

(2019) 01 DEL CK 0355

In the Delhi High Court

Case No : Civil Writ Petition No. 1871 Of 2017& Civil Miscellaneous No. 8317 Of 2017

Monopoly Carriers & Cargo Pvt Ltd

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 28-01-2019

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2019) 01 DEL CK 0355

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Ashish Mohan, Akshit Mago, Jagjit Singh, Ashok Singh, Preet Singh, Vitin Chaudhary

Final Decision : Dismissed

Judgement

Vibhu Bakhru, J

1. The petitioner has filed the present petition impugning an order dated 30.06.2016 passed by respondent no.2 (Chief Commercial Manager - CMM), Northern Railways rejecting the petitioner"s appeal against an order dated 18.01.2016 passed by respondent no.3 (Senior Divisional Commercial Manager/ Freight, Northern Railways, Delhi Division). By the order dated 18.01.2016, respondent no.3 had initiated the following action against the petitioner:-

"1. Termination of all existing contracts running over Delhi Division and forfeiture of Security Deposit as under:-

S. No.

Train

Compt.

From

To

Contractual period

1.

12410

AGC

HNZM

RIG

19.01.13 to 18.01.16

2.

12406

R-1

HNZM

BSL

09.10.13 to 08.10.16

3.

12808

F-2nd

HNZM

VSKP

12.09.13 to 11.09.16

2. Cancellation of Registration Certificate and forfeiture of registration fee.

3. Blacklisting/debarring from participating in future tender/quotations for a period of 5 years."

2. The petitioner also impugns a consequential order dated 10.02.2017 passed by respondent no.2. The aforementioned orders dated 18.01.2016, 30.06.2018 and 10.02.2017 are, hereafter, referred to as the impugned orders.

3. Although, several grounds have been urged in the petition, however, Mr Ashish Mohan, learned counsel for the petitioner had limited the petition to assail the impugned orders only on the solitary ground that they were contrary to Clause 77 of the Agreement dated 06.05.2013, which provided for termination of the contract in case of a fourth default in overloading the leased space. He earnestly contended that there were only three instances of default in overloading the cabin and the impugned orders were passed on the erroneous premise that the

petitioner had committed four defaults. He submitted that one of the instances considered by the respondents as a default in overloading the cabins pertained to loading packages of excess weight and not overloading of cabins. He submitted that without a fourth default, the respondents could not have taken the impugned action of terminating the contract and of blacklisting the petitioner.

4. The learned counsel for the respondents disputed the aforesaid contention. According to the respondents, the instances of overloading were of a very high magnitude and had jeopardized the operational safety, thus, putting human life at risk and, therefore, the action taken by the respondents could not be faulted.

Factual Background

5. The petitioner company is engaged in the business of transporting goods. It was registered as a lease holder with Northern Railways and had entered into leasing contracts for transporting parcels. The petitioner secured a contract to operate parcel leasing space in train No. 12410 Ex. HNKM to RIG for a period of three years - from 19.01.2013 to 18.01.2016. The petitioner had secured the aforesaid contract by successfully participating in an open bidding process.

6. On 06.05.2013, the petitioner entered into an agreement for leasing of one ton space in Brake Vans by Train name/number 12410 Ex. HNKM to RIG (hereafter "the Agreement").

7. In terms of the Agreement, the petitioner was obliged to ensure that the parcels loaded in each Assistant Guard Cabin (AGC) do not exceed the parcel carrying capacity. The Agreement further stipulated that each individual packet carried in the Assistant Guard's Cabin should not exceed 25 kgs. The Agreement also provided for penalty in case of violation of the aforesaid stipulations and further contemplated termination of the Agreement and cancellation of the registration as a leaseholder in case of multiple defaults (4th default).

8. Admittedly, the petitioner had defaulted in complying with the aforesaid stipulation and not only overloaded the cabins, but had also loaded parcels weighing in excess of the permissible limit of 25 kgs.

9. In view of the above, respondent no.3 issued a show cause notice dated 01.01.2016, inter alia, stating that the petitioner had been regularly overloading the leased compartment and called upon the petitioner to show cause as to why the following action be not initiated against it:-

"1. Cancellation of all existing contracts running over Delhi Division and forfeiture of security deposit of all existing contracts.

