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

+ **CS(OS) 1540/2015 & I.A.No.7547/2017**

**GATEWAY RAIL FREIGHT LTD ..... Plaintiff**

Through **Mr.Nalin Tripathi with  
Mr.Sanjeev Singh and  
Mr.Sampa Sengupta Ray,  
Advocates.**

versus

**THE NORTHERN RAILWAY,  
NEW DELHI & OTHERS ..... Defendants**

Through **Mr.R.V.Sinha with  
Mr.R.N.Singh and  
Mr.A.S.Singh, Advocates.**

Reserved on : 26<sup>th</sup> July, 2017

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Date of Decision : 18<sup>th</sup> August, 2017

**CORAM:**

**HON'BLE MR. JUSTICE MANMOHAN**

### **J U D G M E N T**

**MANMOHAN, J:**

**I.A. 24269/2015 in CS(OS) 1540/2015**

1. Present application has been filed by the defendants No.1 to 5 under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "said Act") for referring the disputes raised in the present plaint to arbitration. However, in the prayer clause in the application, it has been prayed that the plaintiff's present

suit be dismissed and the plaintiff be asked to request GM Northern Railway for appointment of an arbitrator.

2. It is pertinent to mention that the present suit has been filed by the plaintiff for recovery of Rs.2,00,32,356 along with interest.

3. In the application, it is averred that Clause 37(v) of the Agreement dated 09<sup>th</sup> September, 2010 provides that in the event of any question, dispute or difference arising under the said Agreement, the dispute shall be referred to Arbitration. According to learned counsel for the applicant-Railways, as there is a dispute between the parties, the matter needs to be referred to arbitration. The arbitration clause contained in the Agreement dated 09<sup>th</sup> September, 2010 is reproduced hereinbelow:-

*"37. Miscellaneous*

xxxx                  xxxx                  xxxx                  xxxx

*(v) In the event of any question, dispute or difference arising under this agreement or in connection with this contract except as to any matters the decision of which is specially provided for by the terms and conditions for this agreement), the same shall be referred to the sole arbitration of the Gazetted Railway officer appointed to be the Arbitrator by the General Manager, Northern Railways. The Gazetted Railway officer to be appointed as Arbitrator however, will not be one of those who had an opportunity to deal with the matters to which the contract relates or who in the course of his duties as Railway servant has expressed views on all or any of the matters under dispute or difference subject to the provision of the Arbitration and Conciliation Act, 1996. The award of the Arbitration shall be final and binding on the parties to this contract."*

4. Per contra, learned counsel for plaintiff stated that plaintiff had not raised any dispute which can be considered within the scope of Section 8 of the said Act. He stated that the sole purpose and scope of agreement dated 09<sup>th</sup> September, 2010 was payment of freight to defendants No.1 to 5 by electronic mode so that immediate payment could be received by them. He contended that Clause 37(v) of the Agreement dated 9<sup>th</sup> September, 2010 was applicable to any question, dispute or difference arising under or in connection with the said Agreement and in the present case there is no such question, dispute or difference between the parties as the parties are in fact *ad idem* on the illegal deduction and appropriation of Rs.1,48,93,945/- by the defendants No.1 to 5. According to learned counsel for the plaintiff, this was a fit case for decree on admission under Order 12 Rule 6 CPC. Learned counsel for the plaintiff placed reliance on order dated 10<sup>th</sup> April, 2013 passed by the Northern Railway itself wherein it held that the deduction of Rs. 1,48,93,945 made by it on 30<sup>th</sup> March, 2012 from the plaintiff's e-payment account for payment of only rail haulage charges/freight was unauthorised and without any basis. He stated that the Northern Railway had specifically constituted a committee to examine the legality of this deduction which gave a report dated 19<sup>th</sup> February, 2013 stating that since the said siding is notified for charging of freight on through distance basis, the shunting charges raised against the plaintiff had been incorrectly levied. The order also recorded the findings that the commercial department of the railways had maintained all along that the said charges were

inadmissible and that the said deduction was unauthorised and without any basis and was thus illegal. He stated that the illegal deduction was made in the Freight Operation Information System (FOIS) by making a handwritten addition by someone who remained unidentified and the same was clearly a case of serious fraud and malpractice which should have been investigated by Northern Railways and guilty person punished. In support of his contentions, he relied upon the judgment of the Supreme Court in the case of ***Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and Others: (2011) 5 SCC 532.***

