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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO(OS) (COMM) No. 244/2018**

Date of decision : 11th December, 2018

TGV PROJECTS & INVESTMENTS PVT LTD Appellant
Through: Mr. Abhishek Pratap Singh, Adv.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA
..... Respondent
Through: Mr. Saurabh Banerjee, Adv.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

ANUP JAIRAM BHAMBHANI, J. (ORAL):

CM No. 44916/2018 (for exemption)

Allowed, subject to all just exceptions.

Application stands disposed of.

CM No. 44917/2018 (for delay of 31 days in filing of appeal)

This application is not opposed. Accordingly, it is allowed.

Application stands disposed of.

CM No. 44918/2018 (for delay of 7 days in re-filing of appeal)

This application is not opposed. Accordingly, it is allowed.

Application stands disposed of.

FAO(OS) (COMM) No. 244/2018

This is an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter the “A&C Act”) read with Section 13 of the Commercial Courts Act, 2015 challenging judgment dated 24th May, 2018 rendered by the learned Single Judge of this Court in OMP (Comm) No. 445/2017, which was a proceeding under Section 34 of the A&C Act impugning arbitral award dated 17th August, 2017. The Impugned Judgment dismisses objections filed by the appellant to arbitral award dated 17th August 2017 rendered by a Tribunal comprising three learned Arbitrators, with one of the Arbitrators rendering a dissenting award.

2. The basis of the disputes between the parties was a contract agreement dated 31st July, 2015 (hereinafter the “Agreement”) entered into between the appellant (M/s TGV Projects & Investments Pvt. Ltd.) and the respondent (National Highways Authority of India) whereby the appellant was granted the right to collect toll or “user fee” on the Vempada Toll Plaza along the Ankapalli-Tuni stretch of National Highway No. 5 for a certain period of time. In consideration of the grant of right to collect toll, the appellant was required to make to the respondent a weekly payment.

3. The appellant’s claim was predicated entirely on excessive rains in

certain parts of Southern India, in particular in Chennai, the Southern part of Andhra Pradesh and Pondicherry during November-December, 2015. It was the appellant's contention before the Arbitral Tribunal that by reason of heavy rains, there was inundation leading to 30 to 40 per cent reduction in traffic on the stretch of road over which the appellant had the right to collect toll. In these circumstances, the appellant made a claim on the following three major counts:

- a. Loss on account of *force majeure* leading to 30-40% loss of traffic for the period 11th November, 2015 to 10th December, 2015. This claim was in the sum of Rs.83,51,425/- ;
- b. Reimbursement for toll maintenance charges for the period 11th November, 2015 to 10th December, 2015 at the rate of Rs.75,000/- per day for 30 days. This claim was in the sum of Rs.22,50,000/-;
- c. Penalty claimed under Clause 19 of the Agreement at 0.2% per day for the first month of delay, in the sum of Rs.6,36,086/- ; and at 0.5% per day for the period beyond one month, in the sum of Rs.2,34,82,044/-.

As per the appellant/claimant, the period during which the alleged *force majeure* prevailed was 6th November, 2015 to 26th November, 2015.

4. On the basis of the claims made, two learned members of the Arbitral Tribunal rendered an award allowing the following claims in favour of the appellant:

(a) A sum of Rs.83,51,425/- towards the claim on account of *force majeure*;

(b) A sum of Rs.6,36,086/- and Rs.2,34,82,044/- towards the claim for penalty under Clause 19 of the Agreement

thereby awarding an aggregate sum of Rs.3,24,69,554/- against the claims made. The majority of the Arbitral Tribunal however declined to grant the claim towards toll maintenance charges, which had been claimed in the sum of Rs.22,50,000/-.

5. The claim towards *force majeure* was awarded by the majority of the Arbitral Tribunal for reasons as contained in the following extracts of the Award:

“..... That the submission put forth by the Claimant is that it is entitled for the benefit of Force Majeure clause due to the climate conditions of the states which are almost 700 to 1400 kms away. Hence the submission of the Claimant is not only devoid of merit but also without any substance.

