

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

Judgment Delivered on 04th March, 2015

+ **O.M.P. 343/2006**

DELHI TRANSPORT CORPORATION

..... Petitioner

Through: Ms.Latika Choudhary, Advocate

Versus

M/S SECURITY CUM DETECTIVE SERVICES

..... Respondents

Through: Mr.S.Khanna, Advocate with
Mr.Abhimanyu Khatri, Advocate

+ **O.M.P. 429/2006**

M/S SECURITY CUM DETECTIVE SERVICES

..... Petitioner

Through: Mr.S.Khanna, Advocate with
Mr.Abhimanyu Khatri, Advocate

Versus

DELHI TRANSPORT CORPORATION

..... Respondents

Through: Ms.Latika Choudhary, Advocate

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J. (Oral)

The present petitions along with OMP 342/2006 were decided by this Court vide its order dated May 04, 2012. Insofar as OMP 343/2006 filed by DTC is concerned, the same was disposed of, whereby this Court

has set aside the impugned award as regards counterclaim No.1 of the DTC granting Rs.11,18,725/- and permitted the DTC to recover the entire sum of Rs.21,03,575 plus Rs.3,225/- on account of penalty for non supply of outsourced drivers. Insofar as the OMP 429/2006 is concerned, this Court had dismissed the application seeking condonation of delay of 30 days in filing the petition as the reasons being not convincing. Be that as it may, vide order dated December 01, 2013, the order dated May 04, 2012 in OMP Nos. 343/2006 & 429/2006 was recalled and the said OMPs were directed to be listed before the roster Bench. Accordingly, the said OMPs were set out for hearing afresh.

2. For convenience, the parties are referred by their status in OMP 343/2006 i.e. Delhi Transport Corporation shall be referred as '*petitioner*' and M/s Security Cum Detective Services as the '*respondent*'. These two petitions arises from an Award dated April 30, 2006, whereby the learned Arbitrator has rejected all the claims of the respondent and allowed the counterclaims of the petitioner DTC to the extent that he has granted an amount of Rs.11,18,725/- to the petitioner DTC, which was subject to adjustment of Rs.5,53,951/-.

Facts:

3. The parties have entered into an agreement dated 02.12.2003, whereby the respondent was to provide drivers on kilometre charge basis

initially for a period of one year with effect from 02.12.2003 to 01.12.2004, which agreement was renewed for another year from 02.12.2004 to 01.12.2005. An amount of Rs.50,000/- was deposited by the respondent as security/contract performance guarantee, in the first year of agreement, which amount was adjusted in the next/second year. The terms of agreement also stipulated a penalty clause which is reproduced as under:-

“In case the outsourcing agency fails to provide the outsourcing drivers as stipulated in the agreement or there is a breach of any terms and conditions of the contract, the Corporation reserves the right to impose the penalty upon the outsourcing agencies in the following manner/slab after accounting for scheduled rest days:-

- (a) 75% or more than 75% of the commitment – No penalty.*
- (b) 50% or more, but less than 75% - Rs.10/- per missing driver per day.*
- (c) 25% or more but less than 50% - Rs.15/- per missing driver per day.*
- (d) Less than 25% - Rs.25/- per missing driver per day.*

The above penalties will be imposed on the basis of 15 days average on availability of drivers. Accordingly, in case the outsourcing agencies fails to provide outsourced drivers as per their agreement, the corporation reserves

the right to impose penalties as detailed above if considered necessary taking into account the overall availability of drivers.

The security deposited by the outsourcing agency will be forfeited.”

4. The learned counsel for the parties concede during submissions, that the respondent through a tender form had initially agreed to supply 400 drivers, which figure was later amended by the respondent to 150 prior to entering the initial agreement.

5. It was the case of the respondent that it had discharged its obligations under the contract. Suffice to state, the terms of agreement did not stipulate the number of drivers to be supplied by the respondent.

6. It was the case of the respondent that till May, 2005 the petitioner was paying all the invoices/bills raised by it for supplying the drivers. In other words, it was its case that the petitioner had at no point of time, even if less drivers were supplied, charged/imposed any penalty. It was the case of the petitioner DTC that it has been holding discussions with the respondent impressing upon it to supply the drivers as per its earlier commitment i.e. 150 drivers every day, failing which the petitioner would be constrained to impose penalty as per the agreement. It was also the case of the petitioner DTC that in furtherance of this discussion with the respondent, a notice dated 12.10.2004 was issued calling upon the

respondent to provide the required number of drivers within a period of one month, failing which the penalty would be imposed. It was also the case that subsequent letters were also sent on the same lines to the respondent. Since the respondent had failed to provide the drivers as per the commitment during the year of agreement, necessary information/data was collected from various Regional Managers and penalties were worked out and imposed upon the respondent in terms of Clause 7.

