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

\+ O.M.P. (COMM) 366/2019, I.As. 12484-12487/2019

M/S BETA EXIM LOGISTICS PVT. LTD.

..... Petitioner

Through: Mr. Anil Nag, Adv.

versus

CENTRAL RAILSIDE WAREHOUSE COMPANY LIMITED

..... Respondent

Through: Mr. S. Agarwal, Mr. Ashish Tiwari and Mr. Rajat Kapoor, Advs.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

O R D E R

% **11.09.2019**

I.A. 12486/2019 (for exemption)

Exemption allowed subject to all just exceptions.

Application stands disposed of.

I.A. 12485/2019 (for delay)

This is an application filed by the petitioner seeking condonation of one day delay beyond the period of three months in filing the present petition.

For the reasons stated in the application, the delay in filing the present petition is condoned.

Application stands disposed of.

I.A. 12487/2019 (for delay)

This is an application filed by the petitioner seeking condonation of 25 days delay in re-filing the present petition.

For the reasons stated in the application, the delay of 25 days in re-filing the present petition is condoned.

Application stands disposed of.

O.M.P. (COMM) 366/2019

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 by the petitioner M/s Beta Exim Logistics (P) Ltd. challenging the award dated March 11, 2019 passed by the learned sole Arbitrator.

2. The facts as noted from the award are that the petitioner is a Private Limited Company based in Cochin. The respondent Central Railside Warehouse Company Limited is a subsidiary of Central Warehousing Corporation (CWC) under the aegis Ministry of Consumer Affairs, Food and Public Distribution, Government of India, for providing transit warehousing facilities to the Rail borne traffic at RWCs located near Railways goods-shed on pan India basis.

3. The respondent in terms of award dated May 16, 2014 was awarded the lease rights from the Southern Railway for operating the Parcel Cargo Express Train (PCET) from Chalakudi to Moga on round trip basis. Pursuant thereto, the respondent after furnishing bank guarantee in terms of the Letter of Award (LOA), a formal agreement was entered into between the respondent and the Southern Railway on February 27, 2015. The agreement is a contract for leasing w.e.f. October 15, 2014 to October January 15, 2018 for a period of three years commencing from October 15, 2014.

4. The contract on round trip basis from Chalakudi to Moga was for Rs. 41,12,832/-. In addition to the freight charges, development charges and

service tax were also payable by the respondent to the Southern Railway. It was also agreed that guaranteed supply of parcel van / SLR would be made available in normal circumstances, however in unavoidable circumstances or operational exigencies, the Railway shall not be bound to fulfil its commitment. It was further agreed that 50% of the lump sum lease amount will be paid at the time of loading at respective ends i.e. Chalakudi and Moga.

5. In terms of the LOA the petitioner had agreed to act as a business associate of the respondent to operate the said PCET Trains. Accordingly, the petitioner and the respondent herein entered into an agreement on January 06, 2015. In terms of the said agreement, the petitioner was permitted to enter upon and use services of the PCET Trains for a period of two years and nine months. It was further agreed between the parties herein that the petitioner would utilize the entire rake space of PCET w.e.f. February 11, 2015 as a facilitator and reimburse the freight charges, development charges and service tax to the respondent which has been charged by the Railway for each round trip / operation of the Parcel Cargo Express Train. In addition, the petitioner agreed to pay 9% of the above charges as facilitation charges to the respondent along with service tax thereon.

6. The petitioner agreed to pay the freight charges for full load to and fro Parcel Cargo Express Train to respondent irrespective of whether the space remains totally / partially unutilized during the period of contract. It was further stipulated that if the petitioner fails to execute the contract or perform unsatisfactorily, the respondent shall be entitled to realise the amount payable by the petitioner from the security deposit / bank guarantee

furnished to the extent of liability / damages fixed in adjudication or amount recovered by the Railway on account of the losses / damages. It appears that on February 18, 2015 the petitioner was to commence the services by making suitable arrangements for loading of the rakes.

7. It appears that the petitioner could not operate the services on that day. The respondent herein accordingly forced to request the Southern Railway for re-scheduling the services from February 18, 2015 to February 20, 2015. It appears that even on February 20, 2016, the rakes were not loaded by the petitioner herein and the PCET ran as empty all the way from Chalakudi to Moga and the respondent had to pay Rs. 20,83,360/- as freight charges to the Railway. The petitioner again requested the respondent for deferment of three subsequent services due on February 25, 2015, March 04, 2015 and March 11, 2015 and consequently rakes were not placed on the said dates. It is a fact that the trips were not operated resulting in Southern Railway raising a demand on the ground that the deferment / waiver of payment is not permitted. The Railway called upon the respondent herein to remit freight charges on or before April 30, 2015 besides threatening to terminate the agreement entered into between the Railway and the respondent herein.

