

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

Judgment reserved on February 02, 2015

Judgment delivered on February 12, 2015

+ **O.M.P. 906/2012**

INLAND ROAD TRANSPORT PVT. LTD.

..... Petitioner

Through Mr.Anil Goel & Mr.Ashwani
Goel, Advocates

versus

UNION OF INDIA & ORS.

..... Respondents

Through Mr.Hashmat Nabi, Advocate

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. The challenge in this petition under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act' in short) is to the award dated July 21, 2012 passed by Mr.Ramashray Pandey, learned Sole Arbitrator, whereby the claim of the petitioner was dismissed.

Facts

2. A written lease agreement was entered into between the petitioner and respondent No.2 for leasing of Parcel Space having carrying capacity of 25 tonnes, VPU in train No.13040/39 Ex. Delhi to Howrah. The said lease agreement was for a period of 3 years with effect from

December 01, 2007 to November 30, 2010 with a clause No.20.1 for extension of lease for further two years. It is the case of the petitioner that the said agreement was executed in terms of comprehensive parcel leasing policy of March 28, 2006 issued vide circular No.12/2006 of the Railway Board. As per clause 28, any dispute with regard to the lease agreement was to be referred to arbitration. It is also the case of the petitioner that a policy decision has been taken by the Railway Board vide circular No.6/2010 dated March 18, 2010 affirming the extension of lease of the leaseholders in terms of clause (E) of the policy dated March 28, 2006, a reference of which is made above.

3. Eight writ petitions were filed in this Court titled as “*Kishan Freight Forwarders vs. Union of India*”, decided on June 02, 2011, whereby this Court had directed the respondents to extend the lease agreement on the payment of 25% enhanced lease amount. The appeal against it was dismissed by the Division Bench. Thereafter, relying upon the aforesaid judgments certain other writ petitions were also allowed. The respondent extended the lease of the petitioner for another two years vide letter dated December 15, 2010. However, it is the case of the petitioner that in violation of the agreement and the policy/circular dated March 28, 2006, the respondents have extended the lease agreement with the enhanced lease rate of about 37%. The petitioner filed an OMP

bearing No.164/2011 against the respondents regarding the enhancement of the lease rate over and above 25%. The said OMP was decided on April 25, 2011 directing that in case the petitioner continues to pay the charges as demanded by the respondents in the letter dated December 15, 2010, the petitioner shall be entitled to use the said parcel van subject to the petitioner complying with all other terms and conditions. The said payments were ordered to be made by the petitioner without prejudice to its rights and contentions and subject to final determination by the learned Arbitrator. In compliance with the order dated April 25, 2011, it is the case of the petitioner that he has made the payment of the lease amount to the respondents. The petitioner invoked the arbitration clause and had filed its claim petition thereby claiming an amount of Rs.22,29,557/- upto the date of filing of the claim, which is extra amount received by the respondents over and above the enhanced lease rate of 25%.

4. According to the petitioner, the original lease rate was Rs.82,392/- which after enhancement of 25% amount i.e. Rs.20,598/- comes to Rs.1,02,990/- but the respondents had charged Rs.1,11,554/-. In other words, an amount of Rs.8,564/- was being charged extra from the petitioner, which amount according to the petitioner had paid under duress, protest on the threat of cancellation of the lease.

5. Learned Arbitrator vide the impugned award decided the claim petition. In the award the learned Arbitrator was even though of the view that the Headquarters' letter dated June 01, 2010 cannot be applied to the lease agreement, however, as the petitioner had accepted the offer and submitted documents mentioned in respondents' offer letter dated December 02, 2010, the situation had changed. According to him, the petitioner had submitted the security of Rs.5.5 Lakh on December 14, 2010. Thus, the petitioner has accepted the offer of the respondent. He relied upon para No.27.2 of the lease agreement, which contemplated amendments and alteration through mutual consent of both the parties. He had accepted the fact that the extension of lease period for 2 years was not as per provision of para No.20.1 of the lease agreement and Headquarters' letter dated June 01, 2010. However, as the petitioner had accepted the respondents' offer of lease charges, freight higher than that provided in para No.20.1 of the lease agreement by submitting affidavit on December 03, 2010 regarding action to be taken in case of deduction of overloading and security deposit calculated on the basis of enhanced charges/freight on December 14, 2010 as required in compliance of the respondents' letter dated December 02, 2010 provisions of para No.20.1 of the lease agreement are considered, amended/alterd with mutual consent in terms of provisions in para No.27.2 of the lease agreement.

6. The respondents in their reply to the objections filed under Section 34 of the Act justify the order of the learned Arbitrator.

