

(2016) 12 OHC CK 0021
In the Orissa High Court
Case No : W.P.(C). No. 14736 of 2016

Ma Chandi Durga Ispat Private Limited	APPELLANT
Vs	
Union of India	RESPONDENT

Date of Decision : 22-12-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2017) 170 AIC 874 : (2017) 123 CutLT 991

Hon'ble Judges : Mr. Vineet Saran, CJ. and Dr. B.R. Sarangi, J.

Bench : Division Bench

Advocate : M/s. Pitambar Acharya, Sr. Advocate, S.Rath, J.P. Parida and D. Panigrahy, Advocates, for the Petitioner; Mr. D.K. Sahu, Advocate, for the Opposite Parties

Final Decision : Allowed

Judgement

Vineet Saran, C.J. - This matter was not on Board today. On being mentioned and through special notice it is taken up as similar matters are already on board.

By consent of learned counsel for the parties, the matter is taken up for final disposal.

2. The petitioner is a registered Company and is engaged in the business of trading.

3. Under the scheme of the opposite party-Railways, known as Wagon Investment Scheme (WIS), which was introduced and published on 31.3.2005, the petitioner entered into an agreement with the opposite party-Railways on 13.12.2006 and in terms of the Scheme, the date of commencement of the agreement was to be 13.06.2009, as the petitioner was provided with the wagons under the scheme only on that date. The period of the agreement was admittedly ten years, which is to expire on 12.06.2019. The petitioner has been using their wagons in terms of the Scheme. It is now aggrieved by the interpretation given with regard to admissibility of WIS benefits to 3rd party for

movement of their consignments in WIS rakes by the General Circular dated 17.09.2013, issued by the Government of India, Ministry of Railways. By this Circular, Railways has interpreted the word "assign" as used in the Scheme, and thereafter gone further to say that the assignment of rake to third party will defeat the basic purpose of Scheme. Challenging the said General Circular dated 17.9.2013, this writ petition has been filed.

4. We have heard Mr. P. Acharya, learned Senior Counsel along with Mr. D. Panigrahy, learned counsel for the petitioner as well as Mr. D.K. Sahu, learned counsel appearing for the opposite party-Railways and perused the record. Pleadings between the parties have been exchanged and with the consent of the learned counsel for the parties, this writ petition is disposed of at the admission stage.

5. The submission of the petitioner is that the General Circular does not apply to the case of the petitioner as the entire scheme does not use the word "assign" which is sought to be interpreted in the aforesaid Circular. It is thus submitted that the business, as has been carried out by the petitioner under the Scheme and as per the agreement between the parties, should be permitted to be carried on, ignoring the aforesaid Circular as the word "assign" may have been used in the agreement in the context where any of the party does not survive, which is not so in the present case, yet the opposite parties are making the Circular applicable in the case of the petitioner.

6. Mr. D.K. Sahu, learned counsel appearing for the Railways, however, admits that the word "assign" has not been used in the entire scheme or policy, and that the word "assign" has been used in the agreement, which is in the context where the party does not survive, and in such an eventuality, its successor or assignee are to be substituted in its place. He however admits that the present case is not a case of succession.

7. The objectives of the Scheme have been given in para 1.0 and the eligibility criteria in para 2.0 and 2.1 of the said scheme, which are reproduced below:

"1.0 - Objective :

In order to encourage public-private partnership in procurement of wagons to meet with the anticipated incremental freight traffic in the coming years, Hon'ble Minister for Railways, while presenting the Railway Budget 2005-06 on 26th February, 2005, has announced introduction of a new scheme called "Wagon Investment Scheme" (WIS). Customers investing in Railway wagons will be assured of supply of a guaranteed number of rakes every month based on the number of rakes procured and the turn round of the type of wagons with 10% concession in freight. In addition, two bonus rakes per month will be supplied without freight concession for the types of wagons indicated under para 7.9. Investors opting for Engine on Load (EOL) Scheme will get additional bonus supply of two BG rakes per month without concession in freight. This guaranteed supply will be in addition to normal supply of rakes to such customers (supplies

during the previous financial years shall be reckoned as normal supply).