8. At this stage, it may be relevant to state here that the respondent had to move an application under Section 9 of the Arbitration and Conciliation Act, 1996 before the High Court of Madras, seeking for interim protection in O.A. Nos.517-518/2019 challenging the said demand as well as the threatened termination. Interim protection was granted by the Court. During the pendency of the petitions, the petitioner herein agreed to pay the demanded freight charges for the round trips not operated, vide its letter

dated July 28, 2015 in instalments. It was the case of the respondent that on assurance given by the petitioner in the meeting held on August 03, 2015 the respondent withdrew all the proceedings pending before the High Court.

9. Based upon the petitioner's promise and representation, the respondent assured the Railway of paying freight charges for 3.5 round trips which the petitioner failed to operate. The respondent by its letter dated August 10, 2015 informed the petitioner that the Southern Railway had agreed to recommence the services w.e.f. August 19, 2015 but subject to certain conditions as agreed upon, including payment of outstanding dues for 3.5 trips. The respondent also informed the petitioner that Rs.20,82,360/- has been paid by the respondent to the Southern Railway at Chalakudi Station towards one-way freight for rake not laded by the petitioner on February 20, 2015 and requested the petitioner to reimburse advance freight for two round trips. By letter dated August 10, 2015 the petitioner confirmed and assured the respondent to fulfil the aforesaid agreement reached between the Southern Railway and the respondent including the payment of the demand by the Southern Railway. Pursuant to the commitment given by the petitioner, the respondent had also submitted a bank guarantee dated August 18, 2015 in a sum of Rs.64,85,450/- as the previous one was already invoked by the Southern Railway.

10. After commencement of PCET services, the respondent operated the service only for one / two days in the outward direction i.e. from Chalakudi to Moga on August 21, 2015 and August 23, 2015 and one day in the return direction from Moga to Chalakudi on September 27, 2015. The petitioner instead of fulfilling its commitment to pay the outstanding dues purportedly terminated the contract suo moto with immediate effect by letter dated

August 31, 2015 without even observing the stipulated two and a half months notice period in terms of the contract. As a result, the respondent had to terminate its contract with the Railway, since it was not possible for them to continue to operate the service and the same was intimated to the petitioner herein. The respondent reiterated that the petitioner will be liable for all claims / damages that would be raised by the Railway for premature cancellation of the contract as well as the commitments made in the meeting dated August 03, 2015 with the Railway.

11. Consequent to the termination vide notice dated September 01, 2015 the Southern Railway encashed the bank guarantee of Rs.1,23,38,456/- submitted by the respondent in terms of the agreement dated February 27, 2015. The respondent in turn, encashed the bank guarantee submitted by the petitioner for breach of the agreement dated January 06, 2015 committed by the petitioner herein.

12. The Railway by its letter dated September 18, 2015 raised the demand for Rs.1,43,94,912/- excluding development charges and service tax towards freight charges for the trips due on February 20, 2015, Moga – Chalakudi and for February 25, 2015, March 04, 2015 and March 11, 2015. It is reiterated by the Railway that the petitioner agreed to pay the said amount to the Southern Railway and only on that basis, assurance was given by the respondent by its letters dated July 28, 2015 and August 10, 2015. Hence, the liability is attributable to the petitioner and to be borne by it in terms of the contract.

13. Accordingly, the respondent vide its letter dated September 24, 2015 raised a demand on the petitioner for Rs.1,46,82,810/- and called upon the petitioner to pay the said sum i.e. demand of Railway with 2% development

charges. The Southern Railway by its letter dated November 05, 2015 adjusted EMD of Rs.10,00,000/- paid by the respondent in some other tender, for taking lease of PCET on KOKG-SSB route towards the outstanding dues and further demanded balance of Rs.1,23,94,912/- immediately.

14. It was the case of the respondent that the respondent also sustained huge loss of business as well as profit, including loss of facilitation charges @ 9% per trip. Apart from the above, the respondent was liable to pay Southern Railway for the 3.5 trips. The respondent herein had raised four claims:

Claim No.1 was in respect of the demand of Rs.1,43,94,912/-.

Claim No.2 was advanced towards loss of profit aggregating to Rs.55,07,815/-.

Claim No.3 towards pre-reference and pendente lite interest.

Claim No.4 cost of the arbitration amount to Rs.3,40,339/-.

