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

Reserved on: December 15, 2016

Decision on: January 10, 2017

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O.M.P. (COMM.) 147/2016

JUGNU JAYANT

..... Petitioner

Through: Mr AshishMohan, Advocate.

versus

UNION OF INDIA THROUGH: GENERAL MANAGER
NORTHERN RAILWAYS & ORS.

..... Respondents

Through: Ms. Shipra Shukla, Advocate.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

10.01.2017

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1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to an Award dated 5th May, 2015 passed by the sole Arbitrator upholding the orders dated 4th June, 2013 and 8th August, 2013 passed by Respondent No. 1, Union of India, through the Ministry of Railways.

2. The background to the present petition is that on 28th February, 2006, the Railways framed the 'Comprehensive Parcel Leasing Policy ('CPLP'). The CPLP was amended by a Freight Marketing Circular No. 11/2007 on 12th April, 2007.

3. An Agreement was entered into between the parties on 8th February, 2011 whereby the Petitioner was allotted leasing space in FSLR Compartment in Train No. 12952 Ex. NDLS to BCT. The agreement was for a period of three years. In other words, the contract was validated up to 7th February, 2014.

4. A letter was written to the Petitioner on 30th January, 2014 by the Chief Commercial Manager, Northern Railway. The above agreement and all other running contracts of the Petitioner were cancelled. This was apart from cancelling the registration of the Petitioner along with forfeiture of registration fee and blacklisting for a period of five years. The action was taken in accordance with clauses 13.4 and 7.4 of the Agreement.

5. On 11th April, 2013 the Petitioner was issued a show cause notice ('SCN') alleging that excess weight had been found to be loaded "in the contract of 04 tonnes FSLR Compartment" of the above train on five occasions. Initially, the Respondent filed OMP NO. 470 of 2013 in which by an order dated 9th May, 2013, this Court directed the Respondent Railways to give to the Petitioner a personal hearing on 13th May, 2013.

6. In terms of the above order, a hearing was given to the Petitioner and his submissions were considered. The Petitioner indicated other instances of overloading where the Railways had granted extension to such lease holders despite being penalized. In those proceedings, a statement was made on behalf of the Railways that it would give the Petitioner an opportunity of hearing. In view of that statement, the Petitioner did not press the petition which was then dismissed as withdrawn with liberty to approach the Court if

the occasion so arose.

7. The Respondent then passed a fresh order on 4th June, 2013 reiterating the decision. The Petitioner then took it up in an appeal which was negated by the Chief Commercial Manager by the order dated 8th August, 2013.

8. Following the above order dated 8th August 2013, the Petitioner filed a claim petition before the sole Arbitrator on 27th November 2013. The learned Arbitrator by the impugned Award disagreed with the contention of the Petitioner that clause 7.4 of the Agreement would be invoked only where Clause 13.8 is invoked and not where Clause 13.4 is invoked.

9. This Court has heard the submissions of Mr. Ashish Mohan, learned counsel appearing for the Petitioner and Ms. Shipra Shukla, learned counsel appearing for the Railways.

10. Mr. Mohan submitted that para 1.3 of the CPLP could be resorted to for blacklisting a leaseholder only if there were four instances of overloading. Under clause 1.7 of the CPLP, “the penalty of blacklisting is mandatorily to be imposed in the event of the eighth instance of overloading.” Further, there was no power regarding forfeiture of security deposits amounting to Rs. 14,61,370. Reliance is placed on the decision of this Court in ***Sultan Hussain v. Union of India*** [decision dated 14th July, 2015 in W.P.(C) 2045/2014]. The Court there set aside the matter and remanded it for a fresh consideration to the Senior Divisional Commercial Manager. Reliance is also placed on the decision in ***Puneet Dawar v. Union of India*** [decision dated 18th August, 2015 in W.P.(C) 7764 of 2013] wherein under similar

circumstances the Railways was asked to refund the security deposit as there was no provision in the contract permitting the Railways to forfeit the security amount.