(extracted from para 8 of the Award)

“ That the Claimant submitted its claim vide letter dated 04.12.2015 (Annexure C-4). Thereafter, the Claimant vide its letter dated 28.12.2015, Annexure C-5, submitted the loss of toll due to reduction of traffic. That the Respondent did not dispute the Claimant's claim within the period specified therein, i.e. in Clause 25(c)(2)

*of the Agreement. That the Respondent asked for documentary evidence regarding Force Majeure event along with Server report in support of the claim vide its letter at Annexure C-6 dated 29.12.2015. Thereby the Respondent is not empowered to dispute the Claimant's claim. No doubt the distance of the various parts through which the concerned highway passes cannot be questioned, AT considers, it may not be possible at this juncture to evaluate reduction in traffic due to the floods and rains that occurred at various relevant places. However, question arises when the Claimant informed/put to notice the Respondent on 4th December, 2015 vide Annexure C-4, the damage caused by the floods and rains, why no response/objection was taken at that material time by the Respondent. The Respondent took more than 4 months to reject the claim. In fact Clause 25(c)(i)(2) mandates that the party receiving the claim under Force Majeure shall, **if wishes to dispute the claim, give a written notice of the dispute to the party making the claim within 30 days of receiving the notice of claim.** AT finds that the Respondent failed in this mandatory contractual requirement. AT has also noted that even while rejecting the claim after more than 4 months of Claimant's notice, Respondent failed to give any reasons. Thus, the AT has no reason to question the contemporaneous record filed by the Claimant and not*

objected to by the Respondent.

(extracted from para 8 of the Award)

(emphasis are as contained in the Award)

“ Hence this evidence, AT holds, cannot be objected to at this stage, when for such objection clause 25(c)(i)(2) specifically lays down 30 days for the party raising an objection. In any case as per Section 19 of the Arbitration and Conciliation Act, 1996 the Arbitral Tribunal is not bound by the Indian Evidence Act.”

(extracted from para 10 of the Award)

As is clear from a perusal of the purported reasoning given by majority of Arbitrators, they considered the claimant's submission that it was entitled to *force majeure* benefit as being devoid of merit since the conditions that were prevailing, namely heavy rains, were almost 700 to 1400 km. away from the location of the Toll Plaza and from the stretch of road under contract to the claimant. However, the majority of the Tribunal proceeded to yet award the amount claimed under *force majeure* on a strict application of clause 25(c)(i)(2) [incorrectly mentioned in the Award as clause 25(c)(ii)] of the Agreement, namely that the respondent had failed to dispute the *force majeure* claim made by the claimant vide letters dated 4th December, 2015 and 28th December, 2015 *within the period* stipulated in Clause 25(c)(i)(2) of the Agreement. The majority of the Tribunal therefore concluded, that having failed to dispute the claim towards *force majeure* within the period stipulated in the agreement, the respondent was not

empowered to *later* dispute the same ; and further that respondent no.1 having also failed to give any reasons to reject the *force majeure* claim, could not later object to this claim. It was on this purported reasoning that the claim of *force majeure* was allowed.

6. Granting the claim for penalty under Clause 19 of the Agreement, the majority of the Arbitral Tribunal proceeded to give the following purported reasons :

“16. The Claimant has further claimed interest as penalty chargeable to Respondent in terms of Clause 19 of the contract as under:

*(i) @ 0.2 percent per day for initial delay of one month
Rs.6,36,086/-.*

*(ii) @ 0.5 percent per day for further delay beyond one
month Rs.2,34,82,044/-.*

The details thereof are given in Annexure C-16. The Respondent has made no observation on the same. AT allows payment of Rs.6,36,086/- and Rs.2,34,82,044/- as claimed by the Claimant in Annexure C-16.”

7. As stated above, while two learned Arbitrators allowed the claims towards *force majeure* and penalty, one learned Arbitrator recorded a dissenting note rejecting all claims made.

8. At this point, it will be useful to extract the clauses of the agreement relating to *force majeure* and penalty that are relevant for a decision in the

matter, for ease of reference :

Clause 25(b) (ii)

“(ii) Floods/Earthquake having materially adverse impact i.e. complete blockade of road.”

