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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. (I) 127/2015

Reserved on: May 07, 2015

Decision on: May 21, 2015

**SOMA ISOLUX SURAT HAZIRA TOLLWAY
PRIVATE LIMITED**

..... Petitioner

Through: Ms. Meenakshi Arora, Senior
Advocate with Mr. Dharmendra Rautray,
Ms. Ankit Khushu, Mr. Suryadeep Singh
and Ms. Tara Shahani, Advocates.

versus

**NATIONAL HIGHWAYS AUTHORITY OF
INDIA**

..... Respondent

Through: Mr. Sudhir Nandrajog, Senior
Advocate with Ms. Tanu Priya Gupta, Ms.
Meenakshi Sood, Advocates.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

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21.05.2015

1. The Petitioner, in this petition under Section 9 of the Arbitration and Conciliation Act, 1996 ('Act'), is a consortium company which entered into a Concession Agreement ('CA') with the Respondent, the National Highways Authority of India ('NHAI') to augment the road

from Km 103.000 to Km 29.100 (approximately 132.913 Km) on the Gujarat/Maharashtra Border-Surat-Hazira Port Section of NH-6 in the state of Gujarat by four-laning on design, build, finance, operate and transfer basis. The concession period was 19 years commencing from the appointed date of the project site i.e. 30th October 2010.

2. The CA was executed on 18th May 2009. The scope of the project has been specified in Article 2 of the CA as under:

“2.1 Scope of the Project

The scope of the Project (the "Scope of the Project") shall mean and include, during the Concession Period:

- (a) construction of the Project Highway on the Site set forth in Schedule-A and as specified in Schedule-B together with provision of Project Facilities as specified in Schedule-C, and in conformity with the Specifications and Standards set forth in Schedule-D;
- (b) operation and maintenance of the Project Highway in accordance with the provisions of this Agreement; and
- (c) performance and fulfillment of all other obligations of the Concessionaire in accordance with the provisions of this Agreement and matters incidental thereto or necessary for the performance of any or all of the obligations of the Concessionaire under this Agreement.

3. Prior to the appointed date, NHAI had to specify certain conditions precedent. Inter alia, in Article 4.1.2 it was stated that:

(a) NHAI shall have provided to the Petitioner, referred to as the 'Concessionaire' the Right of Way ('RoW') to the site in accordance with Clause 10.3.1 and satisfy the conditions set forth in Clause 10.3.2.

4. Article 3.1.2 obliged or entitled (as the case may be) the Petitioner to:

- (a) RoW access and licence to the site;
- (b) finance and construct the project highway;
- (c) manage, operate and maintain the project highway and regulate the use thereof by third parties;
- (d) demand and collect payment and appropriate fee from vehicles and persons liable for payment of fees for using of project highway and
- (e) perform all its obligations under the CA.

5. Article 5 specified the obligations of the Concessionaire and Article 6 those of NHAI. Article 10 contained the clauses concerning the RoW. Article 23 concerned the Independent Engineer ('IE'). Under Article 23.1, NHAI was to appoint a consulting engineering firm from a panel of ten firms or bodies corporate constituted by NHAI substantially in accordance with the consultation criteria set forth in Schedule-P by the Competent Authority.

6. The duties and functions of the IE were set out in Schedule Q. Article 14 specified the clauses relating to the 'completion certificate'. The test to be conducted on the project highway was to be on dates

and times to be determined by the IE in consultation with the Petitioner and in accordance with Schedule 1. The task of the IE was to observe, monitor and review the results of the tests to determine compliance of the project highway with the requisite specifications and the standards. Schedule 1 to the CA set out the tests to be conducted.

7. Schedule B of Annexure 1 to the CA gave a description of the four-laning. Clause 4.1 of Schedule B specified that the project highway shall be widened to four lane dual configuration with paved shoulder with or without Service Roads. The entire road portion shall be 4 lane, while the bridges and other structures shall be 6 lane. Appendix B-1 contained the typical cross sections along with different types of cross sections required to be developed in different segments of the project highway. The typical cross sections drawings were present in B-1 to B-25.

