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

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Pronounced on: 03.07.2018

+ O.M.P. 463/2015

NATIONAL HIGHWAYS AUTHORITY OF INDIA..... Petitioner

Through Mr.Mukesh Kumar, Adv.

Versus

M/S SANGAM (INDIA)LTD

..... Respondent

Through Mr.Rohit Madan, Ms.Sayaree Basu

Mallik and Mr.Nitin Gulati, Advs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Arbitration Act”) seeking to impugn the Award dated 03.05.2015.

2. The brief facts of the case are that the petitioner is a statutory body constituted under Section 3 of the National Highway Authority of India Act, 1988. On 18.10.2012, the petitioner invited bids for the work of collection of user fee at Chamari Toll Plaza at KM 229.913 for the Section from KM 220.000 to KM 260.713 on NH-25 and KM 421.200 – KM 449.000 on NH-2 (Bara to Orai) in the State of U.P. on Annuity basis for a period of two years. The notice inviting tender had mentioned Annual Potential Collection (APC) for the Toll Plaza in question at Rs.47.09 crores per annum. This APC was determined based on the survey and research carried out by the petitioner.

3. In response to the bid, the respondent was one of the bidders and made a bid for Rs. 62.10 crores i.e. about 31.88% above the APC. The second

highest bidder had quoted a sum of Rs.50.04 crores which was only 7.03% above the APC. The respondent was declared as the selected bidder and a contract dated 07.03.2013 was signed between the parties. The contract was for a period of two years beginning from 09.03.2013 to 09.03.2015. The contract provided that the respondent would collect user fees at such rates and from such vehicles as would be notified by the Central Government for the use of the said Section of the National Highway/the said bridge. The respondent was required to remit a total sum of Rs.62.10 crores per annum in installments of Rs.1,19,09,589/- to the petitioner every week. It is pleaded that the said payment was independent of the toll actually collected by the respondent at the Toll Plaza.

4. Notification dated 26.02.2013 was issued which provided that the fee levied and collected would be due and payable at the stated Toll Plaza for the net road length specified for such Toll Plaza. The same was stated as follows:-

“1. The fee levied and collected hereunder shall be due and payable at the following Toll Plaza for net road length specified for such Toll Plaza(s):

Location of Toll Plaza (s) (chainage)	Length (in Km.) For which fee is payable
Before completion of stretch at Kalpi	
Km/Ch.222.913 (near village Usaka in Jaluan District)	66.813
After Completion of stretch at Kalpi	

Km/Ch. 229.913 (near village Usaka in Jaluan District)	68.513
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5. Hence, it is pleaded by the petitioner that in view of the said notification, it is clear that the Central Government had taken note of the fact that a certain stretch at Kalpi still required completion. Hence, the notification stipulated that the user fees would be charged for 66.813 KM of length whereas after completion of the stretch at Kalpi, user fee would be charged for 68.513 KM. The notification also allowed the respondent to reduce the remittance amount to be deposited by it on pro-rata basis for 66.813 KM due to incomplete stretch of 1.7 KM at Kalpi.

6. The respondent started collecting toll on 09.03.2013 at 8.00 am. at the designated toll plaza location. However, the respondent is said to have failed to remit the agreed amount to the petitioner causing losses to the petitioner. Penalty was also levied on the respondent which it failed to pay. Instead the respondent on 16.04.2013 and 08.06.2013 sent notices making averments against the petitioner.

7. Subsequently, the respondent filed a petition under Section 9 of the Arbitration Act being OMP 599/2013 seeking directions that the contract dated 07.03.2013 be suspended till the matter is resolved or in the alternative, the actual toll collected be taken away by NHAI and no coercive measures like encashment of bank guarantee or forfeiture of security deposit be taken by the petitioner. As the petitioner in terms of the arbitration clause on 03.07.2013 appointed the sole arbitrator, on 05.07.2013, the petition was

disposed of directing that the petition be treated as an application under Section 17 of the Arbitration Act. The said application was rejected by the learned Arbitrator vide order dated 13.08.2013. This order was also confirmed by this court when it was challenged in OMP No. 840/2013. This court had dismissed the said petition on 26.08.2013.

8. In the meantime, the petitioner sent a notice on 09.07.2013 for termination and black listing the respondent. Subsequently by letter dated 24.10.2013, the petitioner terminated the contract, forfeited the bank guarantees and performance security of Rs.10.35 crores. The Toll Plaza was handed back to the petitioner on 27.10.2013 and the respondent was debarred for two years from participating or bidding in any future projects.

9. The learned Arbitrator in the course of adjudication framed 10 issues as follows:-

‘(i) Whether the Respondent proves that the Respondent has not committed any Breach of the Contract provisions entitling the Claimant to claim any amount as mentioned in the Statement of Claim.

(ii) Whether the Claimant proves that the subject Contract is voidable.

(iii) Whether the Claimant proves that the subject Contract is void.

(iv) Whether Claimant proves that the Order passed by the Respondents vide their Letter bearing No.NHAI/CO/2013-14/Chamari(Usaka)/45138 dated 24.10.2013 being Exhibit-L to the Statement of Claim, is not legal, enforceable, therefore, liable to be quashed and set aside?

