

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

W.P.A. No. 9998 of 2022

DG Raj Highway Services

-vs.-

Union of India & Ors.

Mr. Saptarshi Roy,
Mr. Arkadipta Sengupta,
Ms. Kakali Das Chakraborty
...for the petitioner

Mr. Rajendra Banerjee,
...for the respondents

Learned counsel for the petitioner contends that despite having come out successful in a tender and having been granted a lease for loading and unloading of goods in railway carriages, the petitioner, due to the laches of the railway-authorities, was not getting the minimum required time even to unload the goods from the said carriages, let alone load thereafter.

It is argued that, on occasions, as less as 15 to 30 minutes' time was given to the petitioner, whereas at least three hours are required to properly complete the unloading operation.

It is submitted that, as a result of such predicament, the petitioner communicated specifically to the railway-authorities, in particular, the Senior Divisional Commercial Manager, Bengaluru and Kharagpur Division,

indicating that the petitioner were being compelled to discontinue the leased LVPH in train no. 12863/12864.

Despite repeatedly having communicated to that effect to the railway-authorities, all of which were acknowledged by the railways, it is contended that no steps were taken by the railway-authorities to resolve the dispute.

Learned counsel appearing for the respondent-authorities, at the outset, submits that the dispute is contractual in nature and, as such, jurisdiction of the Writ Court ought not to be permitted to be invoked by the petitioner for getting the remedy as prayed for.

That apart, Clause 29.2 of the agreement itself, it is argued, contemplates that all disputes in regard to implementation of the agreement would be referred to an Arbitrator nominated by the General Manager of the South Eastern Railway. As such, it is argued, the petitioner is not entitled to any relief, as sought in the writ petition.

It is further contended by learned counsel for the railway-authorities that Clauses 6.0, 6.1 and/or 6.4 contemplate adjustment in advance lump sum leased freight due to non-loading of brake van (SLR/parcel Van(VP). It is submitted that due to the stoppage of the loading and unloading by the petitioner, huge losses are being suffered by the railways unnecessarily during the period when such operation was ceased.

It is, thus, submitted that the writ petition ought to be dismissed on the above score.

Upon considering the nature of dispute involved, it is evident that although the railway-authorities entered into an agreement with the petitioner, such contract was executed in terms of the public duties discharged by the railway-authorities.

Moreover, due to the nature of the allegation made in the writ petition, alternative remedy cannot be an absolute bar for the writ court to interfere, even if such alternative remedy is available to the petitioner.

As held by the Hon'ble Supreme Court in *Uttar Pradesh Power Transmission Corporation Limited & Anr. vs. CG Power and Industrial Solutions Limited & Anr.*, reported at (2021) 6 SCC 15, availability of an alternative remedy does not prohibit the High Court from entertaining a writ petition in an appropriate case, in the situations as indicated therein, namely:

- (i) where the writ petition seeks enforcement of a fundamental right;
- (ii) where there is failure of principles of natural justice;
- (iii) where the impugned orders or proceedings are wholly without jurisdiction;
- (iv) the *vires* of an act is under challenge.

In the present case, it can surely be said that the principles of natural justice have been flouted by the railway-authorities in threatening termination of the contract

with the petitioner in a manner unbecoming of a public authority, even without taking any positive steps to resolve the dispute specifically raised by the petitioner, thereby contravening Clause 8.8 of the agreement itself. That apart, the action by the railway-authorities in threatening termination of the petitioner's contract before resolving the dispute raised by the petitioner and acknowledged to have been raised by the railway-authorities, is patently arbitrary and *de hors* the authority of the railways.

Clause 6.1 of the agreement, as pointed out by learned counsel for the respondent-authorities, contemplates situations where the railway administration is to give guarantee to provide leased parcel space of the brake van/parcel van as per terms and conditions of the agreement. Only in case of the railway's operational exigencies, examples of which have been given in Clause 6.1, the railway administration shall not be held responsible for not providing the guaranteed service for the leased parcel space.

Since no such exigencies have been pointed out at any point of time by the railway-authorities, either to the petitioner or before the Court or in any communication to the petitioner, it cannot be said that Clauses 6.0, 6.1 and/or 6.4 of the agreement are attracted at all to the present case.

Insofar as the operation of Clause 29.2 is concerned, since the Railway Administration has not yet decided on the dispute raised by the petitioner, either by refuting or

conceding the same, it will be premature to say that the matter ought to have been referred to the Arbitrator. That apart, it is well-settled that mere existence of an arbitration clause does not stand in the way of the High Court exercising its writ jurisdiction under Article 226 of the Constitution of India where a patent jurisdictional error and/or arbitrary action has been committed by public authorities.

Clause 8.8 of the agreement squarely provides that in case of dispute on the part of the Railway's discharge of obligations, where lease contract could not be operationalized by the leaseholder or suspended by Railway in certain circumstances like change of loading or unloading point, not providing service, not providing sufficient time for loading or other operational problems, the Railway Administration (CCM) shall be empowered to deal with such situation as deemed fit, depending upon the merits of the case as they are doing *de facto*. If later on the problem is resolved by the Railway, the intervening period involved in resolving such disputes (non-operationalisation of contract/non-loading by the leaseholder due to dispute) would be treated as '*dies-non*'.

In the present case, unfortunately the railway-authorities have not taken any steps towards resolving the issue raised by the petitioner in respect of unavailability of sufficient time for loading and other operational problems, it is incumbent upon the railway-authorities to resolve the

dispute immediately and to treat the period from the date when the petitioner raised the objection, that is, on May 29, 2022, till the date of resolution of the dispute as '*dies-non*'.

In so far as the losses allegedly suffered by the railways is concerned, it is none but the Railway-authorities who are to blame for such losses, if any, since, having acknowledged the problems raised by the petitioner by way of written communication, no action for resolution of the same was taken at the end of the Railways.

In such view of the matter, W.P.A. No. 9998 of 2022 is allowed, thereby setting aside the communication dated June 01, 2022 (annexure P-9, at page 62 of the writ petition), whereby the petitioner was directed to start leasing operation as early as possible, otherwise penal action would be initiated against the petitioner. The respondent no. 6 shall decide on the objections raised by the petitioner in the petitioner's communication, in respect of the loading and unloading problem and ancillary operational problem, as expeditiously as possible, positively within four weeks from date.

Immediately upon such resolution, which will be taken in accordance with law and upon giving an opportunity of hearing to the petitioner, the respondent no. 6 shall intimate the outcome of the same as well as the date of resumption of operation, giving a reasonable period for so resuming to the petitioner.

It is made clear that the merits of the contentions raised by the petitioner and/or refuted by the Railway-authorities have not been entered into by this Court and it will be open to the respondent no. 6 to decide the entire issue independently and in accordance with law without being influenced in any manner by any of the observations made by this Court herein.

It is also made clear that the entire period from May 30, 2022 till the date of intimation of the resolution, whichever way reached, to the petitioner shall be treated as '*dies-non*' in terms of Clause 8.8 of the agreement between the petitioner and the Railway-Authorities (annexure P-2 at page 29 of the writ petition).

There will be no order as to costs.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance of all necessary formalities.

(Sabyasachi Bhattacharyya, J.)