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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **O.M.P. (COMM) 226/2018**

NATIONAL HIGHWAY AUTHORITY
OF INDIA

..... Petitioner

Through: Mr Ankur Mittal, Mr Abhay
Gupta, Advocates.

versus

M/S CHANDA ALLIED SERVICES

..... Respondent

Through

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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22.05.2018

VIBHU BAKHRU, J

1. The petitioner (NHAI) has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, impugning the arbitral award dated 15.01.2018 (hereafter 'the impugned award ') delivered by the Arbitral Tribunal constituted by the sole arbitrator, namely, Sh N.S. Brar (hereafter 'the Arbitral Tribunal'). The impugned award was rendered in the context of disputes that had arisen between the parties in relation to the Contract for Departmental Collection of User Fee dated 01.05.2010 (hereafter 'the Agreement').

2. In terms of the Agreement, the respondent was engaged to collect user fee at the specified toll plaza. The term of the Agreement

was for a period of three months commencing on 02.05.2010 and it expired on 02.08.2010.

3. NHAI had raised claims including for shortfall in collection of User Fee, which were dismissed by the Arbitral Tribunal as being barred by limitation. NHAI disputes the same and seeks to assail the impugned award as patently illegal and contrary to the fundamental policy of Indian Law.

Background facts

4. On 05.04.2010, NHAI issued a proposal for the right of Toll Collection at Boothakudi Toll Plaza located at km 21/020 (near Boothakudi village) in Trichy-Thuvarankurichi (km 0/0 to 60/950) section of National Highway No. 45B (hereafter 'the project').

5. On 12.04.2010, the respondent submitted its willingness to take up the function of collecting user fee at the Boothakudi Toll Plaza (hereafter 'the Toll Plaza'). Thereafter, NHAI issued a Letter of Acceptance (LOA) accepting the respondent's willingness for the project. The contract between the parties was for a period of three months commencing on 02.05.2010 and ending on 02.08.2010.

6. On 01.05.2010, NHAI and the respondent entered into an agreement for Departmental Collection of User Fee ('the Agreement').

7. The respondent commenced collection of user fee, which was divided into three shifts; Shift A from 000 hrs to 800 hrs, Shift B from 800 hrs to 1600 hrs and Shift C from 1600 hrs to 2400 hrs.

8. The Project Director of NHAI deployed Assistant Toll Supervisor (ATS) for supervision of the toll plaza as per Clause 11(e) of the Agreement. Several irregularities were observed by the ATS including that vehicles were allowed to cross the toll without any tickets being issued to them.

9. On 21.07.2010, NHAI issued a letter pointing out major shortfall in the daily collection of user fee for the period between 01.07.2010 to 19.07.2010 from ₹4.28 lacs to ₹2.43 lacs.

10. Since there were allegations that the respondent was collecting toll without issuing the tickets, NHAI did not extend the Agreement and took over the Toll Plaza.

11. After taking over the function of collecting user fee from the respondent, NHAI found that there was a significant increase in collection of user fee. During the period 02.08.2010 to 31.08.2010 (referred to as 'the survey period') there was increase in the daily collection and the average daily collection was ₹4,74,527/- against ₹3,41,734/- during the operational period – that is, from 05.05.2010 to 01.08.2010 (referred to as 'the operational period') . Thus, NHAI concluded that it had incurred a loss of ₹1,32,793/- each day for the period of 89 days during which the respondent had managed the collection of user fee.

12. On 01.09.2010, NHAI sent a letter to the respondent stating that the average collection during the survey period was ₹4,74,527/- and the average collection reported by the respondent during the

operational period amounted to ₹3,41,734/- and, thus, there was a shortfall of ₹1,32,793/- per day in collection of user fee, which amounted to ₹1,18,18,577/- for the entire period. NHAI also stated that it proposed to encash the bank guarantee of ₹15,00,000/- furnished by the respondent against the said shortfall and further called upon the respondent to pay the balance amount of ₹1,03,18,577/-.