8. As far as specifications and standards were concerned, these were set forth in Annexure 1 to Schedule D. Under Schedule D it was specified that the highway would conform to the manual of specifications and standards as published by the NHAI/Ministry of Surface Road Transport and Highways ('MoSRTTH') on 11th March 2008. Clause 4.7 of this manual spoke of the Drainage System and read as under:

“4.7 Drainage System

The design of drainage system such as surface and sub-surface drainage for payment, median, shoulder, high embankment shall be carried out in accordance with IRC:SP:42 and IRC:SP:50. Surface runoff from the main highway, embankment slopes and the service roads shall be discharged through longitudinal drains, which shall be designed for adequate cross section, bed slopes, invert levels and the outfalls. If necessary, the walls of the drains shall be designed to retain the adjoining earth. Where drains are required to be covered, the cover of the drain shall be designed for carrying the maximum expected wheel load. The covered drains shall be provided with iron gratings, strong enough to withstand expected loading.”

9. The IE in the present case is Sheladia Associates Inc. The disputes between the parties have arisen in the context of the grievance by the Petitioner that despite completing 88% of the project, it has not been issued by the IE a provisional completion certificate (‘PCC’), which is a prerequisite to enable the Petitioner to collect toll on the project highway. The relevant provisions of the CA as regards the PCC reads as under:

14.3.1 The Independent Engineer may, at the request of the Concessionaire, issue a provisional certificate of completion substantially in the form set forth in Schedule J (the "Provisional Certificate") if the Tests are successful and the Project Highway can be safely and reliably placed in commercial operation though certain works or things forming part thereof are outstanding and not yet

complete. In such an event, the Provisional Certificate shall have appended thereto a list of outstanding items signed jointly by the- Independent Engineer and the Concessionaire (the "Punch List"); provided that the Independent Engineer shall not withhold the Provisional Certificate for reason of any work remaining incomplete if the delay in completion thereof is attributable *to* the Authority.

14.3.2 The Parties hereto expressly agree that a Provisional Certificate under this Clause 14.3 may, upon request of the Concessionaire to this effect, be issued for operating part of the Project Highway, if at least 75% (seventy five per cent) of the total length of the Project Highway has been completed. Upon issue of such Provisional Certificate, the provisions of Article 15 shall apply to such completed part.”

10. Article 14.4 talked of completion of punch list items which were to be completed by the Petitioner within 90 days of the date of issuance of the PCC. It was after the completion of all punch list items that the IE would issue the Completion Certificate [CC]. The other relevant clauses as far as issuance of the PCC is concerned, read as under:

“14.5 Withholding of Provisional Certificate

14.5.1 If the Independent Engineer determines that the Project Highway or any part thereof does *not* conform to the provisions of this Agreement and cannot be safely and reliably placed in commercial operation, it shall forthwith make a report in this behalf and send copies thereof to the

Authority and the Concessionaire. Upon receipt of such a report from the independent Engineer and after conducting its own inspection, if the Authority is of the opinion that the Project Highway is not fit and safe for commercial service, it shall, within 7 (seven) days of receiving the aforesaid report, notify the Concessionaire of the defects and deficiencies in the Project Highway and direct the Independent Engineer to withhold issuance of the Provisional Certificate. Upon receipt of such notice, the Concessionaire shall remedy and rectify such defects or deficiencies and thereupon Tests shall be undertaken in accordance with this Article 14. Such procedure shall be repeated as necessary until the defects or deficiencies are rectified.

14.5.2 Notwithstanding anything to the contrary contained in Clause 14.5.1, the Authority may, at any time after receiving a report from the Independent Engineer under that Clause, direct the Independent Engineer to issue a Provisional Certificate under Clause 14.3, and such direction shall be complied forthwith.”