(v) Whether Claimant proves that the Order passed by the Respondents vide their letter bearing No.NHAI/C0/20 13-14/Chamari(Usaka)/45313 dated 30.10.2013 being Exhibit-M to

the Statement of Claim, is not legal, enforceable, therefore, liable to be quashed and set aside?

(vi) Whether Claimant proves that they are entitled for an award for return/refund of the Performance security and Bank Guarantee of the amounts of Rs.5,17,50,000/- (Rupees five crores seventeen lakhs fifty thousand only) each and of aggregate amount of Rs.10,35,00,000/- (Rupees ten crores thirty five lacs only) along with interest thereon @18% p.a, from the date of alleged forfeiture until full payment/realization thereof.

(vii) Whether the Claimant proves that they are entitled for an Award to recover from the Respondents a sum of Rs.7,24,66,000/- (Rupees seven crores twenty four lacs sixty six thousand only) towards losses incurred by the Claimants along with interest thereon @ 18% p.a. from the date when the loss incurred till final payment and/or realization thereof as alleged in the Statement of Claim.

(viii) Whether the Claimant proves that they are entitled for an Award to recover from the Respondents a sum of Rs.3,89.39,000/- (Rupees three crore eighty nine lacs thirty nine thousand only) towards loss of profit upto 26.10.2013 along with interest thereon @ 18% p.a. from the date of losses till final payment and/or realization thereof as alleged in the Statement of Claim.

(ix). Whether the Respondent proves that they are entitled for Award for the Counter Claims as prayed for in the Counter Claim.

(x) Whether Claimant proves that they (Claimants) have legally and validly terminated the subject Contract dated 7.3.2013 (relating to Counter Claim) as alleged in the Counter Claim.”

10. The award was passed on 03.05.2015 in favour of the respondent and against the petitioner. The learned Arbitrator noted the plea of the respondent that as per NIT, Request for Proposal documents and Letter of Acceptance that were issued the stretch for which toll was to be collected was of

68.513KM. The bank guarantee and cash performance security was also for 68.513 KM. It was only on 26.02.2013 that for the first time the respondent got knowledge about the reduction in the length of the highway as the Central Government permitted NHAI to collect user fee for 66.813 KM until completion of the 1.7 KM portion at Kalpi. The learned Arbitrator also noted the plea of the respondent that the length of the highway for the purpose of collection/levy of fee could not be reduced through notification.

11. The learned Arbitrator also noted the various pleas of the respondent as to the serious difficulties faced in collection of the toll, namely, (i) 1.7 KM stretch of Kalpi which remained incomplete falls in the main crowded market place of Kalpi town which is a Tehsil Headquarter leading to traffic jams; (ii) due to dangerous and bad condition of the 1.7 KM stretch, huge traffic jams up-to 16 to 18 hours a day was a daily routine affair and the petitioner failed to take any curative steps; (iii) collection of the toll added fuel to the anger of the local population inasmuch as the toll was being collected for an incomplete, damaged and dangerous road; (iv) several dangerous deep craters having depth of 2-3 feet were created on the narrow lanes of 1.7 KM. On account of the same, frequent breakdown of vehicles took place which was also causing frequent traffic jams; (v) before commencement of toll collection, the old Yamuna Bridge was closed by the petitioner and the Bridge was re-opened only in the month of July 2013. Due to closure of this old Yamuna Bridge for six months, it led to a situation where an additional portion of 3.5 KM on either side of the approach became a two lane road. Hence, the total narrow stretch actually was of 5 KM. passing through the crowded market area of Kalpi causing chaos and jams.

The learned Arbitrator further noted that a spot visit was made on 21.07.2014 and spot enquiries were also made. The learned Arbitrator concluded on facts that the contentions of the respondent are true. It also noted that there are serious disputes pending with regard to payment of compensation to land owners and also factum of congestion of traffic due to closure of old Yamuna Bridge.

12. The learned Arbitrator thereafter concluded as follows:-

(a) The fact that the highway was not complete was not known to the respondent as the letter of acceptance, bank guarantee, performance guarantee were all based on the full length of the highway. It was only on 26.02.2013 that the respondent got knowledge of the incomplete stretch when the Central Government permitted the petitioner to collect user fees for only 66.813KM until completion of 1.7 KM stretch for Kalpi area. It was also not disclosed to the respondent that there were long pending disputes regarding the land acquisition and compensation in respect of 1.7KM. stretch.

(b) It was not disclosed that the old Yamuna Bridge was closed on 18.01.2013. This should have been disclosed in the tender document.

(c) Under Rule 3 of the National Highway Fee (Determination of Rates and Collection) Rules 2008, the power to collect toll fees arises only when the highway is complete in all respects. In the absence of the highway being complete, the petitioner could not initiate the tender process for appointment of an agency to collect user fees for want of statutory authority in the present case.

13. Based on the above, the learned Arbitrator concluded that these were misrepresentations and conscious omissions on the part of the petitioner

which makes the contract voidable at the option of the respondent. Hence, the learned Arbitrator decided issues No. 2 and 3 in favour of the respondent.

