Assn. vs. Union of India**, reported in **(2020) 13 SCC 285.**
- iii. **ABL International Ltd. & Anr. vs. Export Credit Guarantee Corporation of India Ltd. & Ors**, reported in **(2004) 3 SCC 553.**

10. On the other hand, Ms. B. Sarma, learned CGC representing the respondents, submits that after the lock down due to Covid-19 Pandemic, the respondent authorities have issued the letter to the petitioner vide order dated 21.07.2021 clearly stating that the petitioner was awarded a lease contract of VP by train No.15601/15602 for a period of 5 (five) years. Accordingly, the loading started from 20.08.2018 but due to outbreak of Covid-19 pandemic, the train service was suspended. Thereafter, the authorities have decided to resume the train service from New Delhi station on 22.07.2021 and from Silchar on 26.07.2021 till further advice. Therefore, the petitioner was requested to deposit the lump sum lease freight one day in advance and start lease operation, as the lease of parcel space shall be permitted as per regular corresponding time table service and attachment of parcel vans shall be permitted.

11. Thereafter, vide communication dated 18.11.2021 when the petitioner failed to start the operation of lease contract which was awarded to the petitioner even after more than three months from the re-introduction of the train service, the petitioner was requested to start the lease operation as early as possible. It was also mentioned that in case of failure to operate/re-start, the lease contract, then the authorities is bound to take necessary action in the light of paragraph 20.4 CPLP and clause 7.2 of contract agreement. Although the

petitioner has made correspondences placing certain grievances, however, the same were either considered or rejected as it was not possible to exceed the demand of the petitioner in terms of the Comprehensive Parcel Leasing Policy and the contract agreement. Therefore, the authorities have rightly issued impugned termination letter and forfeited the security deposit of the petitioner in terms of the Comprehensive Parcel Leasing Policy.

12. Ms. B. Sarma, learned CGC, further submits that there is no question of violation of fundamental rights as the petitioner was intimated again and again to re-start the operation of least contract. However, the petitioner has failed to re-start even after lapse of three months. The intimation to the petitioner directing to re-start is as good as a notice to the petitioner and as such notice is deemed issued. Therefore, present writ petition has no merit and is liable to dismissed.

13. Due consideration has been extended to the submissions advanced by the learned counsel for both the parties and also perused the materials available on record.

14. The issues to be determined in this proceeding is as to whether the railway authorities have acted in terms of the Comprehensive Parcel Leasing Policy in terminating the leasing contract in respect of 23 tone Parcel Van or as to whether a notice in essence has been issued before termination of the leasing contract in terms of the Comprehensive Parcel Leasing Policy and the contract agreement.

15. To appreciate the issue I would refer to the relevant provisions of the Comprehensive Parcel Leasing Policy and analyse the same.

16. Clause 20.0 provides for provisions relating to failure of lease holder to start or operate lease contract. The relevant Clauses are quoted herein below:-

“20.1 On allotment of contract, the successful bidder (leaseholder) shall be required to commence the loading within a period of 15 days, failing which the contract will be terminated and Earnest Money/ Security Deposit will be forfeited.

The accepting authority shall be empowered to condone the delay on the merits of the case on written application from leaseholder and give another 15 days (maximum period) to the leaseholder for commencement of contract.

20.2 If the Highest bidder fails to take up or to start the lease contract, he must be debarred at least two years from participating in the tender in that division/ zonal railway.

20.3 If the leaseholder, after commencement of loading, fails to load leased parcel space of SLR/VP on any specific day without any genuine reason and without prior permission of the Railway administration, the lump sum freight of that day shall be forfeited.

20.4 If the lease holder, after commencement of loading, fails to operate the contract continuously for 10 days without giving any notice, his contract will be terminated and security deposit forfeited.”

