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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**Date of decision: 26th NOVEMBER, 2024IN THE MATTER OF:+ **O.M.P. (COMM) 205/2023**

UNION OF INDIA

.....Petitioner

Through: Mr. Amit Sarkar, Advocate.

versus

DISTRIBUTION LOGISTICS INFRASTRUCTURE PVT. LTD.

.....Respondent

Through: Mr. Mohit Gupta, Mr. Ankit Jain, Ms.
Anisha Gupta, Ms. Aayushi Jain, Ms.
Seemab Ali Fatima, Mr. Anurag
Maharaj, Mr. Mohit Jangra,
Advocates.**CORAM:****HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD****JUDGMENT (ORAL)****I.A. 10843/2023 (Exemption)**

Allowed, subject to all just exceptions.

**O.M.P. (COMM) 205/2023 & I.A. 10842/2023, I.A. 10844/2023, I.A.
24870/2023 & I.A. 35371/2024**

1. The Union of India has approached this Court challenging an Award dated 01.03.2022 passed by the Arbitral Tribunal which was adjudicating a dispute that arose between the parties under a Concession Agreement entered into between the parties on 12.03.2007, which was amended by an Agreement dated 29.05.2015, for carriage of container trains without locomotives.



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2. Material on record indicates that the Respondent procured 45 wagons of Rake FSTR-08 from Texmaco, an RDSO approved manufacturer and supplier, and were inspected by the Petitioner herein and clearance was given. The rake was commissioned on 08.02.2010. It is stated that the BLC Rake FSTR 08 arrived at Madar Depot with "Abnormal Sick Marking" It is stated that disputes arose between the parties under the Concession Agreement and the Petitioner herein raised a demand on the Respondent vide letter dated 29.07.2015 to deposit a sum of Rs.2,05,59,604/- towards stabling charges on its BLC Rake FSTR 08 on the promise of refund after the Rake is moved out but the amount was not refunded to the Respondent.

3. The Respondent first sought amicable resolution of the dispute. Since the dispute was not resolved, the matter was referred to arbitration. An Arbitral Tribunal was constituted and an award dated 01.03.2022 was passed by the Arbitral Tribunal.

4. A perusal of the award discloses that the Union of India had raised three objections, which reads as under:-

“i. The claim has been filed without any basis as no cause of action has arisen as per the A&C Act, 1996 and in terms of the Concession Agreement, the claim is not sustainable;

ii. Mr. Vivek Kalia is not competent to file the Statement of Claims for want of due authorisation of the claimant company; the claim statement is not signed by authorized signatory;

iii. The Statement of Claim against Railway Administration, North Western Railway through its General Manager is not maintainable due to non-joinder of necessary party; that the dispute has arisen



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from Concession Agreement between President of India through Railway Administration, Northern Railway and the claimant. Therefore, the claim has been filed without impleading "Union of India". "

5. All the three objections were rejected by the Arbitral Tribunal. The Arbitral Tribunal observed that the Concession Agreement governs the mutual relationship between the Petitioner and the Respondent which is purely commercial in nature. The Respondent was to procure wagons, brake van etc. at its own costs to own or acquire the right to use rail terminals with access for railway locomotives to do booking of goods for transport in container trains and hand over the loaded train to the Petitioner herein for carriage to its destination on rail routes of Indian Railways.

6. The Petitioner was to carry the containers of the Respondent to its destination and the Respondent was liable to pay various charges such as for haulage/freight, for stabling, for shunting, for placement in the siding etc. which was to be determined in terms of the Concession Agreement.

