

IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB.A. 15/2015 & I.A. No. 4386 of 2015

**MINISTRY OF ROAD TRANSPORT AND HIGHWAYS
GOVERNMENT OF INDIA**

..... Appellant

Through: Mr. Ravi Sikri, Senior Advocate with
Ms. Tanu Priya, Ms. Meenakshi Sood
and Mr. Mukesh Kumar, Advocates.

versus

DSC VENTURES PVT. LTD.

..... Respondent

Through: Mr. Kapil Sibal, Senior Advocate with
Mr. Akhil Sibal, Mr. Deepak Khurana
and Mr. Jatin Mongia, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER
03.03.2015

1. This appeal under Section 37 (2) (b) of the Arbitration and Conciliation Act, 1996 ('Act') is directed against the impugned order dated 25th February 2015 passed by the Arbitral Tribunal ('AT') restraining the Appellant Ministry of Road Transport and Highways ('MoRTH') from "taking any coercive steps to prevent in any manner the operation of the project facility by the claimant after 1st March 2015" and further directing the MoRTH to issue "a revised fee notification in terms of the concession agreement before 2nd March 2015" and further directing that such revised fee notification "may be issued for a period of six months within which period the Tribunal reasonably expects that the matter will be finally adjudicated."

2. In terms of the Concession Agreement ('CA') dated 8th May 2003 executed between the MoRTH and the Respondent DSC Ventures Pvt. Ltd., the

Respondent was awarded the contract for implementation of a project involving construction, operation and maintenance of four laning of two lane road from Km. 282 to Km. 308/6 of NH 6 (Raipur-Durg section in the State of Chhattisgarh) on a build, operate and transfer ('BOT') basis.

3. In its bid, the Respondent quoted a concession period of 11 years and 9 months including the construction period of up to 3 years. Under Clause 2.2 of the CA, the concession period was defined to be that quoted by the Concessionaire commencing from the Commencement Date during which the Concessionaire is authorised to implement the project to operate the Project Facility in accordance with the provisions thereof." In the CA, 'Commencement Date' has been defined to mean "the date on which the physical possession of the project site is delivered by the Government of India (GOI) to the Concessionaire, which shall not be later than 30 days from the date of this agreement." The other relevant definition is 'the commercial operation date' ('COD') which shall be the date on which the Independent Engineer ('IE') issues the completion certificate ('CC') or the provisional certificate ('PC') upon completion of the construction of the project and which shall subject to the provisions of the CA be not later than 180 days after the scheduled project completion date.

4. Under Clause 9.2(a) the project was to be deemed to be completed and open to traffic only when the CC or the PC was issued by the IE in accordance with the article 9.3. Under 9.2 (b), the Respondent guaranteed that the project completion shall be due in accordance with the CA on a date "not later than 36 months from the commencement date." Under 9.2 (d) if the COD does not occur within 180 days from the scheduled project

completion date, GOI shall subject to the provisions of the CA be entitled to terminate the agreement in accordance with the Article 16.2. The events of defaults were specified in Article 16.2. Under Clause 17.2 the concession period could be extended if upon being notified by the Respondent of the change in law and the proposed amendments to the CA, the Steering Group assists the change in the financial position as a result thereof and determine the extension to be given.

5. Schedule B to the CA defines the project site to mean the land width between Km. 282 to Km.308/6 of NH6 is 36.60M and extra land of 4.35M acquired where widening was proposed either to the left side or right of existing carriage-way. Land for the project shall be provided free from all encumbrances and free of costs.

6. According to the NHAI, it handed over the project site to the Respondent on 3rd June 2003 along with all concerned documents. It has enclosed as Annexure A-4 to the appeal, the certificate of hand over and takeover of the project site. However, there is a dispute between the parties as to whether the entire project site was handed over, free from all encumbrances, on the aforementioned date. It is the case of the Respondent that entire project site free from all encumbrances was not handed over to it till much later. In para 8.4 the impugned order, the AT notes the submission of the Respondent was that the date of handing over of the project site could be either "December 2005, June 2006 or April 2010".

7. As far as MoRTH is concerned, it proceeded on the basis of handing over the project site to the Respondent on 3rd June 2003 and contended that the

date of completion of the project had to be within 36 months from the commencement date i.e. 3rd June 2003, which worked out to 3rd June 2006. According to MoRTH, the Respondent could complete the project only on 14th January 2008.

