

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 25.04.2017

+ **O.M.P. (COMM) 505/2016**

UNION OF INDIA & ORS.

..... Petitioners

versus

**HARYANA POWER GENERATION
CORPORATION LIMITED**

..... Respondent

Advocates who appeared in this case:

For the Petitioners : Mr Jagjit Singh and Mr Ashok Singh, Advocates
with Mr Anil Gill and Mr Kunal Hardawan Lal,
from the Railways.
For the Respondent : Mr R. P. Bhatt, Senior Advocate with Mr R. C.
Chugh.

CORAM:

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioners (hereafter referred to as 'the Railways') have filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an arbitral award dated 27.07.2016 (hereafter 'the impugned award') made and published by the sole arbitrator, Sh. M.C. Srivastava, Member Traffic (Retired), Railway Board.

2. The respondent (hereafter 'HPGCL') is a Government Company engaged in the generation of electricity. HPGCL owns a coal based Thermal Power Station (Panipat Thermal Power Station) at Panipat, Haryana. The coal, used as raw material, is procured from subsidiaries of Coal India Limited, namely, Central Coalfields Limited, Bharat Coking Coalfield

Limited, Northern Coalfields Limited and Western Coalfields Limited and is transported by the Railways (East Central Railway, South Eastern Railway and Central Railway). HPGCL had entered into the “Assisted Siding Agreement” dated 21.03.1996 for linkage to the railway siding at its thermal power plant.

3. HPGCL is required to unload the coal and release the rake within a period of seven hours. In the event there is any delay in release of the rakes beyond the period of seven hours, the Railways is entitled to recover demurrage charges at the rate of ₹100 per wagon per hour. The Railways may in certain circumstances also levy penal demurrage charges upto six times the normal demurrage charges.

4. The disputes between the parties relate to levy of demurrage charges amounting to ₹64,63,49,600/- which included penal demurrages charges of ₹32,57,15,690/- for the period of June,2008 to March,2012. The demurrage charges were partially waived by the Railways and were reduced to ₹49,04,28,660/- (including ₹32,57,15,690/- as penal demurrage charges). The Railways demanded that the same be paid along with interest at the rate of 18% per annum. Initially HPGCL had filed a writ petition under Article 226 of the Constitution of India challenging the imposition of demurrage charges (*W.P.(C) 3661/2015 titled "Haryana Power Generation Corporation Ltd. v. Government of India and Others"*), which was disposed of by an order dated 05.10.2015, referring the parties to arbitration.

5. The arbitral tribunal after considering the disputes has not interfered with the demand of normal demurrage charges but has directed the refund of penal demurrage charges amounting to ₹34,27,95,600/- recovered by the

Railways from HPGCL, along with past and *pendente lite* interest at the rate of 7.5% per annum. In addition, the arbitral tribunal has also awarded future interest at the rate of 12% per annum, in the event the amounts awarded are not paid by the Railways within a period of three months from the date of the award.

6. It is the Railways' case that the impugned award is without jurisdiction and is based on reasoning beyond the pleadings of the parties. In particular, it is submitted that there was no dispute regarding receipt of messages imposing penal demurrage charges; yet, the arbitral tribunal has proceeded on the basis that such messages were not received by HPGCL. The Railways further contend that the impugned award is passed in violation of the principles of natural justice inasmuch as after the arguments had been heard and the decision was reserved, the arbitral tribunal had called upon the Railways to furnish various documents and has made the impugned award without affording any further hearing to the Railways.

7. The arbitral tribunal found that HPGCL was primarily responsible for detention of wagons inside its power house. Thus, there was no denying the fact that demurrages were payable. HPGCL had sought waiver of demurrages from the Railways, which was partially allowed. The arbitral tribunal held that the question of waiver of demurrages was discretionary and no interference with the exercise of discretion was warranted at this stage.

8. Insofar as the levy of penal demurrage charges are concerned, the arbitral tribunal held that in terms of the Rates Master Circular Demurrage - Wharfage - Waiver 2016 dated 19.05.2016 issued by the Railway Board,

certain officers (CCM/COM/DRM) were empowered to increase the demurrage rate subject to the maximum of six times the prevalent rate. The said rates could also be increased progressively.

9. Mr Jagjit Singh, learned counsel appearing for the Railways advanced contentions on two fronts to assail the impugned award.

