

GAHC010281112023



2024:GAU-AS:10509-DB

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

**Case No. : WA/111/2024**

THE FOOD CORPORATION OF INDIA AND 3 ORS.  
REP. BY ITS CHAIRMAN-CUM-MANAGING DIRECTOR, BARAKHAMBA  
ROAD, NEW DELHI, PIN- 110006

2: THE GENERAL MANAGER (REGIONAL)  
FOOD CORPORATION OF INDIA REGIONAL OFFICE  
ASSAM REGION PALTANBAZAR GHY ASSAM PIN- 781008

3: THE ASSTT. GENERAL MANAGER (CONT)  
FOOD CORPORATION OF INDIA REGIONAL OFFICE  
ASSAM REGION PALTANBAZAR GHY ASSAM PIN- 781008

4: THE DIVISIONAL MANAGER FOOD CORPORATION OF INDIA  
DIVISIONAL OFFICE SILCHAR CACHAR ASSAM PIN- 78400

VERSUS

HI SPEED LOGISTICS PVT LTD AND 2 ORS  
232, C.R. AVENUE, INTELLECT HEIGHTS, GIRISH PARK CROSSING, NEAR  
BENGAL JEWELLERY, UNIT NO. 5B, KOLKATA- 700006

2:THE GENERAL MANAGER NORTH EASTERN FRONTIER RAILWAY  
MALIGAON GHY ASSAM

3:THE DIVISIONAL MANAGER NORTH EASTERN FRONTIER RAILWAY  
LUMDING DIVISION LUMDING HOJAI ASSAM

**Advocate for the Petitioner : MR B K SINGH, MR D AKRAM**

**Advocate for the Respondent : MS. N DEY, MR. R K D CHOUDHURY, DY. SGI, (R- 2 AND 3),MRS. R BORBORA**

**BEFORE  
HONOURABLE THE CHIEF JUSTICE  
HONOURABLE MR. JUSTICE N. UNNI KRISHNAN NAIR**

Date of hearing : 22.10.2024

Date of Judgment & Order : 28.10.2024

**JUDGMENT & ORDER(CAV)**

***(N. Unni Krishnan Nair, J.)***

Heard Mr. K. N. Choudhury, learned senior counsel, assisted by Mr. B. K. Singh, learned counsel for the appellant-Food Corporation of India. Also heard Mr. A. C. Borbora, learned senior counsel, assisted by Ms. N. Dey, learned counsel, appearing on behalf of respondent No. 1; and Mr. R. K. D. Choudhury, learned Dy. SGI, appearing on behalf of respondents No. 2 & 3.

**2.** The present intra-Court appeal has been so instituted by the appellant-Food Corporation of India, presenting a challenge to an order, dated 08.11.2023, passed by the learned single Judge in WP(c)6317/2022.

**3.** As projected in the writ appeal; the respondent No. 1 was appointed by the appellant-Food Corporation of India, vide communication, dated 08.11.2021, as a Transport Contractor, Ex-Railway Siding Salchapara Rail Head to FSD, Badarpurghat via Weighbridge including Handling works at FSD Badarpurghat w.e.f. 21.11.2021, for a period of 2(two) years.

**4.** During the course of the execution of the contract as assigned to the respondent No. 1; the appellant-Food Corporation of India had deducted amounts towards the demurrage charges from the running bills of the respondent No. 1, herein. Being aggrieved by such deduction of amounts

towards the demurrage charges, the respondent No. 1 had instituted WP(c)6317/2022 before this Court. On consideration of the issues arising in the matter; the learned Single Judge vide the judgment & order, dated 08.11.2023, had proceeded to dispose of the said writ petition by interfering with the deduction made towards demurrage charges from the running bills of the respondent No. 1 with further direction to refund the amounts so deducted. It was further provided that in the event, the amounts so deducted towards the demurrage charges is not refunded within the time frame so prescribed in the said judgment & order; interest at the rate of 9% per annum on the amount, calculated from the date of the said judgment & order till the refund of the same; shall be payable to the respondent No. 1 by the appellant-Food Corporation of India.

