

(2018) 08 DEL CK 0349

In the Delhi High Court

Case No : First Appeal From Order (OS) (COMM) 79 Of 2017 and CM No. 13679 Of 2017

Union Of India & Ors

APPELLANT

Vs

Jugnu Jayant

RESPONDENT

Date of Decision : 14-08-2018

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 37(1)(b)
Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 — Section 13

Citation : (2018) 08 DEL CK 0349

Hon'ble Judges : SANJIV KHANNA, J;CHANDER SHEKHAR, J

Bench : Division Bench

Final Decision : Partly Allowed

Judgement

SANJIV KHANNA, J. (ORAL):

This intra Court appeal under Section 37 (1) (b) of the Arbitration and Conciliation Act, 1996 ('A & C Act' for short) read with Section 13 of the

Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 impugns judgement dated 10.01.2017 passed

by learned Single Judge in O.M.P. (Comm.) No. 147/2016 allowing objections preferred by Jugnu Jayant ('the respondent', for short) under Section 34

of the A & C Act and setting aside the Award dated 05.05.2015 passed by the sole Arbitrator.

2. The impugned judgement also quashes and sets aside the order dated 04.06.2013 passed by the Senior Division Commercial Manager and appellate

order dated 08.08.2013 passed by the Chief Commercial Manager, Northern Railway.

3. Appellant and the respondent had entered into nine contracts for leasing of 4

tonnes FSLR compartments in various trains for a period of three years. The respondent was to comply with and abide by the terms and clauses of the 'Comprehensive Parcel Leasing Policy' (CPLP) enacted and enforced vide Freight Marketing Circular No. 12/2006 as amended vide Marketing Circular No.11/2017 dated 12.04.2007.

4. The appellant had issued Show cause notice dated 11.04.2017 to the respondent for violation of Clauses 13.4 and 7.4 of the CPLP as five instances of overloading in the 04 ton FSLR Compartment in train No. 12952- Ex NDLS to BCT were noticed and recorded.

5. Respondent had then filed O.M.P. 470/2013 in which vide order dated 09.05.2013 the Railway authorities were directed to give personal hearing to respondent. Hearing was granted. By order dated 04.06.2013 passed by the Divisional Regional Manager (DRM), the respondent's registration was canceled and registration fee and security deposit was forfeited. The respondent was blacklisted/debarred from participating in future tenders for five years.

6. While the O.M.P. 470/2013 was pending, disputes between the appellant and the respondent were referred to arbitration.

7. The claim and disputes were adjudicated vide the arbitral award dated 05.05.2015.

8. The arbitral award refers to eight different instances of overloading of leased compartments in violation of CPLP. Order dated 04.06.2013 and appellate order dated 08.08.2013 were upheld. For clarity we would like to extract the exact reasoning and wording of the arbitral award dated 05.05.2015, which reads as under:-

â??Deliberations during the meeting

I) The claimant stated that the Railways has put in effect clause no. 13.4 and 7.4. The penal provisions as initiate against the claimant by the railways are not covered under the ambit of clauses 13.4 and 7.4.

ii) claimant also stated that there is inherent contradiction between clauses 13.4 and 13.8 of the contract which are parimateria clauses 1.3. an 1.7 of

para of the comprehensive leasing policy as well. The amended comprehensive leasing policy as amended in the year 2007 vide Freight marketing

circular no. 11/2007 dated 12.04.2007 replaced the original para (ii) and inter alia provide for overloading and its consequences in the following terms:

II) Overloading

1.3) In addition to the above penalty, Railway may terminate the contract and cancel the registration of the lease holder in case of 4th default.

1.7) In case of cancellation of lease on account of overloading for two separate contracts (minimum of 8 violations in all) registration of the lease

holder would also be cancelled as mentioned in para K15.

Also clause K15 of the policy states that:

If the registration of a lease holder is cancelled as a punitive measure either for reasons of repeated over loading or for repeated failure to start

loading after award of contract, or for attempt to deliberately defraud railways of for repeated violation of any of the existing stipulations where

cancellation of registration has been legislated as the penalty, then the entire registration fee would be forfeited. In addition to forfeiture of registration

fee all his existing leasing contracts being operated from the division would also be cancelled. In addition to cancellation, such a lease holder would be

debarred from dress registration for a period of 5 years.

It was further stated that there is ambiguity in the said clauses and as per the principles of contra preferentum it is required to be interpreted and

construed against the maker of the contract.

Alternatively claimant submits that in case clause 13.4 is invoked only the contract in which overloading is found can be cancelled and only his

registration can be cancelled. Clause 13.4 only empowers cancellation of one contract and cancellation of registration. The other penalties mentioned

in clause 7.4 of the contract cannot be imposed as clause 7.4 of the Agreement is specifically mentioned as a consequence only in case of invocation

of clause 13.8 and not 13.4. has been more than 4 occasions. It is noted here that the Railways has been given a discretion to terminate the contract

and cancel the registration of the leaseholder by usage of the word "may".

