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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.354 OF 2014

Union of India,
through General Manager,
Western Railway Administration,
Western Railway, Churchgate,
Mumbai – 400 020.

...Petitioner

..Versus..

1. M/s.Airwide Express Cargo
114, National Plaza, Opp. Railway Station,
Surat – 396 088, Branch Office
at 14/21, Mata Prasad Chawl,
Near Omkareshwar Temple Koldongri,
Sahar Road, Andheri (East),
Mumbai – 400 067.

2. The Learned Sole Arbitrator,
Mr.Kartikey Singh,
Deputy Chief Vigilance Officer (Office)
Western Railway, Churchgate,
Mumbai – 400 020.

...Respondents

Mr.Chetan Agrawal for the Petitioner.
Mr.Habeezur Rahman for the Respondents.

CORAM : R.D. DHANUKA, J.
DATE : 6TH APRIL, 2015.

ORAL JUDGMENT :-

1. Admit. Learned counsel for the respondents waives service. By consent the matter is heard finally.

2. By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996, the petitioner has impugned the arbitral award dated 21st June, 2013, allowing part of the claims made by the respondents and rejecting the counter claim made by the petitioner. Some of the relevant facts for the purpose of deciding this petition are as under :

3. The petitioner herein was the original respondent in the arbitral proceedings, whereas respondent No.1 was the original claimant.

4. Some time in October, 2003, the petitioner floated a tender for leasing of space in Train No.19019 from Bandra Terminus to Dehradun. Pursuant to the said tender, respondent No.1 submitted their bid for Bandra Terminus to Delhi Terminus and quoted Rs.8700/- per trip 4 tonne.

5. By a letter dated 25th March, 2004, the petitioner informed respondent No.1 that the competent authority had accepted the offer submitted by respondent No.1 and had been allotted 4 tonnes space on lease in the second compartment of 9019 DN Deharadun Express at the rate of Rs.8700/- per trip/day Ex. Bandra Terminus to Delhi for three years with loading and unloading facility. The petitioner called upon the respondent No.1 to approach the office of the Divisional Railway Manager (Commercial) along with the agreement and the bank guarantee of Rs.2,61,000/-. It is not in dispute that pursuant to the said letter of acceptance, the parties entered into an agreement on 1st June, 2004.

6. Under the said agreement, the petitioner granted lease for 4 tonnes of SLR space in Train No.9019 for a period of three years with effect from 1st June, 2004 to 31st May, 2007 at the rate of Rs.8700/- per trip, per day for 4 tonnes. Clause 2 of the said agreement provided that the leased compartment shall contain packages loaded from Bandra Terminus to Delhi station with loading and unloading at enroute station Borivali and Baroda. The said agreement was duly signed by both the parties. Respondent No.1 accordingly submitted the security deposit of Rs.2,61,000/- in terms of the letter of acceptance issued by the petitioner.

7. It is common ground that pursuant to the said submission of tender by respondent No.1 and execution of the agreement between the parties, respondent No.1 acted upon the said lease deed for the destination between Bandra Terminus and Delhi and had been paying the said amount as agreed to the petitioner from time to time.

8. On 19th March, 2004, the petitioner issued letter of acceptance in favour of M/s.Shree Salasar Cargo Services granting lease in the first compartment of train No.9010 DN Dehradun Express at the rate of Rs.8271/- per trip for a period of three years for the destination Bandra Terminus and Dehradun as quoted by the said bidder and called upon the said bidder to submit a security deposit of Rs.2,48,130/-.

9. It is not in dispute that after expiry of 17 months, respondent no.1 addressed a letter to the Senior Divisional Manager

(Commercial) of Western Railway alleging that respondent No.1 was a regular leaseholder of 4 tonnes FSLR by 9019 DN from Bandra to Delhi with load and unload facility at the rate of Rs.8700/- per day per trip for three years and respondent No.1 was loading the same regularly. It was stated in the said letter that respondent No.1 had applied for SLR at the rate of rs.27,49,200/- for Bandra to New Delhi. The petitioner had offered the highest rates of Rs.28,10,100 for Bandra to Dehradun and thus the petitioner had to offer the same terms and conditions to respondent No.1. By the said letter, respondent No.1 requested the petitioner to give permission for loading and unloading from Bandra Terminus to Dehradun instead of Bandra Terminus to New Delhi on the ground that respondent No.1 was already paying the petitioner freight upto to Dehradun. It is the case of the petitioner that the petitioner did not receive any such letter dated 8th December, 2004.