8. It is not in dispute that the certificate of provisional completion (PC) was issued by the IE on 13th June 2006 and the project entered into commercial operation on that date itself. A notification dated 13th June 2006 under Sections 7 and 8 of the National Highways Act, 1956 was published by the MoRTH in the Official Gazette intimating that fee shall be levied and paid on commercial vehicles for use of the Project Facility i.e. the four lane NH6 in the aforementioned stretch, from the date of publication of the notification in the Official Gazette till 2nd March 2015 (being the last date of the concession period) at the rates notified therein. It is not in dispute that since 13th June 2006 toll is being collected on the said stretch of the Project Facility. On 14th January 2008, the final completion certificate was issued.

9. According to MoRTH, work of worth about Rs.50 lakhs was completed after the scheduled date and there was a delay of 1 year, 3 months and 2 days. A penalty of Rs.11,29,932 was accordingly levied on the Respondent. According to the MoRTH, the said amount was paid by the Respondent along with its letter dated 17th May 2011.

10. It is further contended by MoRTH that in view of the continuous and unattended defaults on the part of the Respondent, the condition of the road continued to deteriorate and the issue was taken up with the Respondent by the MoRTH on several occasions. The defaults so pointed out by the

Steering Group to the Respondent in meetings held on 18th July and 24th December 2008. This persisted as was noticed at the meeting held on 28th April 2011. A notice dated 12th June 2012 was issued to the Respondent bringing to its notice the unattended defaults. Reference is also made to a public interest litigation [W.P. (PIL) No. 07 of 2014] filed in the High Court of Chhattisgarh by one Lal Manohar Pandey complaining of the poor condition of the Project Facility. Copies of the orders passed from time to time by the High Court and later the Supreme Court have also been placed on record.

11. According to MoRTH, in view of the persistent defaults of the Respondent, the MoRTH was constrained to issue a notice dated 30th June 2014 granting the Respondent 60 days' time to rectify the defects failing which the MoRTH would be constrained to take appropriate actions including but not limited to termination of the CA.

12. The Respondent invoked the arbitration clause by its letter dated 7th April 2014 and the disputes were referred to a three-Member AT on 30th June 2014. In the statement of claims filed before the AT, the Respondent raised the following claims:

- “(a) Declare that the Concession Period of 11 years. 9 months commences from April 2010; or *in the alternative*,
- (b) Declare that the Concession Period of 11 years 9 months commences from April 2006 at the least; or *in the alternative*,
- (c) Grant extension of Concession Period by 3 years 9 months at the least; or *in the alternative*,
- (d) Award damages to the extent of 37.43 Crores: and interest thereupon at the rate of 12% per annum from June 2006 till

payment; or *in the alternative*,

(e) Grant extension of the Concession Period by 3 years, and award suitable damages (with interest at 12 % per annum till payment),

And

(f) Direct the Respondent to refund Rs.74.51 lakhs which the Claimant was compelled to deposit in connection with removal of HT line with interest at the rate of 12% from the date of deposit till its payment;

And

(g) Declare that the Preliminary Notice dated 30.06.2014 issued by the Respondent is illegal and invalid and set aside the same;

And

(h) Restrain the Respondent its successor, agents, employees, servants, assignees, executives and any representatives from terminating the Concession Agreement dated 08.05.2003;

And

(i) Direct the Respondent to refund the amount of Rs. 50 lakhs realised by way of wrongful encashment of bank guarantee along with interest at the rate of 12% per annum from the date of encashment;

And

(j) Entire actual costs of the present arbitration proceedings, and other legal proceedings as may be taken in connection therewith or herewith, be directed to be borne by the Respondent;

And

(k) Pass any other order as it may deem fit in favour of the Claimant.”

13. Along with the statement of claims, the Respondent also filed application under Section 17 of the Act praying for interim reliefs including stay of the notice of termination dated 30th June 2014. On 29th August 2014, an interim order was passed by the AT restraining the MoRTH from taking further coercive steps to terminate the CA.

14. On 5th January 2015, another application was filed by the Respondent under Section 17 of the Act praying for the following interim reliefs:

"(i) Restrain the Respondent from taking any coercive steps against the Claimant/Applicant to prevent in any manner the operation of the Project Facility by the Claimant;

(ii) Close the right of the Respondent to file Statement of Defence; and

(iii) Grant such other reliefs to the Claimant/Applicant, as it may deem fit in the interest of equity, fairness and good conscience."

15. It was inter alia contended by MoRTH in its reply to the above application that it was the second application under Section 17 of the Act. Since the earlier application under Section 17 was pending, a second application was not maintainable.

16. By the impugned order dated 25th February 2015, the AT disposed of the second application of the Respondent under Section 17 of the Act by the impugned order granting interim reliefs as already noticed.