17. Bare reading of the above clauses shows that Clause 20.1 to Clause 20.4 applies to fresh contract. Clause 20.4 provides that if the lease holder, after commencement of loading, fails to operate the contract continuously for 10 days without giving any notice, his contract will be terminated and security deposit forfeited. Record reveals that the petitioner has notified the authorities vide

letters dated 22.07.21, 30.07.21 intimating the authorities about the reasons for non-operation, reasons being Government SOP during COVID-19, inter-district restrictions, as well as district wise lockdown and curfew after 1 PM to 4PM on a daily basis. Therefore, in my view Clause 20.4 cannot be straightaway invoked by the Respondent Authorities for termination of the lease contract in view of the peculiar facts and circumstances of the present case. Records further reveals that the petitioner was operational for 19 months before Covid-19 Pandemic, and subsequently was non-operational for 16 months only due to the aforementioned reasons. The contract was for 5 years, and approximately 260 round trips, out of which only 44 have been completed.

18. Under Clause 20.6, it is provided that the leaseholder can terminate the contract by giving 60 days' notice to the Railway administration, subject to completion of one- year contractual period and in such cases, security deposit will not be forfeited. However, despite the letter of the petitioner dated 24.12.2021, wherein it was communicated that the petitioner will have to surrender the leasing contract if 10% escalated price is imposed for the lease, due to the non-operation of the train. However, the authorities have neither accepted nor rejected the same rather without notice terminated the leasing contract by forfeiting the security deposit, which the petitioner is otherwise entitled to had the 60 days' notice is considered.

19. Under Clause 20.8, it is provided that non-operationalization of contract/non loading by the leaseholder due to disputes, and the intervening period will be treated as 'dies-non'. However, the Divisional Railway Manager rejected their request for non-inclusion of non-operational period vide letter dated 21.12.2021, thereby denying the request of the Petitioner for deduction of

16 months of non-operation from the contractual period. The Railway Administration shall guarantee to provide leased parcel space of the Assistant guard's cabin/brake van/parcel van as per terms and conditions of the contract under Clause 21.1 and in such cases, lump sum leased freight of that day shall be adjusted for the next loading.

20. Clause 21.0 regulates the adjustment in advance freight due to non-loading. Clause 21.2 relates to adjustment of lump sum leased freight which provides that when the lease space is not made available but the railways due to unavoidable circumstances in certain eventualities. Clause 21.3 provides that when the lease holder is not able to load the parcel space due to unavoidable circumstance including natural calamities like earthquake, floods breach etc. on the day of state/nation elections. Clause 21.4 provides that in case of circumstances mentioned in paragraph 21.2 and 21.3 when the parcel space is not utilised for loading for no fault of leaseholder, he shall be exempted from the payment of freight for that particular days (non loading) subject to verification of circumstance by multi-disciplinary team. If freight is deposited in advance, it may be adjusted in the next loading /payment. In case the freight cannot be adjusted in this manner, then the same may be granted as a refund.

21. Clause 21.5 provides that in case of short termination of train service, the lease holder will be allowed to avail the service up to the destination/train's terminating station, up to which train is running and freight shall be collected proportionately up to that destination.

22. Clause 32.3 provides that in case train runs via diverted route or not terminating/originating at/ from its original terminating /origination station due to natural calamities like earthquake, floods, breach etc, leaseholder shall be

exempted if he desires so on making an application to CCM, to pay lease freight on day(s) of such disruption provided CCM certifies the operational constraints in consultation with OOM. Under Clause 32.5, it is provided that in case of operational exigencies, or reasonable grievances of the leaseholder, where the VP could not operationalize, CCM will be authorised to decide on the merit of the case. However, all the above provision has not been adhered to by the Railway authorities.

23. Right to terminate is provided under Clause 33.0 of Comprehensive Parcel Leasing Policy. Clauses 33.1 provide that lease holder shall have the right to terminate the agreement after serving 60 days notice to railway administration. However, leaseholder shall not be allowed to terminate the contract before one year (10 months+ 2 months notice period) in case of any contract whether it is on short term or long term. In case he does so, his security deposit shall be forfeited and he shall be debarred from entering into any tender for next two year. But he shall be allowed to operate existing tender of other trains, if any. The leaseholder can give notice for termination of contract after completion of 10 months. Thus, 10 months + 2 months (Notice period) =12 months period will be completed. After completion of 1 year period, the leaseholder can be allowed to quit the contract. In such cases, security deposit will not be forfeited.