**5.** Being aggrieved by the said judgment & order, dated 08.11.2023; the appellant-Food Corporation of India has instituted the present proceeding.

**6.** Mr. Choudhury, learned senior counsel, appearing for the appellant-Food Corporation of India, while supporting the action on the part of the Food Corporation of India in deducting amounts from the running bills of the respondent No. 1 towards the demurrage charges calculated; has contended that such deduction of amounts was so made in terms of the provisions of Clause X of the Model Tender Form for Handling and Transport Contract.

**7.** Mr. Choudhury, learned senior counsel, has also contended that the provisions of said Clause X provides that the contractor shall be liable to make good, any compensation/demurrages/wharfage, etc., as may be

incurred by the appellant-Food Corporation of India on account of delay in loading and unloading of trucks.

**8.** Mr. Choudhury, learned senior counsel, by referring to the calculation so made by the constituted Committee towards determination of the demurrage charges in respect of the respondent No. 1, herein, has submitted that such fixation in respect of the said respondent, was so made on account of the fact that the trucks were not so placed by the respondent No. 1 which had prevented the unloading of the wagons so allotted to the respondent No. 1 resulting in imposition of the demurrage charges upon the appellant-Food Corporation of India by the railway authorities.

**9.** Mr. Choudhury, learned senior counsel, has further submitted that the respondent No. 1 was issued with communications requiring him to place the requisite number of trucks prior to the date of the placement of the rakes at the railway siding involved. It was also contended that on the failure of the respondent No. 1 to place the trucks, in question; notices in this connection were so issued to the respondent No. 1. Accordingly, it is the contention of the learned counsel for the appellant-Food Corporation of India that the deduction of amounts towards the demurrage charges from the running bills of the respondent No. 1, herein, was so made after carrying-out a due process in the matter.

**10.** Mr. Choudhury, learned senior counsel, by referring to the conclusions reached by the learned Single Judge in the judgment & order, dated 08.11.2023, has submitted that the learned Single Judge had committed an error in placing reliance on the decision of the Hon'ble Supreme Court

rendered in the case of ***Food Corporation of India & ors. V. Abhijit Paul***, reported in ***2022 SCC Online SC 1605*** in-as-much as the contractual stipulations as considered by the Hon'ble Supreme Court in the aforesaid case, is clearly distinguishable from the contractual stipulations as existing in the contract entered into by the appellant-Food Corporation of India and respondent No. 1, herein. It is contended that the contract involved in the case of ***Abhijit Paul***(supra) did not contain a provision making the contractor liable for losses suffered by the Corporation on account of demurrage charges, however, in the contract so entered into by the appellant-Food Corporation of India with the respondent No. 1, herein; a specific provision to such extent, was available.

**11.** Mr. Choudhury, learned senior counsel, has submitted that the demurrage charges so recovered from the running bills of the respondent No. 1, were in respect of the wagons so allotted for the FSD, Badarpurghat, only.

**12.** Mr. Choudhury, learned senior counsel, has further submitted that the learned Single Judge in the impugned judgment & order, dated 08.11.2023, although had arrived at a conclusion that the allegations as levelled by the appellant-Food Corporation of India that the respondent No. 1, herein, had failed to place the trucks within the free time allotted for unloading of the wagons involved, was highly disputed question of facts; proceeded to consider the writ petition on merits. It is further contended by Mr. Choudhury, learned senior counsel that the learned Single Judge ought not to have proceeded to consider the issues arising in the writ petition on merits and ought to have required the respondent No. 1 to approach the

appropriate forum for adjudication of such disputed question of facts.

**13.** Per contra, Mr. Borbora, learned senior counsel appearing on behalf of the respondent No. 1, has contended that the respondent No. 1 had responded to each and every notice issued by the appellant-Food Corporation of India and had therein, justified the delay so occasioning in the unloading of the wagons involved. It is further contended that the respondent No. 1 had promptly placed the trucks for unloading as and when intimated about the placement of the railway rakes at the railway siding involved.