Clause 25(c)(i) (2)

“(2) The Party receiving the claim for relief under Force Majeure shall, if wishes to dispute the claim, give a written notice of the dispute to the Party making the claim within 30 days of receiving the notice of claim.”

Clause 25(c)(ii)(5)

“(5) The relief under force Majeure will be calculated on the basis of average collection per day, arrived based on the agreed weekly remittance. The difference in collection per day during force majeure and average amount of collection per day, arrived based on the agreed weekly remittance multiplied by number of days of force majeure will be payable to the contractor.”

Clause 25(c)(iii)

“(iii) TERMINATION DUE TO FORCE MAJEURE:

If any event of Force Majeure shall continuously impede or prevent a Party's performance for longer than 60 days from the date of commencement of such Force Majeure event, the

parties shall decide through mutual consultation, either the terms upon which to continue the performance of this Contract or to terminate this Contract by mutual consent. If the parties are unable to agree on such terms or to terminate the Contract by mutual consent within 90 days from the date of commencement of such Force Majeure event, either Party may issue a Notice to terminate this Contract.”

Clause 25(b)(vii)

“(vii) Suspension of traffic on the said section of National Highway/said bridge or any part thereof, exceeding 15 (fifteen) days at a stretch.”

Clause 25(b)(viii)

“(viii) Any event or circumstances of a nature analogous to the foregoing.”

“19. PENALTY FOR FAILURE TO PAY INSTALMENTS:

(i) In case of delay in remittance of the agreed amount of any installment due under this Contract to the Authority beyond the fixed day (as per clause 8, of SECTION - II), the Authority shall levy penalty @ 0.2% per day for initial one month delay and @0.5% per day for further delay beyond one month. Such right would, inter-alia, include unconditional right of the Authority to terminate the

Contract forthwith, without assigning any reasons whatsoever and take over possession of the User Fee Plaza(s) for User Fee collection in any manner the Authority may deem fit. The penalty so levied shall be recovered from the performance guarantee which shall be replenished by the contractor within 10 days from the date of such recovery failing which the contract is liable to be terminated.

(ii) For avoidance of doubt, if more than one remittance are delayed and the contractor deposits a lumpsum amount, this will be adjusted following First-in-First-out (FIFO) approach, i.e., the earliest installment due shall be first adjusted along-with the applicable penal interest on the earliest remittance on that date and in similar manner the other remittances shall be adjusted. No further interest shall be applicable on the penal interest component. The penal interest shall be simple i.e. shall not be compounded.

(iii) (a) If the remittances outstanding including penal interest, if any, on ending of the contract is less than the cash performance security, then such amount shall be recovered from cash performance security, accounts will be settled and balance securities will be released and penal interest shall be levied only upto end date of contract. In case of contractor has not deposited the remittance of last week on ending of contract period which is also to be adjusted from the cash performance security, then an

additional penal interest @0.2% per day for 7 days on the last week remittance shall also be levied.

(b) If the remittances outstanding including penal interest, if any, on ending of the contract are more than the cash performance security, then the dues to the extent of cash performance security will be adjusted as provided at Para-(iii)(a) above, following FIFO approach given at Para-(ii) above and the balance including penal interest shall be deposited by the contractor. For avoidance of doubt, it is clarified that the penal interest will be applicable only on the balance remittances and the penal interest will continue till payment of dues by the contractor.”

9. In making the Award, the Arbitral Tribunal also considered the following communications exchanged between the parties whereby claims were raised, documentation in support of the claims was supplied and claims made were rejected, which documents are being recorded here only for sake of completeness:

- (a) Claimant’s letter dated 4th December, 2015;
- (b) Claimant’s letter dated 28th December, 2015;
- (c) Respondent’s letter dated 29th December, 2015;
- (d) Claimant’s reply dated 29th December, 2015; and
- (e) Respondent’s letter dated 18th April, 2016, finally rejecting the claims made.