Once the discretion of cancellation of the registration of the leaseholder has been Invoked by the competent authority then the clause 7.4 of the

agreement comes into play.

iv) The clause 13.8 binds the Railways to take a punitive decision as mentioned in the agreement. The clause 7.4 comes into consideration immediately

after 13.8 is invoked. It is noted here that the claimants petition that 7.4 can be

invoked only after 13.8 is put in place does not stand ground and is not correct.

As the Respondents have taken action under the legal ambit of the clause as mentioned in the agreement the order steed 4/6/2013 passed by Sr.

DCM/Delhi, Northern Railway and Appellate order dated 8/8/13 passed by CCM/ Northern Railway is upheld.

9. At this stage, we would like to reproduce clauses 2.1, 7.4, 13.4, 13.8 and 13.9 of the CPLP, which read as under:-

2.1 The leaseholder has deposited Rs.1,50,525/-vide FDR No.9111040005800534 dated 01.02.2011 as Security deposit at Delhi. The security deposit

collected in cash shall be refunded only after 03 months after the successful expiry of the contract period.

XXX

7.4 If the registration of leaseholder is cancelled as a punitive measure either for reasons of repeated over, loading or for repeated failure to start

loading after award of contract, or for attempt to deliberately defraud railway or for repeated violation of any, of the existing stipulations where

cancellation of registration has been legislated as the penalty, then the entire registration fee would be forfeited.

In addition to forfeiture of registration fee, all his existing leasing contract being operated from that division would also be cancelled. However contract

can be cancelled/terminated by the Railways with the approved of tender accepting authority.

In addition to cancellation, such a leaseholder would be debarred from fresh registration for a period of 5years. XXX

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

XXX

13.8 In case of cancellation of lease of overloading for 2 separate contracts (minimum 8 violations in all) registration of the leaseholder would also be cancelled as mentioned under para 7.4.

XXX

13.9 While asking for re-weighment of leased FSLR/SLR space by Railway officials, provision for labour assistance is the sole responsibility of the

leaseholder failing which his security money, will be forfeited.

10. The aforesaid clauses have been interpreted by a Single Judge of this Court in W.P.(C) 2045/2014 Sultan Hussain v. Union of India, stating that

power of termination under Clause 7.4 is distinct and different from power of termination under Clause

13.8. Clause 13.8 is mandatory and comes into operation when there are minimum eight violations, in two contracts. On eight overloading violations in

two contracts, there is automatic and mandatory termination of registration in the Division. Clause 13.4 on the other hand gives the Railway an option

to terminate the contract and cancel the registration after the fourth default in a single contract. Termination is in addition to penalty, which may be

imposed on overloading.

11. Clause 7.4 comes into operation in the case of cancellation of the registration of the leaseholder and states that in addition to forfeiture of

registration fee, the leaseholder's existing leasing contracts in operation from that Division be cancelled. However, the cancellation will be with the

approval of the tender accepting authority. Further, the leasee would also be debarred from fresh registration for a period of five years.

12. In the present case, the show cause notice dated 11.04.2013 was regarding five instances of overloading in contract of 04 tonnes FSLR

Compartment in train No. 12952 Ex NDLS to BCT.

Therefore Clause 13.4 was attracted and invoked. Clause 13.8 was not relied upon and invoked. Moreover, we find that the reasoning given by the

Arbitrator quoted and reproduced above does not examine and deal with the respective clauses and the difference between the two clauses. It does

not differentiate between violations covered by clauses 13.4 and 13.8. The reasoning is confusing and not understandable.

13. In these circumstances, the impugned award dated 05.05.2015 did require judicial interference under Section 34 of the A & C Act.

14. However, during the course of hearing, learned counsel for respondent had accepted and admitted to termination of the contract in respect of

Train No. 12952 ex NDLS to BCT. Order dated 9.4.2018 records that the respondent was not contesting and objecting the forfeiture of security

deposit of Rs.1,50,525/-.

15. Therefore, the issue under consideration would be confined and relates to

forfeiture of the security deposit in 8 other contracts. On the said aspect, as observed above, the impugned award would falter as there is no discussion and reasoning with regard to the relevant clauses of the contract. They have not been considered, interpreted and adjudicated. Award therefore cannot be sustained, even if the final finding it could be argued was sustainable by our interpretation and reasoning.

16. In these circumstances, we partly allow the present appeal and uphold the forfeiture of security deposit of Rs.1,50,525/- in respect of Train No.

12952 ex NDLS to BCT. With regard to the other eight contracts, we uphold the judgement passed by the learned Single Judge. There will be therefore no forfeiture of security deposited in respect of other eight contracts.

17. This order would not be construed as an expression of opinion of this Division Bench on applicability and interpretation of different clauses of CPLP, as the appeal has been decided partly in view of concession given by the respondent.

The said questions are left open. No costs.