

IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)

ORIGINAL SIDE

Present:

The Hon'ble Justice Krishna Rao

AP 1855 of 2014

Md. Nasim Akhtar

Versus

Union of India & Ors.

Mr. Debrup Bhattacharjee

Mr. Mainak Gupta

.....For the plaintiff

Mrs. Aparna Banerjee

.....For the respondents

Heard on : 14.07.2022

Judgment on : 20.07.2022

Krishna Rao, J.:

This is an application under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the award passed by the Ld. Sole Arbitrator dt. 29th September, 2014.

The petitioner was awarded with the contract of leasing Rear SLR 4 Tons space in train no. 3185Up Ganga Sagar Express, Sealdah to Jaynagar for a period of 18th January, 2010 to 17th January, 2013 and accordingly on 15th January, 2010, an agreement was entered between the parties.

Clause 25.1 of the agreement provides for extension of lease contract which reads as follows:

“25.1. *“Extension of lease is permissible only in case of long term lease of three years wherein then same can be extended only once, by 2 (two) more years at a lease rate of 25% more than lump sum leased freight subject to satisfactory performance by the leaseholder, without any penalty for overloading or violation of any provision of the contract.”*

On 19th September, 2012 the petitioner had applied for further two (2) years extension for the continuation of the lease of 3185 Up Rear SLR. Though, the petitioner had applied for extension of lease period but the respondents have not taken any decision either extension or rejection, the petitioner had filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 before the Ld. Court of Chief Judge, City Civil Court at Kolkata being Miscellaneous Case No. 49 of 2013. On 11th April, 2013, the Ld. Chief Judge, City Civil Court had disposed of the said application by passing the following order :

“That the Miscellaneous Case (under Section 9 of the Arbitration and Conciliation Act, 1996) is allowed on contest against the respondents but without any cost.

Parties to the proceeding are directed to refer the matter to the arbitrator as per agreement dated 15.1.2010 but till the disposal of the matter by the arbitrator and to protect the interest of the parties, the respondents are restrained by an order of injunction from creating any third party interest over the leasing rights of R-SLR-4 ton space in Train No.3185, Gangasagar Express, Sealdah to Jaynagar on payment of 25 % more lease rate than the lump sum leased freight charge now the petitioner is praying subject to the satisfactory performance of the railway authorities till final disposal of the arbitration proceeding. Each of the party shall refer the matter to the arbitrator within three months from this day failing which this order stands vacated.

Petitioner also files an application supported by an affidavit praying for extension of the ad interim order of injunction on the ground

stated therein. In view of disposal of the original Misc. case, the prayer for extension is infructuous and rejected.”

On 19th August, 2013, the respondents have appointed an Arbitrator and accordingly the Arbitrator had started arbitration proceeding between the parties. During the pendency of the arbitration proceeding and inspite of the order passed by the Ld. Chief Judge, City Civil Court, the respondents have issued a letter on 1st July, 2014 directing the petitioner to stop loading and uploading at Sealdah station in train no. 3185 Up Gangasagar Express. Being aggrieved and dissatisfied with the said letter, the petitioner had again preferred an application under Section 9 of the Arbitration and Conciliation Act, 1996 before the Chief Judge, City Civil Court at Kolkata being Misc Case No. 2564 of 2014 and on 10th July, 2014, the Ld. Court had passed the following order :

“In view of the above, issue notice calling upon the opposite parties to show cause within 15 days from the receipt of the same as to why the petitioner’s prayer for temporary injunction shall not be allowed.

Meanwhile, considering the prima facie case of the petitioner, balance of convenience and inconvenience and urgency of the situation, the Opposite parties are hereby directed not to give any effect to the letter dated 01.07.2014 issued by O.P.No.4, and to allow the petitioner in their loading and unloading at Sealdah Station in Train No. 3185 Up Gangasagar Express from Sealdah to Jaynagar till 08.08.2014.

The petitioner to comply with the provision of order 39 Rules 3 (a) & (b) of the C.P. Code at once.”

In the arbitration proceeding, the petitioner has filed statement of claim praying for the following relief :

“1. Your Petitioner shall be granted two years extension as per clause 25.1 or the said agreement as well as per clause E of the Railway Board’s Comprehensive Parcel Leasing Policy;

2. Cost of litigation amounting Rs. 1,00,000/- (Rupees One Lakh only).

3. Other and further order and/or orders as Your Honor may deem fit and proper.”

The respondents have filed their written statement praying for rejection of the claim made by the petitioner and subsequent to filing of the written statement, the respondents have submitted a letter dt. 30th May, 2014 to the Ld. Arbitrator by which the respondents have made out a counter claim against the petitioner on the ground that the petitioner is enjoying the continuation of the contract in terms of the order passed by the Ld. Chief Judge, City Civil Court at Kolkata during the pendency of the Arbitration proceeding in the lesser rate then the rate leased out by the railway of the same train at the rate of 25001/- + 2% development charges per trip per day.

