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

Date of Decision: 11th April, 2019

+ **O.M.P. (COMM) 103/2017**

DELHI STATE CIVIL SUPPLY CORPORATION
LTD. & ANR.

..... Petitioners

Through: Ms. Anju Bhattacharya and Ms.
Deepika Kumari, Advocates.
(M:7042840681)

versus

M/S TYAGI TRANSPORT CO. & ANR.

..... Respondents

Through: Mr. D. K. Rustagi, Advocate.
(M:9810003385)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter 'the Act'*) has been filed challenging the award dated 11th June, 2010. The background of the dispute is that an agreement dated 9th March, 2004 was entered into between the Delhi State Civil Supply Corporation Ltd.- (*hereinafter 'DSCSC'*) with M/s Tyagi Transport Co. – (*hereinafter 'the Contractor'*). As per the agreement, the Contractor was to transport specified food articles, including wheat and rice on behalf of DSCSC, after lifting the same from the godowns of the Food Corporation of India (*hereinafter 'FCI'*) to various distribution centres.

2. The contract was to remain in force till 31st December, 2004. It was, however, terminated on 16th December, 2004. DSCSC deducted a total sum of Rs.13,56,260/- from the payments made to the Contractor, which led to

the disputes between the parties. The Contractor invoked the arbitration clause in the contract. Ld. Sole Arbitrator was appointed to adjudicate the disputes between the parties. Ld. Arbitrator, after considering the documents, pleadings and evidence on record, held that the withholding by DSCSC was unjustified and, accordingly, awarded a sum of Rs.22,19,690.16 to the Contractor. The operative portion of the said award reads as under:

“RELIEF

i)	<i>Amount of illegal deductions of</i>	<i>Rs.1356260.16</i>
ii)	<i>Interest on the said amount of</i>	<i>Rs.661180.00</i>
iii)	<i>Security amount</i>	<i>Rs.100000.00</i>
iv)	<i>Costs</i>	<i>Rs.100000.00</i>
	<i>Total</i>	<i>Rs.2217440.16</i>
	<i>Stamp duty</i>	<i>Rs.2250.00</i>
	<i>Total</i>	<i>Rs.2219690.16</i>

Say Rs.22,19,690/- (Rupees Twenty Two Lacs Nineteen Thousand Six Hundred Ninety only)

52. In view of the above the claimant is awarded a total sum of Rs.22,19,690/- (Rupees Twenty Two Lacs Nineteen Thousand Six Hundred Ninety only) with future interest @ 18% from the date of this award till realization of the amount”

3. Ms. Anju Bhattacharya, Ld. Counsel for DSCSC submits that the Ld. Arbitrator has made some fundamental errors. The first error, according to her, is that the Ld. Arbitrator notes in paragraph 31 of the award that no memo or show cause notice was issued by DSCSC calling upon the Contractor to rectify the defects in the execution of the contract. This, according to her, is completely contrary to the record. She further points out that three notices, were given, dated November, 2004, 9th December, 2004 and 16th December, 2004. She submits that since these show cause notices

were issued to the Contractor, the Ld. Arbitrator has proceeded on a wrong premise, which is a patent illegality. She further submits that the Ld. Arbitrator has, in fact, in paragraph 41 of the award, simply recorded that the deductions were made on account of penalty, liquidated damages, penalty of short deployment of trucks and penalty of late submissions of WCM (weight chart memo). She submits that the Ld. Arbitrator has treated all the deductions in one brush and has not given reasons why the said deductions are illegal and has set them all aside, without any basis. She further submits that under the contract, the Contractor had to maintain a minimum of 15 trucks available with them and have them ready throughout the period of contract. However, the tabulated statement, which is on record, shows that on several dates, the Contractor did not have requisite number of 15 trucks, and thus, levy of penalty/liquidated damages could not have been set aside by the Ld. Arbitrator. She submits that the deductions were completely lawful.

4. On the other hand, Mr. D. K. Rustagi, Ld. counsel appearing for the Contractor submits that the basis of the deductions has not been placed on record till date. Even the break-up of the amounts has not been given by the DSCSC. The Ld. Arbitrator came to the conclusion that the basis not being there, the same ought to be rightly set aside. Further, he has pointed out page 10 of the objection petition filed by DSCSC, wherein a demand was made by DSCSC for 55 trucks, which was totally contrary to the terms of the contract and arbitrary, in comparison to the fact that the contract provided for a minimum 15 trucks. According to him, when a minimum of 15 trucks were provided, the Contractor cannot be penalized for not providing 55 trucks.

5. The Court has heard the ld. counsels for the parties and perused the documents and evidence on record.

6. The first and foremost thing is that the Ld. Arbitrator has clearly erred in holding that no show cause notice was issued by DSCSC. The show cause notices are on record and issuance of the same is not disputed. However, what is important is that none of these show cause notices mention as to what was the exact breach or loss that was caused due to alleged shortage of the trucks, which were provided by the Contractor. The DSCSC repeatedly relies upon Clauses 9(a) and 9(b) as also some other clauses of the contract to state that the Contractor is in violation of his obligations under the contract. However, a perusal of the chart at page 57 shows that though on some days, the availability of trucks was in single digit, but on a majority of the days, the Contractor had been able to provide more than 20 to 30 trucks on a daily basis. Without going into too much detail of the daily availability of the trucks with the Contractor, this Court is of the opinion that considering that the minimum number of trucks required under the contract was 15 on a daily basis, during the period between February 2004 to December 2004, barring on 34 days there has been substantial compliance of the contract. Even on those days, when the number of trucks was less than 10, there is no evidence or statement to show that the lifting of stock was hampered and what was the loss caused. On almost all the other days, a minimum number of 15 trucks were available with the Contractor. On several days, more than even 30 trucks have been made available.

