

(2019) 07 CAL CK 0004

In the Calcutta High Court

Case No : General Application (GA) No. 870 Of 2019, Temp APO (APOT) No. 28 Of 2019

Union Of India & Ors

APPELLANT

Vs

Ultra Tech Cement Limited & Anr

RESPONDENT

Date of Decision : 03-07-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 5, 8, 11
Constitution Of India, 1950 — Article 226

Citation : (2019) 07 CAL CK 0004

Hon'ble Judges : Soumen Sen, J;Ravi Krishan Kapur, J

Bench : Division Bench

Advocate : Ashok Kumar Chakraborty, Sanajit Kumar Ghosh, Ajay Krishna Chatterjee, P.N. Sharm, Ratnesh Rai, Anunoy Basu

Final Decision : Disposed Off

Judgement

Soumen Sen, J

This appeal arises out of judgment and order dated 11th September 2018 in W.P. No. 1166 of 2013 (along with G.A. No. 3181 of 2015), by which the

learned Single Judge allowed the writ petition and held that the grievances of the petitioner could be proceeded with under this Court's writ

jurisdiction as opposed to having the parties referred to arbitration.

The predecessor-in-interest of the writ petitioner had entered into a licensing agreement with the Railways, on 13th April 1994 and 7th April 2005, to

occupy a godown/shed on a land owned by the Railways upon payment of licence fees. After a demerger and a change in name, the rights and

liabilities under the licencing agreement passed down to the petitioner.

Two clauses in this agreement are relevant to the present dispute. Clause 4 of

the agreement states that the petitioner shall be liable to pay occupational charges, even those made with a retrospective effect, as and when called upon by the Railways to do so. Clause 19(a) of the agreement provided for a reference to arbitration of all disputes that arose between the parties in connection with the agreement. The relevant portions of Clause 4 and Clause 19(a) is reproduced below – Clause 4: That the licensee shall pay the above occupation charges regularly in advance for each year for which the occupation charges is due. The occupation charges is subject to revision at the discretion of the licensor and if and when so reviewed, the licensee shall remain liable to pay with retrospective effect such occupation charges and/or licence fee and Municipal Tax as and when the Licensor calls upon the licensee to make the payment at the revised rate. Clause 19(a): In the event of any question or difference or dispute arising under these conditions or in connection with the agreement (except as to any matters, the decision of which is specifically provided for in these conditions), the matter in dispute shall be referred to the Arbitrator for decision. (emphasis added)

On 10th February 2005, the Railway Board issued a circular on Land Policy in respect of Railway lands being No. 2005/LML/18/8. The circular was the policy guideline for commercial licencing of Railway land. Under the circular, an "Ordinary Commercial Plot" with temporary structures for stacking/storing with a "covered area" had an "Annual Licence Fee as a percentage of land value" at 7½ %.

On 6th December 2006, the Railway authorities issued a demand notice to the petitioner for payment of arrear dues from 1995-96 to 2006-07. On 23rd February 2007, the petitioner wrote back to the Railway authorities seeking details of the demand; and subsequently replied to their demand notice on 9th March 2007.

On 7th June 2012, another demand notice was issued by the Railway authorities, wherein occupational charges were claimed at a purported enhanced rate for the period of 1995-96 to 2011-12 for the godown. The petitioner replied to this demand notice on 18th July 2012, stating that the demand notice was improper and arbitrary.

On 25th March 2013, the petitioner wrote a letter to the Railway authorities regarding an award dated 28th January 2011 in A.P. 95 of 2004 in which

the railways were a party and there was a challenge made to the enhanced licence fees demanded by the Railway authorities.

An instruction was thereafter placed by the petitioner on its bankers, on 21st September 2013, to prepare a demand draft payable to the Railway

authorities for a sum of Rs. 2,18,656 on account of monthly lease rentals for the godown. On 18th October 2013, another demand notice was issued

by the Railway authorities raising a demand for October 2012 to October 2013, by treated the aforesaid amount of Rs. 2,18,656 as part payment of the

monthly lease rental.

On 19th October 2013, a demand notice was issued by the Railway authorities for making payment of the balance occupation arrear charges as well

as the security deposit for the years 1995-96 to 2012-13 aggregating to a sum of Rs. 1,02,39,092. This demand notice is the subject-matter of this writ

petition.

The learned Single Judge allowed the writ petition. The appellants were restrained from realizing the license fee on the basis of a circular dated 10th

February, 2005.

