



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

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Reserved on: 15.12.2023

Pronounced on: 04.03.2024

IN THE MATTER OF:

ARB. A. (COMM.) 9/2023

TATA MOTOR LIMITED

..... Petitioner

Through: Mr. Rajiv Nayar, Sr. Advocate,
Mr. Gopal Jain, Sr. Advocate with Ms. Meera
Mathur, Ms. Nandini Gore, Ms. Aditi Bhatt,
Mr. Rajat Dasgupta, Mr. Sarthak Gaur and
Ms. Manvi Rastogi, Advocates

Versus

DELHI TRANSPORT CORPORATION

..... Respondent

Through: Mr. Manish Vashisht, Sr. Advocate
with Mr. Rikky Gupta, Standing Counsel with
Ms. Ananya Singh, Ms. Harshita N., Mr. Vedansh,
Mr. Vanshay Kaul and Mr. Aman Singh,
Advocates

AND

ARB. A. (COMM.) 27/2023, I.A. 10998/2023 and I.A. 10999/2023

DELHI TRANSPORT CORPORATION

..... Petitioner

Through: Mr. Manish Vashisht, Sr. Advocate
with Mr. Rikky Gupta, Standing Counsel with
Ms. Ananya Singh, Ms. Harshita N., Mr. Vedansh,
Mr. Vanshay Kaul and Mr. Aman Singh,
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Versus

TATA MOTORS LIMITED

..... Respondent

Through: Mr. Rajiv Nayar, Sr. Advocate,
Mr. Gopal Jain, Sr. Advocate with Ms. Meera
Mathur, Ms. Nandini Gore, Ms. Aditi Bhatt,



Mr.Rajat Dasgupta, Mr.Sarthak Gaur and
Ms.Manvi Rastogi, Advocates

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

1. These appeals have been filed under Section 37(2)(B) of the Arbitration and Conciliation Act (hereinafter, '*A&C Act*') against the order dated 17.03.2023 passed by the Arbitral Tribunal on an application under Section 17 of the A&C Act filed by Tata Motors Ltd. (hereinafter, '*TML*'). Both the parties are aggrieved of the separate parts of the order for which they have filed their respective appeals.

2. The facts necessary for disposal of the present case are as under:-

a. Delhi Transport Corporation (hereinafter, '*DTC*') purchased 650 AC and 975 non- AC low floor CNG fueled buses from TML under a contract dated 18.10.2018, to be operated as part of its fleet in Delhi. Besides selling the buses, TML also undertook to maintain the buses against Annual Maintenance Charges ('*AMC*') payable by DTC.

b. Disputes arose between the parties in relation to Clause 24.4 and 46.16 of the General Conditions of Contract ('*GCC*'). DTC alleged that TML became liable to pay penalty under Clause 24 of the GCC for not meeting the guaranteed minimum average fuel efficiency target measured in terms of Kilometers operated per Kilogram of CNG fuel consumed (KMPKG) which it could recover from the AMC dues of TML under Clause 46 of GCC.



c. DTC calculated the KMPKG penalty amount payable under Clause 24.4 of the GCC and adjusted the same from the AMC bills of the TML. The KMPKG was calculated by the DTC on the basis of meterage recorded in the drivers' memo maintained by it for calculation of AMC.

d. This was disputed by TML, who contended that the "kilometers operated" as specified in Clause 24.4 could be the only basis for calculation of KMPKG and not the metreage recorded in the drivers' memo which was made the basis for calculation of AMC under Clause 46.16.

e. DTC raised a demand for payment of KMPKG penalty for the period 2011-12 and 2012-13 and sought to deduct the same from the AMC dues of TML. This prompted TML to invoke arbitration and challenge the demand. By way of an interim orders dated 05.04.2013 and 15.06.2013, the then Arbitral Tribunal stayed the demand and restrained DTC from recovering the penalty from the AMC dues.

f. Eventually an arbitral award was passed on 16.08.2017 (*'First Arbitral Award'*). The majority award held that DTC could not use the meterage recorded in the drivers' memo maintained for calculating AMC under Clause 46.16, and consequently declared the said action as illegal, including the recoveries made by them from the AMC dues of TML.

g. DTC filed objections against the First Arbitral Award under Section 34 of the A&C being OMP(COMM.) 425/2017. On the other hand, TML filed an enforcement petition being



OMP (ENF.)(COMM.) 137/2018 for enforcing the award wherein vide orders dated 26.09.2018, 29.03.2019, 13.03.2020 and 20.07.2020, the Court directed DTC to deposit Rs.100 crores, Rs.140 crores and Rs.100 crores in the Registry and allowed TML to withdraw the said amounts on furnishing of affidavit of undertaking and bank guarantees.