7. While dealing with the dispute which had arisen under the agreement which, as stated earlier, is related to the levy of stabling charges and refund of the amount recovered. While adjudicating the disputes, which have arisen in this case, the Tribunal after examining all the material before it upheld the claim of the Respondent by holding that the Respondent was not liable to pay the stabling charges which was taken for maintenance under the contract and therefore held that the Respondent was entitled to recover the said amount. Paragraph 16.4 of the said Arbitral Award dated 01.03.2022 reads as under:-

"16.4 In view of the above, even on a prima facie consideration of the respondents' own communication



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sent to the claimant from time to time, it is evident that the said amount of Rs. 2,05,59,604/- has been raised on the basis of-

a. false statement of material facts inasmuch as 20 out of 45 wagons were never stabled at Daurai as on the date of the demand letter; they remained stabled at Madar Yard with broken structural parts;

b. concealment of material facts inasmuch as the fact that since 12.02.2013 till 31.07.2015, 38 wagons out of 45 were damaged and not rail worthy; and that sometimes between 12.02.2013 and 16.02.2013 those 25 wagons including sick wagons were moved/stabled at Daurai by the respondents for their own reasons.

For the aforesaid reasons, the said letter of 29.07.2015 and the stabling charges levied thereunder are liable to be quashed on consideration of the facts manifest on the face of the respondents' own document."

8. There are 11 grounds which have been raised by the Union of India in the present petition, which reads as under:-

"Present petition is being preferred on the following amongst other grounds:-

i) Because the Ld. Arbitral Tribunal has passed an award which is against the settled law and completely arbitrary and deserves to be set aside.

ii) Because the Ld. Arbitral Tribunal has failed to understand the intricacies involved in the present case and passed an award without due deliberation and proper understanding. Award passed by Ld. Arbitral Tribunal is against the settled principles of law.



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iii) Because the Ld. Arbitral Tribunal failed to appreciate the fact that petitioner is under obligation to move the FSTR-08 BLC Rake for maintenance, carry out the repairs if needed in accordance with the provisions of Article 5.8.3 and return the rake without any charges for haulage or repairs but Article 5.1, 5.8.1 r/w 5.8.3 is not applicable to the damaged wagons and petitioner department is not liable for poor manufacturing.

iv) That Ld. Arbitral Tribunal failed to appreciate the fact that structural members are not covered under 5.8.1 r/w section 5.8.3.1 and 5.8.3.3. Petitioner is not liable to undertake the repairs were owing to poor manufacturing and it was respondent responsibility to remove the rake from railway lines and get the repairs carried out at a workshop with having requisite facilities.

v) The Ld. Arbitral Tribunal failed to appreciate the fact that, it was lapse on the part of respondent as respondent did not remove the rake, despite several reminders dated 22.03.2013, 18.04.2013, 13.05.2013 14.03.2014, 11.07.2014, and 16.03.2015 and email dated 24.06.2015 the petitioner had to stable the rake awaiting respondent decision, further Ld. Arbitral Tribunal also failed to appreciate that respondent himself requested petitioner to move the rake for further repairs at Texmaco.

vi) Because the Ld. Arbitral Tribunal failed to appreciate the fact that the Respondent was intimated in the beginning that repair work could not be done by petitioner and by several letters intimated to respondent in regard to levy of stabling charges. Respondent was aware that the stabling charges would be levied on him despite respondent failed to move the rake for repairs to the manufacturer company.



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vii) *The Ld. Arbitral Tribunal failed to appreciate the fact that stabling charges was deposited by the Respondent without any protest. Ld. Arbitral Tribunal also failed to appreciate the fact that after depositing the stabling charges respondent after one year submitted letter for refund of stabling charges, which itself shows that there was no protest at the time of depositing stabling charges was deposited by the respondent voluntarily. Ld. Arbitral Tribunal did not appreciate the fact that the Respondent failed to prove that stabling charges were deposited under protest.*

viii) *Because the Ld. Arbitral Tribunal did not record evidence which was necessary in this matter especially to prove the claims of parties.*

(ix) *Because the Ld. Arbitral Tribunal wrongly held that article 7.6.1 (iii) is not applicable to the rake taken for Article 5.8.1 for maintenance.*

"5.8 Wagon maintenance by Railway Administration 5.8.1 The Concessionaire's Wagons shall be maintained by the Railway Administrators in accordance with the maintenance schedule notified by the Railway Administrators. Such maintenance shall, inter alia, include intensive examination, routine overhaul ("ROH") and periodic overhaul ("POH"), the time schedule for which will be notified by the Railway Administration from time to time. The Concessionaire hereby agrees to provide and maintain or cause to be provided and maintained, the requisite Wagon examination facilities (as or cause to be provided and maintained, the requisite Wagon examination facilities (as to cause to be provided and maintained, the requisite Wagon examination