7. Mr. Anil Goel, learned counsel for the petitioner would contend that the learned Arbitrator had erred in rejecting the claim of the petitioner for Rs.22,29,557/- despite admitting the fact that the lease of the petitioner was governed by the policy dated March 28, 2006 issued vide circular No.12/2006. He would state that many leaseholders who had approached this Court had got the benefit inasmuch as for the extended lease period, the enhanced lease amount was charged 25% over and above the original lease amount. The action of the respondents is discriminatory and unsustainable. He would state that the order of the learned Single Judge in batch of writ petitions has been upheld by the Division Bench, whereby the respondents could not have charged enhanced lease amount over and above 25%. In this regard, he would rely upon the judgment of the Division Bench in LPA No.51/2013 ***Union of India & Ors. vs. Aurangzeb Chaudhary & Anr.***, wherein the Division Bench of this Court has dismissed the appeal against the judgment of learned Single Judge. He would also draw support from the order passed by this Court in Writ Petition No.4308/2011, wherein the learned Single Judge of this Court directed the return of the excess amount to the petitioner in that writ petition.

8. On the other hand, Mr.Hashmat Nabi, learned counsel for the respondents would justify the award of the learned Arbitrator by contending that since the petitioner has not challenged at any point of time the claim by the respondents enhanced lease amount over and above 25% in this Court rather he has accepted the enhancement by submitting a security of Rs.5.5 lacs and also an affidavit which would show that the petitioner was not aggrieved with the impugned action of the respondents and the learned Arbitrator interpreting the provisions of clause 27.2 of the lease agreement has rightly rejected the claim. He would also draw sustenance from the judgment of Division Bench in the case of *Aurangzeb Chaudhary & Ors.*, more particularly para 10B of the judgment wherein the Division Bench has dismissed the appeal by noting that the respondents railways had not taken any plea that the parties have entered into an agreement for renewal of lease and acted thereon. In other words, it is his submission that the judgment of the Division Bench in *Aurangzeb Chaudhary & Ors.* would not be applicable as the plea which has been taken by the Railways/respondents in this case was not taken by the Railways in those batch of writ petitions. He seeks the dismissal of the present petition.

9. Having heard the learned counsel for the parties, before I deal with the respective submissions I reproduce hereunder clause No.20.1 of the

lease agreement:-

“20.1. Extension of lease is permissible only i case of long term lease of 3 years wherein the same can be extended only once, by 2 more years at a lease rate of 25% more than the lumpsum leased freight rate subject to satisfactory performance by the leaseholder, without any penalty for overloading or violation of ay provision of the contract.”

10. That apart I note that the circular dated March 28, 2006 stipulates as under:-

*“(E) **Extension of Lease**”*

- 1. Extension of lease is permissible only in case of long term lease of 3 years.*
- 2. In case of Long Term Lease, on expiry of the contract period, the same can be extended only once, by 2 more years at a lease rate of 25% more than lumpsum leased freight rate.*
- 3. Such extension will be subject to satisfactory performance by the lease holder, without any penalty for overloading or violation of any provision of the contract.*
- 4. In case of expiry of contract period and non-finalization of new contract due to administrative delays, temporary extension can be permitted by the CCM only once, for a period of 3 months.”*

11. It is a conceded position that vide circular dated July 13, 2010, it

was decided that all the old cases should be decided as per the old comprehensive lease policy 2006 at Divisional Level. Immediately pursuant to the policy, the lease of the petitioner was extended for another 2 years vide letter dated December 15, 2010. No doubt, the petitioner has submitted the security deposit of Rs.5.5 lacs so also an affidavit. But the petitioner knowing fully its rights had filed an application under Section 9 of the Act by way of an OMP No.164/2011, wherein he sought a restraint order against the respondents from charging lease rental @ 37% more than what the petitioner was earlier paying under the original lease agreement and the Court in its order dated April 25, 2011 has specifically observed as under:-

“Accordingly the present petition is disposed of by directing that in case the petitioner continues to pay the charges as demanded by the respondent in its communication dated 15.12.2010, whereby the extension for two years was granted, the petitioner shall be entitled to use the parcel vans aforesaid, subject to the petitioner complying with all other terms and conditions. The said payment shall be made by the petitioner without prejudice to its rights and contentions and subject to final determination by the arbitral tribunal. The arrears be paid within two weeks. Dasti.”