13. Thereafter, NHAI sent another letter dated 21.09.2010 claiming a further sum of ₹16,800/- on account of eight chairs that were found to be damaged and unserviceable and ₹3,69,960/- for the shortfall in the tickets provided to the respondent. The respondent was called upon to submit its response within a period of seven days from the receipt of the said letter. This was followed by another letter dated 30.09.2010, whereby NHAI pointed out that the respondent had not filed any response to the letter dated 01.09.2010 and it would be assumed that he had nothing to state and recovery proceedings would be initiated for recovering the amount of ₹ 1,18,18,577/-.

14. The respondent responded by a letter dated 30.09.2010 which was received by NHAI on 04.10.2010. In its letter, the respondent had explained that the increase in toll collection during the survey period could be on account of seasonal and other changes. He further requested NHAI not to either encash the bank guarantee or to demand a sum of ₹1,03,18,577/-.

15. NHAI sent a letter dated 26.10.2010 rejecting the explanation

provided by the respondent and informing them that NHAI had decided to recover a sum of ₹1,18,18,577/-. Thereafter, NHAI invoked the bank guarantee and recovered a sum of ₹15,00,000/-.

16. On 10.11.2010, NHAI sent a letter calling upon the respondent to remit a sum of ₹1,07,05,337/- against the loss suffered by it. On 10.12.2010, NHAI sent yet another letter, once again calling upon the respondent to pay a sum of ₹1,07,05,337/- within a period of 15 days failing which it would take further action.

17. On 28.04.2014, NHAI sent another letter once again calling upon the respondent to pay the amount of ₹1,07,05,337/- failing which NHAI threatened that action would be taken under the Agreement. On 17.06.2015, NHAI notified the respondent that if it failed to pay the amount, it would issue a notice of dispute under Clause 27 of the Agreement. Thereafter, the disputes raised by NHAI were referred to arbitration.

18. NHAI filed its statement of claims before the Arbitral Tribunal, *inter alia*, claiming (i) ₹1,03,18,577/- on account of loss in average collection per day during the survey period and operational period as per Clause 25 of the Agreement (Claim No.1); (ii) ₹3,69,960/- on account of variation in amount collected by selling user fee tickets and amount remitted to NHAI (Claim No.2); (iii) ₹16,800/- towards amount claimed under Clause 3(d) of the Agreement for damages; and (iv) pre-claim, *pendente lite* and future interest at the rate of 18% per annum.

19. The Arbitral Tribunal rejected the claims raised by NHAI as barred by limitation.

Discussion and Conclusion

20. Mr Ankur Mittal, learned counsel for the petitioner earnestly contended that the Arbitral Tribunal had grossly erred in calculating the period of limitation from 10.12.2010 being the date the cause of action had arisen. He submitted that there is a difference in calculating the period of limitation for filing a suit and for invoking arbitration proceedings. He submitted that whereas in case of a suit, the period of limitation would commence from the date of cause of action but in case of arbitral proceedings, the right to invoke the arbitration would arise once the claim is made and it is denied by the other party resulting in a dispute. He submitted that since there was no express denial of the claims raised by NHAI, the period of limitation would not commence till the disputes were referred to arbitration. He relied upon the decision of a Coordinate Bench of this Court in ***Radical Builders (India) Pvt. Ltd. v. Pharmaceutical Employees Co-op. Group Housing Society Ltd.: 137 (2007) DLT 709*** in support of his contention.

21. This Court does not find any merit in the aforesaid contentions.

22. NHAI, by its letter dated 01.09.2010, had called upon the respondent to pay the balance amount of ₹1,03,18,577/- by means of a demand draft payable at Trichy forthwith. The respondent was also called upon to furnish his explanation by 10.09.2010. In view of the

above, there can be no cavil that NHAI had raised a demand on 01.09.2010. On 30.09.2010, NHAI had called upon the respondent to submit his reply failing which recovery proceedings would be initiated without any further communication. The reply submitted by the respondent was found to be unsatisfactory and NHAI, by its letter dated 26.10.2010, had unequivocally stated as under:-

“9. In the above circumstance stated above, it is decided to recover of Rs.1,18,18,577/- for short fall in toll collection from you, invoking Agreement clause 36, which specifies that decision of Project Director is final and binding.”

23. Thereafter, NHAI had taken steps to recover the amount demanded and had encashed the bank guarantee furnished by the respondent. On 10.11.2010, NHAI once again called upon the respondent to pay the balance amount of ₹1,07,05,337/-.

