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

\+ ARB. A. (COMM.) 24/2018 & IA No. 6893/2018

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through: Mr.S.B. Upadhyay, Sr. Adv. with Mr.Ramesh Kumar, Mr.Nishant Kumar & Mr.Siddharth Pandey, Advs.

versus

M/S PANIPAT JALANDHAR NH ONE TOLLWAYS PVT LTD

..... Respondent

Through: Ms.Meenakshi Arora, Sr. Adv. with Mr.Dharmendra Rautray, Ms.Tara Shahani & Mr.Shivash Jolly, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

O R D E R

% **22.05.2018**

ARB. A. (COMM.) 24/2018 & IA No. 6894/2018

This appeal has been filed under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the interim order dated 24.01.2018 passed by the Arbitral Tribunal adjudicating the disputes that have arisen between the parties in relation to the Concession Agreement dated 09.05.2008.

The Arbitral Tribunal by way of its Impugned Order has restrained the appellant from demanding unpaid premium of ₹ 36.05 crores for the months of February 2017 to June 2017 and interest thereon, subject to the condition that the respondent shall furnish a Corporate Guarantee to the appellant to the effect that incase the respondent does not succeed in the arbitration in support of its claim of loss to the extent of ₹36.05 crores and interest thereon for delay in payments, the respondent will pay the said sum together with interest. The appellant has therefore, been restrained from terminating the Concession Agreement due to non payment of this amount of ₹36.05 crores.

The learned senior counsel for the appellant submits that in terms of Clause 37.1(h) of the Concession Agreement the appellant has a right to terminate the Agreement in the case of a default of the respondent in paying the concession fee. In the present case as there is an admitted default by the respondent, the appellant could not have been restrained from exercising its right. The learned senior counsel for the appellant has further placed reliance on the judgment of the Supreme Court in ***Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd. and Ors.***, (1985) 1 SCC 260, to contend that the Supreme Court has frowned upon grant of injunction subject to furnishing of the Bank Guarantee. He submits that no Governmental business can be run merely on Bank Guarantee.

I have considered the submissions made by the learned senior counsel for the petitioner, however, in my opinion, the Impugned Order cannot be interfered with on the grounds urged by him. The Arbitral Tribunal in passing the Impugned Order has taken note of the judgment dated 17.04.2014 passed by the Supreme Court in Civil Appeal No. 4611/2014 and held that the same makes a strong *prima facie* case in favour of the respondent on the ground of damages being suffered because of delay in finalising of locations of toll plaza and commencement of toll operations at the approved locations from May 2010 to February 2015. The Arbitral Tribunal has further observed that though the respondent has claimed an amount of ₹386.69 crores as loss suffered by it and a further sum of ₹230.03 crores as interest thereon, the respondent would atleast be entitled to a sum of ₹36.05 crores as damages. The Arbitral Tribunal has further considered the monthly premium / concession fee being deposited by the respondent in terms of the Concession Agreement and has also taken note of the fact that the appellant had completed 71% of the work as noted of by the Supreme Court in the above mentioned Judgment. In view of the above, the Arbitral Tribunal has balanced the equity between the parties while considering the *prima facie* case and balance of convenience.

In ***Wander Ltd. v. Antox India P. Ltd.***, 1990 Supp SCC 727, the Supreme Court while dealing with the power of the Appellate Court under the Code of Civil Procedure, 1908 has held as under:-

> *"13. On a consideration of the matter, we are afraid, the Appellate Bench fell into error on two important propositions. The first is a misdirection in regard to the very scope and nature of the appeals before it and the limitations on the powers of the Appellate Court to substitute its own discretion in an appeal preferred against a discretionary order. The second pertains to the infirmities in the rationcinations as to the quality of Antox's alleged user of the trade-mark on which the passing-off action is founded. We shall deal with these two separately.*
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> *14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the*

court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd. v. Pothan Joseph: (SCR 721)

"... These principles are well established, but as has been observed by Viscount Simon in Charles Osention & Co. v. Jhanaton ...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case."

The appellate judgment does not seem to defer to this principle."

Recently in ***Ascot Hotels and Resorts Pvt. Ltd.*** **v.** ***Connaught Plaza Restaurants Pvt. Ltd.*,** Arb.A.(Comm) 12/2017, this Court again reiterated the above mentioned principle.

This Court in ***Bakshi Speedways*** **v.** ***Hindustan Petroleum Corporation***, 2009 SCC OnLine Del 2476, has held that the same principles will apply even in case of an appeal under Section 37(2)(b) of the Act. Paragraph 4 of the said judgment is quoted herein below:

"4. The principles applicable to an appeal under Section 37(2)(b) in my view ought to be the same as the principles in an appeal against an order under Order 39 Rules 1 and 2, CPC i.e., unless the discretion exercised by the Court against whose order the appeal is preferred is found to have been exercised perversely and contrary to law, the appellate Court ought not to interfere with the order merely because the appellate court in the exercise of its discretion would

have exercised so otherwise. I had at the beginning of the hearing itself inquired from the senior counsel for the appellant as to what could be said to be perverse in the exercise of discretion by the Arbitral Tribunal in the exercise of powers under Section 17 of the Act and as to how the said interim measures granted by the Arbitral Tribunal could be said to be contrary to law; it was further pointed out that in the opinion of this court, on the perusal of the memorandum of appeal, the only ground which appeared to have some force was the ground taken in the memorandum of appeal of the arbitrator as on the date of making of the order having become functus officio."

In view of the above, I find no merit in the present appeal and the same is accordingly dismissed with no order as to cost.

The Arbitral Tribunal shall, however, adjudicate on the main disputes remaining uninfluenced by any observation made in this order.

NAVIN CHAWLA, J

MAY 22, 2018/*rv*