5. Learned counsel for plaintiff further stated that the plea of arbitration clause taken by defendants No.1 to 5 was an afterthought and since the same had never been raised before the Chief Commercial Manager (FM) of the defendant No.1-Northern Railways, they were now estopped from claiming otherwise at this stage and such a plea was designed for the sole purpose of delaying the refund of the wrongly deducted amount. He emphasised that the present application was a gross abuse of process of law and filed with the sole purpose of delaying the proceedings in the present suit and to delay the refund of an admitted wrong deduction and appropriation of amount of Rs.1,48,93,945/-. He reiterated that when the dispute was initially raised by the plaintiff with the Chief Commercial Manager (FM) of defendant No.1-Northern Railways with respect to wrongful deduction of the said amount, the defendant No.1 neither raised any issue of any arbitration clause being applicable to dispute nor acted upon Clause 37(v) of the Agreement dated 09<sup>th</sup> September, 2010 which is now alleged to be applicable.

6. Learned counsel for the plaintiff lastly stated that the matter could be referred to the Arbitration only if all the parties to the suit were parties to the Arbitration Agreement. He contended that since defendant No. 6-State Bank of India is not a party to the Agreement dated 09<sup>th</sup> September, 2010, the present dispute could not be referred to Arbitration. In support of his contention, he relied upon a judgment of the Supreme Court in ***Sukanya Holdings (P) Ltd. Vs. Jayesh H. Pandya & Anr., (2003) 5 SCC 531*** and also a judgment of this Court in ***Alankar Global Pvt. Ltd & Others v. Dinesh Kumar Mathur & Others: 137 (2007) DLT 164.***

7. In rejoinder, the learned counsel for the applicant-Railways contended that the senior management did not accept the order dated 10<sup>th</sup> April, 2013 passed by the Chief Commercial Manager (FM) - Northern Railways directing refund of an amount of Rs.1,48,93,945 to the plaintiff. He specifically denied that any amount was due and payable to the plaintiff and/or that any illegal deductions and appropriation had been made from plaintiff's bill.

8. Having heard learned counsel for the parties, this Court is of the opinion that plaintiff's argument that defendant no. 6-State Bank of India is not a party to the Agreement dated 09<sup>th</sup> September, 2010 is incorrect inasmuch as a bare reading of the said Agreement shows that defendant no. 6-State Bank of India is a party to the agreement dated 09<sup>th</sup> September, 2010. Consequently, the judgment of the Supreme Court in ***Sukanya Holdings (P) Ltd.*** (supra) and of this court in ***Alankar Global (supra)*** have no application to the present case.

9. This Court is further of the view that there is no delay on the part of the defendants in invoking the arbitration clause inasmuch as Section 8 of the said Act, stipulates that the plea of existence of an arbitration clause in an Agreement can only be raised before a judicial authority. Since the Chief Commercial Manager (FM) is not a judicial authority, no delay can be attributed to the defendant nos. 1 to 6 in filing the present application. Accordingly, even the plea of estoppel is inapplicable to the present case.

10. This Court is also of the opinion that just because there is a report in the file of the Railways in favour of the plaintiff does not mean that there is no dispute and/or the plaintiff's claim has been admitted by the defendants. In the opinion of this Court a noting / report in the file of the defendant-Railways (even if communicated to the plaintiff) without a formal order being passed, cannot be made the basis for recording a finding that there is a decision in favour of the plaintiff or that there is no dispute between the parties. The Supreme Court in ***Union of India and Another Vs. Ashok Kumar Aggarwal, (2013) 16 SCC 147*** has held as under:-

*"33. The instant case is required to be considered in light of the aforesaid settled legal propositions, statutory provisions, circulars, etc. The Tribunal inter alia had placed reliance on notings of the file. The issue as to whether the notings on the file can be relied upon is no more res integra.*

*34. In Shanti Sports Club v. Union of India [(2009) 15 SCC 705 : (2009) 5 SCC (Civ) 707] , this Court considered the provisions of Articles 77(2), 77(3) and*

166(2) of the Constitution and held that: (SCC p. 726, para 42)

“42. ... unless an order is expressed in the name of the President or the Governor and is authenticated in the manner prescribed by the Rules, the same cannot be treated as an order on behalf of the Government.”