2. Cancellation of Registration Certificate and forfeiture of registration fee.

3. Blacklisting/debarring from participating in future tender/quotations for a period of five years."

10. The defaults as mentioned in the aforesaid show cause notice are set out

below:-

S.

Train

No.

Date

of

Excess

Penaltie

MR No.

No.

Name of

the

check

Weight

s

Leaseholder

(in

collecte

kgms)

d (Rs.)

1.

12410(AGC)

839 Kgs

68,014/-

774255

Monopoly

10.06.2014

Carriers

&Cargo

Pvt.

Ltd.

2.

Do

28.05.2014

883 Kgs

54,910/-

3.

Do

26.11.2014

23 Kgs

6,725/-

786422

4.

Do

20.06.2015

695 Kgs

59,552

882737

11. The petitioner responded to the aforesaid show cause notice by a letter dated 13.01.2016, inter alia, apologizing for the defaults that had occurred during the tenure of the Agreement and further requesting the respondents to excuse the petitioner for the said defaults.

12. The concerned authorities did not find the petitioner's response to be satisfactory and, accordingly, issued an order dated 18.01.2016, which is impugned in the present petition.

13. Aggrieved by the same, the petitioner appealed to the CMM by a letter dated 21.01.2016. The petitioner, inter alia, contested the allegation that there were four instances of default of over loading. The petitioner claimed that in one instance two packages were found to be overweight by 23 Kgs.; however, the overall weight of the packages was below one ton and, therefore, the same could not be considered as an instance of default for initiating action against the petitioner. It is also pointed out that the show cause notice with regard to the said default was issued to the petitioner on 04.03.2015, which was responded to

by the petitioner on 12.03.2015 and no further action had been taken by the respondents in that regard.

14. The CMM rejected the petitioner's appeal and this was communicated to the petitioner by a letter dated 10.03.2016. The said communication did not indicate any reasons for rejection of the petitioner's appeal. Aggrieved by the same, the petitioner filed a writ petition assailing the order dated 18.01.2016 and 10.03.2016 (being W.P. (C) 3079/2016 captioned Monopoly Carriers & Cargo (P) Ltd. v. Union of India & Ors.). This Court disposed of the said petition by an order dated 09.05.2016, whereby the order dated 10.03.2016 was set aside with the consent of the parties and the petitioner's appeal was remanded to the CMM for consideration afresh. The CMM was further directed to afford the petitioner an opportunity of being heard.

15. In compliance with the aforesaid order, the CMM provided a personal hearing to the petitioner and, thereafter, passed the impugned order dated 30.06.2016.

Reasons and Conclusion

16. At the outset, it would be relevant to refer to the impugned order passed by the CMM, which is set out below:-

"By committing 04 defaults M/s Monopoly Carriers & Cargo (P) Ltd., violated Clause 76 & 77 of agreement and para K-15 of Comprehensive Parcel leasing policy, resulting into termination of contract and cancellation of registration. In addition to cancellation of registration, all his existing contract were also cancelled and was debarred from fresh registration of 05 years.

The appeal against cancellation of registration lies with undersigned. While considering the representation, the magnitude of overloading was the key factor as excessive overloading could endanger the safety of the train and lives of the travelling passengers. The extent of overloading by M/s Monopoly Carriers & Cargo (P) Lt. was very high i.e. up to 88.30%. Since, safety of the human life could not be compromised therefore, the appeal of M/s Monopoly Carriers & Cargo (P) Ltd. to restore the registration to restore the registration and allow operation of other contracts is rejected without prejudice."

17. It is apparent from the above that the impugned action was initiated against the petitioner on account of defaults committed by it, which were alleged to be "in violation of Clause 76 and 77 of the Agreement as well as para K-15 of the Comprehensive Parcel leasing policy".

18. The defaults stated to have been committed by the petitioner on 23.11.2014 pertain to loading 23 Kgs of excess weight in the cabin. Mr Ashish Mohan had referred to the joint report dated 26.11.2014, which indicated that the petitioner had loaded 70 packages weighing 813 Kgs. Out of the above, two packages were found to be weighing 40 Kgs and 33 Kgs respectively. These two packages were in excess of the permissible limit of 25 Kgs. It is not disputed that the said instance is not one of overloading the cabin space, but of loading packages

weighing in excess of the permissible limit.

