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

\+ **<u>O.M.P.(I) (COMM.) 394/2018</u>**

Date of decision: 3rd May, 2019

ASHOK LEYLAND LTD. ..... Petitioner
Through: Mr. Amir Sigh Pasrich, Mr. Kalyan Arambam & Mr. Amit Ranjan Singh, Advocates.

versus

DELHI TRANSPORT CORPORATION ..... Respondent
Through: Mrs. Avnish Ahlawat & Mr. Nitesh Kumar Singh, Advocate.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

<u>RAJIV SHAKDHER, J.</u> (ORAL):

1. This is a petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 (in short, "1996 Act") wherein several interim reliefs have been sought.

1.1 It is pertinent to note that the arbitration proceedings are ongoing and they are, I am told, at the stage of recording of evidence. It may also be relevant to note that upon the demise of Hon'ble Mr. Justice S.B. Sinha, the Presiding Arbitrator, the Arbitral Tribunal has been reconstituted and is presently helmed by Hon'ble Mr. Justice A.K. Sikri, former judge, Supreme Court of India. The other Members being Hon'ble Mr. Justice R.C. Chopra and Hon'ble Ms. Justice Rekha Sharma, former judges of this Court.

2. Before I proceed further, it may be relevant to advert to the prayers made in the petition. The reason that the prayers are extracted hereafter apart from the obvious angle of convenience, is also to highlight the fact that the majority of the prayers sought are of such nature that they cannot be granted, at this stage, by this Court sans the evidence or, in the very least, can be best addressed by the Arbitral Tribunal after evidence is led by the parties and perhaps at the stage of pronouncing the final award.

> *"A. Issue directions inter alia directing that the respondent shall hereafter -*
> *(i) Make payments for all accidental repairs (mechanical and body), tyre damage, broken lights, routine body repairs damage attributed like premature failure of tyres etc. due to operational reasons and not attributable to any defect or mechanical failure as also the cost of tyres damaged/punctured from negligent driving and/or road conditions, etc. during the Respondent's operations.*
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> *(ii) Treat any matter causing loss, damage or other harm to the buses including any theft, vandalism, overloading, etc. whether occurring inside or outside the depot and not attributable to any defect/mechanical failure of the buses to the account of and paid for by the Respondent;*
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> *(iii) Treat the buses as always being under the custody of the Respondent/DTC inside its own depots until such time as they are taken over for repair, maintenance or otherwise driven by the Claimant/Petitioner's drivers.*
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> *B. Direct the Respondent to prepare and issue work orders (also known as "AIRs") to the Petitioner in respect of matters covered by (i) & (ii) of prayer A above and injunct the Respondent from taking any coercive*

action against the Petitioner including but not limited to levy of penalty for the period from the relevant incident upto the completion of DTC's own formalities/obligations i.e. issuance of the duly completed and signed work order and cost estimate and thereafter allow for agreed successive periods for each work process;

C. Direct the Respondent to depute its own staff to inspect and detect any damage/loss caused to the buses at all the depots at the stage of in-shedding or thereafter and identify the culprit/s causing such damage/loss as a reciprocal obligation and condition precedent before issuing any work order/s or AIRs for repairs;

D. Restrain the Respondent from applying or relying upon its own circular or letter Nos. CGM/SBU/852/2011/0205 dated 26th April 2011, No. OSD (O&M)/2011/183 dated 18th April 2011, No.CGM(Tech)/2011/233 dated 14th June 2011, No. CGM/SBU/896 (TML&ALL)/2013/359 dated 14th August 2013 and CGM/SBU/896 (TML&ALL)/2013/361 dated 14th August 2013 until the date of the final award;

E. Injunct the Respondent/DTC from overloading the buses under the AMC contract of the Petitioner in view of the submissions made in paragraph 21 above.

F. Grant urgent ad-interim relief to the Petitioner in terms of the foregoing prayers especially in view of the above submissions made in paragraphs 36 and 39 of this petition;

G. Pass such other and/or further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case and in the interest of justice."

3. In this backdrop, let me advert to the broad contours of the dispute obtaining between the parties.

4. The petitioner before this Court is Ashok Leyland Limited (in short, "ALL"). ALL is the claimant before the Arbitral Tribunal. The respondent i.e. Delhi Transport Corporation (in short, "DTC"), is (as is evident from the cause title set out) a respondent before this Court, and is also, arrayed as a respondent before the Arbitral Tribunal.

4.1 It appears that a Request For Proposal (in short, "RFP") was floated by the Government of National Capital Territory of Delhi (in short, "GNCTD"), which was for supply of low-floor buses embedded with a provision for a Annual Maintenance Contract (in short, "AMC") for their upkeep and maintenance.

4.2 For this purpose, GNCTD had engaged the services of Delhi Integrated Multimodal Transit System Limited (DIMTS). Accordingly, a global tender was floated for procuring 1500 non-air conditioned buses and 1000 air-conditioned buses.

4.3 It appears, amongst others, ALL along with Tata Motors Limited (in short, "Tata") and Volvo submitted their bids in response to the RFP. Upon scrutiny of the bids, Tata was declared the lowest bidder (i.e. L1) while ALL was found to be the second lowest bidder (i.e. L2). Consequently, 65% of the tender quantity was allotted to Tata, while 35% was allocated to ALL. However, the broad terms and conditions of the contracts executed by DTC with Tata and ALL were identical.