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facilities (as specified by railway Administration) inside the Rail Terminal and bear a one time capital cost for tools and plants as specified by Railway Administration and approved by RDSO or its authorized agencies for such examination. In this regard, the Concessionaire also agrees to maintain all such facilities including tools and plants always is good working condition at its own cost. The Railway Administration may from time to time modify the maintenance schedule and corresponding timelines.

5.8.2 The parties hereby acknowledge and agree that wagon maintenance charges for maintenance by Railway administration of the Concessionaire's Wagons shall be included the Haulage Charges as notified from time to time. The extent of such maintenance charges that are a part of haulage charges and any charges therein shall be specified by Railway Administration so that In case the Wagons belong to another party or maintenance is done by other agency, at any future date, the same can be separately accounted for. It is expressly agree that the present Haulage Charges include 5% thereof by way of maintenance charges.

5.9 Wagon maintenance by other entities

5.9.1 Subject to Article 5.8.1, the Concessionaire may undertake maintenance of the Concessionaires wagon through any other entity including the concessionaire on such terms and condition as specified by the Railway Administrators from time to time provided, however, that the maintenance is carried out as per maintenance schedules and various stages of inspection as may be notified by Railway



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Administration and pre-departure certification of inspection as may be notified by Railway Administration and pre-departure certification of such wagons shall be issued by the Railway Administration for which the prescribed charges as notified by Railway Administrators from time to time shall be paid the Concessionaire.

(x) Because the Ld. Arbitral Tribunal wrongly interpreted Article 7.6.1 (iii), Article 7 is very specific & clear and leaves no scope. Petitioner is entitled to levy stabling charging under Article 7 of the Agreement, a bare perusal of the Article 7.6.1 clears that.

7.6.1 The concessionaire shall be liable to pay to railway administration stabling charges, in the following events.

(iii) at any of the station and en-route due to any reason attributable to the concessionaire. Provided however, that stabling charges shall be levied only where the detention of the concessionaire train is for a period in excess of four hours. In the present case rake was loaded at Bazpur and unloaded at ALIK and thereafter taken to Madar station hence rake was enroute to Madar station and thereafter enroute to Daurai. Therefore, ld. Arbitration Tribunal wrongly held that train was not enroute hence, petitioner could not levy stabling charge.

XI. Because the ld. Arbitral Tribunal failed to appreciate that definition of serving station is very clear and specific and leaves no scope. As in the rail Head definition of serving station is given as "Rail head means a serving railway station". Hence, Madar and Daurai were the serving station therefore, respondent was bound to pay stabling charges as per



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Article 7.6.1. ”

9. A perusal of all the grounds indicates that they are purely factual in nature. Apart from stating that the Tribunal has passed an award against settled law and that the Tribunal has failed to understand the intricacies involved in the present case, the facts touching the grounds of the case.

10. None of the grounds raised in the petition are sufficient to set aside the award. The Petitioner has not made out any ground to show as to how the award is in conflict with the public policy of India or that it is vitiated by patent illegality appearing on the face of the award. The Petitioner has only attempted to re-appreciate the evidence before this Court for this Court to come to a different conclusion to the one arrived by the learned Arbitrator.