19. According to the petitioner, the same does not constitute a default as contemplated under Clause 76 of the Agreement.

20. At this stage, it would be relevant to refer to Clauses 76, 77, 81, 82 & 83 of the Agreement. The same are set out below:

"76. If weight of parcels exceeds the permissible carrying capacity of Assistant Guard Cabin, Charges/Punitive charges shall be recovered from the consignor / leaseholder as follows: i) Normal lumpsum leased freight for weight In excess of permissible capacity of vehicle, ii) Punitive charges equivalent to six time the freight at scale- R for entire excess weight from origin to destination irrespective of the pointwhere such over loading was detected. iii) a penalty of Rs, 5000/-per vehicle.

77. In addition to the above penalty, Railway may terminate the contract and cancel the registration of the leaseholder in case of 4th (forth) default.

* * * * *

81. Incase of cancellation of lease on account of overloading for 2 separate contract minimum of 8 violations in all ,registration of the leaseholder would be cancelled as mentioned in para 76.

Loading of heavy packages in Assistant Guard's Cabin:-

82. The weight of individuals packets carried in Assistant Guard's Cabin should not exceed 25 kgs. In case of detection ofweightof any package more than 25 kgs. Loaded in Assistant Guard Cabin, then penalty for excess weight will be as follow:

Excess Weight

Punitive Charge/Penalty

(i)

Up to 5 kgs

No penalty

(ii)

More than 5 kgs

Penalty equivalent to six times of

"Scale-R" for excess weight of

that particular package(s) from

origin to destination irrespective

of the point where such overloading was detected.

In addition to this above, a penalty of Rs. 5,000/- per Assistant Guard's Cabin shall also be recovered.

83. In addition to the above penalty, Railway may terminate the lease contract and cancel the registration of leaseholder in case of 4th (forth) default for loading of heavy packages having weight of more than 25 kgs. in leased AGC. Excess weight found in the entire lot of packages in Assistant Guard's Cabin(AGC) should be treated as one default."

21. As is apparent from the above, clause 76 of the Agreement provides for monetary penalty for failure on the part of the petitioner to adhere to the obligation of not overloading the Assistant Guard Cabin (AGC). Clause 77 is an enabling clause and permits the Railways to terminate the contract and cancel the registration of leaseholder in case of a fourth instance of default. Clause 81 of the Agreement provides that the registration of the leaseholder would be cancelled, if the lease is cancelled on account of overloading in two separate contracts (minimum of eight violations).

22. Clause 77 and 81 are *pari materia* to Clause 1.3 and 1.7 of the Comprehensive leasing policy, which reads as under:-

"1.3 In addition to the above penalty, Railway may terminate the contract and cancel the registration of the leaseholder in case of 4th (fourth default).

xxxxxx xxxxx

1.7 In case of cancellation of lease on account of overloading for 2 separate contracts (minimum of 8 violations in all), registration of the leaseholder would also be cancelled as mentioned under para (K 15)."

23. This court had considered a challenge to the said policy in *Sultan Hussain v. Union of India & Ors.* : W.P. (C) 2045/2014, decided on 14.07.2015. In that case, it was contended that the aforesaid clauses are inconsistent. The Court rejected the aforesaid contention and held that whereas Clause 1.3 confers discretionary powers on the authority to cancel the registration in case of a fourth default, Clause 1.7 casts a mandatory duty on the Railway Authorities to do so in the event there are eight violations. The Court had explained that the Railway Authorities would have no discretion after the eighth violation.

24. A plain reading of Clauses 77 and 81 indicates that the same provides for consequences for different kinds of default. In terms of Clause 77, the Railways are entitled to terminate the contract in case of a fourth default. The default referred to in Clause 77 relates to overloading of the cabin by placing parcels exceeding the permissible carrying capacity of the said cabin (in this case, one ton). Clause 83 provides for consequences in loading heavy packages weighing in excess of 25 Kg. Both the instances are instances of default.

25. According to the petitioner, the Agreement could be terminated only if the petitioner had committed four defaults of either type (overloading the cabins and/or loading packages of 25 Kgs). If the petitioner's contention is accepted, it would mean that it is open for the petitioner to commit three defaults of either type without facing any action of termination of the contract and/or cancellation of the registration. This Court is unable to accept the aforesaid contention. Clauses 77 and 83 of the Agreement clearly indicate that multiple defaults in not adhering to the weight restriction would invite punitive action resulting in cancellation of the contract as well as the registration. The Clauses 77 and 83 have to be read in a meaningful manner and indicative of the action that could be taken against the petitioner for repeated defaults.

