GAHC010192842022

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/6317/2022

HI SPEED LOGISTICS PVT LTD
232, C.R. AVENUE, INTELLECT HEIGHTS, GIRISH PARK CROSSING, NEAR BENGAL JEWELLERY, UNIT NO. 5B, KOLKATA- 700006

VERSUS

THE FOOD CORPORATION OF INDIA AND 5 ORS
REP. BY ITS CHAIRMAN-CUM-MANAGING DIRECTOR, BARAKHAMBA ROAD, NEW DELHI, PIN- 110006

2:THE GENERAL MANAGER (REGIONAL)
FOOD CORPORATION OF INDIA
REGIONAL OFFICE
ASSAM REGION
PALTANBAZAR
GHY
ASSAM
PIN- 781008

3:THE ASSTT. GENERAL MANAGER (CONT)
FOOD CORPORATION OF INDIA
REGIONAL OFFICE
ASSAM REGION
PALTANBAZAR
GHY
ASSAM
PIN- 781008

4:THE DIVISIONAL MANAGER
FOOD CORPORATION OF INDIA
DIVISIONAL OFFICE
SILCHAR
CACHAR

ASSAM
PIN- 784001

5:THE GENERAL MANAGER
NORTH EASTERN FRONTIER RAILWAY
MALIGAON
GHY
ASSAM

6:THE DIVISIONAL MANAGER
NORTH EASTERN FRONTIER RAILWAY
LUMDING DIVISION
LUMDING
HOJAI
ASSAM

Advocate for the Petitioner : MR A C BORBORA

Advocate for the Respondent : SC, F C I

BEFORE
HONOURABLE MR. JUSTICE SUMAN SHYAM

Date of hearing : 17.10.2023.

Date of judgment : **08.11.2023**

JUDGMENT & ORDER (CAV)

Heard Mr. A. C. Borbora, learned senior counsel assisted by Ms. N. Dey, learned counsel appearing for the writ petitioner. Also heard Mr. V. K. Singh, learned Standing Counsel, FCI appearing for the respondents.

2. The writ petitioner herein is a private limited company and is engaged in transportation business. The Food Corporation of India (FCI) had issued a Notice Inviting E-tender (NIT) dated 11.06.2021 *inter-alia,* for awarding the contract of

"Handling and Transportation Contract Ex-Rly Siding Salchapra to FSD Badarpurghat *via* Weighbridge including handling at FSD Badarpurghat". The petitioner had participated in the competitive bidding process and had emerged as the successful bidder. Consequently, by issuing the order dated 08.11.2021, the petitioner was appointed as the handling and transport contractor, Ex-Rly Siding Salchapra to FSD Badarpurghat, at the rates quoted in the tender document. As per the terms and conditions of appointment, the contract would come to an end on 20.11.2023. Although, the petitioner company was awarded the transportation contract from Ex-Rly siding Salchapra to FSD Badarpurghat, yet, the work of handling was awarded only at the Badarpur FSD meaning thereby that unloading of bags of food grains/sugar from the loaded trucks and stacking the foods inside the Food Storage Depot (FSD) only at Badarpur FSD was included within the scope of the contract. However, in so far as the handling of foodgrains at the Railway siding at Salchapra is concerned, the same was awarded to another handling contractor, viz., M/S Anup Trade and Transport (P) Ltd.

3. It is the pleaded case of the petitioner that as and when allotments of consignment was made to the petitioner at the Badarpur Railway Siding, it had executed the transportation work as well as the work of handling (unloading) at the FSD Badarpurghat without any default. Notwithstanding the same, "demurrage" has been deducted from the running bills of the petitioner which is apparent from the sanction order issued by the Manager Accounts. According to the writ petitioner, there is no clause in the contract permitting the authorities to deduct "demurrage" from the running bills of the petitioner since the petitioner company was not the

handling contractor at the Ex-Railway Siding at Salchapra. It has also been alleged in the writ petition that the delay in unloading of wagons took place not on account of any default on the part of the writ petitioner but on account of negligence on the part of the FCI officials to open the wagon rakes within the "free time" notified by the Railway authorities and therefore, the writ petitioner cannot be held liable for "demurrage", if any, charged by the Railway authorities upon the FCI.

4. The respondents have contested the petitioner's case by contending that as per the terms and conditions of the contract agreement, the petitioner is liable to pay "demurrage" due to delay in loading the trucks beyond the "free time" notified by the N. F. Railway authorities. It has been contended that the officials of the FCI have always received the wagons on time, even if it is in odd hours, late in the evening and therefore, the allegation made in the writ petition are wholly unfounded.

