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

+ **FAO(OS) (COMM) No. 160/2017**

Date of decision: 29th August, 2017.

UNION OF INDIA & ORS.

..... Appellants

Through Mr. Jagjit Singh, Standing Counsel.

versus

HARYANA POWER GENERATION CORPORATION LTD

..... Respondent

Through

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE NAVIN CHAWLA

SANJIV KHANNA, J.(ORAL):

This intra court appeal under Section 13 of the Commercial Court, Commercial Division and Commercial Appellate Division of the High Court Act, 2015 read with Section 37 of the Arbitration and Conciliation Act, 1996 impugns the judgment dated 25th April, 2017 passed by the Commercial Bench of the High Court.

2. The appellant had filed objections under Section 34 of the Arbitration and Conciliation Act, 1996 (Act, for short) impugning the

arbitral award dated 27th July, 2016 passed by Mr. M.C. Srivastava, Member Traffic (Retired), Railway Board.

3. Haryana Power Generation Corporation Ltd, a State Government Undertaking engaged in the generation of electricity and having coal based Thermal Power Station (Panipat Thermal Power Station) had invoked the arbitration clause for refund of Rs. 32,57,15,690/- recovered from them by Northern Railway as penal demurrage charges.

4. There was a contract called “Assisted Siding Agreement” dated 21st March, 1996 between the respondent and Northern Railway for transportation of coal from subsidiaries of Coal India Limited to the Railways siding at the Thermal Power Station at Panipat, Haryana.

5. As per the agreement, the respondent was required to unload the coal and release the rake within a period of seven hours. In case of delay beyond seven hours, the appellant was entitled to recover demurrage charges @ Rs. 100/- per wagon per hour.

6. The appellants had levied demurrage charges of Rs. 25,92,89,500/-. However, on appeal filed by the respondent for waiver, the respondent was granted waiver of Rs. 14,05,19,320/-. They had accordingly paid demurrage charges of Rs. 11,87,70,180/-.

7. The appellants had also levied penal demurrages charges of Rs. 32,57,15,690/- for the period June, 2008 to March, 2012. These charges were recovered. The respondent had initiated arbitration

proceedings for the refund of the penal demurrage charges alongwith interest @ 18 % per annum.

8. The learned Arbitrator in award dated 27th July, 2016 on the question of penal demurrage charges, has referred to paragraphs 3.4.1 and 3.4.2 of the Rates Master Circular Demurrage, Waiver 2016 issued vide Railway Board's Letter No. TC-1/2016/201/1 dated 19th May, 2016. The two paragraphs read as under:-

“Para 3.4.1

In case excessive congestion takes place at any terminal/steel plant, CCM/COM/DRM can increase the demurrage rates, even at progressively increasing rate subject to a maximum of six times of the prevalent rate. This penal rate should be implemented only after giving due publicity and notice of 48 hours and should be applicable for the notified period.

Para 3.4.2

The rates can be increased by say 2 times or 3 times or so on and not necessarily six times at one go in all cases. In fact, Railway may decide to levy variable rates like 2 times for first three times detention, 3 times for next twelve hours detentions and so on and so forth. Railway must judiciously evaluate the situation and the rates should be increased on merit to the extent considered justified. Levy of six times rate should be resorted only when the situation becomes very alarming.”

Examining the aforesaid clauses, the learned Arbitrator has observed that for imposition of penal demurrage, the following conditions were required to be fulfilled:-

“It can be imposed by CCM/COM/DRM only.

- (a) The situation should be judiciously evaluated to come to the conclusion that the situation is so bad that it warrants imposition of penal charges.
- (b) It should be implemented only after giving wide publicity and notice of 48 hours.
- (c) 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 times for next 12 hours detention and so on and so forth.”

On each of the aforesaid aspects, learned Arbitrator has given specific findings, which are as under:-

“47(a) Let us see if these instructions were followed. Message No. 114/CC/10, dated 12/1/10 imposing penal charges at PTPS was issued by the control office in DRMs office at 2 times of the normal rates for 3 days after giving due notice. The message was issued on behalf of Sr. DCM. This message was approved on 13/1/10 by CTM and not by DRM. The penal demurrage charge was thus imposed without proper authority.

47(b) In another case extension of penal demurrage charges at PTPS was extended on

same conditions upto 30/11/2009. The message dated 26/11/2009 bore the number CI/D/1/DC/Penal 2005-2006. Here the approval of DRM was taken on 30.11.2009 whereas the penal demurrage charge imposition orders were issued on 26/11/2009.

