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

Date of decision:30th August, 2018.

\+ **O.M.P. 499/2008**

DELHI TRANSPORT CORPORATION ..... Petitioner

Through: Mr. Jyotindra Kumar & Mr. A.K. Verma, Advocates (M-8587815809).

versus

M/S FOUR S. SECURITY & ALLIED SERVICES LTD. ..... Respondent

Through: Mr. M. Taiyab Khan, Advocate (M-9312222450).

CORAM:
JUSTICE PRATHIBA M. SINGH

<u>Prathiba M. Singh, J.</u> (Oral)

1. The present petition has been filed under Section 34 of Arbitration and Conciliation Act, 1996 challenging the award of the Learned Sole Arbitrator dated 6th June, 2008, except to the extent of award passed qua Issue No. 2 therein.

2. The brief background is that the Respondent is an out sourcing agency through whom drivers were employed by DTC vide contract dated 31st May, 2005. The agreement was valid for a period of one year from 1st June, 2005. Services of drivers were being availed of by DTC and payment was made on the basis of per kilometre rate. The payments for the months of February, March, April and May, 2006, were withheld out of the sums payable to the drivers, through the Respondent, as the Respondent had not made the statutory payments under the Employment Provident Fund (*hereinafter 'EPF'*) and Employees' State Insurance Corporation (*hereinafter 'ESIC'*). The ESIC's recovery officer had issued notices to DTC and had also attached its bank accounts, as the DTC was treated as the principal employer

of the drivers. In this view of the notice issued by ESIC and the withholding of payments to the Respondent by DTC, disputes arose between the parties and the matter was referred to arbitration by this Court in O.M.P. 181/2006.

3. The impugned award dated 6th June 2008, came to be passed. As per the award, a sum of Rs.13,00,078/- has been awarded to the Respondent/claimant, out of which Rs.10,35,644/- was payable to the Respondent along with the security deposit of Rs.50,000/- and interest @ 18% per annum. The operative portion of the award is as under:

> *"14. On the basis of the discussion and findings in the preceding paragraphs, I allow the claim of the Applicant M/S Four S. Society for an amount of Rs.1300078 (rupees thirteen lakhs and seventy eight only). Out of this Rs.1035644 will be paid to the Claimants along with a refund of earnest money/ security deposit of Rs. 50 thousand, while an amount of Rs.2,65,064 will be released till much time that the EPF authorities give the final order on the penalty for delayed payment. These amounts will be paid to the Claimants by the DTC within a period of one month from the date of this order failing which the Claimants will be entitled to payment of interest at 18 percent on the above amount from the date of the award till the date of actual payment. The Respondent DTC will also refund the amount if any left over from the amount Rs.2,65,064 being held over pending the final order on penalty by the EPF."*

4. The Ld. Counsel for DTC submits that the Learned Sole Arbitrator has failed to take into consideration the fact that various sums were paid by the DTC towards the EPF and ESI, while awarding the said amount. The basic contention is that the interest is also on the higher side. Ld. Counsel further submits that the amount due to the Respondent is also not admitted

by DTC and hence there was no basis for awarding the same amount.

5. On the other hand, Ld. counsel for the Respondent submits that the Arbitrator has gone by the record and the admitted position of DTC as on record. He pointed out to the relevant paras of the award which, according to him, clearly show that all the requisite facts have been taken into consideration by the Sole Arbitrator.

6. A perusal of the award shows that on each of the issues, the Learned Arbitrator has appreciated the evidence on the record. The main claim i.e. in respect of amount due to the Respondent for the months of February, 2006 March, 2006, April, 2006 and May, 2006 the Learned Arbitrator has relied upon the additional affidavit filed by DTC in O.M.P.181/2006 wherein DTC admitted that the total amount due for payment to the Respondent is Rs.19,55,959/-. In the said affidavit, the DTC has categorically stated as under:

> "*That as per the statement prepared by the respondent (A/c Deptt.) the bills pending for payment to the petitioner is Rs.19,55,959/- against which ESI contribution payment due from the petitioner is Rs.3,19,095/-. Thus, the balance amount payable after deduction of ESIC dues is Rs.16,36,864/-. The provident fund dues to be paid by the petitioner is Rs.7,59,914/-. Copy of the statement of account is annexed and marked as Annexure A.*"

The Arbitrator has relied on this particular affidavit which has been extracted in the award and thereafter in issue no.2 calculated the exact amounts payable to ESIC and EPF. The Arbitrator has then held that the total sum which was to be paid by the DTC to the ESIC and EPF was Rs.6,55,251/-. The Learned Arbitrator has rejected the counter claim and also held that insofar as the dues to the drivers are concerned, the same would be the responsibility of the Respondent and finally awarded the amounts in favour of the Respondent.

7. The calculation made by the Arbitrator was that from the admitted sum which was due DTC's affidavit filed in OMP 181/2016 i.e. Rs.19,55,959/-, the Arbitrator deducted a sum of Rs. 6,55,251/- i.e. towards EPF and ESI dues. Thus, the amount due is a sum of Rs. 13,00,078/- along with the security deposit. The Arbitrator, further allowed DTC to retain a sum of Rs.2,65,064/- towards any penalty which may be levied by the EPF authorities for non payment of the EPF dues. The calculations of the Arbitrator are correct as per the record as also the notices issued by the statutory authorities. No fault can be found insofar as these findings are concerned. Insofar as the amount withheld towards possible penalty by the EPF authorities, it appears that the penalty amount has been awarded twice by the arbitrator, once as part of the EPF dues as recorded in paragraph 8 of the award and again as part of the balance payable by the Respondent. This is a duplication which deserves to be corrected. Thus, the amount of Rs.2,65,064/- is liable to be reduced from the sum allowed to be retained by the DTC. If any penalty is imposed by EPF authorities, DTC is entitled to recover the same from the Respondent.

8. Counsel for the Petitioner – DTC has expressed apprehension that the DTC has been made a party before the Labour Commissioner and hence the Court ought to clarify that the DTC is not liable for the dues of the drivers. On issue no.5, the Arbitrator has clarified as under:

> *"11. It is an admitted position on both sides that the dues of the ESIC have already been determined and*

paid by the Principal Employer namely DTC. The position in regard to EPF to the EPF has been dealt with in para 13 above and should provide sufficient safeguard for DTC. In so far as any claims by the drivers are concerned, these will become the responsibility of the Claimants in terms of the agreement between the parties for the period payments, on account of the outsourced drivers, are made by the DTC."

9. From the above, it is clear that the responsibility for making the payment to the drivers is solely of the Respondent and not of DTC. It is clarified accordingly.

10. The interest awarded by the Arbitrator is on the higher side i.e. 18%. The same is modified to 10% per annum from the date of award till the date of actual payment. The payment shall be released within a period of 8 weeks by the Petitioner – DTC to the Respondent, failing which, interest on the total amount awarded @ 12% per annum would be liable to be paid, on the total decretal amount till the date of actual payment.

11. Thus, the award is upheld in respect of Issue no.1 and Issue no.2. Insofar as Issue no.3 is concerned, the amount of Rs. 2,65,064/- is not liable to be retained by DTC. Thus the total amount payable by DTC to the Respondent would be Rs. 13,00,078/- along with security deposit of Rs.50,000/- and simple interest at 10% per annum from the date of award till the date of actual payment on the total amount.

12. The award is upheld in the above terms and the O.M.P. is disposed of.

PRATHIBA M. SINGH
JUDGE

AUGUST 30, 2018/*Rahul*