**14.** Mr. Borbora, learned senior counsel, by referring to the pleadings brought on record before the learned Single Judge, has contended that the delay in unloading of the wagons involved during the period the contract was so being executed by the respondent No. 1; were for reasons not attributable to the respondent No. 1 but attributable to the officials of the appellant-Food Corporation of India as well as the circumstances as prevailing in the area at that point of time.

**15.** Mr. Borbora, learned senior counsel, has further contended that the deduction from the running bills of the respondent No. 1 was an unilateral action on the part of the appellant-Food Corporation of India without any reference to the respondent No. 1, herein. The learned senior counsel has also contended that the respondent No. 1 not being the handling contractor at the railway siding involved; the demurrage charges so imposed by the railway authorities upon the appellant-Food Corporation of India could not have been transferred to the respondent No. 1.

**16.** Mr. Borbora, learned senior counsel, has further contended that the authorities of the appellant-Food Corporation of India while saddling the respondent No. 1 with the liability of the demurrage charges so imposed by the railway authorities on the appellant-Food Corporation of India; had not carried-out any exercise to determine the extent of default on the part of the respondent No. 1, contributing to the imposition of the demurrage charges upon the appellant-Food Corporation of India.

**17.** Mr. Borbora, learned senior counsel, by referring to the conclusions reached by the learned Single Judge in the judgment & order, dated 08.11.2023, has contended that the same are reasoned and are based on the materials as brought on record in the writ proceeding and accordingly, has contended that the same would not call for any interference from this Court.

**18.** We have heard the learned counsels appearing for the parties and also perused the materials available on record.

**19.** At the outset, it is to be noted that the respondent No. 1 was appointed as a Transport Contractor, Ex-Railway Siding Salchapara Rail Head to FSD, Badarpurghat, and he was not engaged for the handling works at the railway siding involved and the said works were so assigned to one Anup Trade & Transport Private Transport Ltd.

**20.** The contract as entered into by the appellant-Food Corporation of India with the respondent No. 1 for the work so assigned to him; contains the following stipulations:

***“X. Liability of Contractors for losses etc. suffered by Corporation : a) The contractors shall be liable for all costs, damages, demurrages, wharfage, forfeiture of wagon, registration fees, charges and expenses suffered or incurred by the Corporation due to the contractor’s negligence and un-workman like performance of any services under this contract or breach of any terms thereof or his failure to carry out the work with a view to avoid incurrence of demurrage etc. under this contract or breach of any terms thereof or his failure to carry out the work with a view to avoid incurrence of demurrage etc. and for all damages or losses occasioned in the Corporation due to any act whether negligent or otherwise of the contractor themselves or his employees. The decision of the General Manager regarding such failure of the contractor and their liability for the losses etc. suffered by Corporation and the quantification of such losses shall be final and binding on the contractor.”***

**21.** It is not disputed that the contract so entered into by the appellant-Food Corporation of India with the respondent No. 1 also included a liability cast upon it of being liable for all costs including the demurrages as suffered by the appellant-Food Corporation of India. However, the respondent No. 1, admittedly, being only a transport Contractor of Ex Railway Siding, Salchapra, to FSD, Badarpurghat, and not a handling contractor at the Railway siding involved; the appellant-Food Corporation of India before recovering from the respondent No. 1 the demurrage charges as suffered by it; ought to have made a proper determination of the extent of liability of the respondent No. 1 in the matter and thereafter, proceeded to make the deductions so involved after putting the respondent No. 1 to notice in the matter.

**22.** The appellant-Food Corporation of India before the learned Single Judge had brought on record the calculation so made by it with regard to the fixation of the demurrage charges against the contractors involved which is also available in the records of the present writ appeal.