Another message number 885-CC-/10 dated 21/8/2010 was issued imposing penal demurrage at PTPS without obtaining the prior approval of DRM. His approval was taken on 26/8/2010.

These Messages were issued without any authority.

48. Para 46(b) calls for judicious evaluation of the situation so as to come to the conclusion that the situation is so bad as to warrant imposition of penal charge. This evaluation has to be done before imposition of penal charge. There is no evidence on record to show that such an evaluation was made. DRM office File No. CCIID/1/DC/Penal/2007-8 and CIID/1/DC/Penal/2005-2006 from which approval of DRM was obtained do not contain any such evaluation.

49. Para 46 (c) says that before imposition of penal charge wide publicity is given besides giving a notice of 48 hours. Respondents produced a register maintained by the Goods Clerk in the HPGCL Siding in which all control messages given to Goods Clerk PTPS about imposition of penal charges were recorded. I do not find the name and designation of staff of

HPGCL to whom this message was given to apprise them the intent of the Railway to levy penal demurrage charge. At some pages someone has put initials. Respondents say that these initials were of Power House Staff in token of having received the message.

In the siding agreement the power house authorities are required to set up an office to receive all communications, notices etc. from parties including Railways. Any communication handed over there is deemed to have been received. I do not know why this procedure was not followed. In the absence of any evidence to prove that the initials on the register were of power house staff I am not inclined to believe that these messages were delivered to them. The respondents have failed to prove the name and designation of the employee to whom the message giving information about their intent of railways to levy demurrage charges was given. It has thus been proved that wide publicity was not given.

50. Para 46(d) requires levy of penal demurrage charges at variable rates such as 2 times for first 3 hours detention, 3 times for next 12 hours detention and so on so forth. The purpose behind levy of demurrage charges whether normal or penal, is to encourage the party to release the wagons. That is why the provision of 2 times for first 3 hours detention and 3 times for next 12 hours detention and so on so forth has been made. With this flexibility you

can increase or decrease on the performance. If it is imposed at a pre-determined rate for days together there is no incentive to the party to ensure quick release of wagons. As an officer, one tends to overlook cases where penal demurrage charges have been in existence for days together. The intention of Railway Board was not to levy penal demurrage charges for days together. The intention of Railway Board was not to levy penal demurrage charges for days together. That is why this provision was not made in the rules.

For example, vide message No. 72/CC/096 dated 4/5/09 referring to a message No.23/CC/09, dated 4.5.09, referring to a message No. 23/CC/09 dated 30.4.09, the validity of penal charges was extended for three days at double the normal rate. Again vide message no. 103/CC/09, dated 7.5.2009 in reference to earlier message of 4.5.2009, the penal demurrage charges were extended for another 3 days. On 11.5.2009, the penal charges were extended for 3 days at double the rates refereeing to earlier message dated 7.5.2009. On 13/5/2009 vide message No. 198/CC/09 the duration of validity of penal demurrage charges at the same rates were extended upto 18.5.2009.

Continuation of penal demurrage charges for eleven days as mentioned above appears to me stereotyped. This did not serve any purpose except inflating demurrage charges. There

appears to be no judicious evaluation of situation.”

9. Thereafter, the learned Arbitrator concluded that there was violation of the aforesaid circular.

10. Contesting the aforesaid findings, it is submitted by the counsel for the appellants that the waiver circular relied upon by the Arbitrator is dated 19th May, 2016, whereas penal demurrage were imposed for the period June, 2008 to March, 2012. Our attention was specifically to the date of the circular i.e. 19th May, 2016.

11. The contention, in our opinion, is mis-conceived. Paragraph 3.4 of the circular dated 19th May, 2016 deals with penal demurrage charges. Paragraphs 3.4.1 and 3.4.2 are not new clauses, but were the clauses introduced and made applicable by the Board’s letter No. TC-1/2005/201/2 dated 22/23.10.2008. This fact is specifically noticed in paragraph 51 of the award dated 27th July, 2016, which reads as under:-

“51. From above discussions, it will be seen the provisions made in Railway Boards’ Letter No. TC-1/2005/2012, dated 22/23/10/2008 about levy of penal demurrage charges were not followed. Without adherence to railway rules such an imposition was not correct.”

12. Thus, the circular dated 19th May, 2016 in paragraphs 3.4.1 and 3.4.2 had not introduced a new clause, but was only affirming the position and the Board’s circular dated 22/23.10.2008.