9.1 First, he contended that although the arbitral tribunal had held that HPGCL was primarily responsible for the delay in release of wagons and was liable to pay demurrage charges, the arbitral tribunal had set aside the levy of penal demurrages on the ground that the messages for such levy were not delivered to HPGCL. He submitted that a register maintained at site was produced before the arbitral tribunal, which contained the recording of all messages regarding imposition of demurrages/penal demurrages and the said register was initialled by one of the employees of HPGCL. However, the arbitral tribunal has disbelieved that such messages were delivered to HPGCL as there was no *“evidence to prove that the initials on the register were of power house staff”*. He submitted that there was no dispute as to the receipt of such messages. HPGCL had not denied that the initials in the register were not that of its staff. Mr Singh submitted that since this was not an issue before the arbitral tribunal, the Railways were not required to lead any evidence to establish that the initials on the register maintained at site were that of the employees of HPGCL. He further submitted that this issue was also not put to the Railways and as such, they had no occasion to respond to the same.

9.2 Second, Mr Singh contended that the last hearing before the arbitral tribunal was held on 24.04.2016 and the matter was reserved for making the

award. However the arbitral tribunal issued a letter dated 21.06.2016 thereafter, calling upon the parties to submit a list of documents within a period of 15 days thereof. In compliance of the said directions, the Railways provided certain documents, which were considered by the arbitral tribunal. But, the Railways were given no opportunity to make any submission or advance any contentions with regard to those documents. He submitted that the procedure adopted by the arbitral tribunal violated the principles of natural justice.

10. Mr Bhatt, learned Senior Advocate appearing for HPGCL contended that finding of the arbitral tribunal with regard to message register was just one of the findings and was not material to the outcome of the decision. He submitted that even if it is assumed that the message register had been initialled by one of the HPGCL's staff, nonetheless the penal charges levied by the Railways were liable to be refunded as the arbitral tribunal had found that there was no judicious determination by competent officers as to whether such penalty ought to be levied in the first place. He further contended that the arbitral tribunal had also held that there was no notice for levy of penal demurrage charges as required under the circulars issued by the Railway Board. He contended that the arbitral tribunal had considered the same and accordingly, directed refund of penal demurrage charges.

Reasons and conclusion

11. At the outset, it is necessary to observe that before the arbitral tribunal, HPGCL had challenged the levy of demurrage on various grounds including: (i) that the penal demurrage charges could not be levied without giving wide publicity and due notice of 48 hours, which had not been given

by the Railways (See Ground ‘M’); (ii) that penal demurrage charges were levied without passing speaking orders, which required consideration of all pleas of HPGCL and justification for rejection of the same (See Ground ‘M’); (iii) that the representation made by HPGCL had not been considered (Ground ‘N’); and (iv) that normal demurrage charges and penal demurrage charges were determined by Chief Goods Supervisor by non-speaking orders and the validity of such orders was not examined by the appellate authority (Ground ‘S’).

12. As noticed earlier, the arbitral tribunal found that there were delays in release of wagons for which the primary responsibility rested with HPGCL. Accordingly, the demurrage charges were payable by HPGCL. The arbitral tribunal further held that the question whether such demurrages were to be waived was at the discretion of the Railways and at that stage, no interference with exercise of such discretion was warranted. Insofar as the levy of penal demurrages is concerned, the arbitral tribunal referred to paragraph 3.4.1 and 3.4.2 of the Rates Master Circular Demurrage - Wharfage - Waiver 2016, dated 19.05.2016 and held as under:

“46 Imposition of penal demurrage requires fulfilment of following conditions:

- (a) It can be imposed by CCM/COM/DRM only.
- (b) The situation should be judiciously evaluated to come to the conclusion that the situation is so bad that it warrants imposition of penal charges.
- (c) It should be implemented only after giving wide publicity and notice of 48 hours.

(d) The rates can be increased by say, 2 times or 3 times or so on, and not necessarily six times (which is maximum) at one go in all cases. Railway may decide to levy variable rates like 2 times for first three hours detention, 3 time for next 12 hours detention and so on and so forth.”

13. The arbitral tribunal thereafter proceeded to examine whether the aforesaid conditions were fulfilled. The arbitral tribunal did not believe that the initials on the message register (which was relied upon to indicate that the notice of levy of demurrages was served on HPGCL) were that of HPGCL’s staff; however, the said finding is not determinative of the arbitral tribunal’s conclusion and is not the only basis on which the impugned award has been made. Concededly, the message register did not indicate that a 48 hour notice was provided to HPGCL before the levy of penal charges. The message register plainly indicated that damages were imposed on HPGCL and such messages are not in the nature of a 48 hour prior notice. The arbitral tribunal thus concluded that there was no evidence to show that 48 hour notice for imposition of penal demurrage charges was served on HPGCL.

