

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION

APPELLATE SIDE

Present:

The Hon'ble Justice Moushumi Bhattacharya

WPA 10668 of 2021

Radhey Shyam Pandey

Vs.

Union of India & Ors.

For the Petitioner : Mr. Saptarshi Roy, Adv.
Ms. Kakali Das Chakraborty, Adv.

For the North Eastern Railways : Mr. Shankar Ranjan Sen, Adv.

For the Respondent no. 5 : Mr. Subhankar Chakraborty, Adv.
Mr. Saptarshi Bhattacharjee, Adv.
Ms. Ruchira Manna, Adv.

Last Heard on : 17.03.2022.

Judgment on : 06.04.2022.

Moushumi Bhattacharya, J.

1. The petitioner seeks a direction on the North Eastern Railway to withdraw a letter of termination dated 31st March, 2021 issued by the Senior Divisional Commercial Manager, being the respondent no. 4 herein. By the said impugned communication, the petitioner's security deposit of Rs.23,02,661/- was forfeited and the petitioner was restrained from taking part in the tender of the North Eastern Railway

for the next two years. The impugned letter referred to Scenario-3 of a letter dated 3rd December, 2020 which provides for termination of the contract between the Railways and the Leaseholder (petitioner).

2. The petitioner emerged as the successful bidder for a tender for lease of 23 tonnes parcel space and a Lease Agreement was executed between the petitioner and the Railways for a period from 17th January, 2020 to 16th January, 2025. The operation of the trains was suspended by the Railways by reason of the Covid-19 pandemic. The petitioner thereafter declined to accept the offer of the Railways for a substitute train for limited operation. The petitioner invoked clause 23.1 of the Lease Agreement by a letter dated 6th February, 2021 with 60 days prior notice and the Railways issued the impugned communication of 31st March, 2021 under clause 23.2 of the Lease Agreement and terminated the contract.

3. According to learned counsel appearing for the petitioner, the petitioner's right to terminate the contract emanates from clause 23.1 of the Lease Agreement and the Railway Board Circular dated 3rd December, 2020 (Scenario-2 of the Circular). The petitioner sought refund of the security deposit under the said clause. The Railways however, without taking into account the petitioner's invocation, issued the impugned communication by applying Scenario-3 of the Circular and forfeited the security deposit of the petitioner. Counsel submits that the petitioner was blacklisted for two years without there being any provision for such under the relevant Agreement. It is submitted that

the Lease Agreement pertained to a specific train i.e. Train No.13020/13019. It is also submitted that the petitioner is entitled to freight adjustment in the event of suspension of service and that the Railways are under a statutory obligation for guaranteed supply of Lease Space. Counsel submits that the petitioner has a right to approach the Writ Court and that the alternative remedy in the form of recourse to arbitration would not apply in the present case.

4. Learned counsel appearing for the respondent Railways submits that the facts of the present case do not give rise to a cause of action which would confer jurisdiction on this Court and that this Court should not interfere in the case of a determinable contract. Counsel relies on the clauses in the Agreement which entitle the respondent to forfeit the security deposit and that the contract was liable to be terminated since the petitioner (Leaseholder) failed to operate the contract continuously for 10 days without giving any notice. Counsel places emphasis on clause 23.2 of the Agreement under which the North Eastern Railway has right to terminate the contract as a punitive measure without giving any notice for breach of agreement. Counsel urges that the Railways suffered huge monetary loss by reason of the petitioner failing to start the work as would be evident from letters exchanged between the parties. It is also submitted that the Agreement contains an arbitration clause and the petitioner has an alternative remedy available to invoke.