13. The appellants have submitted that in the present case, there were long delays in release of rakes and this was duly intimated and recorded in the register maintained by the respondent at the Railway siding. This aspect has been dealt with in the Award and the contention was rejected. The requirement as per Circular dated 22/23.10.2008 was issue of 48 hours notice. There is no evidence or material on record to suggest that these notices were ever given or served. The requirement of judicious valuation whether or not penal demurrages should be charged and at what rates was violated. There was no evidence or material to show that penal demurrages charges had been levied keeping in mind the aforesaid mandate and requirement.

14. Learned counsel for the appellants has submitted that principles of natural justice were violated. Arguments were heard on 22nd April, 2016 and the case was reserved for passing of the arbitral award. Thereafter, the Arbitrator vide the order dated 21st June, 2016, had asked the parties to submit documents within fifteen days and the next date of hearing was fixed on 15th July, 2016. Proceedings were held on 15th July, 2016 and a detailed order sheet was passed. The order sheet dated 15th July, 2016 for the sake of convenience and completeness is reproduced below:-

**“Before the Sole Arbitrator in WP (C)
3661/2015”**

1. On 21/06/2016, I had asked respondent and claimant to submit the certain documents. A copy of the aforesaid order is enclosed. On

- 15/07/2006, the claimant gave a copy indicating the requirement of 26 staff by Railway and sanction of HPGCL authorities for ten extra staff.
2. Vide item No. 13 of the orders given on 21/06/16, HPGCL have submitted a copy of their representation to GM/NR.
 3. Vide item No. 10 of my previous order dated 21/06/16, I had asked railway to produce records to show that 48 hours notice was given to the Management of Power House indicating railways intent of imposition of penal demurrage charges. No records have been produced to confirm it.
 4. I had also asked vide item No. 12 of orders dated 21/06/16 to produce letter/Note addressed to the Power House Management, their decision for imposition of penal demurrage in each case. I also wanted to know the name, designation and signature to indicate the Power House authorities to whom this notice was given. ACM/Fr. says that a copy of the documents available with them will be given to HPGCL and the sole arbitrator by 19th July 2016.
 5. Vide item no. 2, of my orders dated 21/06/16. I had asked to Railway to produce records in original to show that the situation had become so alarming so as to warrant imposition of penal demurrage. Railway would be giving a copy of these orders on 19/07/2016 with a copy to me and HPGCL Board.
 6. Vide item No. 4 & 5 of my orders dated 21/06/16, Railway stated that as per prevalent practice at that time the message was given through control first and then approval of DRM/DLI was taken. No evidence in this regard to item No. 6 of my query dated 21/06/16 has been produced, however, on 15/07/16, DCM/Fr/DLI explained the contents of the letter of Railway Board referred to item No. 6 & 7 of

my query dated 21/06/16.

7. The copy of 30 cases of demurrage pertain to HPGCL will be submitted by railway on 19/07/2016 with a copy to me and HPGCL.
8. Vide item No. 11 of orders dated 21/06/16, I was asked original records to show that DRM has recorded merits of the case while imposing penal Demurrage. Railway stated that copies of these orders will be given to me with Copy to HPGCL by 19/07/16.

At this stage I will also record for dealing with this case, I must be given of Rs. 2 Lakh as arbitration fees and Rs. 10 thousand as secretarial charges. This include the expenses on purchase of stamp papers for arbitral award and typing charges etc. The arbitral fees of Rs. 2 Lakh and secretarial charges of Rs. 10 thousand, it should be shared equally by Railway and HPGCL. The party should ensure payment by dated 22/07/2016.”

The aforesaid order sheet was signed by the representatives of the Railways, including their Advocate and the respondents. In these circumstances, we fail to fathom how the appellants can submit and urge that there was violation of principles of natural justice. In case the appellants wanted further hearing or wanted to give any clarification, they should have done so on 15th July, 2016. The Award was pronounced subsequently on 27th July, 2016. The appellants did not at any time after 15th July, 2016 raise any objection or submit that the matter should be re-heard.

15. Another contention raised by the appellants is that the respondent had not relied upon the Circular dated 19th May, 2016, and had urged that the circular had not been issued by the competent authority. Even if the contention is to be taken as correct, we would note that during the course of arbitration, the circular and its effect had come up for consideration. The primary claim of the respondent was that penal demurrages have not been levied and should not have been imposed. This is an issue and aspect which has been dealt with by the learned Arbitrator.

16. There is no merit in the present appeal and the same is dismissed. No Costs.

SANJIV KHANNA, J.

NAVIN CHAWLA, J.

AUGUST 29, 2017
MR/VKR