11. The Tribunal while examining the evidence of the case found that the dispute had arisen from two letters being letter dated 29.07.2015 and letter dated 03.07.2017, both issued by Deputy CCM/FM, Jaipur. The Tribunal observed that through the first letter dated 29.07.2015, it can be seen that the stabling charges of Rs. 2,05,59,604/- has been levied because the Respondent's BLC Rake FSTR 08 of 45 wagons has been stabled at Daurai since 12.02.2015. However, it has been found to be incorrect. The Tribunal held that the facts reveal that the Rake FSTR 08 in question had never been taken Daurai at any point of time since 12.02.2012 till 29.07.2015 and therefore the basis of the allegations given in the letter dated 29.07.2015 were incorrect since the wagon ceased to be in existence since 09.02.2013. The Tribunal held that in view of the fact that the stabling charges could not have been levied as the Rake FSTR 08 was never taken to Daurai and therefore the question of it being stabled at Daurai does not arise. In view of



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the above, it is stated that the levy of stabling charge have been made without any liability incurred and therefore the levy was completely *void ab initio*. The second letter namely 03.07.2017 was only a reply to the request of the Respondent for resolving the dispute of levy of stabling charges as required under Article 18.1 of the contract.

12. The case of the Petitioner is that the obligation of Union of India under Article 5.8.1 does not include repairing of manufacturing defects of structural members. Other than baldly stating that the conclusion arrived at by the Tribunal is wrong, it has not been stated in the present petition under Section 34 of the Arbitration & Conciliation Act as to how a reading of the various provisions of the award is so perverse or is completely contrary to the agreement, the attempt on the part of the Union of India is only that the grounds are only an endeavour beseeching this Court to re-interpret the various clauses.

13. The Tribunal, after due consideration to the clauses of the agreement and facts of the present case, held that there is no provision which provides for stabling of the rake that has been brought for maintenance under Article 5.8.1, under which the Respondent herein would be liable to pay. It has also been thoroughly discussed and held that there was no denial on the part of the Petitioner of their obligation under Article 5.8. It was further held that Article 7.6.1(iii) will not be applicable to the rake taken for maintenance under Article 5.8.1 read with Article 5.8.3. It is also held by the Tribunal that it is evident that a rake given for maintenance and declared sick, disintegrated into parts and stabled at two different places is not the event specified under para (iii) so as to attract the liability to pay any charges under Article 7.6.1(iii).



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14. A perusal of the award shows that the Tribunal has meticulously examined the provisions of the contract and has applied its minds to the pleadings and the evidence adduced before it and therefore this Court is not ready to interfere with the Impugned Award. It is well settled that courts while examining a challenge to an award under Section 34 of the Arbitration & Conciliation Act does not re-appraise the matter as if it was an appeal and it is well settled that even if two views are possible, there is no scope for the Court to examine an award under Section 34 of the Arbitration & Conciliation Act to re-appraise the evidence and take a different view to the one taken by the learned Arbitrator.

15. The view of the Tribunal is normally accepted by the Court and is allowed to prevail unless it is shown that view taken by the Tribunal is so unreasonable that no person of ordinary prudence would come to that conclusion or if the Arbitrator has accepted to the terms of the agreement or the award has been passed without any evidence.

16. The Apex Court in Batliboi Environmental Engineers Ltd. v. Hindustan Petroleum Corpn. Ltd., (2024) 2 SCC 375, has observed as under:-

“35. Sub-section (1) to Section 34 of the A&C Act requires that the recourse to a court against an arbitral award is to be made by a party filing an application for setting aside of an award in accordance with sub-sections (2) and (3) of Section 34. Sub-section (2) to Section 34 of the A&C Act stipulates seven grounds on which a court may set aside an arbitral award. Sub-section (2) consists of two clauses, (a) and (b). Clause (b) consists of two sub-clauses, namely, sub-clause (i) which states that when the subject-matter of the dispute is not capable of



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settlement by arbitration under the law for the time being in force, and sub-clause (ii), which states that the court can set aside an arbitral award when the award is “in conflict with public policy of India”. We shall subsequently examine the decisions of this Court interpreting “in conflict with public policy of India” and the explanation.

37. Explanation to sub-clause (ii) to clause (b) to Section 34(2) of the A&C Act, as quoted above and before its substitution by Act 3 of 2016, had postulated and declared for avoidance of doubt that an award is “in conflict with the public policy of India”, if the making of the award is induced or affected by fraud or corruption, or was in violation of Sections 75 or 81 of the A&C Act. Both Sections 75 and 81 of the A&C Act fall under Part III of the A&C Act, which deal with conciliation proceedings. Section 75 of the A&C Act relates to confidentiality of the settlement proceedings and Section 81 deals with admissibility of evidence in conciliation proceedings. Suffice it is to note at this stage that while “fraud” and “corruption” are two specific grounds under “public policy”, these are not the sole and only grounds on which an award can be set aside on the ground of “public policy”.