7. According to the petitioner, a sum of Rs.5,19,925/- was worked out as penalty against the respondent for the period between 13.10.2004 to 15.04.2005. On the other hand, the respondent was aggrieved by the fact that its bills were not being cleared by the petitioner DTC. Dispute arose between the parties, which was ultimately referred to the arbitration. The respondent had raised the following claims:-

- (a) For Rs.50,000/- towards refund of security amount.*
- (b) For Rs.7,30,921/- towards amount withheld illegally.*
- (c) For Rs.27,034/- on account of interest over @ 18% from 02.12.2005 to 13.02.2006.*
- (d) For Rs.50,000/- towards damages for illegally withholding of legitimate amount.*
- (e) For Rs.75,000/- towards costs of arbitral proceedings.*

8. Simultaneously the petitioner had also made certain counterclaims,

which are as under:-

(a) Claim No.1 for Rs.21,03,575/- plus Rs.3,225/- on account of penalty for non supply of drivers.

(b) Claim No.2 for Rs.1 lac towards costs of arbitration.

9. Before the Arbitrator, the petitioner DTC gave break up of penalties that it sought to recover, as under:-

<u><i>“Penalty for the period</i></u>	<u><i>Amount (Rs.)</i></u>
<i>(i) 02.12.03 to 12.10.04</i>	<i>8,88,550.00</i>
<i>(ii) 13.10.04 to 15.04.05</i>	<i>5,19,925.00</i>
<i>(iii) 16.04.05 to 31.08.05</i>	<i>4,07,075.00</i>
<i>(iv) 01.09.05 to 30.11.05</i>	<i><u>2,88,025.00</u></i>
	<i>21,03,575.00</i>
<i>Total amount of penalty recovered/adjusted by the DTC from the bills of the claimant</i>	<i>- <u>5,53,951.00</u></i>
<i>(Rs.5,19,925.00 + 34,026.00)</i>	
<i>Remaining amount</i>	<i><u>15,49,624.00”</u></i>

10. As stated above, learned Arbitrator rejected all the claims of the respondent and allowed the counterclaim No.1 to the extent that it had justified the penalty of Rs.11,18,725/-. Out of the said amount, he had adjusted an amount of Rs.5,53,951/- and granted the balance amount of Rs.5,64,774/- in favour of the petitioner DTC. The relevant portion of the Award is reproduced as under:-

“Respondents have worked out a total penalty of

Rs.21,03,575/- from 02.12.2003 to 30.11.2005 and Rs.3225 for 01.12.2005. Taking overall view of the matter, I find that the respondents are not entitled to make any recovery from the claimants up to 15.11.2004. The penalty worked out by the respondents from 16.11.2004 to 15.04.2005 comes out to Rs.4,20,400/- (after deducting the penalty for the period 13.10.2004 to 15.11.2004 from the figure of Rs.5,19,925/- worked out by the respondents for the period 13.10.2004 to 15.04.2005). Further, the penalties for the period 16.04.2005 to 31.08.2005 and 01.09.2005 to 30.11.2005 have been worked out by the respondents as Rs.4,07,075/- and Rs.2,88,025/- respectively. Besides above, a penalty of Rs.3,225/- has been worked out by the respondents from 16.11.2004. Thus, the overall penalty worked out by the respondents from 16.11.2004 to 01.12.2005 works out to Rs.11,18,725/-. The claimants have not made any comments on the above calculations, I find that the respondents are entitled to the above penalty of Rs.11,18,725/-.”

11. Insofar as the challenge in OMP 343/2006 by the petitioner is concerned, the same is limited to the extent the learned Arbitrator has held that the petitioner could not have imposed penalty upto 15.11.2004.

12. Learned counsel for the petitioner would argue that the respondent had since beginning i.e. 02.12.2003 failed to supply the drivers as per its commitment of 150 drivers per day. According to her, in view of the

stipulation in the agreement the petitioner was within its rights to impose penalty upon the respondent, which it sought to recover by way of counterclaim. She would further submit that the learned Arbitrator had erred, in justifying the penalty, post 15.11.2004 and not for earlier period. According to her, the learned Arbitrator based his conclusion primarily on the notice issued by the petitioner on 12.10.2004. She would state that even during the period before 12.10.2004, deliberations were being held with the respondent impressing upon the respondent to supply the drivers as per its commitment. She also states that in view of stipulation of penalty in the agreement, the petitioner DTC was not required to call upon the respondent to discharge its obligation in terms of its commitment. She would state that the balance penalty which has been denied by the learned Arbitrator to the extent of Rs.8,88,550/- for the period between 02.12.2003 to 15.11.2004, is untenable. She would also relies upon the judgment of this Court in OMP 342/2006 and the conclusion therein.