The grievance of the appellants before us is that although the learned Single Judge had noticed the existence of an arbitration clause in the license-in-

agreement, the writ was entertained and orders were passed disregarding the arbitration clause. The learned counsel for the appellant has argued

before us that the predecessor-in-interest of the respondent no. 1., M/S Larsen & Toubro Ltd., had filed a writ being W.P. No. 6370(W) of 2001

challenging the demand notice of enhanced Railway Godown Rent for the year of 1986-87 to 2000-01 of the impugned godown. The writ petition was

disposed of by an order dated 18th May 2001 stating,

“The writ petition is filed questioning mere demands and arising as claimed by the Railway administration, on agreements. The matter is in the

realm of contract and therefore, the instant writ application is being disposed of by observing that the Railway administration “respondents herein, if

they are so entitled to, shall recover such claim, if sustainable, only in accordance with law.”

It is contended that the instant case is also arising out of a contract and ought to be similarly treated. It is further pointed out the agreement in W.P.

6370 of 2001 was also in relation the very same godown premises that is the

subject matter of this case; the parties are also the same; and, further, the agreement in W.P. 6310 of 2001 also contained a clause permitting the Railways to charge occupation rent with retrospective effect.

Another writ petition against the Railways being W.P. No. 10924(W) of 2001, in which the predecessor-in-interest was a party (petitioner no. 18),

dealing with a similar factual background as the present case, had also been disposed of by an order dated 1st February 2002, stating:

“The respondent’s case is that they are making the increase in licence fee in terms of the agreement. This is disputed by the petitioner. This

court is not inclined to decide the dispute in view of the arbitration clause in the agreement.”

The learned Senior Counsel appearing for the appellant/Railways further submits that the writ ought not to have been entertained in view of the

alternate remedy available to the petitioners. In this context, reliance is placed on Narmada Bachao Andolan v. State of Madhya Pradesh reported at

(2011) 7 SCC 639. It is further submitted that the cases cited by the petitioner could all be distinguished on the ground that they related to land

whereas the fact situation in the present matter relates to godowns. It is submitted that the ratio of each case must be seen with reference to its

peculiar facts. Reliance is placed on The Regional Manager v. Pawan Kumar Dubey reported at AIR 1976 SC 176 6for this proposition. It is also

contended that since the specific point of alternate remedy arising out the agreement was taken at the time of admission of the writ petition and

thereafter in the affidavit-in-opposition, the appellant/Railways can very well urge the same at the time of final disposal of the writ petition. For this

proposition, reliance is placed on L. Hirday Narain v. Income Tax Officer reported at AIR 1971 SC 33f.

Additionally, the Railways has also contended that the impugned judgment had taken note of a case cited by them, Joshi Technologies International Inc

v. Union of India (2015) 7 SCC 728, but did not deal with it or answer why the proposition of law stated therein, that only those contractual matters

that have a public law element could be allowed in writ petitions, would not apply in the instant matter. The Railways has also contended that the cost

of Rs. 50,000 imposed on them by the impugned judgment is unfair.

Mr. Ajay Krishna Chatterjee, the Senior Counsel appearing on behalf of the

respondent has candidly admitted that that there is an arbitration clause in the agreement. However, it is contended that once the impugned order has been passed on merit, it is not advisable for the appeal court to go back and consider the question of alternate remedy since that is a preliminary question that entirely falls within the discretion of the learned Single Judge. It is submitted that unless the exercise of discretion by the learned Single Judge is found to be arbitrary and/or unreasonable, the appeal Court may not interfere with such discretion. Mr. Chatterjee submits that there is universal rule that a writ petition would not lie even if there is no existence of an arbitration clause and it is always open for the court in exercising writ jurisdiction to the extent itself where there is a need to prevent miscarriage of justice. This extraordinary power of the writ court is no way curtailed by reason of the existence of the arbitration clause. In this regard Mr.

Chatterjee has relied upon *Kanak v. U.P. Avas Evam Vikash Parishad* reported at (2003) 7 SCC 693 (para 25-30), *L.K. Verma v. HMT* reported at (2006) 2 SCC 269 (para 13, 20 21) and *Ram Barai Singh v. State of Bihar* reported at (2015) 13 SCC 592 (para 11).