45. Referring to the third principle in Western Geco [ONGC Ltd. v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , it was explained that the decision would be irrational and perverse if (a) it is based on no evidence; (b) if the Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or (c) ignores vital evidence in arriving at its decision. The standards prescribed in State of Haryana v. Gopi Nath & Sons [State of Haryana v. Gopi Nath & Sons, 1992 Supp (2) SCC 312] (for short Gopi Nath & Sons) and



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Kuldeep Singh v. Delhi Police [Kuldeep Singh v. Delhi Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429] should be applied and relied upon, as good working tests of perversity. In Gopi Nath & Sons [State of Haryana v. Gopi Nath & Sons, 1992 Supp (2) SCC 312] it has been held that apart from the cases where a finding of fact is arrived at by ignoring or excluding relevant materials or taking into consideration irrelevant material, the finding is perverse and infirm in law when it outrageously defies logic as to suffer from vice of irrationality. Kuldeep Singh [Kuldeep Singh v. Delhi Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429] clarifies that a finding is perverse when it is based on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it. If there is some evidence which can be acted and can be relied upon, however compendious it may be, the conclusion should not be treated as perverse. This Court in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] emphasised that the public policy test to an arbitral award does not give jurisdiction to the court to act as a court of appeal and consequently errors of fact cannot be corrected. Arbitral Tribunal is the ultimate master of quality and quantity of evidence. An award based on little evidence or no evidence, which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Every arbitrator need not necessarily be a person trained in law as a Judge. At times, decisions are taken acting on equity and such decisions can be just and fair should not be overturned under Section 34 of the A&C Act on the ground that the arbitrator's approach was arbitrary or capricious. Referring to the third ground of public policy, justice or morality, it is observed that these are two different concepts. An award is against justice when it shocks the conscience of the court, as in an example where the claimant has restricted his claim



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but the Arbitral Tribunal has awarded a higher amount without any reasonable ground of justification. Morality would necessarily cover agreements that are illegal and also those which cannot be enforced given the prevailing mores of the day. Here again interference would be only if something shocks the court's conscience. Further, "patent illegality" refers to three sub-heads : (a) contravention of substantive law of India, which must be restricted and limited such that the illegality must go to the root of the matter and should not be of a trivial nature. Reference in this regard was made to clause (a) to Section 28(1) of the A&C Act, which states that the dispute submitted to arbitration under Part I shall be in accordance with the substantive law for the time being in force. The second sub-head would be when the arbitrator gives no reasons in the award in contravention with Section 31(3) of the A&C Act. The third sub-head deals with contravention of Section 28(3) of the A&C Act which states that the Arbitral Tribunal shall decide all cases in accordance with the terms of the contract and shall take into account the usage of the trade applicable to the transaction. This last sub-head should be understood with a caveat that the arbitrator has the right to construe and interpret the terms of the contract in a reasonable manner. Such interpretation should not be a ground to set aside the award, as the construction of the terms of the contract is finally for the arbitrator to decide. The award can be only set aside under this sub-head if the arbitrator construes the award in a way that no fair-minded or reasonable person would do."

17. This Court has meticulously gone through the award and also the grounds raised by the Petitioner in the present petition. As stated earlier, the Union of India has not been able to demonstrate as to what is the portion of the evidence that has been ignored which will have a vital bearing on the



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award or non-consideration of which has made the award opposed to the public policy of India or that it is in contravention of the fundamental policy of Indian law or it is in conflict with basic notions of morality and justice which alone are the grounds on which the award can be challenged. The award which has been passed by the Tribunal is a well considered award and therefore does not deserve to be interfered with by this Court.

18. With these observations, petition is dismissed along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

NOVEMBER 26, 2024

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