7. Under the contract the clauses providing for minimum trucks, penalty and liquidated damages, read as under:

“9a) The contractor shall provide minimum number of

trucks/vehicles everyday as given below at the time of commencement and during the validity of this contract and ensure that the operation of lifting of SFAs from the FCI godown and delivery to Fair Price Shops, is completed within the period specified.

Name of Godown	Group No.	Food circles attached	Min. number of trucks vehicles required
Narela	C	44,45,46,47 & 48	15

NB:

1. *Pt- Part of circle*
2. *In congested areas the transporter will be required to provide smaller vehicles.*
3. *The requirement of trucks is based on present demand. The trucks/vehicles shall be required to be increased/decreased by transporter in proportion to any increase/decrease in demand during the contract period.*
- b) *However, the contractor may be required to arrange more number of trucks/vehicles at short notice i.e. one day and he shall be bound to comply with such requisitions.*
- c) *The transporter shall be required to own at least 20% of the minimum number of trucks as mentioned in the para 9 (a) for each of the group/godown (as the case may be). In case the tenders are given for more than one group/godowns, proof of ownership of separate fleet much be given for each group/godown.*
In support of transporter mustering remaining transport fleet from other sources, he shall be required to furnish written consent with proof of ownership from owner of such trucks/vehicles at the time of executing the contract.

d) *In case of contractor's failure to provide the minimum number of trucks/vehicles as mentioned in para 9 (a) above or as demanded by the corporation, considering the quantity pending for issue at the time of commencement of the operation on any working day, the Chairman/MD of the corporation shall have discretion to impose penalty of Rs.200/- per truck per day for the number of trucks failing short of minimum number of trucks/vehicles required to be provided by the contractor.*

e) *In case the contractor fails to provide adequate number of trucks/vehicles on any specific day, the corporation is free to get the work done from any outside agency at the risk and cost of the contractor without any notice and any extra payment made on that account shall be recoverable from the contractor including deductions from the pending bills from this contract or any other contracts or in any other manner.*

.....

11b) In case quantity remains undelivered to the FPSs beyond 5 working days after the day of receipt of ROs from FCI, the Chairman/MD of the Corporation shall levy liquidated damages at the rate of Re. 1/- per qtl on the contractor for every working day on any quantity remains unlified thereafter provided issuable stocks are available at the godown.

8. Thus, both the penalty and liquidated damages had to be in terms of the contract i.e. Rs.200 per truck per day when the Contractor fell short of minimum number of 15 trucks and liquidated damages of Re.1 per quintal on any day when the quantity remained unlified. A query was put to the Ld. counsel for DSCSC as to what is the break-up of all the deductions, which were made i.e. Rs.13,56,260/-. The break-up, however, is not on record. In

fact, even the Ld. Arbitrator has observed in paragraph 28 as under:

“28. In the present case, the reply of the respondent corporation is completely silent as to how much deduction is made under which head or pertains to which clause of the agreement.....”

9. It is clear that the basis of the deductions was not made available before the Ld. Arbitrator. The Ld. Arbitrator has recorded that the witnesses of DSCSC also could not produce on record as to how much quantity was lifted and how much remained to be lifted from the FCI godown. Further, no witness was produced even from the FCI. In view of the above reasons, the Ld. Arbitrator came to the conclusion that the deductions are not valid and legal, and accordingly, awarded a sum of Rs.22,19,690/-.

10. This Court has perused the clauses of the agreement and also the reasoning of the Ld. Arbitrator. Barring the infraction in the award to the extent that show cause notices were not given by DSCSC, the imposition of penalty, liquidated damages appear to be contrary to the terms of the contract. In any event, it is the settled position as per ***Kailash Nath Associates v. Delhi Development Authority & Anr. (2015) 4 SCC 136***, which has been reiterated in ***Mahanagar Telephone Nigam Ltd. v. Tata Communications Ltd., 2019 SCC OnLine SC 278***, that liquidated damages cannot be automatically imposed and actual loss or factum of loss has to be proved on record. The show cause notices, the claim petition and the evidence are silent as to the basis of the quantum of deductions made. Penalties and liquidated damages have to be on foundational facts without which they cannot be sustained. Under these circumstances, the award of the sum of Rs.22,19,690/- in favour of the Contractor is upheld.

11. Considering that the DSCSC is a government undertaking and also in view of the fact that the present petition has been pending in this court for some time now, the interest is modified to 12% simple interest per annum payable from date of award till payment. It is directed that payment be now made within eight weeks, failing which 18% simple interest per annum interest would be liable to be paid from the date of expiry of eight weeks.

12. OMP is disposed of in the above terms.

PRATHIBA M. SINGH
JUDGE

APRIL 11, 2019/dk