24. On 10.12.2010, NHAI sent another letter, *inter alia*, stating as under:-

“5. Finally, we wish to state that the recovery proceeding is as per Agreement Clause and you are requested to remit the sum of Rs.1,07,05,337 (Rupees One Crore Seven Lakhs, Five Thousand and Three Hundred and Thirty Seven) to this office within 15 days of receipt of this letter, failing which, we will be constrained to take further action as per Agreement conditions.

6. It may please be noted, that no more communication will be entertained in this office, in this regard.”

25. As is apparent from the above, NHAI had unequivocally stated that it would not entertain any communication in regard to its claim. In this view, the question of NHAI awaiting for any denial or response from the respondent for initiating any recovery proceedings does not arise.

26. The Arbitral Tribunal had considered the above facts and had found that the claims made by NHAI were barred by limitation. This Court finds no infirmity with the aforesaid decision.

27. The contention that there is any distinction between the period of limitation, as is calculated in filing a suit and for initiating the arbitration proceedings, is erroneous. The period of limitation must commence from the date when the right to sue accrues. This has to be ascertained in the facts of each case. In the present case, NHAI had made a demand and called for explanation from the respondent. It had then found the explanation to be non-satisfactory and had thereafter unequivocally taken steps for recovering the amount demanded. The bank guarantee furnished by the respondent was encashed for recovering the amount claimed. Concededly, the respondent had not paid the amount within the time specified and, therefore, the right to sue accrued in favour of NHAI way back in December 2010, if not earlier.

28. Thus, clearly, the claims raised by NHAI were barred by limitation being beyond the period of three years when the right to sue had accrued in favour of NHAI.

29. The reliance placed by NHAI on the decision in ***Radical Builders (India) Pvt. Ltd. v. Pharmaceutical Employees Co-op. Group Housing Society Ltd.*** (*supra*), is misplaced. In that case, the disputes related to final bills submitted by the petitioner for carrying out certain works. The contract between the parties required that the bills would be settled by the architect, who was required to give his decision in writing. Plainly, the question of referring the dispute as to non-payment of final bills would arise only after the architect had taken a decision in the matter. It is in that context, the Court had held that the right to apply for arbitration would arise once the dispute had arisen.

30. The said decision cannot be read as an authority for the proposition that the right to sue in case of a suit arises at a point which is different from the right to invoke the alternate dispute resolution clause. Of course, in cases the dispute resolution clause may specify the procedure required to be followed before invoking the arbitration clause, the question as to when the right to refer the disputes to arbitration arises would have to be considered in the context of the agreement between the parties. It is common for a dispute resolution clause to provide that the parties refer their disputes to conciliation before initiating arbitration proceedings, in such cases, the right to refer the dispute to arbitration would arise only on the once the parties

have exhausted their efforts for conciliation.

31. In the present case, the arbitration clause did not require the parties to exhaust any pre-reference procedure entailing receipt of a specific denial of liability by the respondent as a precondition for NHAI to invoke the arbitration clause.

32. It was also contended that the respondent had acknowledged the liability as it had not denied its obligation to pay the sum demanded. However, the Arbitral Tribunal found that there was no documentary evidence to indicate that the respondent had acknowledged its liability and had rejected the aforesaid contention. This Court is not persuaded to accept that any interference by this Court is warranted in regard to the said conclusion, under Section 34 of the Act.

33. Mr Mittal had also contended that the respondent had admitted in the pleadings that the respondent had not denied that he had kept on assuring NHAI that it would pay the amount demanded. The said contention is also unmerited as the perusal of the statement of defence indicates that the respondent had denied all allegations made by NHAI. The respondent had further specifically pleaded that “*The last letter sent to the Respondent by the Claimant was 10.12.2010 and thereafter there was no communication between the parties and suddenly after 4 years, the Claimant woken up and filed the present claim petition dated 13.11.2015*”

34. The respondent had also denied the entire claim petition as being based on *imaginary story* and bereft of any *truth or logic*. Thus,

the contention that the respondent had admitted that he had acknowledged its liability to NHAI is, *ex facie*, incorrect.

35. In view of the above, the petition is unmerited and is, accordingly, dismissed.

MAY 22, 2018
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VIBHU BAKHRU, J