24. Under Clause 33.2, it is provided that the Railways shall have the right to terminate the contract/agreement for any reasons whatsoever after serving one month's notice to the lease holder. However, Railway shall reserve the right to terminate the contract as a punitive measure without any notice and at any time in case of breach of agreement or serious violation of any of the stipulation of policy/railway's rules by the lease holder or in case of operational exigencies.

Such instantaneous termination of contract by railway administration should be followed by a written intimation of breach of contract within 3 working days of termination. However, in the present case, no notice was issued to the Petitioner before the impugned letter of termination except 2 communications to restart the lease contract with certain stipulations.

25. A lease contract agreement dated 20.08.2018 has been entered into between the petitioner and the Railway authorities. Amongst others, Clause 7.0 regulates failure of leaseholder in fulfilling his obligations after having started loading which are quoted herein below:-

“7.1 If the lease holder fails to load leased parcel van on any day without any genuine reason and without prior permission of the Railway Administration, the lump sum freight for that day shall be forfeited.

7.2 If the lease holder after commencement of loading in leased parcel van fails to operate the contract continuously for 10 days without giving any notice, his contract will be cancelled and security deposit forfeited.

26. Clause 26.0 regulates settlement of disputes of the contract agreement which is reproduced herein below:-

“Matters finally determined by the Railway- All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract shall be referred by the contractor to the Railway and the Railway shall within 120 days after receipt of the Contractor's representation make and notify decision on all matters referred to, by the contractor in writing. The special condition of the contract shall be deemed as "excepted matters" and

decision of the Railway Authority thereon shall be final and binding on the contractor, provided-further that "excepted matters" shall stand specifically excluded from the purview of the arbitration clause and not be referred to arbitration”

Clause 27.0 provides for demands for arbitration which are quoted herein below:-

“27.1 In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective right and liabilities of the parties on any matter in question dispute or difference on any account or as to the claim to be entitled to, or if the Railway fails to make a decision within 120 days then and in any such case but except in any of the" excepted matters", the contractor after 120 days but within 180 days of this presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.”

27. On bare reading of the aforesaid clauses of the Comprehensive Parcel Leasing Policy and the Contract Agreement goes to show that a notice is required to be issued to the lease holder before termination of the lease contract. It also provides for redressal of the disputes and also provides for arbitration in the event of any dispute and differences between the parties.

28. It is noticed that the petitioner after accepting the lease contract had executed the work in terms of the contract agreement. In the meantime, when Covid-19 pandemic broke out, the operation of train No. train No.15601/02 (14037/38) was suspended. Thereafter, the running of the train resumed w.e.f. 22.07.2021. Before the resumption of train after the Covid-19 pandemic vide communication dated 21.07.2021 the petitioner was intimated that the authorities have decided to resume the train services from New Delhi (DSL)-

Silchar (SCL) on 22.07.2021 and from Silchar (SCL)-New Delhi (DSL) on 26.07.2021 till further advice. Thereby, requested the petitioner to deposit a lump sum lease freight one day in advance and start leasing operation as the lease parcel space shall be permitted as per regular corresponding time table service and the adjustment of parcel van shall be permitted. The petitioner vide its intimation and representation has placed his grievance of its inability to start the lease operation as there was stipulation to deposit a lump sum freight one day in advance.

29. Record reveals that the petitioner has also filed a representation before the respondent authorities raising certain issues which the respondents have rejected. Admittedly, the petitioner has not re-started the lease operation. After a lapse of 3 (three) months, it is noticed that the respondent authorities have again intimated the petitioner to re-start the lease operation or else the provisions of Clause 20.4 of the Comprehensive Parcel Leasing Policy and Clause 7.2 of Contract Agreement shall be invoked. The authorities appear to have not accepted the demand made by the petitioner. Consequently, the lease contract has been terminated vide impugned letter dated 07.03.2022 and forfeits the security deposit of the petitioner. It is noted that the lease period was for 5 (five) years and now the 5 (five) years period have already elapsed.

30. On consideration of the materials, it appears that the respondent authorities have not acted as required to be done in terms of the Comprehensive Parcel Leasing Policy as no notice was issued to the petitioner by the respondent authorities except the two communication letters to re-start the lease operation. As noted above, as per the clauses referred to hereinabove, under the Comprehensive Parcel Leasing Policy and the Contract Agreement, a

notice is to be issued to the petitioner before the leasing contract is terminated.