2.0. Eligibility :

2.1 Wagons under this scheme can be procured by:

- (i) Individuals as producers;
- (ii) Corporate entity as producers;
- (iii) Association or group of companies, such as, integrated steel plants of SAIL or a group of cement companies in a "cluster" etc.
- (iv) Public Sector Undertaking (PSUs)/Government Undertakings.
- (v) Private Trading houses.
- (vi) Power houses."

The benefits under the Scheme in the category of which the petitioner falls are given in para 7.3, which is reproduced below:

"7.3. Category "II"- BOX"N Wagons.- Freight rebate of 10% shall be granted for 10 years and guaranteed supply of wagons at the rate of 6 rakes per month. In addition, a guaranteed supply of two bonus rakes will be made without freight concession. (For customers opting for EOL Scheme 2 further additional bonus rakes will be supplied without freight concession.)"

The ownership of Wagons in the present case, as per the Scheme, would remain with the petitioner for a period of ten years, as would be clear from para 7.10 of the scheme, which is reproduced below.

"7.10 - Ownership of Wagons:- Ownership of wagons procured under Wagon Investment Scheme (WIS) shall get transferred to Indian Railways after 10 years for BOXN rakes, 15 years for BCN rakes, 9 years for BTPN rakes, 15 years for BRNA rakes, 7 years for BOST rakes and 7 years for BOBRN rakes."

Although changes are contemplated under the Scheme, only with the mutual consent of the parties, but admittedly no change has been done in the present case. However, paragraph 13.0 relating to change in the Scheme which is reproduced below:

"13.0 Changes in the Scheme:- Terms of the Scheme (WIS) may be altered by mutual consent of both parties."

The scheme also contemplates for Arbitration, which is provided at para 15.0 and 15.1. The relevant portion of paras 15.0 and 15.1 are reproduced below:

"15.0. Arbitration:

15.1. In the event of question, dispute or difference between the parties hereto relating to any matter arising out of or quoted "with this" agreement, such dispute or difference shall be referred for the award of three arbitrators?.."

Similar condition for Arbitration is also provided for in clause 16 of the agreement.

8. For proper appreciation of the facts of the present case, the entire Circular dated 17.9.2013 is reproduced below:

"Government of India

Ministry of Railways

Railway Board

Sl. No. 117(G)/2013

No.2006/TC(FM)/4/25 pt-I New Delhi, Dated: 17.09.2013

General Manager, South Eastern Railway, Kolkata.

Sub: Admissibility of WIS benefits to 3rd party for movement of their consignments in WIS rakes.

With reference to CTPM/Eastern Railway Lt. No. AS/60C/WIS/MTCPL dated 03.04.2013, 23.07.2013 addressed to Adv.(FM) on the above mentioned subject, the matter has been examined in consultation with Legal Advisor/Railway Board.

While framing the policy the basic interpretation of the term "assign" was as part of the company's successors or assigns which is in terms of the company being assigned to some other owner in case of liquidation/merger or the assets of the company being transferred to some other entity who will then be the owner of the WIS rakes. Therefore the situation where the investor as owner can "assign" i.e. lease his WIS rakes to someone else while retaining ownership of the company is not tenable.

Moreover the basic thrust of the policy was :

1. "Assignment of rakes of WIS to third party is not as per the policy & will create complications in supply of guaranteed rakes as well as freight rebate. The WIS policy was for the investor only as per para 2.0 of the WIS policy.
2. The policy does not mention any assignment or leasing of WIS rakes. In fact para 12.0 clearly mentions that "In the event of the termination of the arrangement by the investor on account of liquidation/merger with other company or due to any alteration/deletion in the scheme, the ownership of wagons would remain with the Investor." The investor can only sell his wagons to IR at a mutually agreed price.

Legal Advisor in his opinion has agreed that "Assignment of rake to third party will defeat the basic purpose of WIS policy, as in this scheme only end users have been allowed to make investment. Simultaneously it will make the policy of Wagon Leasing Scheme redundant". Accordingly, movement and booking of 3rd

party consignments in WIS rakes is not allowed.

In view of the above, Railway is requested to take necessary action in the matter accordingly.