17. Mr. Ravi Sikri, learned Senior counsel appearing for the Appellant MoRTH submitted that the AT has virtually re-written the CA between the

parties and extended the period of concession by six more months. Such a relief was incapable of being granted by the AT, much less by way of an interim order in an application under Section 17 of the Act. Referring to the decision of the Supreme Court in ***Indian Oil Corporation Ltd. v. Amritsar Gas Service (1991) 1 SCC 533***, he submitted that such a relief could not have been granted as it was virtually an order preventing the CA from coming to an end by efflux of time on the scheduled date i.e. 2nd March 2015. He referred to Section 14 (1) (c) of the Specific Relief Act 1963 (SRA) and submitted that there was a complete bar to a Court ordering specific performance of a contract that was determinable at will or by efflux of time. Relying on the decision of this Court in ***Intertoll ICS Cecons O & M Pvt. Ltd. v. National Highways Authority of India 197 (2013) DLT 473*** he submitted that the impugned order was far beyond the scope of the powers of the AT under Section 17 of the Act. He submitted that once the PC was issued and collection of toll commenced on the COD i.e., 13th June 2006, and a fee notification specifying the date of expiry of the concession period i.e. 2nd March 2015 was gazetted, it was legally impermissible for the AT to extend the concession period by six months and permit the toll to be collected for the extended period. He pointed out that this was not even the relief prayed for by the Respondent. He referred to the reliefs sought in the main statement of claims where Respondent itself had claimed the alternative relief of damages in lieu of stay on the termination of the CA.

18. Mr. Kapil Sibal, learned Senior counsel and Mr. Akhil Sibal, learned counsel appearing for the Respondent relied on the decision of this Court in ***KSL & Industries Ltd. v. National Textiles Corporation Ltd. 2012 (3) Arb LR 470 (Del)*** to urge that there was a distinction between contracts that were

determinable at will i.e. simply by the issuance of a notice of termination irrespective of any fault and those which are determinable for a cause and which can be terminated only upon proving a breach of certain terms of the contract. It is contended that while in the former category Section 14 (1) (c) of the SRA might bar the relief of specific performance, in the latter case the State had to act in a fair, reasonable and non-arbitrary manner. According to Mr. Sibal, the MoRTH was acting arbitrarily in seeking to treat the CA as expiring on 2nd March 2015 by efflux of time particularly when there was a dispute between the parties about the date of handing over of the project site. He submitted that the Commencement Date was not 3rd June 2003 as contended by the MoRTH and therefore the concession period of 11 years and 9 months could not be computed from that date. The Respondent had made out a *prima facie* case, which was accepted by the AT, that the date of the CA coming to an end had to be beyond 2nd March 2015. It is submitted that the balance of convenience is entirely in favour of the Respondent in the CA continuing for a further period of six months which was a reasonable estimate of the time that would be taken by the AT to conclude these proceedings and deliver an Award. It is submitted that as long as the commuters pay the toll without demur, the MoRTH should have no difficulty in issuing a revised fee notification extending the operation of the gazette notification dated 30th June 2006 for a further period of six months. It was submitted that unless the extension was granted as ordered by the AT, the Project Facility itself might be declared to be a non-performing asset ('NPA'). Alternatively, Mr. Sibal offered that the Respondent will not withdraw the toll money that will be collected and deposit in a separate account pending the conclusion of arbitral proceedings. Reference was made to the decision in *Food Corporation of India v. Chandu Construction*

(2007) 4 SCC 697 to contend that the AT was bound to act within the terms of the CA and that the AT was within its jurisdiction to restrain MoRTH from continuing to act in contravention of the CA.

19. The Court would first like to discuss the scope of the powers of the AT under Section 17 of the Act. The AT can, in terms of Section 17 of the Act, pass orders for interim measures of protection “in respect of the subject-matter of the dispute”. It was observed by this Court in *Intertoll ICS* that the protection envisaged under Section 17 “is in relation to some tangible property and not indeterminate mandatory claims.” The Court drew a distinction between the powers exercisable by a Court under Section 9 of the Act and that by the AT under Section 17 of the Act. It was observed in para 19 as under:

“19. However, for examining the questions as to what could constitute the ‘subject-matter of the dispute’ in the context of Section 17 of the Act, it would be useful to draw a comparison with Section 9 of the Act. A reading of the various sub-clauses of Section 9 makes it apparent that a distinction has been drawn between the words ‘subject-matter of the dispute’[used in Sections 9 (ii) (a) and (c)] and ‘amount in dispute’[used in Section 9(ii)(b)]. It is arguable that where the legislature in the same provision uses the words ‘subject-matter of the dispute’ in two sub-clauses and uses the words ‘amount in dispute’ in another sub-clause it intends to draw a distinction between the two. When Section 9(ii) (a) use the words ‘subject-matter of the dispute’, they refer to goods in respect of which there could be an order of preservation or interim custody. The same words in Section 9 (ii)(c) refer to any property or thing in respect of which there could be an order of detention preservation or inspection of. Where the claim is of a monetary nature Section 9 (ii) (b) talks of securing the amount in dispute in the arbitration. By the same analogy the words ‘subject-matter of dispute’ in Section 17 should be understood as

referring to a tangible subject-matter of dispute different from an amount in dispute.”