5. It is apparent from the documents annexed to the writ petition that the Railway authorities had notified "free time" for unloading the wagons. Any loading/unloading taking place beyond the "free time" would invite "demurrage" levied at the rate of Rs.150/- per 8 wheeled wagon per hour or part of an hour for detention of wagons in excess of the permissible "free time" for loading or unloading. It is the admitted position of fact that the petitioner is not the handling contractor at the Railway siding inasmuch as M/S Anup Trade and Transport (P) Ltd. was the contractor appointed for handling at the Railway siding. As such, it is evident that there was no responsibility on the petitioner to unload the railway wagons.

Notwithstanding the same, the FCI has started levying "demurrage" from the running bills of the petitioner on the ground that there was delay in unloading of the wagons due to non-supply of vehicles by the petitioner.

6. In order to appreciate the nature of dispute raised in this writ petition, it would be apposite to quote the statements made in paragraph 19 of the writ petition, which are extracted herein below :-

> "*19. That the petitioner begs to state that the rake placement time is generally in the night at about 8 P.M. to 10 P.M. and the FCI Officers are not present at the Railhead to take over charge of the rakes in the night. The rakes are opened on the next day at about 8 A.M. to 10 A.M. for which Demurrage Charges are levied upon the petitioner without any default. It is pertinent to mention herein that on Sundays the FSD Godowns are kept closed and the petitioner's request to open the FSD's to facilitate unloading of foodgrains falls into deaf ear. Therefore, loaded trucks arriving at the FSD on Saturdays are received by the FSD official on next Monday incurring huge demurrages.*"

7. The reply of the respondents to the said paragraphs is available in paragraph 31 of the counter-affidavit, which is extracted herein below :-

> "*31. That the statements made in paragraph 19 of the writ petition are not correct as such vehemently denied by me. It is specifically denied that the FCI officers are not present at the railhead to take over charge of the rakes in night. In this connection, the deponent craves to pray that the petitioner be put to strict proof of the same. In this regard, I say that the FCI officials also*

worked on Sunday for doing needful for unloading of wagons if the occasion arises. I further say that the Divisional Manager on delegation of power (DoP) by the General Manager, levy demurrage charges as applicable in the lines of appropriate terms and conditions of Tender agreement."

8. From the above, it would be apparent that the allegation of negligence on the part of the petitioner company in its failure to place the trucks within the "free time", is a heavily disputed question of fact. Be that as it may, the other relevant question that would also arise for consideration of this Court in the present proceeding was as to whether, as per the terms and conditions of the contract, is it at all permissible for the FCI authorities to levy "demurrage" upon the petitioner unilaterally.

9. By referring to the decision of the Supreme Court rendered in the case of **Food Corporation of India and others Vs. Abhijit Paul** reported in **2023 (157) ALR 205** Mr. Borbora, learned senior counsel for the petitioner has argued that the issue raised in the present writ petition is squarely covered by the aforesaid decision of the Supreme Court which has affirmed the judgments of the learned Single Judge as well as the Division Bench of the High Court of Judicature at Tripura rejecting similar claims of the FCI authorities, relying upon the same condition of the contract Agreement. Mr. Borbora has argued that the Manager Accounts does not have the jurisdiction or authority under the law to make unilateral deduction of "demurrage" from the running bills of the petitioner company, particularly since the petitioner was not the handling contractor at the Railway siding and hence, did not have any direct role to

play in unloading of the wagons.

10. Refuting the above contention, Mr. V. K. Singh, learned counsel for the FCI authorities has submitted that the terms and conditions of the present contract are not the same as those involved in the case of **Abhijit Paul** (*supra*) and therefore, the decision of the Supreme Court in the aforesaid case is distinguishable on facts. Contending that the contract agreement permits levying of "demurrage" for the default of the contractor and by arguing that if the FCI is prevented from enforcing the said clause on account of failure of the handling and transport contractor to unload the wagons within the "free time", then, it would be wholly unviable for the Corporation to execute the transport contracts. Mr. Singh has prayed for dismissal of the writ petition.

11. I have considered the submissions made at the bar and have also carefully gone through the materials available on record.