Sd/- illegible

(Gulshan Kumar)

Dy. Director Freight Marketing"

9. The aforementioned circular lay emphasis on the term "assign". But, the said word has neither been defined in the said circular nor in the scheme nor in the agreement between the parties. Therefore, the general connotation of the word "assign", as mentioned in the dictionaries, is taken into consideration.

As per Chambers Dictionary, New Edition the word "assign" means:

"to allot, share out; to designate, appoint; to put forward, adduce; to make over, transfer; to ascribe, refer; to specify; to fix, determine-n a person to whom any property or right is made over, an assignee (law); (in pl. Shakesp) appendages."

According to Oxford Dictionary the word "assign" means:

"Allocate (a job or duty); appoint (someone) to a job, task, or organization; designate or set (something) aside for a specific purpose; transfer (legal rights or liabilities).

In Collins Dictionary the word "assign" has been explained to mean:

"to select; to give out or allot; to set apart; to attribute; to transfer;

As per Macmillan Dictionary the word "assign" means:

"to employ someone; to send; to sort, classify, and characterize; to give, present, hand; to fix, time and schedule; to alienate, alienation, assign"

In Merriam-Webster's Law Dictionary, the word "assign" has been explained to mean:

"to transfer (property or rights) to another; to appoint to a post or duty; to fix or specify in relationship or correspondence."

10. It is well settled principle of law of interpretation laid down by the apex Court in plethora of decisions that when a word is not defined it is permissible to refer the dictionary to find out the general sense, in which that word is understood in common parlance. In Commissioner of Wealth-tax, Andhra Pradesh v. Officer-in-charge(Court of Wards) Paigah, AIR 1977 SC 113, the Constitution Bench of the apex Court held as follows:

"It is true that, in Benoy Kumar Sahas Roy's case (AIR 1957 SC 768) (supra), this Court pointed out that meanings of words used in Acts of Parliament are not necessarily to be gathered from dictionaries which are not authorities on what

Parliament must have meant. Nevertheless, it was also indicated there that, where there is nothing better to rely upon, dictionaries may be used as an aid to resolve an ambiguity. The ordinary dictionary meaning cannot be discarded simply because it is given in a dictionary. To do that would be to destroy the literal rule of interpretation. This is a basic rule relying upon the ordinary dictionary meaning which, in the absence of some overriding or special reasons to justify a departure, must prevail."

In view of the dictionary meaning attached to the word "assign" and taking into consideration the same as used in the circular dated 17.09.2013 it would go to show that it is a general interpretation given to the word "assign" with regard to the Scheme, which can only be read in relation to the word "assign" as mentioned in the agreement.

11. Learned counsel for the parties do not dispute the fact that the word "assign" is nowhere used in the Scheme. The Circular has been issued on the basis of some legal opinion which may have been sought from the Legal Advisor of the opposite party. We are of the view that, while giving such legal opinion, the Legal Advisor has lost sight of the word "assign" as used in the agreement, which is only in the context where one of the parties does not survive and not in a case where all the parties are surviving. As such, the Circular has been issued under wrong impression of interpreting the word "assign" as used in the Scheme without noticing that such word has not been considered or used in the Scheme.

12. In view of the aforesaid, the Circular issued on 17.9.2013, which is impugned in this writ petition, does not relate to the agreement or the Scheme in question and has to be ignored while interpreting the Scheme or the agreement between the petitioner and the opposite parties while considering the question of use of wagons by the petitioner as per the agreement between the parties.

13. It may also be stated that in the present case, though the Arbitration clause is provided for in the Scheme as well as the agreement, but as there is no question of dispute or difference between the parties relating to any matter arising out of the agreement, and further that we are of the opinion that the Circular itself does not apply to the present case, we would not be inclined to relegate the parties to the Arbitrator under the aforesaid clause.

14. In view of the aforesaid, we allow the writ petition to the extent that the Circular dated 17.9.2013 is quashed in so far as it relates to the case of the petitioner, and the petitioner shall be permitted to carry on the business in terms of the agreement, ignoring the direction issued in the aforesaid Circular dated 17.9.2013.