Additionally, the petitioner/respondent has also contended that, even otherwise, the existence of an alternate remedy is not an absolute bar to maintain

a writ petition and a writ petition could be maintainable despite an arbitration clause in the contract. In support of this contention, the respondent has

relied on â?

i. *Dr. Kuntesh Gupta v. H.K. Mahavidyalaya* reported at (1987) 4 SCC 525 (para 12);

ii. *Whirlpool Corporation vs. Registrar of Trade Mark, Mumbai & Anr.* reported at (1998) 8 SCC 1;

iii. *Satwati Deswal vs. State of Haryana & Ors.* reported at (2010) 1 SCC 126 (para 5-7);

iv. *Harbanslal Sahnia v. IOC Limited* reported at (2003) 2 SCC 107 (followed *Whirlpool Corporation* (supra));

v. *Union of India v. Tania Construction* reported at (2011) 5 SCC 697 (para 33, 34); and

vi. *D.R. Enterprises v. Collector of Customs* reported at (2015) 15 SCC 431 (para 22-24).

The respondent has contended, without prejudice, that question of reference to

arbitration for resolution of the disputes now does not and cannot arise inasmuch as by the impugned order and purported demand of the Railways dated 18th October 2013 and 19th October 2013 have been quashed and thus there exists no disputes pending between the parties to be referred to arbitration.

The petitioner has also relied on an award dated 25th January 2011, annexed to the paper-book, passed by a Sole Arbitrator in an arbitration between

a different party and the Railways (P. Roy Chowdhury & Co. & Ors. v. Eastern Railway), where in similar circumstances, the learned arbitrator has

held that an increase in rent retrospectively is illegal. The petitioner states that even though the award is between different parties, it is persuasive in

its reasoning; and the petitioner is likely to succeed in any arbitration reference, if directed to pursue arbitration. As such, it is stated that the impugned

judgment ought to be upheld on merits in order not to prolong the matter. The petitioner also relies on a Division Bench judgment of this Court in

Divisional Railway Manager, Eastern Region vs. Kalighat Railway Plot Holders Association & Anr. reported at (2006) 4 CHN 771 (para 5-9). and

submits that the reasoning by the Division Bench is on the same lines as that of the award dated 25th January 2011 aforementioned; and is an

authority for the proposition that enhancement of rent with retrospective effect is illegal. It is submitted that in the instant case, the circular dated 10th

February 2005 relates to licence fees both for land as well as for sheds, plots, shops or any other temporary structure erected on such lands/plots for

storage or stacking; and this wide reach of the circular covers within its ambit the godown of the petitioner/respondent.

The case of the petitioners is that the circular dated 10th February 2005, which provided for fixing of land value for the purpose of determination of

licence fee/occupation charges in respect of the commercial plots being licenced by the railways, is also applicable to the petitioners. The said circular

issued by the Railways is binding on them and they are not entitled to raise any demand in volition of or disregarding the instructions contained in the

circular. Per contra, the stand of the Railways is that the circular is only applicable to lands whereas the petitioner is in occupation of a godown. Their

contention is that, as such, the circular is wholly inapplicable to the petitioner and the demand notices that have been raised on the petitioner have all

been raised pursuant to the agreement between the parties.

If the petitioner was covered under the circular, they would benefit from the circular fixing the rent at 7 ½ % as a percentage of land value whereas

if they fall under the agreements that they had entered into with the Railways, they were liable to pay occupational charges as determined by the

Railway authorities from time to time under clause 4 of their agreement, which could even be made applicable with retrospective effect.

Clause 4 of the agreement is not under challenge. The parties have until the filing of the writ petition proceeded on the basis of the said agreement.

The predecessor-in-interest of the petitioner/respondent, M/S Larsen & Toubro Ltd, had also applied to this Court for appointment of an arbitrator on

similar disputes in the past, prior to the circular dated 10th February 2005. The agreement with the writ petitioners contains similar clause and pertains

to the same godowns. The demand for enhanced licence fees in the earlier dispute was on the basis of clause 4 of the agreement, as the circular

dated 10th February 2005 had not yet been notified at that time, and that the dispute arose out of the agreement between the parties is beyond the pale

of any dispute. The writ petitioners have not argued that the present dispute is not covered by the arbitration clause. A suit filed by the writ petitioner

would be barred under Section 5 of the Arbitration and Conciliation Act, 1996 and would be the subject-matter of an application under Section 8 of the

Arbitration and Conciliation Act, 1996. When the parties, with their eyes wide open, have entered into an agreement and had agreed that in the event

of any dispute, arising out of the said agreement, such disputes shall be resolved by arbitration, the parties are bound by the said arbitration clause

unless the agreement is vitiated by fraud. The parties have, in the past for the earlier periods on similar issues had earlier taken recourse to similar

arbitration clause for adjudication of the disputes and accordingly at this stage, the writ petitioner cannot turn around and seek redressal in a writ

petition. It is important to mention that for the earlier periods arbitration proceedings are pending between the parties concerning similar issues and the

predecessor-in-interest of the writ petitioner applied to the Court under Section 11 of the Arbitration and Conciliation Act, 1996 being A.P. No. 55 of

2004 for the appointment of an arbitrator to adjudicate similar issues.