10. Upon a conspectus of the foregoing aspects, the following undisputed

position emerges:

- (a) During the period November-December, 2015 heavy rains had affected Chennai, Southern parts of Andhra Pradesh and Pondicherry;
- (b) Admittedly, no flooding had occurred on the section of the road for which the claimant had been granted the right to collect toll under the Agreement;
- (c) The distance between the claimant's toll plaza and the places where the claimant said flood conditions prevailed were as under:

Nellore – distance from Toll Plaza was 552 km.;

Chennai – distance from Toll Plaza was 725 km. ;

Pondicherry – distance from Toll Plaza was 882 km.;

and

Andhra Pradesh – distance from Toll Plaza was 422 km.

- (d) It is also evident from a perusal of the claim for penalty and the majority decision awarding penalty that even the amount on which the percentage penalty has been computed is nowhere to be found.

11. The claim for *force majeure* was permitted under Clause 25(b)(ii), namely *force majeure* event arising from “*Floods/Earthquake having materially adverse impact i.e. complete blockade of road*”. Considering the vast distance between the places that were affected by heavy rains/flooding and the location of the appellant's toll plaza, and considering the admitted

position that there was no flood resulting in complete blockade of road in and around the toll plaza, it is impossible to conclude that the heavy rains/flooding in those distant locations was the cause for reduction in traffic at the appellant's toll plaza.

12. While Clause 25(b)(ii) of the Agreement was the only basis of the *force majeure* claim as pleaded in the Statement of Claim, subsequently in the course of proceedings before the Arbitral Tribunal the claimant also cited clause 25(b)(vii), namely suspension of traffic exceeding 15 days at a stretch on the road section that was subject matter of the agreement.

13. Thereafter, in the proceeding under Section 34 of the A&C Act before the Single Judge, as a defence to the objections raised by the respondent, the appellant also cited clause 25(b)(viii), namely an event or circumstances of a nature analogous to the other events or circumstances enumerated in clause 25(b) of the Agreement. It bears mentioning that the appellant had not placed reliance upon clause 25(b)(viii) in its statement of claim nor had this clause been relied upon by the majority of the Arbitral Tribunal in allowing the *force majeure* claim.

14. In our opinion, considering the vast distance between the places affected due to heavy rains/flooding and the location of the appellant's toll plaza, clause 25(b)(ii) would have no application. This clause would not apply since, even by the appellant's own reckoning, there was no *complete* blockade of road and the claim was of 30 to 40% reduction in traffic.

15. Furthermore, clause 25(b)(vii) which contemplates suspension of traffic exceeding 15 days at a stretch on the road section that was subject matter of the agreement, would also not apply for the reason that the *force majeure* claim relates only to the period from 16th November, 2015 to 26th November, 2015 i.e. a period less than 15 days.

16. Even the afterthought of applying clause 25(b)(viii), namely an event or circumstances of nature *analogous* to the other events or circumstances enumerated in clause 25(b) would necessarily have to take its colour and meaning from the other events contemplated in the clause. A significant aspect of all other events and circumstances contemplated in the provision is that they result in *complete blockade* of traffic on the section of the road for which the appellant is entitled to collect toll. But at the risk of repetition, it is not even the appellant's own case that there was complete blockade of traffic on the subject section of the road but only that there was a significant drop in traffic.

17. The term 'analogous' is understood, in common parlance as also in law, to mean that there is resemblance, proportion or correspondence of one thing with another. In law, we also understand 'analogous' in the sense of the phrase *ejusdem generis* or 'of the same kind'. In the present case, the term 'analogous' would therefore be applicable to events and circumstances that, though not specifically mentioned in the other provisions of the clause, are akin to or of the same kind as those referred to in such other provisions.

18. On the aspect of *force majeure*, a brief reference to the true nature of

force majeure may not be out of place. In its recent judgment titled ***Energy Watchdog vs. CERC & Ors.*** reported as (2017) 14 SCC 80, on a conspectus of earlier rulings, the Supreme Court explains that *force majeure* would arise under the Contract Act, 1872, either under Section 32 thereof if it is relatable to an express or implied clause in the contract; or under Section 56 insofar as events occurring *dehors* the contract are concerned. If unforeseen events occur during the performance of the contract making it impossible of performance, in the sense that the fundamental basis of the contract goes, then such contract need not be performed since in such circumstances insisting upon performance would be unjust (citing ***Taylor vs. Caldwell*** (1861-73) All ER Rep 24).