20. It is seen from the reliefs sought in the statement of claims filed by the Respondent before the AT that the Respondent sought an alternative relief of "damages to the extent of Rs. 37.43 Crores and interest thereupon at the rate of 12% per annum from June 2006 till payment " in lieu of an order granting extension of Concession Period "by 3 years 9 months at the least ". Clearly, therefore, the Respondent was able to quantify its monetary claims which it prayed for as alternative to the relief of declaration of continuation of the concession period. In the considered view of the Court, in entertaining a prayer for interim measure in the form of continuing the concession period for a further six months, the AT was acting beyond the scope of its powers under Section 17 of the Act.

21. It must be noted here that although Mr. Akhil Sibal pleaded that under Section 21 SRA, an additional or alternative relief of damages could be prayed for, the question here would be whether a relief that is barred under Section 14 (1) (c) read with Section 41 (e) SRA could be granted at an interim stage. The power of a Court to grant the relief of specific performance, even at the end of the proceedings, is discretionary and under Section 14 (1) (a) SRA, one of the grounds on which a Court might decline to grant specific performance is where compensation to the claimant for breach of contract would be an adequate relief. In the impugned order the AT has not indicated the legal basis for granting, as an interim measure, a relief that in terms of Section 14 (1) (c) would amount to continuing a contract, in this case the CA, which in its nature was determinable. If what the Respondent was apprehending was a continuing breach of the CA by

MoRTH then even in terms of Section 41 (e) SRA no injunction could be granted "to prevent the breach of a contract the performance of which would not be specifically enforced."

22. In para 8.4 of the impugned order, the AT recorded the submission of counsel for the Respondent as under:

“8.4 The AT, in its internal meeting held on 06.02.2015 had, in paragraph 4.6 of its proceedings, made it very clear that the actual expiry date of the Concession Agreement is decidedly the issue before the AT for adjudication. During the course of arguments, the learned counsel for the Claimant had vehemently argued that on the basis of the provisions of the Concession Agreement referred to by him, the actual Commencement Date of the Concession Period would be either December 2005 or April 2006 or April 2010, but decidedly not on 03.06.2003. Consequently it was argued that after adding a period of 11 years and 9 months to the Commencement Date so indicated, the actual expiry date of the Concession Agreement could only be either September 2017 or January 2018 or January 2022 and certainly not on 2.3.2015. The AT has taken note of the argument advanced by the Learned Counsel for the Claimant.”

23. Thereafter in para 8.5 of the impugned order, the AT noted the submissions of the MoRTH including the one regarding the bar to granting relief under Section 14 SRA, but simply states that they "do not hold good in the present case" without discussing the provision or the law. In para 9.1 of the impugned the AT concludes that if the MoRTH proceeds to restrain the operation by the Respondent of the Project Facility beyond 2nd March 2015, then "the very subject matter of the dispute would be wiped out." The Court fails to understand how it could be said that the subject matter would be

"wiped out" when the project has already been completed and its commercial operation has commenced way back on 13th June 2006. The very approach of the AT to justify the exercise of powers under Section 17 of the Act appears to proceed on an erroneous factual premise.

24. In para 9.2 of the impugned order, the AT came to the *prima facie* conclusion that the actual expiry of the CA would have to be based on various interpretations of the CA. Here it requires to be noted that the CA makes it plain how the Commencement Date, the date of completion and date of expiry of the CA is to be computed. The AT was therefore stating the obvious. What was in dispute was whether the Commencement Date was 3rd June 2003 as contended by the MoRTH or one of three later dates as contended by the Respondent. On this, the AT held in para 9.3 that "while the actual commencement date and the actual date of expiry of the concession period could be determined/calculated at the time of disposing of the statement of claims, the actual expiry date would be after 02.03.2015." The Court finds that the AT, in fact, did not come to even a *prima facie* conclusion whether it found merit in the contention of the Respondent that the actual commencement would be "either December 2005 or April 2006 or April 2010". In any event, if that was an issue that required evidence to be led and determined at the time of disposal of the statement of claims then certainly AT could not have come to any kind of conclusion by which the concession period could be extended by way of an interim measure.