5. Since a point of maintainability has been raised by the respondent Railways, this point is being dealt with first. The impugned letter of termination dated 31st March, 2021 was received by the petitioner in Howrah, within the jurisdiction of this Court. The entire cause of action of the writ petitioner arises from this letter of termination. The impugned letter not only terminated the Lease Agreement but also debarred the petitioner from taking part in tenders for the next two years. The impugned letter was served on the petitioner at his registered office and the punitive effect of the said letter was received and continued within the jurisdiction of this Court. Besides this fact, the petitioner participated in the tender from his office situated within the jurisdiction of this Court, the security deposit submitted by the petitioner was drawn on a bank, namely ICICI Bank, Howrah, within the jurisdiction of this Court and the respondent Railways sought to liquidate the security deposit from the said bank within the jurisdiction of this Court. Article 226(2) of The Constitution of India empowers a High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises, to issue directions, orders or writs notwithstanding that the seat of the Government or authority is outside the territories. In *Om Prakash Srivastava vs Union of India*; (2006) 6 SCC 207, the Supreme Court held that in order to maintain a writ petition, a writ petitioner must establish that a legal right claimed by him has *prima facie* either been infringed or is threatened to be infringed by the respondent within the territorial limits

of the Court's jurisdiction and such infringement may take place by causing him actual injury or threat. This view was reiterated in *Nawal Kishore Sharma vs Union of India*; (2014) 9 SCC 329.

6. With regard to the objection taken as to the petitioner having an alternative remedy in respect of an arbitration clause in the Lease Agreement, the decisions cited by the petitioner are of relevance and assist the petitioner. In a recent decision of Supreme Court in *Uttar Pradesh Power Transmission Corporation Limited vs CG Power And Industrial Solutions Limited*; (2021) 6 SCC 15, the Supreme Court opined that availability of an alternative remedy does not prohibit the High Court from entertaining a writ petition in an appropriate case particularly where the writ petition seeks enforcement of a fundamental right; where there is failure of principles of natural justice; where the impugned order is wholly without jurisdiction or the vires of an Act is under challenge. The Supreme Court relied on *Whirlpool Corpn v Registrar of Trade Marks*; (1998) 8 SCC 1 in coming to this view. The Supreme Court also referred to *Harbanslal Sahnia vs Indian Oil Corpn. Ltd.*; (2003) 2 SCC 107 wherein it was held that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In another recent decision of the Supreme Court in *Unitech Limited vs Telangana State Industrial Infrastructure Corporation*; 2021 SCC OnLine SC 99, the Supreme Court held that the recourse of a public law remedy despite the presence of an arbitration clause needs to be decided on a case to case basis. This

Court is of the view that since the petitioner has pleaded breach of his fundamental rights in being debarred from participating in any tender and suffering a termination by the act of the Railways, the issue of breach of the petitioner's fundamental rights is patently evident from the facts. The petitioner has also been blacklisted without being afforded an opportunity of being heard which is also a breach of principles of natural justice. The petitioner hence has a right to approach the Writ Court notwithstanding the arbitration clause in their Agreement. The arbitration clause (clause 26.4) is in any event, limited to dispute arising out of construction or operation of the contract and other matters stated therein and excluding the excepted matters referred to in clause 63 of the conditions.

7. In *Oil and Natural Gas Commission vs Utpal Kumar Basu; (1994) 4 SCC 711*, cited by the respondent, the Supreme Court was of the view that the facts pleaded in the writ petition did not show that part of the cause of action had arisen within the territorial jurisdiction of the Calcutta High Court and that mere reading of an advertisement at Calcutta and submitting the offer from Calcutta would not constitute facts forming an integral part of the cause of action. *Food Corporation of India vs Jagannath Dutta; 1993 Supp (3) SCC 635*, also cited by the respondent, was a policy decision taken by the FCI for terminating storage agencies in West Bengal. *Kerala State Electricity Board vs Kurien E. Kalathil; (2000) 6 SCC 293*, was concerned with interpretation of the terms and conditions of a contract and the Supreme Court was of the

view that this was a matter to be considered by a Civil Court. *Datar Switchgears Ltd. vs Tata Finance Ltd.*; (2000) 8 SCC 151, is only for the proposition that a party who has not disputed the arbitration clause is normally bound by it and is obliged to comply with the procedure laid down under it. In *Jagdish Mandal vs State of Orissa*; (2007) 14 SCC 517, the Supreme Court formulated two points which should be considered by a Writ Court before interfering in tender or contractual matters. These points were whether the decision made by the authority is *mala fide*, arbitrary or irrational and whether public interest is affected. *National Agricultural Coop. Marketing Federation India Ltd. vs Gains Trading Ltd.*; (2007) 5 SCC 692 is only for the proposition of the severability of an arbitration clause from the underlined contract. *Assistant Excise Commissioner vs Issac Peter*; (1994) 4 SCC 104, has been cited for the proposition that the doctrine of fairness could not be invoked to amend, alter or vary the express terms of the contract between the parties. This decision is of no relevance since there is no attempt on the part of the petitioner to alter the terms of the Agreement.