13. On the other hand, learned counsel appearing for the respondent would justify the denial of penalty for the period between 02.12.2003 to 15.11.2004. According to him, there was no commitment on the part of the respondent to supply 150 drivers per day to the petitioner DTC. According to him, it was the obligation of the DTC to inform the respondent of the requirement of drivers each day. The respondent was supplying the drivers

as per the requisition made by the DTC telephonically and even if the number of drivers supplied for each day was less than 150, the respondent could not have been penalized for that. That apart he would state that even if the respondent had defaulted in supplying the number of drivers as per the commitment, the petitioner at the most could have forfeited the security deposit or blacklisted the respondent.

14. I have heard the learned counsel for the parties. An issue has been raised by the learned counsel for the petitioner about the petition filed by the respondent i.e. OMP 429/2006, that the same is barred by delay. I have seen the application filed by the respondent seeking condonation of delay. The same is supported by the affidavit of Mr. Anil Rana, Advocate. The averments made in the application gives the following reading:-

“That the petitioner upon the receipt of copy of the Award, sent the same to Mr. Anil Rana, Advocate, to take necessary steps for filing objections before this Hon’ble Court. However, the envelope containing the copy of Award was mixed up in the miscellaneous papers of Mr. Anil Rana, Advocate, and could not be noticed till 28.8.2006. Mr. Anil Rana, Advocate, was also busy for the medical treatment of his wife as well. However, when on 29.8.2006 when the Award came in the notice of Mr. Anil Rana, who immediately contacted the petitioner and then the present objections were prepared and being filed without any

further day.”

15. On a reading of the averments made in the aforesaid para it is revealed that the petitioner in the application apart from taking a ground that the envelope containing the copy of the Award was mixed up in the miscellaneous papers had also stated that he was also busy with the medical problems of his wife as well, which shows sufficient cause to condone the delay. I accordingly condone the delay in filing the present petition by the respondent i.e. M/s Security cum Detective Services.

16. Insofar as the submissions made on merit by the learned counsel for the parties are concerned, I note that the agreement stipulated a penalty clause which has already been reproduced above. Insofar as the aspect of supply of number of drivers by the respondent on a given day is concerned, the learned Arbitrator has held as under:-

“The claimants have taken a plea that they had not made any commitment to provide any particular number of drivers, as such they are not liable to pay any penalty. The respondents have filed a copy of their annexure R-4 along with copy of tender form signed by the claimants from which it is seen that the claimants had initially committed to provide 400 number of drivers. This commitment was amended by them to 150 drivers vide their letter dated 02.12.2003, although the claimants had mentioned to provide maximum number of drivers. The claimants had

requested during the hearing that the respondents be directed to produce the records, log books, registers etc. pertaining to deployment of drivers provided by all the agencies, time period and mileage covered by such drivers. The respondents had filed certain details in 172 sheets and copies were given to the claimants also. I find that the documents filed by the respondents provide sufficient information as may be relevant for the disputes in question and further information, is not considered necessary. It is seen that the claimants have been providing different number of the drivers for different periods. The conduct of the claimants clearly indicates that they were aware of their commitment to provide the drivers accordingly but were not able to provide the committed numbers.”

17. In view of the aforesaid conclusion of the learned Arbitrator, this Court can safely proceed on a premise that the respondent was to supply 150 drivers per day to the petitioner DTC. The learned Arbitrator did not accept the stand of the respondent that it was supplying the number of drivers as requisitioned for by the petitioners. The learned Arbitrator has in his award concluded as under:-

“Further, another fact which cannot be ignored is that the claimants were providing different number of drivers on different days keeping in view of their commitment but subject to their capacity from day to day although not to the extent of their commitment. They have not produced

any evidence to show different demands from the respondents on different days to support the number of drivers provided by them on different days.”

18. The aforesaid conclusion would also prove that the respondent was supplying drivers short of its commitment. On respondent not supplying the drivers as per its commitment, the necessary consequence under the agreement must follow i.e. the penalty in terms of clause 7. The reasoning given by the learned Arbitrator was that since the petitioner had for the first time issued notice on 12.10.2004 to the respondent calling upon it to ensure supply of the drivers as per its commitment, it would be thereafter only the penalty could be imposed as for the earlier period, it has given up its claim to recover penalty. The notice dated 12.10.2004 reads as under:-

“It has been observed that some of the out-sourcing Agencies have failed to provide the requisite number of out-sourced drivers as per their commitments made by them at the time of entering into agreement with D.T.C. resulting in shortage of drivers in DTC an affecting the operation of the buses adversely. It is relevant to mention here that in case any of the outsourcing agencies fails to provide outsourced drivers as per their agreement, the Corporation reserves the right to impose the penalties as per slab system circulated vide this office circular memo No.PLD-III/3126 dated 24.10.2003 for imposing the penalty, if

considered necessary taking into account the overall availability of drivers as also decided during the course of a meeting held on 6.10.2004.