11. The Petitioner states that the total project cost was Rs.2418.65 crores at the time of financial closure. The Petitioner was under an obligation to submit performance security and achieve the financial closure within 180 days from the commencing of the CA. Accordingly it submitted two Bank Guarantees (‘BGs’) amounting to Rs.75.46 crores on 14th November 2009. The common loan agreement was signed on 18th November 2009 and financial closure was achieved.

The Petitioner was expected to spend on the project a crucial sum not less than 20% of the total project cost and upon spending that amount, the performance security was to be released in terms of Clause 9.3 of the CA. The Petitioner states that the consortium of banks advanced a loan of Rs.1814 crores at an interest rate of 11% from the date of initial disbursement till the commercial operation date (COD). The loan was repayable by the Petitioner after moratorium period of COD or from 31st December 2012 whichever was earlier. Rs.302.83 crores was funded through equity contribution by the members of the Petitioner Consortium and Rs.301.82 crores was to be funded through NHAI's grant (in the form of equity support). According to the Petitioner, as of February 2015 it had received from NHAI only a sum of Rs.287.55 crores in the form of grant.

12. To complete the narration as regards the collection of toll, it requires to be noticed that Clause 27.1 of the CA states that on and from the COD till the transfer date, the Concessionaire shall have the "sole and exclusive right to demand, collect and appropriate fee from the users subject to and in accordance with this agreement." Under Article 31.1.1, the Petitioner was to open an escrow account and enter into an escrow agreement with the State Bank of India, the escrow bank and the senior lenders. Article 31.2 sets out the deposits into the escrow account including the toll fee collected by the Petitioner and all funds constituting the financial package. Article 31.3 provides for withdrawal from the escrow account during the concession period.

Article 31.3.1 (c) and (i) of the CA entitles the Petitioner inter alia to withdraw the toll fees deposited in the escrow account for meeting the operation and maintenance ('O&M') expenses and for monthly proportionate provisions of the debt service payments respectively.

13. According to the Petitioner although it was to be granted 100% RoW within 90 days of the appointed date, it had not been granted the complete ROW by NHAI due to various factors including hindrances, land acquisition etc. Under Article 15.1 the COD would be the date on which the CC or the PCC is issued to the Petitioner. However, it was alleged that for issuing the PCC, the NHAI was "coercing or pressurising the Petitioner to sign the supplementary agreement and to give up its legitimate claim as a pre-condition to the PCC."

14. The Petitioner states that on 6th December 2013, it informed the IE of its readiness to subject the project highway to tests. On 25th January 2014, it notified the IE that it completed 113.185 kms out of 132.91 km of the project highway and that the completed stretches could be safely and reliably put to commercial operation. The Petitioner requested IE to take the necessary actions for issuance of the PCC. It is stated that anticipating issuance of the PCC, the Petitioner on 29th January 2014 forwarded to the NHAI, rates of toll fee for financial year 2013-14 applicable from 1st February 2014 onwards for the toll plazas at Km 28+590 and Km 89+860.

15. The Petitioner states that the newly constructed road has been in use by the traffic since 25th January 2014 without any safety issues or concerns. It is stated that on 22nd January 2014, the IE had requested the Petitioner to identify the stretch of 75% of the total length so as to make preliminary arrangements for test. The Petitioner did so and requested the IE for issuance of the PCC. According to the Petitioner at the joint inspection conducted between 17th and 21st February 2014, it was verified and confirmed that 103.037 Km out of 131.500 kms of the project highway (after excluding the Vyara bypass) can be reliably and safely placed in commercial operation. It accordingly requested for grant of the PCOD under Article 14.3.2 and agreed that the toll fee would be collected only for the aforementioned length of 103.037 km. The Petitioner also meanwhile applied for extension of time for the balance work which was held up for reasons not attributable to the Petitioner. The Petitioner claims to have successfully conducted the Ultrasonic Pulse Velocity Test and the Rebound Hammer Test for Minor Bridges, Major Bridges, Flyovers, VUPs, PUPs, Box Culverts and submitted a report to the IE on 10th April 2014. It also claims to have successfully conducted the Bump Integrator Survey.