15. The learned Arbitrator has in effect allowed the claims. Against claim No.1, he has awarded an amount of Rs.1,52,87,396/-. He has awarded the said amount on the ground that a settlement was arrived at by and between the parties, inasmuch as the petitioner herein had vide its letters dated July 28, 2015, August 10, 2015 and August 08, 2015 had agreed to pay the said amount which was in respect of freight charges for 3.5 trips with development charges and service tax. The learned Arbitrator held that the letters are clear admission of liability by the petitioner to the respondent herein. He held that on the basis of the promise of the petitioner, the respondent had made a further promise to the Railway. The demand by Railway on the respondent and of the respondent on the petitioner is because

the petitioner failed to perform the 19th (1/2), 20th, 21st and 22nd trips. In fact, the learned Arbitrator held that the entire claim is to be paid to the petitioner as per demand.

16. The only submission made by Mr. Nag, learned counsel appearing for the petitioner with regard to the award to claim no.1 by the learned Arbitrator is that the learned Arbitrator could not have granted the amount over and above Rs.1,23,38,496/- which amount has been recovered by the respondent by invoking the bank guarantee. I am unable to agree with this submission of Mr. Nag for the simple reason, the Railway had also claimed a similar amount of Rs.1,43,94,912/- from the respondent herein, by invoking the bank guarantee of Rs.1,23,38,496/-, as freight charges, development charges and service tax. In other words, in effect, the learned Arbitrator has granted that amount to the respondent which has been given by the respondent to the Railway. Hence, the claim as awarded cannot be faulted.

17. Insofar as the claim No.2 is concerned, the learned Arbitrator has granted an amount of Rs. 55,07,815/- as 9% facilitation charges / fee on 14 trips i.e. 10.5 trips which the petitioner did not operate in 2 ½ months on the ground that it had existed the contract and 3.5 trips, which petitioner did not operate. The learned Arbitrator held, the petitioner was required to give in terms of clause 22 of the agreement notice of 2½ months which it failed to give. In other words, the learned Arbitrator has compensated the respondent for facilitation charges for 10.5 trips. That apart, he had granted facilitation charges for 3.5 trips which the respondent could not earn as the petitioner had not operated the said trips. I may clarify here that vide claim No.1 the ld. Arbitrator has awarded freight charges, development charges and service

tax which are different from facilitation charges which the respondent is entitled to at 9% as per contract.

18. The submission of Mr. Nag in his challenge to claim No.2 is that when 14 trips (10.5+3.5) were never undertaken, no freight charges for the same are payable much less the facilitation charges. Again, I am not impressed by this submission of Mr. Nag for the simple reason, the amount against this claim was granted on the analogy of loss of profit which the respondent could have earned had the petitioner operated the 10.5 and 3.5 trips.

19. Mr. Nag, during his submissions had not denied that the contract stipulated payment of facilitation charge at 9% to the respondent. If that be so, when the petitioner had not operated 14 trips, the learned Arbitrator has rightly awarded the amount which the respondents could have earned. The challenge to the conclusion to this claim is rejected.

20. Insofar as the third claim is concerned, it is the submission of Mr. Nag that the learned Arbitrator has granted pre-reference, pendente lite and future interest @ 12% per annum but a perusal of paras 53 and 73, it is noted that pre-reference interest is granted from September 01, 2015 in Para 53 and whereas from September 06, 2015 in para 73. He also states that there is an anomaly in the figures, inasmuch as the amount depicted in para 53 is Rs.2,07,95,213/- whereas in para 73 it is Rs.2,46,23,101/-, I say nothing in this regard, appropriate for the petitioner was to file an application under Section 33 of the Act to get the correction / interpretation of the award. Having said that, I do not see any infirmity in the learned Arbitrator awarding the pre-reference, pendente lite and future interest at 12% per annum. Liberty shall be with the petitioner to seek clarification /

interpretation of the award from the learned Arbitrator.

21. Insofar as the award to fourth claim is concerned, the learned Arbitrator has awarded the cost to the respondent, the same being a discretionary relief in view of Section 31A of the Act, I do not see any illegality in the learned Arbitrator awarding the same.

22. During the course of submissions, Mr. Nag had relied upon the following judgments of the Supreme Court and this Court:

(i) ***Maula Bux v. Union of India, 1969 (2) SCC 554;***

(ii) ***State of Goa v. Praveen Enterprises; (2012) 12 SCC 518; and***

(iii) ***Wishwa Mittar Bajaj and Sons v. Shipra Estate Ltd. And Jaikishan Estate Developers P. Ltd., 256 (2019) DLT 42 (DB).***

I have considered those judgments and I am of the view that in view of my aforesaid conclusion, the judgments are distinguishable on facts.

23. The petition is dismissed.

I.A. 12484/2019 (for stay)

Dismissed as infructuous.

V. KAMESWAR RAO, J

SEPTEMBER 11, 2019/*aky*