**23.** We have perused the purported calculation sheets and find that there is no justification provided for the amounts so determined against the

respondent No. 1, herein. It is seen that a committee of officers of the district office of the appellant-Food Corporation of India at Silchar, Assam, had made the calculation involved. However, it is required to be noticed that in the remarks column; the following stipulation was made:

***“Night placement/round of clock siding/late supply of trucks by RTCS.”***

**24.** The aforesaid stipulations does not specify the default so committed by the respondent No. 1, herein, in-as-much as the respondent No. 1 could not have been held to be responsible for the night placement of the rakes, in question, by the railway authorities or the operation of the round-of-clock siding. Further, the said calculation sheet does not demonstrate the default if so committed by the respondent No. 1, herein, in placing of the trucks and the consideration of the reasons, if any, cited by the respondent No. 1, on this count. Accordingly, the purported calculation as made by the authorities of the appellant-Food Corporation of India does not merit acceptance from this Court.

**25.** The Hon'ble Supreme Court in the case of **Abhijit Paul**(supra) while dealing with a similar issue although with stipulations in the contract not similar to the one so entered into by the appellant-Food Corporation of India with the respondent No. 1, herein; had, insofar as the liability of a transport contractor is concerned, concluded that a transport contractor was not required to undertake the task of loading or unloading of foodgrains from the Railway Wagons.

**26.** In this connection, the conclusions drawn by the Hon'ble Supreme

Court in the case of **Abhijit Paul**(supra), is extracted hereinbelow:

*“26. Irrespective of the disputed fact, the real question is whether the contractors had any obligation towards loading and unloading of foodgrains from the railway wagons. It is evident from the contractual provisions and also the admissions of the Corporation in written submissions, that the task of loading or unloading of foodgrains from the railway wagons was not a part of the contract. Thus, based on interpretation of the expression "charges" in the contractual context, we are of the opinion that it did not include liability on account of demurrages. Consequently, the Corporation cannot impose and collect demurrages from the contractors.*

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*29 It is evident from the above that the contracts delegating the responsibility of loading and unloading of foodgrains from railway wagons, as an integral part of the contract, include a clear and distinctive clause for the imposition of liability, inter alia, on account of demurrages. Evidently, the liability clause in these contracts, termed the Handling and Transport Contracts, is starkly distinct from the present Road Transport Contracts.”*

**27.** In the light of the conclusions as contained in the decision of the Hon'ble Supreme Court in the case of **Abhijit Paul**(supra); it is an admitted position that the respondent No. 1, herein, not being required to undertake the task of loading and/or unloading of foodgrains on the Railway wagons; the demurrage being not a contractually stipulated amount and the same being in the nature of an unliquidated damage, would mandate a due and proper determination of the same *qua* the respondent No. 1 before any deduction in this connection, is so made from the running bills of the respondent No. 1 by the appellant-Food Corporation of India.

**28.** The learned Single Judge by noticing the provisions of Clause X of the Model Tender Form for Handling and Transport Contract, had proceeded to draw the following conclusions:

*"15. It is no doubt correct that "demurrage" is included in Clause (X)(a) of the contract. However, since the writ petitioner was not entrusted with the task of unloading the*

*wagons Ex-Rly Siding Salchapra, in view of the decision of the Supreme Court in Abhijit Paul (supra) the said clause in the contract agreement, in the opinion of this Court, cannot be interpreted as a provision in the contract permitting levy of "demurrage" upon the contractor. It may be the case that due to the default on the part of the petitioner to place the trucks at the Railway siding, there was delay in unloading of the Railway wagons on odd occasions as a result of which, the unloading could not be completed within the "free time", thus inviting demurrage being imposed by the Railways upon the FCI. However, since the petitioner was not responsible for un-loading the wagons, the FCI authorities cannot unilaterally deduct amount of "demurrage" from the bills of the contractor on such count. In other words, imposition of "demurrage" by the FCI upon the transport contractor, cannot be based on mere ipse dixit of the General Manager or any other official of the FCI coming within the definition of Clause I(v) of Annexure-1 of the contract agreement. Such a claim against the transport contractor would be maintainable only when there is a proper determination of the claim by following the due process under the law wherein, the contractor is given sufficient opportunity to produce its/his version along with evidence. Otherwise, the FCI authorities cannot maintain a claim against the contractor for recovery of "demurrage" save and except by obtaining a decree from the civil court or any other adjudicatory order or award.*