12. Surely, the order passed by the learned Single Judge of this Court

in OMP No.164/2011 had sufficiently safeguarded the rights of the petitioner to challenge the demand of the respondents for enhanced lease amount over and above 25%. Unfortunately, I find that there is no reference by the learned Arbitrator to this order of the learned Single Judge of this Court in its award. Even assuming the petitioner has submitted the security deposit of Rs.5.5 lacs, in view of the conclusion of the learned Single in the OMP No.164/2011, the learned Arbitrator was required to go into the legality of the action of the respondents in claiming enhanced security deposit over and above 25%. Regrettably, despite coming to the conclusion that it is the policy of March 28, 2006 which would govern the extension of lease of the petitioner and also the fact that the policy of 2010 cannot be applied to the lease agreement in question, the learned Arbitrator has rejected the claim petition which in my submission is not sustainable. The justification of the learned Arbitrator placing reliance on para No.27.2 of the lease agreement was not proper as it was not the case of the respondents that the petitioner before invoking the arbitration clause had never challenged the action of the respondents charging an enhanced lease amount. The stand of the petitioner that it submitted the security deposit of Rs.5.5 lacs and the affidavit possibly on the threat of cancellation of lease deed cannot be brushed aside. Even otherwise, the action of the respondents appears to

be discriminatory as is seen that they had granted the relief of charging 25% as enhanced lease amount only in cases where the leaseholder has approached the Court. A point in case is the writ petition No.4308/2011 ***M/s Monopoly Careers and Carto Pvt. Ltd.***, wherein this Court had directed refund of the difference in the amount to the petitioner in that case. In any case, as I have said above, the petitioner instead of filing the writ petition had approached this Court by way of petition under Section 9 of the Act, wherein this Court has safeguarded the rights of the petitioner.

13. This Court can't be oblivious of the fact that the respondents being "State" within the meaning of Article 12 of the Constitution, their every action need to satisfy the test of non-arbitrariness in terms of Article 14. I find that the said test has not been fulfilled on two counts:-

(i) Despite policy dated March 20, 2006 and followed by decision dated July 13, 2010, the respondents had claimed enhanced lease amount over and above 25%.

(ii) The respondents resorted to pick and choose policy and gave relief to those leaseholders who had approached the Court.

14. I note for benefit paragraph Nos.19 & 25 of the judgment of the learned Single Judge dated June 02, 2011 in W.P.(C) 7289/2010 ***Kishan Freight Forwarders vs. Union of India & Ors.*** and connected petitions,

wherein the learned Single Judge has held as under:-

“19. Therefore, learned counsel for the Respondents is not right in his contention that on account of the change in the policy the extension clause no longer held good. The contracts with the Petitioners have to be consistent with the CPLP as clarified subsequently by Circular No. 6 of 2010 of the Railway Board. Since these are binding on the Northern Railway, the Petitioners could justifiably insist that their leases should be extended for two years with an increase in the lease rate by 25%. These contracts, referable as they are to the CPLP and policy circulars of the Railway Board, cannot be characterized as private contracts. One party to the contracts is an instrumentality of the State and as explained in Kumari Shrilaekha Vidyarthi its actions even in the contractual sphere have to satisfy the test of non-arbitrariness under Article 14 of the Constitution. In the instant cases the Northern Railway has unilaterally decided to depart from Clause (E) of the CPLP. The so called consent of the Petitioners to conditional extension was in fact given under protest as is evident from the letter dated 19th October 2010 which has been extracted hereinbefore.

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25. The Petitioners have brought on record several instances of extension of leases having been granted whether in respect of SLR spaces or in respect of Parcel Vans. Some of these extensions have been granted by the Moradabad Division of the Northern Railway itself. The explanation offered by the railways that this was a temporary measure or that the policy is different

for Parcel Vans is not convincing particularly since the Railway Board appears to have adopted one comprehensive policy to cover SLRs and Parcel Vans. There appears to be no justification for the grant of extension of leases without pre-conditions in some cases, the grant with conditions in some others and the outright refusal to extend in yet others. There is merit in the contention of the Petitioners that the Northern Railway has adopted pick and choose policy in the matter of granting extension of leases.”

15. The learned Arbitrator has not even cared to refer and consider the order of this Court dated April 25, 2011 in OMP No.164/2011 and the above Judgment. Hence, it is a case of perversity which has led to illegality in the impugned award and that the same is unsustainable and is liable to be set aside. The petitioner is entitled to the claim of Rs.22,29,557/- made before the learned Arbitrator, which it is liable to get with interest @ 9% p.a. with effect from December 2011 (a month after the lease was cancelled) till its realization in terms of this order.

16. The petition is allowed in terms of the above. No costs.

(V.KAMESWAR RAO)
JUDGE

FEBRUARY 12, 2015/km