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

Date of decision:30th August, 2018.

\+ **O.M.P. 498/2008**

DELHI TRANSPORT CORPORATION ..... Petitioner

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

versus

M/S ABC PLACEMENT SERVICES (REGD.) & ANR. ..... 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 16th May, 2005. The agreement was valid for a period of one year from 16th May, 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.

3. The impugned award dated 6th June 2008, came to be passed. As per the award, a sum of Rs.10,66,186/- has been awarded to the Respondent/claimant, out of which Rs.9,95,865/- 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 discussions and findings in the preceding paragraphs, I allow the claim of the Applicant M/S ABC Placement Services (Regd.) for an amount of Rs.1066186 (rupees ten lakhs sixty six thousand one hundred and eighty six only). Out of this Rs.995865 will be paid to the Claimants along with a refund of earnest money/security deposit of Rs.50 thousand. These amounts will be paid to the Claimants by the DTC within a period of one month of 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 of Rs.70321 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 record. The main claim is 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 assertion made by the Claimant/Respondent in their reply to the counter-claim of DTC, filed before the High Court, wherein the DTC had admitted that the total amount due for payment to the Respondent is Rs.14,12,027/-. On this basis, the Arbitrator held that though the DTC had not made a statement as to the amounts withheld by them, but had only generally averred that certain sums are due to them for the amounts paid by them towards ESIC and EPF, the amounts paid towards ESIC and EPF are liable to be deducted from the payable amount. Thereafter in issue no.2, the Ld. Arbitrator has 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.3,45,841/-. 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 as per the DTC reply/counter claim i.e. Rs. 14,12,027/-, the Arbitrator deducted a sum of Rs. 3,45,841/- i.e. towards EPF and ESI dues. Thus, the amount due as per the award is a sum of Rs. 10,66,186/- along with the security deposit. The Ld. Arbitrator has taken the admitted dues as Rs.14,12,027 on the basis of a statement made by the Claimant in its Reply to the Counter Claim. The affidavit filed by DTC has not been placed on record. In fact counsel for the DTC relies upon a reply given under RTI dated 15th April 2009, to a query by one of the Claimants. In the said reply, the amount admitted by the DTC is to the tune of Rs.11.37.329/-. Accordingly, the amount due from DTC under issue no.1 ought to be taken as Rs.11,37,329/-. From the said amount, the EPF and the ESIC amount of Rs.3,45,841/- would be liable to be deducted. Thus the amount awarded to the Petitioner would be a sum of Rs.11,37,329/- minus Rs.3,45,841/- in addition a sum of Rs.50,000/- which is the refund of the security deposit is also awarded.

8. The Arbitrator, further allowed DTC to retain a sum of Rs.70,321/- towards any penalty which may be levied by the EPF authorities for non payment of the EPF dues. Insofar as this amount is concerned, which was 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.70,321/- is liable to be reduced from the sum allowed to be retained by the DTC. If any further penalty is imposed

by EPF authorities, DTC is entitled to recover the same from the Respondent.

9. 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 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 12 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."*

10. 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.

11. 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.

12. Thus, the award is upheld in terms of Issue No.2. Insofar as Issue No.1 is concerned, the amount awarded i.e., Rs.14,12,027/- is modified to Rs.11,37,329/-. From the said amount, the EPF and the ESIC amount of

Rs.3,45,841/- would be liable to be deducted. To this sum, an amount of Rs.70,321/- is added. Thus the amount awarded to the Petitioner would be a sum of Rs.8,61,809/- in addition to a sum of Rs.50,000/- which is the refund of the security deposit is also awarded. Simple interest @10% per annum would be payable on the total amount from date of award till date of actual payment.

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

PRATHIBA M. SINGH
JUDGE

AUGUST 30, 2018
Rahul