*16. There is yet another aspect of the matter which deserves consideration in this case. Clause X(a) of the contract agreement envisages the right of the employer to recover cost, damages, wharfages etc. on the ground of failure on the part of the contractor to comply with the terms and conditions of the contract. However, there is no clause in the contract which quantifies the quantum of "damage/demurrage" that would be recoverable from the contractor nor does the contract specify as to whether, demurrage would be recoverable from the handling contractor at the Railway Siding or the transporter. Therefore, it cannot be said that Clause X(a) of the contract agreement contains a condition for imposing Liquidated Damage (LD) on the transporting contractor.*

*17. As per the Black's Law Dictionary (Tenth Edition), Liquidated Damage is an amount contractually stipulated as a reasonable estimation of actual damages to be recovered by one party if the other party breaches. If the parties to a contract have properly agreed on Liquidated Damages, the sum fixed is the measure of damages for a breach, whether it exceeds or falls short of the actual damage. Naturally, therefore, unliquidated damage would mean damages that cannot be determined by a fixed formula and must be established by a judge or jury [see Black's Law Dictionary].*

*18. Section 74 of the Indian Contract Act, 1872 deals with compensation for breach of contract where penalty is stipulated for i.e. Liquidated Damage. Section 74 is extracted herein below for ready reference :-*

*"74. Compensation for breach of contract where penalty stipulated for.—*

*[When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.]*

**19. In the case of Union of India vs. Raman Iron Foundry reported in (1974) 2 SCC 231 the Supreme Court has observed that claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a court or other adjudicatory 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. Although the decision in the case of Raman Iron Foundry (supra) has been overruled by a subsequent decision rendered in the case of H. M. Kamaluddin Ansari & Co. vs. Union of India reported in (1983) 4 SCC 417 as well as in the case of State of Gujarat vs. Amber Builders reported in (2020) 2 SCC 540, yet, the findings recorded in Raman Iron Foundry (supra) as regards the rights of the party to the contract pertaining to the liquidated and unliquidated damage have remained undisturbed. 20. In another decision of the Supreme Court rendered in the case of Gaziabad Development Authority Vs. Union of India and another reported in (2000) 6 SCC 113 it has been observed that in case of breach of contract, damages may be claimed by one party from the other who has broken its contractual obligation in some way or the other. The damages may be liquidated or unliquidated. Liquidated damages are such damages as have been agreed upon and fixed by the parties in anticipation of the breach. Unliquidated damages are such damages as are required to be assessed. Broadly, the principles underlying assessment of damages is to put the aggrieved party monetarily in the same position, as far as possible, in which it would have been, if the contract would have been performed.**

**21. From a careful analysis of the decisions of the Supreme Court referred to above, read in the context of sections 73 and 74 of the Indian Contract Act, it is clear that, unless the contract agreement itself specifies an agreed amount of damage which can be levied on the contractor for having breached the conditions of the contract, any amount claimed by the employer would not automatically translate into a debt but would merely remain a claim. If the claim is legitimately disputed by the contractor being one of the parties to the contract agreement, the same would give rise to a dispute which would have to be adjudicated upon by the Court or through any other adjudicating mechanism established under the law.**

**22. In the present case, as has been noted above, there is no Liquidated Damage clause. Moreover, the petitioner (contractor) was not entrusted with the work of unloading of the foodgrains at the Railway siding. As such, in view of the denial on the part of the petitioner of any laches or negligence on its part which can be seen as a breach of the terms and conditions of the contract, the FCI cannot unilaterally recover any amount from the contractor as demurrage unless the liability of the contractor is determined through a process established by law."**

29. The conclusions as drawn by the learned Single Judge and as extracted hereinabove, is a reasoned one and is in tune with the facts as existing in the matter. The learned Single Judge after drawing the above conclusions; had proceeded to make the following directions:

***"23. For the reasons stated herein above, this Court is of the opinion that this writ petition must succeed and the same is hereby allowed. Consequently, all deductions made from the previous running bills of the petitioner on account of "demurrage" are hereby set-aside. The respondents are directed to refund the amounts so deducted from the running bills of the writ petitioner as "demurrage" within 60(sixty) days from the date of receipt of a certified copy of this order and also to refrain from deducting any further amount on account of "demurrage" from the bills of the writ petitioner. It is made clear that if the deducted amount is not refunded within 60 (sixty) days from the date of this order, interest at the rate of 9% per annum on the amount, calculated from the date of this order, till refund of the same shall be payable to the petitioner by the respondent. This order would, however, not preclude the respondents from initiating any action against the writ petitioner for realization of damage and compensation, if any, in accordance with law and in the light of the observations made herein above."***

**30.** The learned Single Judge upon concluding that the appellant-Food Corporation of India cannot unilaterally recover any amount from the respondent No. 1 as the demurrage unless the liability of the contractor is determined through a process established by law, proceeded to provide that the appellant-Food Corporation of India would not be precluded from initiating any action against the respondent No. 1 for realization of damage and compensation, if any, in accordance with law and in the light of the observations made hereinabove. The said observation as made by the learned Single Judge, in our considered view, has protected the interest of the appellant-Food Corporation of India.

**31.** At this stage, the contention made by Mr. Choudhury, learned senior counsel appearing for the appellant-Food Corporation of India, to the effect that the learned Single Judge in the judgment & order, dated 08.11.2023, having opined that the allegations as raised by the appellant-Food Corporation of India that the respondent No. 1 had failed to place the trucks within the free time, is a heavily disputed question of fact, ought not to have proceeded to consider the writ petition on its merit; is required to be considered.

**32.** The conclusion as made by the learned Single Judge, in this connection, in paragraph 8 of the judgment & order, dated 08.11.2023, passed in WP(c)6317/2022, is extracted hereinbelow:

***“8. From the above, it would be apparent that the allegation of negligence on the part of the petitioner company in its failure to place the trucks within the “free time”, is a heavily disputed question of fact. Be that as it may, the other relevant question that would also arise for consideration of this Court in the present proceeding was as to whether, as per the terms and conditions of the contract, is it at all permissible for the FCI authorities to levy “demurrage” upon the petitioner unilaterally.”***

**33.** The said conclusion of the learned Single Judge was in the context as to whether the appellant-Food Corporation of India was entitled to levy demurrages upon the respondent No. 1, unilaterally. The learned Single Judge proceeded to consider the said issue and came to a conclusion that the respondent No. 1, herein, having disputed the claim of the appellant-Food Corporation of India; the same would give rise to a dispute which would have to be adjudicated by a Court of law or through any other adjudicating mechanism established under the law. The learned Single Judge further proceeded to hold that the respondent No. 1 not being entrusted with the task of unloading of foodgrains at the Railway siding and it having categorically denied any laches or negligence with regard to the work as assigned to it; the appellant-Food Corporation of India could not have proceeded to unilaterally recover any amount from the respondent No. 1 as demurrages without first determining the liability of respondent No. 1 through a process established by law.

**34.** The observations of the learned Single Judge in paragraph 8 of the judgment & order, dated 08.11.2023, as extracted hereinabove; in our considered view, is in connection with the imposition of the liability upon

the respondent No. 1 of the demurrage charges suffered by the appellant-Food Corporation of India, which was held to be an unliquidated damage. It is, in the above context, that the learned Single Judge had concluded that without a due and proper determination of such liability of the respondent No. 1, herein; the appellant-Food Corporation of India could not have unilaterally deducted the demurrage charges suffered by it in the matter. Accordingly, the contention raised by the appellant-Food Corporation of India to the extent that the learned Single Judge ought not to have proceeded to consider the writ petition on merits; would not merit acceptance.

**35.** In view of the above discussions; we are of the considered view that the conclusions reached by the learned Single Judge in the judgment & order, dated 08.11.2023, is not erroneous and accordingly, would not call for any interference.

**36.** The writ appeal is, accordingly, held to be devoid of any merit and consequently, the same stands dismissed. However, there shall be no order as to costs.

**JUDGE**

**CHIEF JUSTICE**

**Comparing Assistant**