h. During the pendency of its objections, DTC issued an Office Memorandum dated 05.02.2021 raising a demand of Rs.127 Crores (approx.) from TML pertaining to the period between 2009 to 2020, excluding the periods 2011-2012 and 2012-13 already covered by the First Arbitral Award and held to be illegal.

i. TML filed a post award Section 9 petition being OMP(I)(COMM.) 62/2021 to restrain DTC from recovering the said amount from its AMC dues. TML contended that DTC's action was in violation of the First Arbitral Award and the contractual provisions.

j. Apparently, on 15.02.2021 and 18.02.2021, DTC deducted a sum of Rs.15,00,59,200/- and Rs.4,11,01,700/- respectively aggregating to a total of Rs.19,11,60,900/-, from the AMC dues of TML. However, later vide order dated 18.02.2021 passed in the aforementioned Section 9 petition, DTC gave an undertaking that it shall not make deductions from the AMC dues of TML till the next date of hearing.

k. Later, vide order dated 15.11.2021, the court directed DTC to deposit a sum of Rs 19,11,60,900/- in court that it had



already deducted.

l. DTC challenged the order dated 15.11.2021 by way of an appeal being FAO(OS)(COMM.) 167/2021. Record reveals that the appellate court did not stay the impugned order dated 15.11.2021 and DTC filed an SLP being SLP(C) No.1079/2022 against the appellate court's refusal to stay the direction for deposit.

m. While the SLP was pending, the OMP(I)(COMM.) No 62/2021 itself came to be disposed of vide order dated 27.01.2022, whereby DTC was restrained from recovering penalties from the AMC dues of TML. Eventually, on 22.03.2022, the SLP was disposed of in view of the final order dated 27.01.2022 leaving all the questions open for adjudication.

n. DTC filed an appeal being FAO(OS)(COMM.)72/2022 against the order dated 27.01.2022. In the said appeal, DTC made a statement on 09.01.2023 stating that it would withdraw the appeal if TML withdrew its Section 9 petition itself. Consequently, vide order dated 03.02.2023, TML withdrew its OMP(I)(COMM.) 62/2021 and DTC withdrew its appeal and with the consent of TML, DTC was permitted to withdraw the sum of Rs 19,11,60,900/- that it had deposited pursuant to the order dated 15.11.2021.

o. While all the aforesaid was going on, another parallel track of recoveries had been initiated by the DTC. A demand dated 02.07.2022 was raised for a sum of Rs 17,86,43,616/- as KMPKG penalty for the period 2021-2022 in relation to around



20 depots. This demand was raised pursuant to the Office Memorandum dated 05.02.2021, where already a demand of sum of Rs.127 crores had been made.

p. After raising the aforesaid demand, DTC on its own invoked arbitration vide its notice of invocation dated 05.07.2021, and raised a claim of Rs.127 Crores, pursuant to its OM dated 05.02.2021. Pursuant to the invocation notice, the Arbitral Tribunal ('AT') was constituted on 07.08.2022.

q. TML filed an application before the AT under Section 17 ('*First Section 17 application*'), to stay the demand of Rs.17,86,43,616/- made by DTC. Vide order dated 09.11.2022, DTC was restrained from recovering the said penalty amount. In the same order, TML was directed to furnish a bank guarantee to secure the said amount. Notably, this order was not challenged by DTC.

r. Later, another application under Section 17 ('*Second Section 17 application*') was filed by TML to challenge a demand dated 29.12.2022 for the sum of Rs 5,51,53,753/- made by DTC for the period 2020-2021. Vide order dated 06.02.2023, the AT passed an order similar to the earlier order dated 09.11.2022 and stayed the demand. TML was yet again directed to furnish a bank guarantee to secure the said amount. This order too remained unchallenged by DTC.

s. Whilst two previous orders passed under Section 17 were already operating and remain unchallenged, TML filed yet another application under Section 17 with the similar prayer i.e.,



to stay the DTC's KMPKG penalty demand, albeit for a different period and amount than the previous orders. In this fresh application, the demand of Rs.127 Cr, which actually is the sum claimed as Claim No.1 in DTC's Statement of Claim ('SOC') was sought to be stayed. TML further sought stay of the internal communication dated 04.01.2023 whereby a decision was taken to recover the said sum even though the claim was pending adjudication by the AT.

t. Additionally, in the said application, TML prayed for recovery of sum of Rs.49,81,87,525/- deducted by DTC from its AMC dues which was deducted in January 2023 and February 2023.

u. The AT, following its two previous orders passed under Section 17, as discussed above, passed the impugned order dated 17.03.2023, which was consistent with its previous orders. As before, DTC was restrained from recovering the sum of Rs.78,04,39,450/- being the remaining amount, after discounting a sum of Rs.49,81,87,525/- already recovered by DTC from the sum of Rs.127 Cr and TML was directed to furnish a bank guarantee to secure the amount in dispute. Additionally, TML's prayer for direction for release of sum of Rs.49,81,87,525/- already deducted by DTC was rejected.

v. Aggrieved by the impugned order, the parties have now challenged the order dated 17.03.2023 in these appeals.