35. The Court further held: (Shanti Sports Club case [(2009) 15 SCC 705 : (2009) 5 SCC (Civ) 707] , SCC pp. 726-27, para 43)

“43. A noting recorded in the file is merely a noting simpliciter and nothing more. It merely represents expression of opinion by the particular individual. By no stretch of imagination, such noting can be treated as a decision of the Government. Even if the competent authority records its opinion in the file on the merits of the matter under consideration, the same cannot be termed as a decision of the Government unless it is sanctified and acted upon by issuing an order in accordance with Articles 77(1) and (2) or Articles 166(1) and (2). The noting in the file or even a decision gets culminated into an order affecting right of the parties only when it is expressed in the name of the President or the Governor, as the case may be, and authenticated in the manner provided in Article 77(2) or Article 166(2). A noting or even a decision recorded in the file can always be reviewed/reversed/overruled or overturned and the court cannot take cognizance of the earlier noting or decision for exercise of the power of judicial review.”

36. Similarly, while dealing with the issue, this Court in Sethi Auto Service Station v. DDA [(2009) 1 SCC 180] held: (SCC pp. 185-86, para 14)

“14. It is trite to state that notings in a departmental file do not have the sanction of law to be an effective

order. A noting by an officer is an expression of his viewpoint on the subject. It is no more than an opinion by an officer for internal use and consideration of the other officials of the department and for the benefit of the final decision-making authority. Needless to add that internal notings are not meant for outside exposure. Notings in the file culminate into an executable order, affecting the rights of the parties, only when it reaches the final decision-making authority in the department, gets his approval and the final order is communicated to the person concerned." (emphasis in original)

37. In *Jasbir Singh Chhabra v. State of Punjab* [(2010) 4 SCC 192] , this Court held: (SCC p. 209, para 35)

"35. ... However, the final decision is required to be taken by the designated authority keeping in view the larger public interest. The notings recorded in the files cannot be made basis for recording a finding that the ultimate decision taken by the Government is tainted by mala fides or is influenced by extraneous considerations."

38. Thus, in view of the above, it is evident that the notings in the files could not be relied upon by the Tribunal and Court....."

(emphasis supplied)

11. A dispute entails an element and assertion of denying. Since in the present case in the rejoinder learned counsel for Railways has specifically denied that any amount is due and payable to the plaintiff, this Court is of the view that there is a dispute that arises between the parties. Consequently, the judgment of the Supreme Court in **Booz**

*Allen and Hamilton Inc.* (supra) is inapplicable to the facts of the present case.

12. As far as the plaintiff's argument that the plaintiff has not raised any dispute which can be considered within the scope of Section 8 of the said Act, this Court is of the view that the undisputed arbitration clause incorporated in the present agreement is of the widest amplitude as it uses the expressions *"In the event of any question, dispute or difference arising under this agreement or in connection with this contract....."*.

13. Consequently, in such cases even the existence, validity, scope and applicability of the arbitration clause has to be examined by the Arbitrators and not by the Courts. The Supreme Court in *Renusagar Power Co. Ltd. vs. General Electric Company & Anr., (1984) 4 SCC 679* has held as under:-

*"25. Four propositions emerge very clearly from the authorities discussed above:*

*(1) Whether a given dispute inclusive of the arbitrator's jurisdiction comes within the scope or purview of an arbitration clause or not primarily depends upon the terms of the clause itself; it is a question of what the parties intend to provide and what language they employ.*

*(2) Expressions such as "arising out of" or "in respect of" or "in connection with" or "in relation to" or "in consequence of" or "concerning" or "relating to" the contract are of the widest amplitude and content and include even questions as to the existence, validity and effect (scope) of the arbitration agreement.*

*(3) Ordinarily as a rule an arbitrator cannot clothe himself with power to decide the questions of his own jurisdiction (and it will be for the court to decide those questions) but there is nothing to prevent the parties from investing him with power to decide those questions, as for instance, by a collateral or separate agreement which will be effective and operative.*

*(4) If, however, the arbitration clause, so widely worded as to include within its scope questions of its existence, validity and effect (scope), is contained in the underlying commercial contract then decided cases have made a distinction between questions as to the existence and or validity of the agreement on the one hand and its effect (scope) on the other and have held that in the case of former those questions cannot be decided by the arbitrator, as by sheer logic the arbitration clause must fall along with underlying commercial contract which is either non-existent or illegal while in the case of the latter it will ordinarily be for the arbitrator to decide the effect or scope of the arbitration agreement i.e. to decide the issue of arbitrability of the claims preferred before him.*

(emphasis supplied)

14. Resultantly, for the reasons stated above, the present application is allowed and the parties are referred to arbitration. The General Manager, Northern Railways is directed to appoint an arbitrator within four weeks of receipt of this order.

15. With the aforesaid direction, present suit and pending applications stand disposed of.

**MANMOHAN, J**

**AUGUST 18, 2017**

js/rn