26. Overloading of trains has serious consequences. This Court had taken note of the counter affidavit filed by the Railways in *Swaminath Tiwari v Union of India &Anr. : W.P. (C) 8365/2014*. In the said affidavit, the Railways had explained the serious consequences of overloading. The relevant portion from the said counter affidavit as quoted by the Court in its judgment is set out below:-

"16. That the extent of heavy overloading as has been done by the Petitioner could have led to train-accidents and more importantly had put the lives of passengers travelling in the trains at grave peril. The issues related to safety of the passengers is of utmost importance for the Railways and any activity/instance which puts the lives of passengers at risk has to be dealt with very seriously and with iron hands. It is further submitted that every system has limited capacity for withstanding the load. The coach structure & under gear is designed for a defined load. If weight of parcels exceeds the limited load capacity, the system becomes prone to damage. Overloading is very dangerous in moveable coach. Impact load experienced by the coach structure during rail-wheel interaction may lead to its failure. It is submitted that the technical aspect of failure of coach safety due to over loading areas under:-

I. Suspensions system of coach gets suppressed beyond permissible limit in parcel portion side, which causes unevenness of coach and may lead to derailment on curves.

II Buffer height gets reduced beyond permissible limit, which may lead to buffers of adjacent coaches getting entangled leading to derailment.

III. Friction forces increase between trolley frame & side bearers causing high wear of matting surfaces and hence prone to premature failure.

IV. Braking forces of coaches is set as per their lading capacity. In overloaded condition, braking distance of that coach will increase, which may lead to overshooting of signals and accidents consequently.

All these conditions cause failure of coach sub-assemblies and unsafe running of coach, which may result in accident of train, which is dangerous for the safety of railway passengers. A copy of the letter dated 19/6/2014 issued by Sr. Divisional

Mechanical Engineer/Coaching (who is the Head of the branch, maintaining the rolling stock, i.e. coaches, engine wagons, etc. at Divisional Level), regarding technical aspects of failure of coach safety due to overloading is annexed herewith and marked as Annexure R-2."

Keeping in view the grave consequences of overloading, it can hardly be accepted that the Railway Authorities would necessarily have to await four defaults of such overloading before taking any action in the matter.

27. In the present case, defaults committed by the petitioner are serious. Admittedly, in three instances the petitioner had overloaded the cabin by an excess of 69.5% to 88.3%. The competent authority had found that such overloading presented a serious risk and endangered the safety of the train and the lives of the passengers travelling on it. This Court finds no reason to doubt the said view. Admittedly, the petitioner has been a repeated defaulter. It is also evident that the magnitude of overloading was very high. Plainly, in such circumstances, the Railway Authorities were not required to await yet another instance of overloading - or an untoward incident - to initiate any punitive action.

28. As explained by the Supreme Court in *M/s Patel Engineering Ltd. v. Union of India and Anr.*: (2012) 11 SCC 257, an Executive Authority would have the discretion to decide as to whom it would deal with. The Railway Authorities have a right to refrain from dealing with any person. The only limitation being that such action should not be arbitrary or unreasonable. In the present case, the concerned Railway Authorities have found that the petitioner had repeatedly overloaded the cabin to an unreasonable extent, thus, putting the train and the lives of the passengers at risk. Plainly, this would be sufficient ground for the respondent to take an action to refrain from dealing with the petitioner. This Court finds no ground to interfere with the decision of the Railway Authorities to blacklist the petitioner for a period of five years.

29. There is yet another aspect of the matter. Article 226 of the Constitution of India provides for a discretionary remedy. Thus, even if it is accepted that Clause 77 of the Agreement contemplated four defaults and the action of the respondent is not strictly in accordance with Clause 77 of the Agreement, this Court is of the view that no interference in the impugned order is warranted. The actions of the petitioner in overloading the Assistant Guard's Cabin have undisputedly put the safety of passengers at risk. In this view, this Court is also not persuaded to exercise any discretion in favour of the petitioner.

30. The petition is, accordingly, dismissed. The pending application stands disposed of.