All out-sourcing agencies are, therefore, requested to provide the required number of outsourced drivers to the D.T.C. as per their commitments, within a period of one month positively otherwise the Corporation shall be constrained to impose the penalties as per the Scheme in vogue or the slab system introduced by the (illegible).

This issues with the approval of the competent authority.”

19. I also note from the arbitral record that the petitioner DTC had issued a communication dated 10.08.2005, whereby it had imposed penalty on the outsourcing agencies including the respondent herein of Rs.5,19,925/- on its failure to provide the drivers for the period between 13.10.2004 to 15.04.2005. The communication dated 10.8.2005 reads as under:-

“The following outsourcing agencies have failed to provide outsourced drivers to DTC as per their commitments/terms and conditions of Agreement during the period from 13-10-2004 to 15-4-2005 and thus, the amount recoverable from those agencies on the above said account has been indicated against each agency:-

<i>S.No.</i>	<i>Name of the outsourcing Agency</i>	<i>Amount Recoverable (In Rs.)</i>
1.	<i>M/s.Peregrine Security Pvt. Ltd.</i>	<i>67,920-00</i>
2.	<i>M/s.Front Line-403 Security & Services</i>	<i>2,44,325-00</i>
3.	<i>M/s.Security-cum-Detective Services</i>	<i>5,19,925-00</i>
4.	<i>M/s.Black Angles Security Services Pvt. Ltd.</i>	<i>7,75,625-00</i>
5.	<i>M/s.J.B.G. Enterprises</i>	<i>3,46,500-00</i>

In view of the above, it is requested that the amount as per details given above may please be recovered from the respective outsourcing agencies under intimation to this office.”

20. Nothing has been brought to my notice that such letter was issued for the period before 15.11.2004 and/or 13.10.2004. A perusal of the letter would show that it was an unequivocal stand of the DTC in the letter dated 10.08.2005 that it would be imposing penalty with effect from 13.10.2004 meaning thereby, not for the period before that. Learned counsel for the petitioner tried to justify the absence of reference to the period before 13.10.2004 to say that even the letter dated 10.08.2005 was not required to be issued as the stipulation for penalty exists in the agreement. I am not in agreement with this contention of learned counsel for the petitioner for the reason, having issued letter dated August 10, 2005, limited to the period 13.10.2004 to 15.04.2005, despite clause 7, the petitioner must own its action to limit the penalty w.e.f. 15.11.2004 as held by the learned Arbitrator.

21. Even though a reference is made to the letter dated 10.08.2005, the

same has not been considered by the learned Arbitrator while justifying the penalty with effect from 15.11.2004. In any case, even if he had considered the letter dated 10.08.2005, the result would have been the same which the learned Arbitrator has arrived at in the impugned award. In other words, the petitioner DTC could justify the penalty between 13.10.2004 or 15.11.2004 till 15.04.2005 and subsequent period but not for the period before 13.10.2004 or 15.11.2004. I note, the learned Arbitrator has given the benefit of deduction of penalty for the period 13.10.2004 to 15.11.2004 from the figure of Rs.5,19,925/-. In other words, the penalty justified by the learned Arbitrator is with effect from 15.11.2004. In so far as the submission of the learned counsel for the petitioner by placing reliance on the judgment of the learned Single Judge OMP No.342/2006 is concerned, suffice to state, the letter dated 10.08.2005 has not been brought to the notice of the learned Single Judge whereby he neither refers to nor considered the communication dated 10.8.2005, which, according to me, would be material as vide the communication the petitioners themselves have limited the penalty for the period between 15.11.2004 to 15.4.2005. Keeping in view the aforesaid position, I do not see that it is a case where this Court in exercise of its power under Section 34 of the Arbitration & Conciliation Act, 1996 should interfere with the award. Suffice to state that this Court is not sitting in an appeal over the findings of the learned

Arbitrator, whereby this Court can re-appreciate the evidence and come to a different conclusion. The illegality should be such which should go to the root of the matter, which I feel this case is not of such a nature where the award of the learned Arbitrator need to be interfered. The petition, OMP No. 343/2006 filed by the petitioner DTC is dismissed.

22. Insofar as the challenge to the rejection of the claims are concerned, the learned Arbitrator has rejected the claim in view of his findings against counter claims of the DTC. Since I have upheld the award to that extent, I agree with the rejection of the claims of the respondent herein by the Arbitrator. The challenge to the award to that extent in OMP 429/2006 needs to be rejected and I dismiss the petition. In conclusion, I dismiss OMP Nos. 343/2006 and 429/2006.

(V.KAMESWAR RAO)
JUDGE

MARCH 04, 2015/km