DTC'S GROUNDS OF CHALLENGE

3. In short, DTC has challenged the impugned order inter-alia on the grounds that TML unconditionally withdrew its Section 9 petition vide order dated 03.02.2023 and is estopped from seeking similar relief under Section 17 from the Tribunal. It is contended that the relief sought from the AT is barred by constructive res judicata.

4. It is further contended by DTC that there is no fresh cause of action available to TML to file the present section 17 application since the internal communication dated 04.01.2023 was issued, pursuant to the Office Memorandum dated 05.02.2021, which was challenged by TML by filing OMP(I)(COMM.) 62/2021, and later, unconditionally withdrawn vide order dated 03.02.2023, as explained above. The unconditional withdrawal estopped TML from challenging the same demand all over again. DTC has cited the judgment passed in Kanchan Kapoor v. Swaran Kumar¹, in support of its contention.

5. DTC has further relied upon the judgment delivered in Arcelor Mittal Nippon Steel India Ltd v. Essar Bulk Terminal Ltd.² and Kirtikumar Futarmal Jain v. Valencia Corporation³, to argue that once relief under Section 9 is refused, the same relief could not have been sought from and granted by the AT under Section 17.

6. DTC also cited H.M Kamaluddin Ansari & Co. v. Union of India⁴ to contend that stay against recoveries sought for by DTC amounts to a direction to DTC to pay the sums to TML, and a direction of such nature

¹ 2014 SCC OnLine Del 6552

² (2022) 1 SCC 712

³ 2019 SCC OnLine Guj 3972

⁴ (1983) 4 SCC 417



was held to be in violation of Section 41(b) of the Arbitration Act 1940.

TML'S GROUNDS OF CHALLENGE

7. TML has challenged the AT's refusal to direct refund of Rs.49,81,87,525/- withheld by the DTC, on the ground that the issue had already been decided in the previous arbitral award dated 16.08.2017 whereby DTC's demand of KMPKG penalty was held to be illegal. DTC's action was in violation of the said award.

8. TML has further argued that under Section 17, AT does have the power to grant interim mandatory injunction orders and AT's observation that such power doesn't exist is contrary to the settled legal position. Reference, in this regard, was made to the decisions in NTPC Ltd. v. Jindal ITF Ltd. & Ors.⁵ and SPA Agencies (India) Pvt. Ltd., Chennai v. Harish Rawtani⁶.

DISCUSSION

9. It bears noting that the impugned order dated 17.03.2023 passed by the AT is the third such order in a series of consistent orders passed by the AT under Section 17, on applications filed by TML. None of the two previous orders dated 09.11.2022 and 06.02.2023 have been challenged by DTC. Like in the present impugned order, in both the aforesaid previous orders, DTC was restrained from deducting KMPKG penalty from the AMC dues of the TML and TML was directed to furnish a bank guarantee to secure the said amounts.

10. No reasons have been offered by DTC for not challenging the

⁵ 2017 SCC OnLine Del 11219

⁶ 2010 (1) ALD 453



previous orders and why an exception was made for the impugned order in choosing to challenge the same.

11. DTC has rested its challenge mainly on the ground of constructive res judicata arising from the fact that TML unconditionally withdrew its Section 9 petition, thereby abandoning the relief of stay granted by the court in the said proceedings. DTC contends that vide order dated 03.02.2023, passed in FAO(OS)(COMM) 72/2022, TML agreed to DTC withholding the sum of Rs.19,11,60,900/-, which was some kind of conceding by TML to the DTC's right to recover KMPKG penalty from the AMC dues of TML. According to DTC, TML having conceded this position earlier, cannot challenge the recovery now.

12. This contention of DTC does not appear to be correct. The order dated 03.02.2023 suggests that a mutual arrangement was worked out between the parties whereby a limited concession was conceded by TML, allowing DTC to recover a sum of Rs.19,11,60,900/-. In return, DTC also withdrew its appeal against the order staying the recoveries. The order however, does not suggest that a permanent understanding had been reached between the parties on the issue. It would be reasonable to conclude that TML had no reason to concede, since it already had an arbitral award in its favour whereby DTC's act of making deduction had been held to be illegal.