11. Clauses 7.4, 13.4 and 13.8 of the Agreement read as under:

“Clause 7.4

If the registration of a leaseholder is cancelled as a punitive measure, either for reasons of repeated overloading or for repeated failure to start loading after award of contract, or for attempt to deliberately defraud railways or for repeated violation of any of the existing stipulations where cancellation of registration has been legislated as the penalty, then the entire registration fee would be forfeited.

In addition to forfeiture of registration fee, all his existing leasing contracts being operated from that division would also be cancelled. However, contract can be cancelled/terminated by the Railways with the approval of tender accepting authority.

In addition to cancellation, such a leaseholder would be debarred from fresh registration for a period of 5 years.

Clause 13.4

In addition to the above penalty, Railway may terminate the contract and cancel the registration of the leaseholder in case of 4th (fourth) default.”

Clause 13.8

In case of cancellation of lease on account of overloading for 2 separate contracts (minimum of 8 violations in all), registration of the leaseholder would also be cancelled as mentioned under para 7.4.”

12. It is plain from Clause 13.8 that cancellation of registration can happen only where there are eight instances of overloading. It is further submitted

that the Railways has permitted the operation in contracts when there is overloading in one contract. However, in the present case, the Railways cancelled all the contracts of the Petitioner. When the Petitioner filed a petition under Section 9 of the Act being OMP No. 941 of 2013, this Court by an order dated 25th October, 2013 stayed the order passed by the Railways on 8th August, 2013 pending completion of pleadings of the said petition. While Clause 1.3 of the CPLP confers a discretionary power to cancel the registration in the case of fourth default, Clause 1.7 of the CPLP makes it mandatory for such cancellation only on the occurrence of eight violations. If without resorting to Clause 1.7, the Railways invokes Clause 1.3, then again reasons would have to be given.

13. There is clearly a distinction in the circumstances where resort can be had to Clause 13.4 or Clause 13.8. In the present case, except stating that there was overweight as far as one case is concerned, there appears to be no justification given for cancellation of all the contracts of the Petitioner. The following observations of the Court in para Nos. 6, 8, 9 and 11 in *Sultan Hussain (supra)* would be relevant in this context:

“6. Mr. Mohan lastly submits that if there is any irreconcilability and ambiguity in terms of the contract, the same has to be resolved in favour of the Petitioner based on the principle of *contra preferentem*.

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8. In the opinion of this Court, Clauses 1.3 and 1.7 are neither contradictory nor irreconcilable. Clause 1.3 confers discretionary powers on the authority to cancel the registration in a case of fourth default.

9. Clause 1.7 casts a mandatory duty on the Railway Authority to cancel the registration on account of eight violations. Respondent-Railways has no discretion after the eighth violation.

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11. Though Mr. Ashish Mohan, learned counsel for Petitioner has sought to urge that as Clauses 1.3 and 1.7 operate in the same field of overweight it would amount to giving untrammelled discretion to the officers, yet this Court is of the view that the Authority would have to give cogent and special reasons for exercise of power under Clause 1.3 and for not waiting for eighth default under Clause 1.7.”

14. In as much as there is no reason given for resorting to Clause 1.3 or Clause 1.7 of the CPLP, the Award suffers from a serious infirmity as it is based on a wrong interpretation of the clauses of the contract and is, in fact, contrary to the contract.

15. As regards the forfeiture of the security deposit, the Court again finds that there is no warrant at all for the said action. There is no provision that permits the forfeiture of security deposit. The relevant paragraph from the decision in ***Puneet Dawar v. Union of India*** (*supra*) reads as under:

“Challenge to the legality and validity of Comprehensive Leasing Policy framed by the Railway Board has been rejected by this Court vide judgment and order dated 14th July, 2015 passed in WP(C) 2045/2014. Accordingly, the said challenge in the present matter also fails.”

16. For the aforementioned reasons, the Court sets aside the impugned Award dated 5th May, 2015. Consequently the order dated 4th June, 2013

passed by the Senior Divisional Commercial Manager and the appellate order dated 8th August, 2013 passed by the Chief Commercial Manager, Northern Railway are also set aside.

17. The petition is allowed in the above terms but in the circumstances with no order as to costs.

JANUARY 10, 2017
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S. MURALIDHAR, J.