16. A letter dated 7th April 2014 of the IE set out in Annexure 1 thereto, lists the incomplete works. The Petitioner states that it had completed all the works mentioned in the Annexures to the said letter. It is stated that on 14th April 2014, the IE informed the Petitioner that

it had recommended to the NHAI for consideration of the PCOD and issuance of PCC. However, it mentioned that before issuing the PCC “suitable supplementary agreement may be signed by the concessionaire with the authority to complete the balance works remaining after completing 103.037 Kms of road length which is already under PCOD.” Annexure A and Annexure B to the IE’s letter dated 17th April 2014 again set out the remaining works to be completed.

17. At this stage it is required to be noticed that there is a divergence of stands between the parties as regards satisfactory completion of the stretch of 116.43 Kms by the Petitioner. According to NHAI, there are many missing links and divergence which are causing huge public inconvenience. Annexure R-2 to its reply is a copy of the chart showing such missing links and balance works as. Further NHAI states that the IE informed the Petitioner on several occasions that works were not constructed as per the provisions in the CA and that several non-conformity reports (‘NCRs’) were pending closure. It is pointed out that as of date there were more than 16 NCRs that remained to be closed notwithstanding the Petitioner’s undertaking/commitments. It is pointed out since IE had only discussed about successful completion of test, it had not been possible to reach the stage for issuance of the PCC. According to NHAI, the Petitioner had constructed a sub-standard work and the existing NCRs reflect the non-reliability of the project highway. A sampling of

photographs has been enclosed as Annexure R-3 to the reply affidavit. A list of 13 NCRs concerning serious structural quality issues have been set out in para 1.10.2 of the reply affidavit. It is stated that although the said NCRs have been closed by the IE it is not satisfied with the reliability or durability of the structures. By a letter dated 1st April 2015, the IE has invited the Petitioner and asked for a third party test certificate to ascertain the durability and stability of structures in the PCC stretch. In para 1.10.4 of the reply it is stated that 17 NCRs issued by the IE in the PCC stretch are yet to be closed.

18. Another issue raised by NHAI is in regard to the non-completion of the pre-requisite tests. A reference is made to a letter dated 25th March 2015 of the IE regarding the balance tests that are required to be undertaken. One major issue that has cropped up between the parties is regarding construction of 'Median cut drain in super elevation portions'. It is stated that the IE issued two NCRs in April and September 2012 for non-construction of 'Longitudinal Median Drain in 20.30 Km in PCC stretch'. A reference is made to NCR No. 25 dated 18th April 2012 and NCR No. 42 dated 20th September 2012. It is stated that the Petitioner constructed chute drain across the median instead of the longitudinal concrete drain. NHAI insisted that the longitudinal drain in terms of the Schedule B of the CA be constructed.

19. On the issue of drains, the Petitioner points out that as per Clause 4.7 of the MoSRTTH Manual the drainage system was to be constructed in accordance with Indian Roads Congress Standards ('IRCS') IRCS-42 and IRCS-50. It is stated that although the longitudinal drain has been constructed at certain points, they are not required at certain other points as per the IRCS Guidelines. The Court has been shown the aforementioned guidelines. A reference is made to Para 4.4.11 of the IRCs 'Guidelines of Road Drainage-2014' which inter alia states as under:

“When there is divided carriageway with a raised central median, disposal of surface water of super elevated section requires elaborate arrangement. Water can be diverted from one carriageway to other by having an opening/channel in the median as shown in Photo 4.21. These are provided at 10 m to 20 m intervals depending upon the intensity of rainfall, road width etc. When both the carriageways are at different levels, median drains have to be provided as shown in Fig. 4.30. An open drain or a buried pipe provided for collecting surface water can be disposed of at a nearby cross drainage structure. When pipes are used, RCC manholes have to be provided to collect water from pavement surface. Some alternate designs of median drainage arrangements are shown in Figs. 4.31 to 4.33.”