We find no merit in the contention of the writ petitioner that after the sanctioning

of the scheme of arrangement, the writ petitioner has no papers or pleadings pertaining to the earlier round of arbitration initiated by its predecessor-in-interest. In this context, the relevant pleading of predecessor-in-interest of the writ petitioner in its application under Section 11 of the Arbitration and Conciliation Act 1996, in A.P. No. 55 of 2004, show that the writ petitioner has itself, under similar circumstances and factual scenario in the past, prayed from appointment of an arbitrator. The relevant pleadings are set out hereinbelow â?

â??4. You petitioner was initially inducted into the godown and/or shed No. 14 under agreements of licence of limited period i.e. one year period commencing from 1st April and ending on 31st March of the next year. Till the year 1999 your petitioner enjoyed use and occupation of the godowns and/or sheds under successive agreements which were duly performed by your petitioner on one hand and the respondent on the other.

5. By agreements dated April 12, 2000, your petitioner agreed to the terms and conditions for use and occupation of the said godowns and/or sheds for the period April 1, 2000 to March 31, 2001 with the respondent. Copy of the agreement dated April 12, 2000 between the President of India acting in the premises through the respondent and your petitioner are annexed hereto and collectively marked with the letter â??Aâ?. Such agreement entered into between the respondent on the one hand and your petitioner on the other is hereinafter referred to as the â??said agreementâ??.

6. Prior to the expiry of the said agreement, your petitioner had duly applied for renewal of its licences.

7. Also prior to the expiry of the said agreement, by demands dated 6 th June, 2001 and 13th July, 2001 the respondent authorities demanded occupation charges escalated @ 10% each year on the basis of rate prevailing in 1986-87 (financial year) with retrospective effect in respect of godowns and/or sheds held under licence by your petitioner, agreed licence fees for which had been paid in advance upto 31st March, 2001 as agreed in the said agreement. Copies of such demands made by the railway authorities made upon your [petitioner] is annexed hereto and collectively marked with the letter â??Bâ?? for convenience.

8. Upon such demand your petitioner raised a dispute in respect thereof issuing letters to the respondent raising such dispute on the grounds mentioned

therein. A copy of such letter dated 20th February, 2001 from your petitioner to the respondent is annexed hereto and marked with the letter 'C'.

9. In spite of there being an arbitration agreement contained in the said agreement the respondent instead of referring the matter for adjudication of the disputes raised by your petitioner by arbitration, persisted with their demands. In the circumstances your petitioner made a writ application challenging the said demands.

The writ petitioner/respondent has relied on a Division Bench judgment of this Court in Divisional Railway Manager (supra). However, the said

judgment can be distinguished on facts. While in the said judgment, the matter related to land, in the present case the matter relates to a godown. The

entire case, in the present situation, turns on this aspect since rent payable for godowns were not covered under the circular dated 10th February 2005

and, by logical extension, if the writ petitioner/respondent was not covered by the circular, the retrospective demand made on it would be covered

under the agreement between the parties, on the basis of Clause 4 of the agreement.

In the present case, the predecessor-in-interest of the writ petitioner, M/S Larsen & Toubro Ltd., had filed a writ being W.P. No. 6370(W) of 2001

challenging the demand notice of enhanced Railway Godown Rent for the year of 1986-87 to 2000-01 of the impugned godown. The writ petition was

disposed of by an order dated 18th May 2001 directing the parties, essentially, to arbitration. Another writ petition against the Railways being W.P.

No. 10924(W) of 2001, in which the predecessor-in-interest was a party (petitioner no. 18), dealing with a similar factual background as the present

case, had also been disposed of by an order dated 1st February 2002, directing the parties to arbitration.