8. With regard to the merits of the writ petition, it is evident that the respondent Railways has invoked clause 23.2 of the Agreement in terminating the contract. Clause 23.2 gives the right to the Railways “to terminate the contract/agreement for any reason whatsoever after serving one month’s notice to the lease holder. However, Railway shall reserve the right to terminate the contract as a punitive measure without any notice and at any time in case of breach of agreement or serious violation

of any of the stipulation of policy.....”. Clause 23.2 hence requires the Railways to give one month’s notice of termination to the Leaseholder except in cases of breach of agreement. The Railways have not sent any intimation or notice to the petitioner alleging breach of the terms. The clarification sent by the Railways on 3rd December, 2020 contains guidelines for dealing with cases relating to non-commencement of leased contract of parcel space and indicates Scenario-3 where a Leaseholder has not commenced contract corresponding Passenger Special Train service. The Railways have not alleged any breach of the contractual terms even in this letter but appears to have invoked Scenario-3 in terminating the contract by the letter dated 31st March, 2021. It is an admitted fact that the termination was made without giving any notice to the petitioner as required under clause 23.2 of the Agreement. It should also be noted that clause 23.2 does not contain any provision for blacklisting the Leaseholder in case of violation of the terms or under any other condition.

9. It is also significant that the termination letter was issued by the Railways only after and as a counterblast to the petitioner’s letter of 6th February, 2021 by which the petitioner served 60 days notice under clause 23.1 of the Agreement to terminate the contract and sought refund of the security deposit. Clause 23.1 provides for the Leaseholder’s right to terminate the Agreement after giving 60 days notice to the Railway administration after the Leaseholder has completed ten months (plus two months notice period) of the contract.

The petitioner's right of termination is supported by clause 23.1. It is also relevant that the Lease Agreement executed between the parties was only in relation to a specific train name and number 13020/13019 for transportation of parcels from Kathgodam to Howrah and back. It does not provide for the petitioner plying any other train which the petitioner was compelled to do by the action of the respondent Railways. The facts in the present case reflect a wholly arbitrary action taken on behalf of the Railways which also includes breach of the petitioner's right to a hearing before such action was taken against the petitioner.

10. The impugned letter of termination therefore falls foul of the contractual terms between the parties. The letter of termination is also in violation of the petitioner's right to a fair hearing before the Agreement was terminated and the petitioner's security deposit forfeited. The action of debarring the petitioner from future tenders is high-handed, arbitrary and against the contractual terms executed between the parties. As recognised by the Supreme Court in *M/s. Erustan Equipment & Chemicals Ltd. vs State of West Bengal; (1975) 1 SCC 70*, blacklisting has the effect of preventing a person from the privilege and advantage of entering into a lawful relationship with the Government for purposes of gains. The Supreme Court was also of the view that fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist. This view was also echoed by the Supreme Court in *Jagdish Mandal vs State of Orissa; (2007) 14 SCC 517* where the Supreme Court

held that cases involving blacklisting or imposition of penal consequences on a contractor require a higher degree of fairness in action.

11. For the reasons as stated above, this Court finds the impugned letter of termination dated 31st March, 2021 liable to be revoked and set aside. WPA 10668 of 2021 is accordingly allowed and disposed of in terms of prayers (a) and (b). The respondent Railways is restrained from giving any further effect to the impugned letter of termination dated 31st March, 2021.

Urgent Photostat certified copies of this judgment, if applied for, be given to the respective parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J)