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

% *Date of Judgment: 15th October, 2018*

+ **FAO(OS) (COMM) 233/2018**

NATIONAL HIGHWAY AUTHORITY OF INDIA

..... Appellant

Through Mr. Ankur Mittal, Advocate.

versus

M/S CHANDA ALLIED SERVICES

..... Respondent

Through Mr. B.G. Sivabalamurugan with Mr.
R. Karuppiah, Advocates.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S. SISTANI, J. (ORAL)

CM.APPL 43279/2018 & 43281/2018 (exemptions)

1. Exemptions allowed, subject to all just exceptions.
2. The applications stand disposed of.

CM.APPL 43282/2018 (delay in filing)

3. This application has been filed by the applicant/appellant seeking condonation of 54 days delay in filing the appeal.
4. Prayer made in this application is not opposed. Accordingly, the same is allowed. Delay of 54 days in filing the appeal is condoned.
5. The application stands disposed of.

FAO(OS) (COMM) 233/2018

6. The present appeal has been filed under Section 37 (1) (c) of the Arbitration and Conciliation Act, 1996 against the order dated

22.05.2018 passed by a learned Single Judge of this Court, by which the objections to the Award dated 15.01.2018 stand dismissed.

7. The parties had entered into an agreement for collection of user fee at a specified toll plaza. This agreement was for a period of three months commencing from 02.05.2010 till 02.08.2010. The subject matter of the dispute was the shortfall in collection of the user fee by the respondent herein. The claim of the appellant was rejected by the impugned award.
8. The necessary facts required to be noticed for disposal of this appeal and as correctly summed up by the learned Single Judge are reproduced below :

“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.”

9. The Arbitrator has rejected the claim purely on the ground as being patently barred by limitation. The learned counsel for the appellant has contended that no doubt the contract was for a period of three months which expired on 02.08.2010. However, post the conclusion of the contract, the parties continued to negotiate for a settlement as there was a huge shortfall in the collection at the time when the respondent was collecting the toll fee i.e. between the period 02.05.2010 and the period post the conclusion of the contract to which the respondent had no plausible explanation to give. Counsel further contends that there was a tacit acceptance in view of the fact that a bank guarantee in the sum of Rs.15 lacs was encashed by the appellant while there was no protest by the respondent. Counsel further contends that the appellant continued to demand a sum of Rs.1,03,18,577/-, however, there was no denial with regard to payment and thus the period of limitation was extended and it is only

when the respondent failed to pay the amount, the dispute was referred to the arbitration.

10. The short question which arises for consideration is as to whether there was any acknowledgement of debt by the respondent to which there is no clear-cut answer by the counsel for the appellant herein. The Arbitrator in our view has rightly rejected the claim as being barred by limitation and so has the learned Single Judge. The agreement between the parties was admittedly for a period of three months commencing from 02.05.2010 upto 02.08.2010. To say that since post 02.08.2010 there was no express denial of the claims raised by the NHAI, the period of limitation would not commence in our view is without any force. The appellant by its communication dated 01.09.2010 had called upon the respondent to pay the balance amount of Rs.1,03,18,577/- by means of demand draft. NHAI has thereafter encashed the bank guarantee furnished by the respondent and on 10.11.2010 the appellant once again called upon the respondent to pay the outstanding amount. The appellant then called upon the respondent by communication dated 10.11.2010. 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.”

11. In view of the concluding part of this communication, we have found that NHAI in clear terms had stated that no further communication would be entertained, which shows that even as per NHAI the matter had been closed at their end. It is settled law that period of limitation commences from the date when the right to sue survived. Once the NHAI had made a clear unequivocal demand, it remained unpaid. The bank guarantee having not been encashed, it is at that point of time in the month of December, 2010 that the right to sue survived in favour of the appellant herein. Admittedly without any doubt the claims were made beyond the period of three years.
12. We find no infirmity in the award and the order of the learned Single Judge. The present appeal is dismissed with cost of Rs.10,000/-.

G.S.SISTANI, J.

SANGITA DHINGRA SEHGAL, J

OCTOBER 15, 2018

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