13. Also, there were two orders already operating under Section 17 in favour of TML namely order dated 09.11.2022 and 06.02.2023 whereby DTC had been restrained from making recoveries from the AMC dues of TML, which orders have not been challenged by DTC. By way of the aforesaid two orders, DTC was restrained from recovering penalty for the periods 2021-2022 and 2020-2021 respectively.



14. It is further pertinent to note that DTC faced contempt for violating its own undertaking dated 18.02.2021 given in OMP(I)(COMM.) No 62/2021 that it shall not make any deductions. It was in the contempt petition filed by TML wherein vide order dated 15.11.2021, DTC was directed to deposit the sum of Rs.19,11,60,900/- that it had deducted/withheld. However, before the main OMP and the contempt application could be disposed of by the court, the parties reached an arrangement, as mentioned above. Therefore, DTC having taken benefit of escaping the consequences of a possible contemptuous action, due to a mutual arrangement worked out between the parties, it cannot be allowed to argue that the withdrawal of the OMP(I)(COMM.) 62/2021 was unconditional and hence operates as res judicata.

15. DTC's reliance on the judgment of this Court in Kanchan Kapoor (Supra) is not helpful to its cause. In the said judgment, the court applied the principle of res judicata where an appeal against a judgment passed by a civil court was unconditionally withdrawn by an appellant, wherein there was a finding against the appellant regarding his title to the suit property. The appellant was disallowed from asserting title in subsequent proceeding between the parties since he had unconditionally withdrawn his appeal against the civil court judgment. There is no similarity of facts between above case and the present one.

16. There is no decree or adjudication against TML in OMP(I)(COMM.) 62/2021 regarding the issue of KMPKG penalty. Rather, there is a prior arbitral award against DTC and two unchallenged orders passed against it under Section 17 forbidding it from recovering penalties.

17. DTC's reliance on Arcelor Mittal (Supra) and Kirtikumar Futarmal



(Supra) to contend that the ratio laid down therein prohibits the AT from entertaining Section 17 application once proceedings under Section 9 before court was withdrawn., is misplaced. The said judgments discuss the inter-play between Section 9 and Section 17 in the same arbitral proceedings. The ratio of the aforesaid judgments is that if the court has declined to pass an order under Section 9, then the arbitrator is precluded from entertaining an application under Section 17 on the same cause of action. However, in the present case, the order dated 03.02.2023 was passed in the proceedings that did not pertain to the arbitral proceedings in question, as explained above. Therefore, there is no legal conflict that the AT faced in entertaining TML's application under Section 17.

18. AT rightly observed that it was DTC that chose to invoke arbitration and sought adjudication of its claim. Having chosen to seek adjudication, it cannot, before the claim is adjudicated, on its own recover the KMPKG penalty. There is no error in the reasoning adopted by the AT.

19. As far as TML's challenge is concerned, it is noted that TML's contention that AT erred in holding that it did not possess powers to grant interim mandatory injunction under Section 17, is completely incorrect. AT posed a question to itself about its powers under Section 17 however, undeterred by its own conclusion that such powers do not exist, refused to grant interim mandatory injunction on merits. TML did not suffer refusal because AT held that such powers did not exist but rather on merits.

20. AT refused to reverse the recoveries made by DTC from time to time since TML could not succeed in getting an order from High Court in the earlier proceedings. The AT observed that *'it would not like to upset the apple cart'*. In view thereof, TML's objection is unfounded. The case law



cited by TML is out of context since AT did not reject TML's prayer for refund of withheld amount due to lack of powers under Section 17.

21. It may be added that the recoveries were made by DTC on 15.02.2021, 18.02.2021, 17.01.2023, 19.01.2023, 20.01.2023, 15.02.2023, 28.02.2023, 02.03.2023, 07.03.2023, 15.03.2023, 17.03.2023 and till date TML has not filed a counter claim to claim the sums back. Insofar as the amounts deducted in February 2021 are concerned, TML could have initiated arbitral proceedings of its own to recover the withheld sums even prior to the time when DTC invoked arbitration in August 2022. Having failed to make a substantive claim in the arbitral proceedings, it cannot seek recovery by way of interim mandatory injunction under Section 17. Such relief would be beyond the scope of Section 17 and AT is correct in not entertaining the prayer.

22. For the reasons discussed above, both the appeals are dismissed. Pending applications are disposed of as infructuous.

MANOJ KUMAR OHRI
(JUDGE)

MARCH 4, 2024
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