20. During the course of hearing it was submitted by Ms. Meenakshi Arora, learned Senior counsel appearing for the Petitioner, that the IE has been insisting on the longitudinal median drains contrary to what the IRC Guidelines themselves require. She submitted on instructions that if this was included in the punch list items, the Petitioner was

prepared to construct the drains within 90 days of the issuance of the PCC. However, she submitted that the Petitioner had a genuine apprehension that the IE which was from the empanelled consulting firms of the NHAI was not taking an independent view as was required under the CA. Therefore, an independent authority like the Central Road Research Institute ('CRRI') should assess the work.

21. Mr. Sudhir Nandrajog, learned Senior counsel appearing for the NHAI, joined issue on this aspect. According to him, the IE was acting independently and if the IE felt that the median drain had to be constructed for safety and reliability of the project highway, the Petitioner cannot possibly avoid that. Mr. Nandrajog also resisted the appointment of any other authority to oversee the inspection or assessment of the quality of the work that has been undertaken. Relying on the decision in *Assistant Excise Commissioner v. Issac Peter (1994) 4 SCC 104*, he submitted that the contract between the parties cannot be rewritten to suit the convenience of the Petitioner.

22. It must be mentioned that during the course of hearing further notes were exchanged between the parties on what work remained to be carried out. The Court at one stage suggested that NHAI could come up with a list of works which it considered essential to be completed even before the issuance of the PCC and those that could be included in the punch list items for the completion of which a period of three months would be available to the Petitioner after the issuance

of the PCC. On 11th May 2015, NHAI had submitted a short note in respect of 'critical NCRs to be closed out of total pending 16 NCRs for proposed PCC stretch'. Even as regards the median work, this note mentions at least three median works which are required to be executed by the Petitioner before the issuance of the PCC.

23. Enclosed with the note is a copy of a letter dated 8th May 2015 along with its Annexures addressed by the IE to the NHAI detailing the balance NCRs for PCOD stretch and locations of longitudinal median drain. Also enclosed is a copy of a letter dated 10th May 2015 from the IE to the NHAI detailing the locations of the longitudinal median drain.

24. The Court does not propose to examine in this order the allegation of the Petitioner that the IE is not acting independently. As rightly pointed out by Mr. Nandrajog, the IE is not a party to these proceedings and has no opportunity of contesting the above allegations.

25. At the same time, it is plain that an impasse has resulted from the seemingly intransigent stands taken by the parties. Despite a 116 km stretch of the project having been open to traffic since 25th January 2014, i.e nearly a year and four months, no toll fee collection has commenced. The loss of revenue as estimated by the Petitioner is

around Rs.65-75 lakhs per day. Although in this particular project the NHAI is not a beneficiary of the revenue generated, the loss to the Petitioner and consequentially to the lenders is substantial. The balance of convenience is in favour of the Petitioner to issue directions to facilitate removal of the hurdles to the issuance of the PCC to the satisfaction of both parties in the earliest practicable timeframe. Further, this requires to be achieved without compromising the ‘safety and reliability’ of the project highway.

26. On its part, the Petitioner has expressed its willingness to cooperate with any time bound direction that may be issued for the completion of the remaining work. The only request is that some other independent agency be asked to assess whether the remaining works as pointed out by the NHAI and the IE have been satisfactorily completed by the Petitioner.