On 29th September, 2014 the Ld. Arbitrator has passed the following Award :

“7.6 After going through the arguments of both sides and papers submitted by them, the counter claim of the respondent is found justified. The claimant was forced to run the SLR at a lower rate when in the same train the respondent was getting higher rate by leasing its front SLR. Moreover, the claimant by its action stopped the respondent from finalizing a new tender for rear SLR. Thus, due to action of the claimant, the respondent was prevented from availing the full benefit of its asset, which any business entity is entitled to. The respondent had very clearly expressed their unwillingness to extend the contract. In the new contract finalized at the same time for front SLR, the respondent was getting Rs. 25000 + 2% development charges. Thus, it will be an injustice to allow running of two SLR’s in the same train, one in the front and one at the rear at two different rates. It may lead to further

legal complication in future. Keeping in view, the facts detailed above, the counter claim of the respondent of Rs. 71,58180 + 2% development charge accrued till 30.06.2014 is permitted.

8 The summarized position of the counter claim is as under:

<i>S. No</i>	<i>Claim</i>	<i>Award given</i>
<i>1</i>	<i>The respondent has made a counter claim of Rs. 13506/- plus 2% development charges per day per trip till the publication of award</i>	<i>Claim of Rs 7158180 permitted as detailed in para 7 to 7 6</i>

Ld. Arbitrator has allowed the counter claim raised by the respondents on the ground that even on completion of the period of contract the petitioner was continued with the contract on a lesser rate though the railway authorities have award work of the same train in the front portion at the higher rate. As per clause 25.1 of the agreement entered between the parties, *“extension to lease is permissible only in case of long term lease of three years wherein the same can be extended only once by two more years at a lease rate of 25% more than the lump sum leased freight subject to satisfactory performance by the leaseholder without any penalty for overloading or violation of any provision of contract.”*

The petitioner had invoked the provision of Clause 25.1 of the agreement by requesting the respondent authorities for extension of lease period but the respondents have neither extended nor rejected the request of the petitioner and accordingly, the petitioner has filed an application before the appropriate court under Section 9 of the Arbitration and Conciliation Act, 1996 and in the said application the petitioner succeeded in getting an interim order and in terms of the interim order and in terms of the agreement, the petitioner had started paying 25% more than the lump sum

leased freight rate. The respondents have accepted the order passed by the Ld. Court and have allowed the petitioner to continue with the said work. The order of injunction passed by the Ld. Court was till the disposal of the Arbitration proceeding but during the pendency of the arbitration proceeding, the respondents have issued a letter to the petitioner directing the petitioner to stop the said work. The petitioner had again filed an application under Section 9 of the Arbitration Act, 1996 before the Ld. Court and again the Ld. Chief Judge, City Civil Judge at Kolkata passed an interim order not to give any effect to the letter dt. 01.07.2014 and the said order was also accepted by the respondents without preferring any appeal.

In Associate Builders case reported in (2015) 3 SCC 49 Paras 31 & 32 which reads as follows:-

“31. *“The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where :*

(i) a finding is based on no evidence, or,

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse.

32. *A good working test of perversity is contained in two judgments. In Excise and Taxation Officer – cum-Assessing Authority v. Gopi Nath & Sons, it was held:*

“7.....it is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.”

In *Ssangyong Engineering and Construction Company Limited -v- National Highways Authority of India (NHAI)* reported in (2019) 15 SCC 131, page 171, para 41, the Hon'ble Supreme Court held that ;

“41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of the Associate Builders, while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence in as much as such decision is not based on evidence led by the parties, and therefore, would also have to be characterized as perverse.”

In the present case, the Ld. Arbitrator has relied the letter dt. 27.09.2012 and held that the same was communicated to the petitioner by informing the petitioner that respondents are not agree to extend the agreement, but the letter dt. 27.09.2012 was neither served to the petitioner nor the same was placed on record. In the written statement filed by the respondents before the Ld. Arbitrator have relied with the letter dt. 27.07.2012 which is the internal communication with the department and not with the petitioner. Ld. Arbitrator also not considered that by the orders of the Court, the petitioner continued with the work and as per the agreement, the petitioner had paid 25% more than the lump sum freight rate to the respondents for the extended period.

In the case on *Delhi Development Authority –versus- R. S. Sharma and Company*, New Delhi (2008) 13 SCC 80, Page 91, Para 21 held that:

“21. *From the above decisions, the following principles emerges:*

(a) An Award, which is

(i) contrary to substantive provisions of law ;or

(ii) the provisions of the Arbitration and Conciliation Act, 1996;

or

(iii) against the terms of the respective contract; or

(iv) patently illegal; or

(v) prejudicial to the rights of the parties;

is open to interference by the court under Section 34(2) of the Act.

(b) The award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) Ojustice or morality.

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with in on the ground that it is patently illegal and opposed to the public policy of India.”

In the present case there is a Clause 25.1 in the agreement which provides for extension and on the basis of the same the petitioner had applied for extension but the respondents have not replied to the same and the petitioner had approached before the Ld. Court of Chief Judge, City Civil Court and the Ld. Court had allowed to continue with the work till the disposal of the arbitration proceeding and during the pendency of the arbitration proceeding the respondents have issued a letter by directing the petitioner to stop the work and again the petitioner had approached the Ld. Court and again the Ld. Court had allowed the petitioner to continue with

the work but the Ld. Arbitrator has not consider the order passed by the Ld. Court and has relied upon the letter dt. 27.09.2012 which is neither placed on record nor the same was served upon the petitioner at any point of time.

In view of the above, this Court finds that the Award passed by the Ld. Arbitrator dt. 29.09.2014 is perverse and patent illegal. Award dt. 29.09.2014 is set aside and quashed.

AP No. 1855 of 2014 is allowed.

(Krishna Rao, J.)