12. As is apparent from the facts noted above, the core issue involved in this proceeding is pertaining to the question as to whether, the FCI was empowered under the contract agreement to levy "demurrage" and deduct such amount from the bills of the petitioner. The same issue had arisen for consideration in a writ petition filed by another FCI contractor, viz., Sri Abhijit Paul before the Tripura High Court, which was numbered and registered as WP(C) No.367/2012. By the judgment and order dated 27.02.2015 passed by the Tripura High Court in WP(C) No.367/2012 [*Sri Abhijit Paul Vs. Food Corporation of India and others*], it has been held that the levy of demurrage by the FCI on the petitioner was bad and the same was set aside by

holding that the contractor could be held liable for such "demurrage" if it can be substantiated that for negligence or dereliction of the contractor, the respondents (FCI) have suffered loss in the course of transportation but for that purpose, there has to be an enquiry where the petitioner must have his say. The learned Single Judge has held that the quantum of damage is to be determined by following the due process of law and satisfying the requirements of principles of natural justice or by way of conciliation. It is only in that event, that the petitioner (contractor) can be asked to make good the loss and not otherwise. The aforesaid order was passed by taking note of another decision of this Court rendered in the case of **Bulbul Enterprise vs. Food Corporation of India and others** reported in **AIR 2000 Gau 164** wherein, it was also held that deductions made by the FCI from the bills of the contractor as "demurrage" was dehors the terms of the contract and hence, not sustainable in law. Be it mentioned herein that in both the cases, the contract agreement contained a provision for levy of demurrages/wharfages upon the contractor, if the Corporation suffers or incurs any loss due to the negligence of the contractor.

13. The decision of the learned Single Judge of High Court of Judicature at Tripura in the case of **Abhijit Paul** (*supra*), the order of the Division Bench rejecting the appeal preferred by the FCI against the order of the learned Single Judge and some other proceedings connected with the same issue, came up for consideration before the Hon'ble Supreme Court in the case of **Food Corporation of India and others Vs. Abhijit Paul.** After considering the terms and conditions of the contract agreement, the Hon'ble Supreme Court *inter-alia* has held that since the contractor was not entrusted with the task of loading or unloading of foodgrains from the Railway wagons under

the contract agreement, hence, the expression "charge" would not include any liability upon the contractor on account of "demurrages". Consequently, it was held that the Corporation cannot impose and collect "demurrages" from the contractor. It is thus apparent that unless the loading and unloading of foodgrains from the Railway wagons falls within the scope of the contractor's duties under the contract, "demurrages" as a penalty for non-performance of contractual duties, would ordinarily not be applicable. The matter could, however, be different if breach of contract on the part of the contractor is established though any adjudicatory mechanism.

14. In the present case, the relevant clause of the contract which comes into play is clause (X)(a), which is reproduced herein below for ready reference :-

> "***X. Liability of Contractors for losses etc. suffered by Corporation*** :
>
> *a) The contractors shall be liable for all costs, damages, demurrages, wharfage, forfeiture of wagon, registration fees, charges and expenses suffered or incurred by the Corporation due to the contractor's negligence and un-workman like performance of any services under this contract or breach of any terms thereof or his failure to carry out the work with a view to avoid incurrence of demurrage etc. under this contract or breach of any terms thereof or his failure to carry out the work with a view to avoid incurrence of demurrage etc. and for all damages or losses occasioned in the Corporation due to any act whether negligent or otherwise of the contractor themselves or his employees. The decision of the General Manager regarding such failure of the contractor and their liability for the losses etc. suffered by Corporation and the quantification of such losses shall be final and binding on the contractor."*

15. It is no doubt correct that "demurrage" is included in Clause (X)(a) of the contract. However, since the writ petitioner was not entrusted with the task of unloading the wagons Ex-Rly Siding Salchapra, in view of the decision of the Supreme Court in **Abhijit Paul** (*supra*) the said clause in the contract agreement, in the opinion of this Court, cannot be interpreted as a provision in the contract permitting levy of "demurrage" upon the contractor. It may be the case that due to the default on the part of the petitioner to place the trucks at the Railway siding, there was delay in unloading of the Railway wagons on odd occasions as a result of which, the unloading could not be completed within the "free time", thus inviting demurrage being imposed by the Railways upon the FCI. However, since the petitioner was not responsible for un-loading the wagons, the FCI authorities cannot unilaterally deduct amount of "demurrage" from the bills of the contractor on such count. In other words, imposition of "demurrage" by the FCI upon the transport contractor, cannot be based on mere *ipse dixit* of the General Manager or any other official of the FCI coming within the definition of Clause I(v) of Annexure-1 of the contract agreement. Such a claim against the transport contractor would be maintainable only when there is a proper determination of the claim by following the due process under the law wherein, the contractor is given sufficient opportunity to produce its/his version along with evidence. Otherwise, the FCI authorities cannot maintain a claim against the contractor for recovery of "demurrage" save and except by obtaining a decree from the civil court or any other adjudicatory order or award.

