IN THE COURT OF DISTRICT JUDGE, KHURDA
AT BHUBANESWAR.

Present :-

Dr. D.P. Choudhury,
District Judge, Khurda
at Bhubaneswar.

Dated, 29th day of September, 2014.

ARB.(P) No.343-2013

Sanjib Ku. Patra, aged about 49 years, S/o- Shyam Sunder Patra, Proprietor, of M/s. Metro Cargo @ Movers at Balichhaksahi, Po-Jatni, Dist – Khurda.

... Petitioner.

-Vrs-

1. Chief Commercial Manager/ Divisional Railway Manager (Commercial), Khurda Road Division, East Coast Railway & another.

2. The Senior Manager, Divisional Commercial Manager, East Coast Railway, Khurda, At/Po/Dist – Khurda.

... Opp. Parties.

Counsel:

For the petitioner- Sri A.K. Pattnaik & Associates.

For the Opp. Parties Sri A.K. Mohanty @ Associates.

Date of argument : 19.09.2014

Date of judgment: 29.09.2014.

J U D G E M E N T.

This is an application U/s.9 of the Arbitration & Conciliation Act, 1996 (hereinafter called the Act), wherein the petitioner has prayed for restraining the opposite parties from terminating lease agreement dtd. 11.04.2012 under Annexure -1 and also further to restrain the opposite parties from terminating the contract vide different agreements between the petitioner and opposite parties and from taking any coercive action in pursuance to the notice dtd. 13.09.2013 with the declaration of such notice as void abinitio and to quash the same.

2. The factual matrix leading to the case of the petitioner is that the petitioner entered into contract with the opposite parties by virtue of an agreement dtd. 11.04.2012 where the opposite parties agreed for leasing of parcel space in brake van (front SLR, front compartment) in the train No. 12815 Puri- New Delhi Nandanakanan Express from for a period of 3 years i.e. from 11/4/2012 to 10/4/2015. There are several clauses in the agreement. According to the petitioner after execution of aforesaid agreement, the petitioner started loading parcels i.e. beetles leaves in the aforesaid train. On 02.05.2012 the petitioner having faced lot of problem for carrying out his loading activity made representation before the Sr. Divisional Operating Manager East Coast Rly., which was in vein but all on sudden on 13.09.2013, Sr. Divisional Manager Commercial Manager, Khurda issued notice to the petitioner stating that the petitioner has over loaded the leased compartment in the said train on 04.8.12, 12.11.12, 02.06.13 and 15.06.013.

It was also stipulated that in view of such over loading the contract will be cancelled due to breach of contract. The petitioner challenges said notice stating that it is illegal as Opp. No.2 has no evidence of over loading of parcels by the petitioner. It is averred in the petition that said notice is void abinitio thus liable to be set aside.. It is further averred that according to clause 7.4 of the agreement dtd. 11.04.2012 that the contract only be cancelled or terminated with the approval of tender accepting committee but here no such approval has been made for which the notice dtd. 13/9/13 is against the terms of the agreement. It is also submitted by the petitioner that when there was amount of excess weight as alleged by the opposite parties, the presence of the petitioner was not there. There is a clause 26 of the lease agreement dtd. 11/4/12 where it is mentioned that any dispute between the parties shall be referred to the sole arbitrator. As the allegation of the opposite party has no basis, in the event of cancellation of lease agreement the petitioner would suffer from irreparable loss. On the other hand, the petitioner has got a prima facie case and specific equity is in his favour. In fact there was no over loading by the petitioner and the balance of convenience lies in favour of the petitioner. Hence it is prayed U/s.9 of the Act restraining the opposite parties to terminate lease agreement dtd. 11/4/12 and further to restrain opposite parties from terminating the agreement dtd. 08//03/2012, 13/07/2012, 27/06/ 2012, 27/07/2012 and

27/08/2012 and to declare notice dtd. 13/9/2012 void with the further direction to the opposite parties from taking any coercive action on such notice. Learned counsel for the petitioner further submits that since there is contract for three years between the petitioner and the opposite parties for loading of parcels and petitioner has successfully commenced his work, there is no reason for opposite parties to terminate the contract on the plea of over loading. In fact there is no over loading at all. He further submitted that petitioner has a prima facie case, balance of convenience lies in his favour. He further submitted if the interim measure U/s.9 of the Act is not granted, the petitioner would suffer from irreparable injury. Hence, the petition.