25. It is trite that The AT was required to follow the Indian statutory law, and in the context of the reliefs prayed for in the Respondent's application

under Section 17 of the Act, it included the SRA. The AT appears to have failed to notice the legal position on whether its power under Section 17 of the Act included the power to actually extend the concession period beyond 2nd March 2015. As already noticed, there is only one clause in the entire CA that contemplates extension of the concession period. That is Clause 17.2. Admittedly, the conditions for extension of the concession period in terms of Clause 17.2 do not exist as far as the present case is concerned. Therefore by granting extension of concession period beyond 2nd March 2015, the AT was in fact rewriting the contract and providing for an extension which was not intended or contemplated by the parties to the CA.

26. The AT appears to have overlooked the fact that a provisional certificate was issued on 13th June 2006 and simultaneously toll began to be collected on the Project Facility with effect from that date by issuance of a fee notification in the Gazette. The gazette notification recorded the last date of the concession period as 2nd March 2015. The said notification was never challenged by the Respondent for all these years. The Respondent had itself quoted a concession period of 11 years and 9 months, which was to begin to run from the Commencement Date (and included the construction period). The COD was the date of issuance of the PC and the toll began to be collected from 13th June 2006 itself. There is a basic incongruity in the submission of the Respondent that the project site was not handed over and therefore the Commencement Date did not begin till April 2006 (or April 2010) when in fact the project was certified on 13th June 2006 as having been provisionally completed and the COD was also that very date. It appears that a substantial extent of the Project Site free of encumbrances

must have been handed over for construction to begin and be completed by June 2006 and which could then be commercially operated from 13th June 2006 onwards. As the AT itself noted, the possible expiry date of the CA, could be conclusively decided only after evidence was led by the parties. It is therefore not understood on what basis the AT could have, at the interim stage, come to a conclusion that the expiry date of the CA was definitely after 2nd March 2015. That conclusion was not based on any evidence.

27. The Court is unable to agree with the submission of Mr. Sibal that this was a contract not determinable at will or by efflux of time but for a cause. The contract was sought to be terminated by MoRTH by its notice dated 30th June 2014. That notice was stayed by the AT by its order dated 29th August 2014. In terms of that order, the stay was operative only till the last date of the CA. That order was premised on the basis that but for the stay, the CA would have come to an end on 2nd March 2015. It is for that reason that the Respondent filed another application under Section 17 of the Act conscious that the CA by efflux of time was to end on 2nd March 2015. The Respondent knew way back on 13th June 2006, when the fee notification was gazetted, that the date of expiry of the CA was 2nd March 2015.

28. There can be no doubt that in directing in the impugned order that a revised fee notification should be issued by the MoRTH for a further period of six months and directing the MoRTH not to take coercive steps “to prevent the operation of the project facility” after 1st March 2015, the AT was in fact extending the concession period. But for the direction in para 9.5 of the impugned order, the CA would expire on 2nd March 2015. The CA

was by its nature determinable and under Section 14 (1) (c) SRA, there could be no order, much less as an interim measure, preventing the CA from coming to an end and further extending it for six months thereafter.

29. In terms of the law explained by the Supreme Court in *Indian Oil Corporation Ltd.* even if the termination of the CA on 2nd March 2015 is ultimately found to be illegal, the highest relief that can be granted to the Respondent is one of damages. This is because in terms of Section 14 (1) (c) of SRA the CA is a contract which in its nature is determinable. In para 14 (SCC) of the decision it was explained that if the contract was not terminated according to the clauses of the contract, the only relief that could be granted would be compensation in terms of those very clauses. On the facts of that case it was held that no relief restoring the distributorship, which was terminated in alleged breach of the contract, could have been granted. Even in terms of Section 41 (e) SRA, no interim relief in order to prevent a breach of a contract which is otherwise not enforceable could be granted. The case of the Respondent essentially is that it could have recovered toll fee from an earlier date if the entire project site had been handed over earlier. The loss if any suffered by the Respondent is quantifiable and can be compensated if its ultimately succeeds on merits. Thus, no interim measure of the kind granted by the impugned order of the AT was legally permissible to be ordered.

30. The impugned order of the AT overlooks the applicable law and legal principles and is, therefore, not sustainable in law. Consequently, the impugned order of the AT is set aside. The appeal is allowed with costs of Rs.10,000 which will be paid by the Respondent to the MoRTH within four

weeks. The application is disposed of. It is clarified that inasmuch as the present order concerned the grant of interim measures, the AT will finally decide the issues arising before it uninfluenced by this order.

S. MURALIDHAR, J.

MARCH 03, 2015
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