10. Respondent No.1 vide its letter dated 9th September, 2005 to the petitioner, once again requested to give them permission for Bandra Terminus to Dehradun instead of Bandra Terminus to New Delhi on the similar ground. It appears that the Divisional Railway Manager (Commercial) addressed a letter to respondent No.1 in reply to the letter dated 14th September, 2005 informing that the compartment authority had permitted respondent No.1 to book SLR from Bandra to Dehradun with loading and unloading facility at Borivali, Surat and New Delhi instead of Bandra Terminus and Dehradun subject to adhering all terms and conditions in original allotment letter and the agreement executed between the parties.

11. It is the case of the petitioner that the said Divisional

Railway Manager (Commercial) was not authorized to address any such letter to respondent No.1 thereby granting extension from Delhi to Dehradun. It is also the case of the petitioner that in any event, respondent No.1 was liable to pay the additional freight at the rate of Rs.2881/- per trip to the petitioner for the distance between Delhi and Dehradun. The petitioner raised the said demand upon respondent No.1.

12. In response to the said letter of demand, respondent No.1 made representation to the General Manager, Western Railway vide letter dated 8th May, 2006 and requested to look into the matter immediately. Respondent No.1 also requested the General Manager to appoint an arbitrator to settle their claim for the extra freight from Delhi to Dehradun for the period of 1st June, 2003 to 24th November, 2005. The matter was not settled and the dispute was thus referred to arbitration.

13. On 7th October, 2010, respondent No.1 filed the statement of claim before the learned arbitrator *inter-alia* praying for refund of a sum of Rs.2,61,000/-, which was encashed by the petitioner and also sought refund of freight charges of Rs.34,197/-. Respondent No.1 also demanded refund of the excess freight charges alleged to have been paid to the petitioner of Rs.7,95,566/- between Delhi and Dehradun with interest. Before the learned arbitrator the petitioner made counter claim *inter-alia* praying for an additional freight which according to the petitioner was liable to be paid by respondent No.1 between Delhi and Dehradun.

14. The learned arbitrator rendered an award on 21st June,

2013 thereby directing the petitioner to pay a sum of Rs.2,61,000/- under claim No.1, Rs.34,197/- under claim No.2 and Rs.7,95,566/- under claim No.3. The learned arbitrator rejected the counter claim made by the petitioner.

15. Learned counsel for the petitioner invited my attention to the various correspondence forming part of the record before the learned arbitrator and also pleadings and would submit that though the tender was invited by the petitioner for the distance between Bandra Terminus and Dehradun, the fact remains that respondent No.1 had submitted their bid only for the lease between Bandra Terminus and New Delhi. Respondent No.1 had paid the security deposit amount also according to the letter of acceptance issued to the respondent No.1 by the petitioner. He submits that even the lease agreement entered into between the parties from 1st June, 2004 was also in respect of the distance between Bandra Terminus and Delhi.

16. Learned counsel submits that admittedly respondent No.1 acted upon the said agreement and did not raise any dispute for a period of 17 months from the date of execution of the said agreement. He submits that only as and by way of after-thought, respondent No.1 applied for extension of the lease between Delhi and Dehradun on the ground that the another contractor who had submitted their bid at the same time was awarded contract by the petitioner between Bandra Terminus and Dehradun and that also at the lesser rate.

17. Learned counsel for the petitioner then submits that the

letter addressed by the Divisional Railway Manager (Commercial) on 28th October, 2005 thereby granting permission to book the SLR from Bandra Terminus to Dehradun had no authority to grant such permission. He submits that in any event the said permission was granted subject to the respondent No.1 adhering to all the terms and conditions in the original allotment letter. Learned counsel submits that even if the said letter signed by the Divisional Railway Manager (Commercial) was considered as valid, respondent No.1 was liable to pay the additional freight for the distance between Delhi and Dehradun at the rate of Rs.2881/- per trip. He submits that the learned arbitrator has re-written the contract by granting an extension of lease period between Delhi and Dehradun without payment of any additional freight. He submits that the learned arbitrator could not have considered the notings in the departmental files of the petitioner as the same were never communicated to respondent No.1. He submits that there was no amendment to the contract entered into between the parties thereby extending the lease between Delhi and Dehradun without any additional freight.

18. Insofar as rejection of the counter claim is concerned, learned counsel submits that even if the letter dated 28th October, 2005 while considering the letter of respondent No.1 for booking of SLR from Bandra Terminus to Dehradun was subject to all the terms and conditions in the original contract, respondent No.1 could not have refused to pay the additional freight between Delhi and Dehradun. The learned arbitrator thus could not have rejected the counter claim filed by the petitioner.