In *Bisra Stone Lime Company Ltd. vs Orissa State Electricity Board* (1976) 2 SCC 16, the Supreme Court reiterated that, ordinarily, when a matter

is covered under an arbitration agreement, the court ought not to interfere.

In *Har Shankar v. Deputy Excise and Taxation Commissioner* (1975) 1 SCC 737, the Court held that the writ jurisdiction of the High Courts under

Article 226 was not intended to facilitate avoidance of obligations voluntarily incurred.

In *Engineers India Limited v. D. Wren International Ltd.* (1997) 2 CHN 1, a

Division Bench of this Court held that when the parties had a valid arbitration agreement between them, the ordinary course of action would be to refer them to arbitration. It held, on a reading of Section 5 of the Arbitration and Conciliation Act 1996 that the language used in the said section is stringent and unequivocal in barring the jurisdiction of any judicial authority for a matter that is covered by arbitration.

Additionally, on the proposition that since the Single Judge has dealt with the merits of the dispute, the appeal court should also decide the dispute on merits, the Division Bench in Engineers India Limited held that this was not the real nature of the jurisdiction conferred under Article 226. It held that

“if by some wrong interpretation, the learned Single Judge entertained the writ petitioner and heard the matter on merit, it does not mean that the matter under appeal has to be decided on merit irrespective of the fact that the appeal court finds that there is adequate specific alternative remedy available to the respondents”.

The learned Single Judge noted, and appeared to agree with, the contention of the Railways that the circular dated 10th February 2005 pertained to land only and did not mention godowns. The learned Single Judge held, however, that

“Even if this Court finds that the said circular has no applicability in the present context, yet it cannot overlook the fact that the railway authorities cannot whimsically and capriciously enhance and/or revise the licence fees without following the set norms or parameters relating to the licence of the land as reflected in the said circular”.

The above quoted statement is self-contradictory. If the court assumed that the circular had not applicability then, needless to say, the actions of the railway authorities could not have been whimsical and capricious, since a specific clause in the contract permitted them to raise a demand with retrospective effect. In that case they would not have had to follow “the set norms or parameters relating to the licence of the land as reflected in the said circular” as they would have been following the arrangement agreed upon between them in clause 4 of the agreement.

We are also not in agreement with the finding of the court that the documents of the railways were “per se illegal and void having made within the

basis and authority of law? since it appears that the learned Single Judge has overlooked Clause 4 of the agreement. Whether the railways authority

would be entitled to recover the licence fee at the rates, with retrospective effect, on the basis of Clause 4 of the agreement, is a matter to be decided

in the arbitration proceedings. One arbitration proceeding between the parties touching and/or concerning the interpretation of Clause 4 with regard to

the demands made for the earlier periods, with retrospective effect, is already before an arbitral tribunal.

The actions of the Railways were therefore not "capricious" as they were merely acting in pursuance of their contract. As stated in Joshi

Technologies (supra) and a catena of prior decision of the Supreme Court going back to ABL International Ltd. v. Export Credit Guarantee

Corporation of India Ltd., (2004) 3 SCC 553, the Courts under Article 226 do not ordinarily interfere in pure contractual matters unless there is

arbitrariness or a public law element involved. From the finding of the learned Single Judge himself, that the contention of the Railways that the

circular dated 10th February 2005 pertained to land only and did not mention godowns was correct and that "the circular dated 10th February 2005

is not applicable to the godowns", it is clear that the present matter is a pure contractual matter, where the contract provides for a dispute resolution

mechanism.

Following the decision of the Division Bench in Engineers India Limited (supra) that "if by some wrong interpretation, the learned Single Judge

entertained the writ petitioner and heard the matter on merit, it does not mean that the matter under appeal has to be decided on merit irrespective of

the fact that the appeal court finds that there is adequate specific alternative remedy available to the respondents", and prior decisions of this Court in

similar matters involving the predecessor-in-interest of the writ petitioner, the parties must be relegated to the forum selected by them, that is,

arbitration.

On such consideration we feel that the writ application should not have been entertained and the parties should have been relegated to go before the

forum selected by them. We were inclined to appoint a Sole Arbitrator to expedite the matter. The appellants have consented to appoint a sole

arbitrator by us, however, the respondents have not agreed. In view of such

disagreement, the parties shall be free to take appropriate steps for appointment of an arbitrator in accordance with the law.

G.A. No. 870 of 2019 is disposed of in terms of this order.

Urgent Photostat certified copy of this judgment, if applied for, be given to the parties on usual undertaking.