3. The case of the opposite parties is that the petition U/s. 9 of the Arbitration and conciliation Act is not maintainable in the eye of law, there is no cause of action to file the petition and petitioner has no loco-standi to file this case. It is also averred that the petitioner has not come with clean hand and suppressed the material fact for which he is not entitled to get any relief. According to the opposite parties under the agreement at clause 7.4, 12.1, 13.4, 21.1 the lease agreement between the parties can be terminated by Rly. Administration represented by including it's Sr. Commercial Manager by giving one month notice. Since the petitioner has over loaded the parcel goods beyond the limit contravening the agreement he was penalised four times i.e. on 4.8.2012, 12.11.2012, 2.6.13, and 16.6.13. He was issued notice rightly on

13.9.13 for termination of lease agreement for which the letter dtd. 13.9.13 is legal and valid. It is further averred that after collection of penalty from the petitioner due to over loading, no question to fresh proof of over loading in the present case can be raised by the petitioner and, the question of over loading is not subject of adjudication in the present case. Moreover, it is averred by the opposite party that after the acceptance of the approval of tender accepting authority, the notice of termination of lease contract and cancellation of registration of the petitioner has been issued by virtue of letter dtd. 13.09.13. It is further averred that over loading of parcel goods beyond permissible limit in a compartment is a hazardous task for safety and security for smooth running of a train affecting danger and damage to the machineries of the train. Since the petitioner has violated the terms and conditions, he can not seek for equitable relief U/s. 9 of the Act. Moreover, it is pleaded that the opposite parties have no personal grudge with the petitioner although the petitioner repeatedly committed the breach of contract and for that through notice dtd. 13/09/13, the petitioner was given opportunity to establish his innocence. It is further pleaded that there is no prima facie case and balance of convenience does not lie in favour of the petitioner. Moreover, he will not suffer from irreparable loss in the event of refusal of relief asked for. Learned counsel for the opposite parties submitted that the petitioner has over loaded the parcels in four occasions for which appropriate action under the

agreement has been taken. He further submitted that according to the letter of the petitioner he has not continued the work for 10 clear days as he expressed inability to execute the order. According to him the letter dtd. 13/9/2013 is nothing but notice to show cause as to why the contract will not be cancelled. So, he submitted that the case of the petitioner is a premature one and there is no prima facie case in his favour. He also submitted that the balance of convenience lies in favour of the opposite parties but not in favour of the petitioner. learned counsel for the opposite parties submitted that if the injunction is issued there will be loss to the opposite parties. Under such circumstances, he prayed to dismiss the petition.

4. Basing on the pleadings and contention of the parties, following points emerged for discussion.

i) Whether there is prima facie case established by the petitioner,

ii) Whether the balance of convenience lies in favour of the petitioner,

iii) Whether there is irreparable loss or injury to be caused to the petitioner in the event of refusal of injunction u/s.9 of the Act.

iv) Whether the petitioner is entitled to get any relief U/s.9 of the Act.

Point No.i:

5. It is a admitted fact of both the parties that there is agreement between the parties on 10.04.2012 for leasing of parcels space in brake van (front SLR, front compartment) by train No. 12815, Puri- New Delhi Nandankanan Express from Puri to New Delhi. It is further available from that agreement that **clause 7.4 speaks as follows** :

" if the registration of a 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 railways 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 view of above clause the Rly. Administration has got ample power to cancel or terminate the contract if there is over loading and as per further content in Clause 7.4. contract can be cancelled / terminated with the approval of the tender accepting authority.

Similarly, clause **13.2 speaks as follows :**

" Overloading in SLRS: Weight of each individual package is not required to be checked. Only the total weight of the consignments loaded in the vehicle would be checked. In case of SLR, weight of the consignments should be checked for

each 4 tonne compartment separately, and it must be within the permissible limit for each compartment. Under – loading in one 4 tonne compartment will not mean that the other 4 tonne compartment can be over loaded.

Thus according to this clause there can only consignment for 4 tonnes in each compartment within permissible limit.

6. **Clause 13.3** shows that in case of carrying the parcels exceeding the permissible limit the penalty can be imposed. The **Clause 13.4** also gives power to Rly. Administration to terminate contract and cancel the registration of lease holder in case of 4th default and finally **clause 21.1** also speaks that the Rly Administration reserves the right to terminate the contract without giving any notice at any time for whatsoever reason as a punitive measure or breach of agreement by the leaseholder or in case of operational exigencies or it is necessary to do so in public interest. It is also revealed from that clause that where the Rly. Administration terminates the contract for breach of contract he must give the three working days intimation of termination to the concerned lease holder. Now **clause 26** of the agreement shows that in the event of any difference opinion or dispute between the Rly. Administration and lease holder as to the rights and obligations of the parties, the matter will be referred to the sole arbitrator or any officer appointed by Rly. Administration. Thus from the Annexure -1 it is found