19. Learned counsel for respondent No.1 on the other hand

invited my attention to the various correspondence and the lease agreement and would submit that since the petitioner themselves granted the contract to another bidder who had submitted the lesser rate at the same time for the distance between Bandra Terminus and Dehradun, respondent No.1 was justified in demanding correction by extension of contract period between Delhi to Dehradun without additional freight. He submits that the higher authority of the petitioner had already taken such decision and had agreed to do the parity of contract of the respondent No.1 with the contract awarded to the other bidder. He submits that the Divisional Railway Manager (Commercial) was authorized to address such letter dated 28th October, 2005 granting permission to book the SLR from Bandra Terminus to Dehradun. He submits that in any event since the petitioner had not modified the terms and conditions of the original contract for demanding the additional freight between Delhi and Dehradun, the demand of the petitioner for the additional freight by a letter was not justified. He submits that the learned arbitrator was right in comparing the contract between the contract awarded to respondent No.1 and contract awarded to another contractor, which was granted at the same time however, for the distance between Bandra Terminus and Dehradun and that also for the lesser amount of freight and in granting reliefs in favour of the respondents.

20. Learned counsel for respondent No.1 then submits that the learned arbitrator has rendered a finding of fact which is not perverse and thus this Court cannot interfere with such finding of fact rendered under section 34 of the Arbitration & Conciliation Act, 1996. He submits that insofar as the counter claim rejected by the learned arbitrator is concerned, since the petitioner had granted extension of

contract between Delhi and Dehradun on the same terms and conditions without increasing any additional freight, the learned arbitrator has rightly rejected the counter claim made by the petitioner and thus no interference with that part of the award is warranted.

21. Insofar as claim No.2 is concerned, he submits that since respondent No.1 completed the contract satisfactorily, the petitioner was liable to return the security deposit made by respondent No.1.

22. Insofar as claim No.3 is concerned, it is submitted that the petitioner could not have retained advance freight deposited by respondent No.1.

23. Learned counsel for respondent No.1 relied upon the judgment of the Supreme Court in the case of *Sunil Pannalal Banthia & Ors. vs. City & Industrial Development Corporation of Maharashtra Ltd. & Anr.* Reported in *AIR 2007 SC 1529* and in particular paragraphs 9, 10 and 19 and submits that since the petitioner had granted extension of contract to bring the contract of the petitioner with respondent No.1 in parity with the other contractor, there was no question of the petitioner demanding any additional freight. It is submitted that the petitioner is estopped from challenging the authority of the Divisional General Manager (Commercial).

24. Learned counsel for respondent No.1 also placed reliance on the judgment of the Supreme Court in the case of *Ravindra Kumar Gupta & Co. vs. Union of India*, reported in *(2010) 1 SCC 409* in support of the submission that if the learned arbitrator has

rendered reasons and has rendered a finding of fact which are not perverse, such findings cannot be interfered with by this Court.

25. A perusal of the record indicates that there is no dispute that the petitioner had invited the tenders for granting lease for space in train No.19019 from Bandra Terminus to Dehradun. It is also not in dispute that respondent No.1 however, had submitted their bid for lease of space in the said train between Bandra Terminus and Delhi and had quoted their rates accordingly. A perusal of the record indicates that even in the letter of acceptance issued by the petitioner to respondent No.1, it was clearly conveyed to the respondent No.1 that the said lease was granted for the space in the said train No.19019 from Bandra Terminus to Delhi at the rate of Rs.8700/- per trip per tonne. A perusal of the lease agreement entered into between the parties clearly indicates that the said lease was for Bandra Terminus to Delhi. It is not in dispute that for the period of 17 months, respondent No.1 did not raise any dispute and continued to pay the freight to the petitioner between Bandra Terminus to Delhi at the rate agreed.

26. A perusal of the correspondence subsequently entered into between respondent No.1 and the petitioner indicates that respondent No.1 however, demanded the extension of contract on the ground that the other contractor was paying lesser amount for the contract of lease for the same train for Bandra Terminus to Dehradun. In the said letter, it was contended by respondent No.1 that respondent No.1 was already paying freight upto Dehradun. Further correspondence was ensued between the parties. The Divisional Railway Manager (Commercial) thereafter addressed a

letter to respondent No.1 informing that the competent authority had permitted to book the SLR from Bandra Terminus to Dehradun with loading facility at Borivali BL, ST and New Delhi instead of Bandra Terminus to Delhi however, subject to adhering all terms and conditions of the original agreement. The question however, that arise for consideration is whether by the said letter respondent No.1 was granted permission to book SLR from Bandra Terminus to Dehradun without any additional freight.