16. There is yet another aspect of the matter which deserves consideration in this case. Clause X(a) of the contract agreement envisages the right of the employer to

recover cost, damages, wharfages etc. on the ground of failure on the part of the contractor to comply with the terms and conditions of the contract. However, there is no clause in the contract which quantifies the quantum of "damage/demurrage" that would be recoverable from the contractor nor does the contract specify as to whether, demurrage would be recoverable from the handling contractor at the Railway Siding or the transporter. Therefore, it cannot be said that Clause X(a) of the contract agreement contains a condition for imposing Liquidated Damage (LD) on the transporting contractor.

17. As per the Black's Law Dictionary (Tenth Edition), Liquidated Damage is an amount contractually stipulated as a reasonable estimation of actual damages to be recovered by one party if the other party breaches. If the parties to a contract have properly agreed on Liquidated Damages, the sum fixed is the measure of damages for a breach, whether it exceeds or falls short of the actual damage. Naturally, therefore, unliquidated damage would mean damages that cannot be determined by a fixed formula and must be established by a judge or jury [see Black's Law Dictionary].

18. Section 74 of the Indian Contract Act, 1872 deals with compensation for breach of contract where penalty is stipulated for i.e. Liquidated Damage. Section 74 is extracted herein below for ready reference :-

> "***74. Compensation for breach of contract where penalty stipulated for***.— *[When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is*

entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

19. In the case of **Union of India vs. Raman Iron Foundry** reported in (**1974) 2 SCC 231** the Supreme Court has observed that claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not *eo instanti* incur any pecuniary obligation nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. Although the decision in the case of **Raman Iron Foundry** (*supra*) has been over-ruled by a subsequent decision rendered in the case of **H. M. Kamaluddin Ansari & Co. vs. Union of India** reported in **(1983) 4 SCC 417** as well as in the case of **State of Gujarat vs. Amber Builders** reported in **(2020) 2 SCC 540**, yet, the findings recorded in **Raman Iron Foundry** (*supra*) as regards the rights of the party to the contract pertaining to the liquidated and unliquidated damage have remained undisturbed.

20. In another decision of the Supreme Court rendered in the case of **Gaziabad Development Authority Vs. Union of India and another** reported in **(2000) 6 SCC 113** it has been observed that in case of breach of contract, damages may be claimed by one party from the other who has broken its contractual obligation in some way or the other. The damages may be liquidated or unliquidated. Liquidated damages are

such damages as have been agreed upon and fixed by the parties in anticipation of the breach. Unliquidated damages are such damages as are required to be assessed. Broadly, the principles underlying assessment of damages is to put the aggrieved party monetarily in the same position, as far as possible, in which it would have been, if the contract would have been performed.

21. From a careful analysis of the decisions of the Supreme Court referred to above, read in the context of sections 73 and 74 of the Indian Contract Act, it is clear that, unless the contract agreement itself specifies an agreed amount of damage which can be levied on the contractor for having breached the conditions of the contract, any amount claimed by the employer would not automatically translate into a debt but would merely remain a claim. If the claim is legitimately disputed by the contractor being one of the parties to the contract agreement, the same would give rise to a dispute which would have to be adjudicated upon by the Court or through any other adjudicating mechanism established under the law.

22. In the present case, as has been noted above, there is no Liquidated Damage clause. Moreover, the petitioner (contractor) was not entrusted with the work of unloading of the foodgrains at the Railway siding. As such, in view of the denial on the part of the petitioner of any laches or negligence on its part which can be seen as a breach of the terms and conditions of the contract, the FCI cannot unilaterally recover any amount from the contractor as demurrage unless the liability of the contractor is determined through a process established by law.

23. For the reasons stated herein above, this Court is of the opinion that this writ

petition must succeed and the same is hereby allowed. Consequently, all deductions made from the previous running bills of the petitioner on account of "demurrage" are hereby set-aside. The respondents are directed to refund the amounts so deducted from the running bills of the writ petitioner as "demurrage" within 60(sixty) days from the date of receipt of a certified copy of this order and also to refrain from deducting any further amount on account of "demurrage" from the bills of the writ petitioner. It is made clear that if the deducted amount is not refunded within 60 (sixty) days from the date of this order, interest at the rate of 9% per annum on the amount, calculated from the date of this order, till refund of the same shall be payable to the petitioner by the respondent.

This order would, however, not preclude the respondents from initiating any action against the writ petitioner for realization of damage and compensation, if any, in accordance with law and in the light of the observations made herein above.

The writ petition stands disposed of accordingly.

Parties to bear their own cost.

JUDGE

T U Choudhury/Sr.PS

Comparing Assistant