that the Rly. Administration has jurisdiction to impose penalty in case of over loading and in addition to that can terminate the contract where there is breach of contract and for public interest also. Annexure-2, shows that the petitioner has been issued a notice for termination of lease of contract as on 04.08.2012, 12.11.2012, 02.06.2013 and 16.06.2103 he has made over loading of 585 kgs, 1200 kgs, 1234 kg and 260 kg and accordingly penalty has been imposed and he has been charged for violation of contract and this is a notice given under clause **21.1** of the contract to represent within 30 days from the date of issuance of notice. In addition to imposition of penalty Rly. Administration has also cited other agreements between the petitioner and opposite parties may be affected and his entire registration fees will be forfeited in addition to concellation of contract. So, the annexure-2 is a impugned notice dtd. 13/09/2012. There is another agreement vide annexure-3 dtd. 27.6.12 but that is not a case of over loading. There is no other document submitted by the petitioner to show that he has submitted any show cause to the notice dtd. 13.09.2013. Thus it assumed that he has accepted the allegation made in 13.09.2013, rather he has approached this court on 7.10.2013 against this notice. Of course he obtained one order of status quo from this court on 20.12.2013 and again on 7.5.2014 the status quo extended with a liberty to the opposite parties to take necessary action in case of violation of any terms and conditions in the agreement of both the parties. As

discussed above the notice to show cause was issued on 13.9.2013 basing on the **clause 21.1** of the agreement which is binding on both the parties. So, this is for the petitioner to answer the show cause. Even he has got opportunity to establish his bonafideness in the court but no such bonafideness is established in the court to show that he has not over loaded parcels. Not a scrap of paper is filed to prove that he has complied the agreement and his bonafiedness before the concerned authority.

7. The opposite party has submitted that he has given opportunity to the petitioner to establish his innocence and it has also been established by the opposite party in his pleading that they have obtained the approval of the tender approval accepting authority under clause 21.1 of the Act. When already there are charges against him for over loading and the notice show cause has been given and in fact over loading beyond permissible is hazardous for safety and security for the smooth running of the train affecting danger and damage to the machineries of the train, the notice to show cause is justified. Hence, the petitioner has not proved a prima facie case from invoking petition U/s.9 of the Act. Hence point number 1 answered accordingly.

Point No.II

8. So far as the balance of convenience is concerned, I find in the instant case, the petitioner is a lease holder and he has got every

opportunity to move for arbitration. In the instant case he has not filed any document to show that he has referred the matter for arbitration. When there is no prima facie case and no document is filed, to prove his innocence the balance of convenience does not lie in favour of the petitioner, rather I find the balance of convenience lies in favour of the opposite party as they are going to suffer for over loading of parcels. So, the next ingredient is not proved. The point number two is answered accordingly.

Point No.iii

9. The petitioner apprehends for causing irreparable injury to him in case the entire contract in this case is cancelled or the other contracts between the petitioner and the opposite parties are cancelled. It is a fact there will be huge loss to the petitioner in case of cancelllation of contract or registration but when he has not proved a prima facie case and a balance of convenience does not lie in his favour, it will be a futile exercise for asking for injunction on the ground that he will suffer from irreparable loss or injury in case of refusal of injunction. The issue No.iii is answered accordingly.

Point No.iv

It is reported in (2007) Supreme Court cases 125 in case of Adhunik Steels Ltd. .... Appellant Versus Orissa Manganese and Minerals

(P) Ltd. Respondent, where the lordship observed that

> *"whether an interim mandatory injunction could be granted directing the continuance of the working of the contract, had to be considered in the light of the well settled principles in that behalf. Similarly,whether the attempted termination could be restrained leaving the consequences, thereof vague would also be a question that might have to be considered in the context of well settled principles for the grant of injunction. Therefore, on the whole, it would not be correct to say that the power under section 9 of the Act is totally independent of the well known principles governing the grant of an interim injunction that generally govern the courts in this connection".*

10. In the instant case, I found all the three ingredients i.e. prima facie case, balance of convenience and irreparable injury have not been proved by the petitioner for which no relief U/s. 9 of the Act can be granted to the petitioner. However, since the petitioner has knocked the door of the court it is necessary to give him relief by giving another opportunity before the cancellation of the contract. But in course of hearing it has been brought out by the petitioner that already notice on 9 / 10 .06. 2014 has been served on him showing the forfeiture of all security deposits, registration fees, and debarring for a period of 5 years for registration of the contract. Since the

petitioner has filed a petition for violation of order of status quo, such matter cannot be discussed in this case. But taking cue from the notice 13.09.13, which is the subject matter of this case, I find the notice to show cause requires to be answered by the petitioner. Hence, this notice is still valid till date. Hence, ordered.

O R D E R.

Arbitration petition is dismissed on contest against the opposite parties but the petitioner is given another opportunity to answer the show cause notice dtd. 13.09.2013 of O. Ps within a period of 15 days from today and opposite parties are at liberty to take action on the matter without prejudice to the notice issued on 10.06.2014 to the petitioner during pendency of this case.

District Judge,Khurda
at Bhubaneswar.

Computed to my dictation,corrected by me and pronounced
in the open court on this the 29th day of September, 2014 under
my signature and seal of the court.

District Judge,Khurda
at Bhubaneswar.