27. A perusal of the correspondence clearly indicates that respondent No.1 has accepted the position that they had submitted their bid for booking SLR from Bandra Terminus to Delhi and not between Bandra Terminus to Dehradun. Respondent No.1 had requested for extension of the contract between Delhi and Dehradun. The petitioner had accordingly demanded the additional freight for permission granted between Delhi and Dehradun. A perusal of the award indicates that the learned arbitrator has while allowing claim No.3 has come to the conclusion that two SLR were allotted to two different parties i.e. M/s.Shree Salasar Cargo Services and another respondent No.1 herein. However, with a different destination stations in the agreement, the higher bidder i.e. M/s.Shree Salasar Cargo Services turned out to pay lesser amount than what was being paid by respondent No.1.

28. The learned arbitrator relied upon the internal noting on the file of the petitioner in which it was alleged to have been decided that the Railway Administration with a view to restore parity between two parties for destination stations, shall grant permission for booking from Bandra Terminus to Dehradun to respondent No.1 subject to

adhering all the terms and conditions in the original agreement executed by the parties. It is not in dispute that the said decision alleged to have been taken by the higher authority, which was found in the file of the petitioner, was not communicated to respondent No.1. On one hand the learned arbitrator has relied upon the said internal noting of the petitioner and on the other hand refused to allow the counter claim which was for demanding the additional freight based on the said letter dated 28th October, 2005. In my view, even if there was any such discussion held between the officers of the petitioner, which was forming part of the internal files, till such decision, if any, taken by the petitioner was communicated to respondent No.1, the same would not be binding on the petitioner. No such reliance thus could have been placed by the learned arbitrator on such internal noting of the petitioner. There was no contract between the parties granting such extension without payment of the additional freight.

29. In my view, the learned arbitrator could not have re-written the contract between the petitioner and the respondents on the basis of the terms and conditions of the contract entered into between the petitioner with another contractor for the lease of the space between Bandra Terminus and Dehradun. The petitioner had granted two separate contracts to two different parties on different terms and conditions. Even if the terms and conditions of respondent No.1 were not found reasonable according to respondent No.1 after accepting of the contract, the same could not have been the ground for directing the petitioner to award contract to respondent No.1 on the same terms and conditions, which were entered into with another contractor. In my view, the learned arbitrator has exceeded his

jurisdiction by holding that the contractors ought to have been identified and there shall be parity between two contractors.

30. Be that as it may, the learned arbitrator in any event could not have rejected the counter claim made by the petitioner on the ground that no additional freight was fixed by the petitioner. In my view, claim No.3 awarded by the learned arbitrator thus shows patent illegality on the face of award and thus deserves to be set aside. Award rejecting counter claim of the petitioner is accordingly set aside.

31. Insofar as claim No.1 is concerned, the finding rendered by the learned arbitrator that the petitioner was not required to be paid by respondent No.1 under the letter of extension is concerned, the said finding, in my view, is totally perverse and contrary to the plain reading of the letter dated 28th October, 2005. However, since respondent No.1 has completed the contract as awarded to respondent No.1 by the petitioner, under the terms and conditions of the contract, the petitioner was liable to return the security deposit. I am therefore of the view that there is no infirmity with that part of the conclusion rendered by the learned arbitrator insofar refund of the security deposit is concerned.

32. Insofar as claim No.2 is concerned, the finding of the learned arbitrator that the additional rate was not decided by the petitioner is perverse and contrary to the documents on record and deserves to be set aside. However, insofar as the conclusion of the learned arbitrator is concerned, the learned arbitrator has directed the petitioner to refund the said amount which the respondent No.1

had deposited in advance and was not allowed to withdraw, the said finding of the learned arbitrator is not perverse and thus no interference with such finding is permissible.

33. Insofar as the counter claim made by the petitioner is concerned, the perusal of the counter claim indicates that the learned arbitrator has rejected the said claim considering the departmental notings, which were not communicated to respondent No.1 which finding is perverse. However, since this Court cannot make an award in respect of the claim rejected by the learned arbitrator, this Court is inclined to set aside the said award, rejecting the counter claim.

34. I therefore, pass the following order :-

- a). The arbitration award in respect of claim Nos.1 and 2 is upheld. The arbitration award in respect of claim No.3 and rejection of the counter claim is set aside.
- b). The petition is disposed of in the aforesaid terms.
- c). There shall be no order as to costs.

(R.D. DHANUKA, J.)