4.4 The contract entered into between DTC and ALL obliged ALL to supply 1093 low-floor buses to DTC. Out of the 1093 buses which ALL had to supply, only 437 buses had to be air-conditioned.

4.5 Evidently, ALL supplied 1093 buses to DTC in the period spanning between 5 November 2009 and 7 October 2011.

4.6 In and about 2014, disputes arose between the parties amongst other qua the issue of levy of penalty. This propelled ALL to file a petition under Section 9 of the 1996 Act. This petition was numbered as OMP No. 337/2014. A learned single Judge of this Court by an order dated 15 April 2014 granted interim protection to ALL vis-à-vis imposition of penalty by DTC. The operative part of the order dated 15 April 2014 reads as follows:-

> *"....Till the next date, the recovery of any amount towards penalty under the agreement from the petitioner shall remain stayed on the undertaking of the petitioner that in case the said penalty is found to be justified by the Arbitral Tribunal, the same shall be paid along with interest as may be determined by the Arbitral Tribunal which shall not be less than 15% per annum..."*

4.7 Thereafter, on the next returnable date (i.e. on 9 July 2014) OMP No. 337/2014 and the attendant interlocutory application was disposed of with the operative direction that "imposition of liquidated damages" by DTC "under clause 46.6 at that stage was not justified". The Court, however, observed that once the Arbitral Tribunal was constituted and was seized of the dispute, it would be open to it to vacate, modify or vary the order.

4.8 The relevant observations made in this behalf by the learned single Judge in the order dated 9 July 2014 are extracted hereafter:-

> *"The petitioner is a large corporation and has been supplying buses to the respondent. Merely because the contract provides for levy of liquidated damages under clause 46.6, it does not follow that the respondent can unilaterally levy the same on the petitioner, when the issue-whether the same is justified or not in the facts of the case, is still to be adjudicated. Keeping in view of the overall facts and circumstances, I am of the view that the imposition of liquidated damages under clause 46.6 at this stage may not be justified.*
>
> *However, once the Arbitral Tribunal is constituted and is seized of the disputes arising in the contract, it shall be open to the respondent to seek vacation, modification or variation of this order, and to lay its claim for recovery of liquidated damages under clause 46.6 during the pendency of the arbitral proceedings, and the arbitral tribunal shall deal with the same expeditiously. The order dated 15.04.2014 is confirmed subject to the clarification that the same would not apply to any other recovery sought to be made, or charges sought to be levied by the respondent, except in respect of excess fuel consumption penalty and liquidated damages under clause 46.6 of the contract. It shall be open to the parties to approach the arbitral tribunal for any other interim relief.*
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> *The petition stands disposed of.*
>
> *No observation made in this order shall prejudice the case of either party in arbitration…"*

4.9 The record shows that, thereafter, applications were filed by both ALL and DTC before the Arbitral Tribunal. The Arbitral Tribunal examined the contentions advanced on behalf of both parties. The Arbitral Tribunal's deliberations finally culminated in the order dated 8 April 2015. Via its order, the Arbitral Tribunal attempted to balance the equities between the parties pending final adjudication of disputes and towards the end issued the following directions:-

> *"91. Keeping in view the peculiar feature of this case, as also the order passed by another Tribunal, and the interim orders passed by the Hon'ble High Court of Delhi, we are of the opinion that the interest of justice will be sub-served if the Respondent is permitted to deduct all statutory charges as also the charges of water and electricity.*
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> *92. DTC is directed to pay unto ALL 60% of the calculated damages w.e.f. the date of passing of the interim order by the High Court of Delhi on 9.7.2014, until further order. It is made clear that 40% of the calculated damages may be retained by the DTC. These orders cover the amount already due as well as the amounts which may fall due hereinafter till an award is passed.*
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> *93. It is furthermore directed that in the event, any of the parties found liable to reimburse the other, it pay unto the other side such amount with interest as may be determined by this Tribunal, but the same shall not be less than 15% per annum."*

5. In sum, via order dated 8 April 2015 the Arbitral Tribunal directed that 60% of the liquidated damages/penalty imposed by DTC with effect from 9 July 2014 would be paid to ALL while the balance 40% would be retained by DTC. Pertinently, the order makes it clear that the apportioned liquidated damages/penalty would be carried out in the same ratio till the passing of the award.

5.1 Therefore, while DTC could quantify and convey the quantification of penalty/liquidated damages to ALL, it can, pending final adjudication, only retain 40% of the damages.

6. Thus, given the fact that the matter has reached the stage of evidence, it may not be appropriate for this Court to grant the reliefs sought for in the captioned petition without appraising the material placed on record by the parties before the Arbitral Tribunal. Any step taken by Court at this stage at the behest of the petitioner could upset the fine balance struck by the Arbitral Tribunal via its order dated 8 April 2015. Besides this, since the Arbitral Tribunal is seized of the matter, if at all, any directions are required by ALL to work out its reliefs with regard to AMC, it would be best if it were to approach the Arbitral Tribunal for that purpose.

7. Therefore, for the foregoing reasons, I am not inclined to exercise powers under Section 9 of the 1996 Act at this stage of the matter and grant the reliefs sought for by ALL. The petition is accordingly closed. ALL will be at liberty to take recourse to an appropriate remedy in accordance with law.

RAJIV SHAKDHER, J.

MAY 03, 2019
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