27. One issue which requires to be addressed is the construction of median drains. Since a fair offer has been made by the Petitioner to construct median drains wherever required and since the NHAI had specified the three stretches of median work which are required to be executed “before the issuance of PCC”, the Court does not propose to determine the necessity for these median drains but is prepared to accept the assessment of the IE that since this involves the ‘safety and reliability’ of the project highway they are essential to be completed prior to the issuance of the PCC. This is, of course, without prejudice

to the contentions of the Petitioner. The right of the Petitioner to seek compensation for the losses that it may seek to demonstrate as having suffered as a result of having to carry out the above works is left open to be agitated by it in the arbitral proceedings.

28. The Court also proposes to involve an expert from the CRRI to assess the satisfactory completion of the above essential works before the issuance of the PCC. This, it is clarified, is not to be considered as casting any doubt on the competence or view of the IE but only to have an additional input of an expert not involved in any manner with either of the parties.

29. The Court considers it appropriate to issue the following time-bound directions to facilitate the issuance of PCC so that toll fee collection may start soon thereafter:

(i) The three NCRs i.e. NCR Nos. 34 and 63 of the Isolux Section and NCR No. 15 of Soma Section shall be closed by the Petitioner to the satisfaction of the IE within a period of two months and in any event on or before 31st July 2015.

(ii) The essential median drains as specified in the note submitted by the NHAI on 11th May 2015 be constructed by the Petitioner within a

period of three months and in any event not later than 31st August 2015.

(iii) Simultaneously, the observations of the IE that remain to be resolved in respect of the Schedule 1 tests shall be redressed by the Petitioner and be satisfactorily resolved by 31st July 2015. (The complete set of observations as on 22nd April 2015 in relation to the tests, safety issues in NCRs and Annexure A, B, and C to the letter dated 17th April 2014 of the IE have been handed over in Court to the Petitioner).

(iv) Both the Petitioner and the NHAI will within five days from the date of this order write jointly to the Chairman, CRRI requesting him to nominate a Civil Engineer of not less than 20 years of relevant experience to examine (a) whether the median drains as set out in the note dated 11th May 2015 of the NHAI have been satisfactorily constructed in conformity with the standards and specifications set out in the CA; (b) whether the observations of the IE, which touch on the issues of safety and reliability have been satisfactorily resolved by the Petitioner and (c) the list of remaining works which can be included in the punch list which shall then be completed by the Petitioner within 90 days of the issuance of the PCC.

(v) The inspection of the works as and when completed shall be carried out by the Engineer nominated by the CRRI in the presence of the IE and representatives of both the Petitioner and the NHAI and shall be completed not later than 10th September 2015. The schedule of the inspections shall be fixed as per mutual convenience of the parties.

(vi) If the nominated engineer of the CRRI certifies the satisfactory completion of the works at (a) and (b) above, then the IE will proceed to issue the PCC not later than one week from the date of such certification and the collection of toll fee shall be permitted to begin immediately thereafter. The PCC will be conditional upon satisfactory completion by the Petitioner, within 90 days of the date of the PCC, the works included in the punch list as recommended by the Engineer nominated by the CRRI.

(vii) The fees of the Engineer of the CRRI will be fixed by the Chairman, CRRI and paid to him without delay in equal shares by the Petitioner and NHAI with liberty to both to claim the said amount from the other in the arbitral proceedings.

(viii) It will be open to the parties to agree to vary the above time lines by not more than ten days. It is also open to either party to apply to the

Court for further directions and clarifications if there is any difficulty encountered in carrying out any of the above directions.

(ix) If and when an AT is constituted, the parties can seek appropriate interim reliefs before it by filing an application under Section 17 of the Act.

30. It is clarified that the Court has in this order not expressed any final opinion on the merits of the contentions of the parties. The observations are of a prima facie nature on the basis of materials before the Court at this stage. This order will not come in the way of the AT taking an independent view on the merits, on the basis of the records, of the contentions of the parties, all of which are left open to be urged in the arbitral proceedings.

31. A copy of this order be delivered to the Chairman, CRRI through a Special Messenger forthwith for compliance.

32. The petition is disposed of in the above terms.

S. MURALIDHAR, J

MAY 21, 2015

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