14. Mr Singh, could not refer to any evidence on record which would indicate that 48 hour notice was served on HPGCL for imposition of penal demurrage charges. He rested his case by contending that no such evidence was required as there was no issue regarding the same. In this court's view, the contention that no such evidence was required to be lead as the same was not an issue before the arbitral tribunal, is not merited. HPGCL had specifically pleaded that prior 48 hour notice had not been served and it was incumbent upon the Railways to produce all relevant materials in their possession to contest the same. Thus, even if it is assumed that the messages

as recorded in the message register were initialled by the staff of HPGCL, the same does not in any manner dilute the finding that the requirement of 48 hour prior notice for levy of penal demurrages, was not complied with.

15. The other ground that has weighed with the arbitral tribunal for directing refund of penal demurrages is that there was no judicious determination as to whether such penal charges should be imposed. It is also found that in certain cases the demurrages were imposed by officers other than those authorised under circulars issued by Railway Board. The arbitral tribunal returned an unambiguous finding that: "*there appears to be no judicious evaluation of the situation*". Considering that the penal demurrages could be levied up to six times the normal demurrages but it was not necessary to do so to the maximum extent; it is indisputable that the authority imposing such charges was required to examine the attendant circumstances for detention of wagons before imposing such penal charges. Whilst the period of detention is relevant, it is not the only consideration that was required to be taken into account.

16. In view of the aforesaid finding, the question of sustaining levy of penal demurrages, obviously, does not arise.

17. The arbitral tribunal had also considered the order passed by the General Manager in respect of the representation made by HPGCL and had found flaws with the same.

18. This Court does not sit as a court of first appeal while examining a petition under Section 34 of the Act and, therefore, it is not permissible to re-appreciate all contentions and re-evaluate the findings of the arbitral

tribunal. This court can interfere with the impugned award only if any of the grounds as listed in Section 34 of the Act are established.

19. It is abundantly clear from the impugned award that the arbitral tribunal had found that there was no judicious evaluation as to whether penal demurrage charges should be levied and if so, to what amount. Further, the necessary 48 hour notice had also not been issued. Both the aforesaid findings formed the material basis for directing refund of the penal demurrage charges. This Court finds no fundamental flaw with the aforesaid reasoning which would warrant any interference in these proceedings.

20. The contention that the principles of natural justice have been violated by the arbitral tribunal by calling further information after the matter had been heard and the award was reserved, is also unpersuasive.

21. A perusal of the list of documents directed to be furnished by the arbitral tribunal indicates that the arbitral tribunal had sought original records available with the parties in regard to the principal issues agitated before it. Such documents ought to have been produced before it and were relevant to the controversy raised. To illustrate this, one may consider the first six entries in the list of documents directed to be produced by the arbitral tribunal, which read as under:

- “1. Railways should produce original records to show that excessive congestion was taking place in the Power House siding at Panipat.
2. Railways should produce records in original to show that the situation had become so alarming so as to warrant imposition of penal demurrage to the tune of four times for seven days in one go.

3. Evidence to indicate as to whether wide publicity was given by Railways before levy of penal demurrage charges.
4. Railways original records be produced to show that the judicious evaluation of the situation ensuring that the demurrage rates are increased on merit to the extent considered justified was done by the Railway Administration (Sr. DCM) before putting up the case to the competent authority (DRM).
5. Railways should produce original record to prove that before sending any kind of message about imposition of penal demurrage to any authority or representative of power house written approval of DRM was taken.
6. According to Railways Board's Circular No.TC-1/2005/201/2 dated 22/23.10.2008 the rates of penal demurrage can be increased on merits to the extent justified and not necessarily for four or six times in <illegible> Railways to produce evidence that this has been done."

22. It is at once apparent from the nature of documents sought that the same ought to have been produced by the Railways in the first instance to oppose the claims made by HPGCL. As noted above, HPGCL had challenged the levy of penal demurrages on various grounds including that 48 hour prior notice had not been issued and further that there was no judicious evaluation of whether penal demurrages ought to have been levied and if so, to what extent. In absence of the relevant documents, the arbitral tribunal could have simply taken an adverse view and proceeded on the basis that no such documents existed. However, the arbitral tribunal in its wisdom granted one more opportunity to the Railways to produce documents, which indicate that prior notice of penal demurrages was served

and the penal demurrages were levied after evaluating relevant factors.

23. Surely, the Railways cannot be heard to make a grievance of the arbitral tribunal giving the railways an additional opportunity to substantiate its case, which was already argued. The arbitral tribunal's order directing production of documents does not offend the principles of natural justice as it is in the nature of a further opportunity to produce documents that ought to have been produced in the first place. Thus, the contention that principles of natural justice had been violated is wholly unsustainable.

24. The petition and the pending application are, accordingly, dismissed. The parties are left to bear their own costs.

APRIL 25, 2017
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VIBHU BAKHRU, J