19. Furthermore, the Supreme Court cites ***Edwinton Commercial Corporation vs. Tsavlis Russ (Worldwide Salvage and Towage) Ltd. (The Sea Angel)*** (2007) 2 Lloyd's Rep 517 (CA) to say that the doctrine of frustration of contract is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be, as it were, a break in identity between the contract and in its performance in the new circumstances, for such doctrine to be applicable.

20. In the present case since *force majeure* had been contractually defined, it was necessary to proceed only on the basis of such contractual definition and not to travel beyond what the parties had agreed would amount to *force majeure*.

21. In our view, in the facts of the present case, circumstances warranting

invocation of *force majeure* do not at all arise. In any event, considering the distance between the appellant's toll plaza and the places affected by heavy rains and floods, to invoke *force majeure* would be to grossly over-stretch the concept, since even assuming there was some drop in traffic by reason of the natural calamity in a distant place, one is unable to discern a cause-and-effect nexus between the calamity and the drop in traffic. At best, the *force majeure* event was too remote. If events as remote as the ones in the present case are accepted as basis for a *force majeure* claim, then surely excessive rains and flooding in parts of Southern India must also, indirectly and consequentially, have affected trade and commerce throughout the country in some way. In our view however, such indirect or consequential impact on trade and commerce cannot justify a *force majeure* claim. We may also add that nothing was cited or brought before the Arbitral Tribunal to show that the natural calamity in remote locations was the *only* reason for drop in the volume of traffic at the appellant's toll plaza.

22. By relying upon a purely procedural provision of the agreement, namely the provision that required the respondent to dispute a *force majeure* claim within the time period provided in the contract, the majority of the Arbitral Tribunal held, in effect, that default in disputing the *force majeure* claim within such time period *ipso facto* would amount to admission of such claim. We are afraid, we cannot subscribe to this view, since mere *omission* to respond can never amount to *admission* of a claim ; and a mere procedural provision cannot be construed in a way as to create a substantive right in the appellant to receive damages. It is pertinent to mention here that the respondent did, on point of fact, dispute the *force majeure* claim made

by the appellant by respondent's communication dated 18th April 2016, albeit beyond the 30-day period stipulated in clause 25(c)(i)(2) of the agreement.

23. So far as the claim for penalty under Clause 19 is concerned, we are at a complete loss to understand as to how the provisions of Clause 19 would at all be available to the claimant, who was the contractor liable to pay the weekly amount to the respondent. A perusal of Clause 19 of the agreement shows that the provision relates to penalty for the failure on the part of the contractor/concessionaire to pay to the NHAI the weekly amount in consideration for the grant of the permission to collect toll. This penalty is meant to compensate for the delay in remittance of the weekly amount payable by the contractor to the NHAI, on which weekly amount a percentage penalty is leviable for the delay in payment. No matter how much one bends or contorts Clause 19, the provision applies only to a situation when the appellant defaults in paying the weekly amounts to the respondent ; and the clause cannot be applied in the reverse order as has been done in the majority Award.

24. In fact this Court is at a loss to find even the sum *on* which the penalty of 0.2% per day for the first month and 0.5% per day for the subsequent months is required to be applied to reach the sum claimed and awarded.

25. In light of the above discussion, we are in complete agreement with the Single Judge when by the impugned judgment, he holds that the majority

Award runs contrary to the contract and falls within the scope of Section 34(2)(b)(ii) of the A&C Act, apart from being *ex facie* perverse and failing the test of reasonableness.

26. Accordingly, we find no infirmity in the impugned judgment which has correctly set-aside the majority Award dated 17th August, 2017.

27. We find no merit in the present appeal which is accordingly dismissed, without however, any order as to costs.

ANUP JAIRAM BHAMBHANI, J

SANJIV KHANNA, J

December 11, 2018
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