31. It is also noticed that the lease contract agreement provides for a resolution of disputes and demand for arbitration. Neither the petitioner nor the respondents have recourse to the said clause of dispute resolution or arbitration as provided under the contract agreement. Although, the petitioner has also not made any attempt to avail the remedy of dispute resolution and arbitration, since the respondent authorities have directly terminated the lease contract and forfeits the security deposit on the purported clauses 20.4 and 7.2 of the Comprehensive Parcel Leasing Policy and Contract Agreement, I am of the view that the petitioner would not have any occasion to refer to the dispute resolution or arbitration. It is known to the whole world that there was an unfortunate covid-19 pandemic which had shaken the world. The calamity of such magnitude could have been taken into account by the respondent authorities as the provision of the Comprehensive Parcel Leasing Policy clearly provides for.

32. Though, learned Counsel for the respondents did not agitate the ground that a remedy against the termination of contract arising out a contractual matter cannot be availed of under Article 226 of the Constitution. However, it is apposite to refer to the settled principle of law that recourse to the jurisdiction under Article 226 of the Constitution is not excluded altogether in a contractual matter. A public law remedy is available for enforcing legal rights subject to well-settled parameters. In the case of **Maharashtra Chess Association** (Supra), the Hon'ble Supreme Court reiterates the principle that the mere existence of alternate forums where the aggrieved party may secure relief does not create a legal bar on a High Court to exercise its writ jurisdiction. It is a factor to be

taken into consideration by the High Court amongst several factors. Even the existence of an alternate adequate remedy is merely an additional factor to be taken into consideration by the High Court in deciding whether or not to exercise its writ jurisdiction. This is in marked contradistinction to the jurisdiction of a civil court which is governed by statute. In exercising its discretion to entertain a particular case under Article 226, a High Court may take into consideration various factors including the nature of the injustice that is alleged by the petitioner, whether or not an alternate remedy exists, or whether the facts raise a question of constitutional interpretation.

33. Reverting back to the present case, it needs no reiteration that the right and obligation of the parties in the Contract are governed by the contract agreement and in the case at hand, I am of the view that except for invoking the Clause 7.2 of the Contract Agreement and Clause 20.4 of Comprehensive Parcel Leasing Policy, no other terms of the contract have been adhered to by the respondent authorities. Undoubtedly, the termination and forfeiture of security deposit of the petitioner visits with adverse civil consequences.

34. This court finds that the respondent authorities have not acted as required to be done in terms of the Comprehensive Parcel Leasing Policy as no notice was issued to the petitioner by the respondent authorities except the two communication letters to re-start the lease operation. As noted above, as per the clauses referred to hereinabove, under the Comprehensive Parcel Leasing Policy and the Contract Agreement, a notice is to be issued to the petitioner before the leasing contract is terminated.

35. The lease contract agreement provides for a resolution of disputes and demand for arbitration. Neither the petitioner nor the respondents have

recourse to the said clause of dispute resolution or arbitration as provided under the contract agreement. Although, the petitioner has not avail the remedy of dispute resolution and arbitration, since the respondent authorities have directly terminated the lease contract and forfeits the security deposit under clauses 20.4 and 7.2 of the Comprehensive Parcel Leasing Policy and Contract Agreement, I am of the view that such an exercise is arbitrary which is antithetical to Article 14 of constitution.

36. Having considered the above, I am of the view that the respondent authorities have acted arbitrarily and illegally by terminating the lease contract and forfeit the security deposit without adhering to the terms of the Comprehensive Parcel Leasing Policy and contract agreement. The terms of the contract agreement clearly provides for issuance of notice before termination therefore, I am of the considered view that such action is a clear violation of principle of natural justice which is expressly ingrained apart from violation of other terms of contract agreement.

37. In view of what has been discussed hereinabove, this Court is of the view that the impugned termination letter bearing No.C/442/LMG/VP Leasing/18 dated 17.03.2022 issued by the Divisional Railway Manager (Commercial), Lumding, NF Railway, is not sustainable and accordingly the same is set aside and quashed.

38. Writ petition stands allowed and disposed of. Parties to bear their own costs.

JUDGE

Comparing Assistant