The act of the petitioner of serving a notice dated 09.07.2013 for termination and black listing the respondent and by letter dated 24.10.2013, terminating the contract and forfeiting the bank guarantee and performance security was held to be illegal. The said letters dated 24.10.2013 and 30.10.2013 were quashed. The forfeiture and appropriation of the performance security and bank guarantee of Rs.10.35 crores was held to be illegal and bad in law and was set aside.

The learned Arbitrator noted that the total toll collected for the period from 09.03.2013 to 26.10.2013 was Rs.25,95,96,115/- whereas the respondent had paid Rs.29,86,55,749/-. The following reliefs were granted to the respondent: - (Described as claimant in the award)

“(i) The Respondent is directed to return/refund to the Claimant a sum of Rs.10.35 Crores towards illegally forfeited performance security including bank guarantee along with simple interest @14.55% p.a. from the date of cancellation of the Contract, i.e. 24/10/2013, till the date of refund;

(ii) The Respondent is directed to pay to the Claimants a sum of Rs.332.05 Lacs towards excess payment received above the actual toll collection; along with simple interest @14.55% p.a. from the date of cancellation of the Contract, i.e. 24/10/2013, till the date of payment;

(iii) The said exercise of refund, as mentioned in clauses (i) & (ii) above, must be done within a period of six weeks from the date of receiving of award, failing which the interest shall stand enhanced to and will be calculated and payable @18%p.a., on the aforesaid awarded amounts, from the date of passing of this award until full payment thereof.

(iv) The counter claim filed by the Respondent is hereby rejected.

(v) Both the parties to bear their own cost.”

14. Hence, essentially as per the award the petitioner was allowed to retain the actual amount of the toll collected by the respondent without deduction of any expense. All other payments received in excess by the petitioner were directed to be refunded with interest.

15. I have heard learned counsel for the parties.

16. Learned counsel for the petitioner has vehemently argued as follows:-

(i) That the Central Government issued notification on 26.02.2013 which clearly specifies that before completion of the stretch at Kalpi user fee shall be charged for 66.813 KM. of length and after completion of the stretch, the user charges shall be for 68.513 KM. Hence, the Central Government had taken note of the fact that certain stretch at Kalpi required completion. The amount that was to be paid by the respondent was reduced from Rs.1,19,09,589/- to Rs.1,16,14,079/- per week on account of reduction in the stretch. Hence, no loss or damage was caused to the respondent. This aspect has been completely ignored by the learned Arbitrator.

(ii) Even otherwise, as on 26.02.2013 when the notification was issued the respondent knew about the problem on the Kalpi stretch. Yet, the respondent executed the contract thereafter on 07.03.2013. The respondent need not have proceeded with the contract, as at that stage as at least he had knowledge of the full facts, yet he proceeded to sign the contract admittedly with complete knowledge of full facts.

(iii) Under Clause 9(a) of the Contract, the respondent was to survey the national highway and surrounding areas before submitting its bid. Hence, no fault can be found with the petitioner. The respondent cannot plead ignorance of the facts pleaded.

(iv) It has also been pleaded that the learned Arbitrator wrongly held that the contract is void/voidable. Reliance is placed on the judgment of this court in OMP (COMM) 298/2016 dated 06.02.2017 titled as ***National Highway Authorities of India vs. IRB Ahmedabad Vadodara Super Express Toll ways Private Limited*** to support the plea.

17. Learned counsel for the respondent has reiterated the contentions as stated in the Award and has relied upon the judgment of the Allahabad High Court in ***Surya International Pvt. Ltd. vs. UOI*** dated 07.02.2014 being Civil Writ Miscellaneous No. 47607/2013 to support the plea.

18. It is obvious from a reading of the Award that the learned Arbitrator has recorded a finding of fact that the tender document did not refer to the fact that 1.7 KM stretch of Kalpi was incomplete and that the old Yamuna Bridge was closed. He also concluded that on account of these two conditions, there were huge obstructions in the flow of traffic which led to problems in collection of toll fees. There was also anger and resentment among the general public in making payment of the toll fees. The learned Arbitrator also concluded that there were also issues regarding the land acquisition process and payment of compensation to the local population. The combined effect of this was noted to be an adverse impact on the revenue collection. Based on these facts, the learned Arbitrator has concluded that the contract was voidable at the option of the respondent.

19. The relevant portion of the Award holding as above reads as follows:

“.... Though the levy was for 68.513 kms but Central Government permitted NHAI to collect user fee for 66.813 kms only until completion of 1.7 km Portion and upon completion of said 1.7 kms portion at Kalpi for entire section of 68.513 kms. The said fact was never known to the Claimant before 26.02.2013. The Respondent's positive representation to the Claimant through its NIT and RFP document was as if the 68.513 Kms of stretch was complete and available for collection of toll; The Claimant acted upon and proceeded to deposit the bank guarantee and performance security on the basis of the same assumption that the complete 68.513 Kms stretch of road was for toll collection. The fact that there is a long pending dispute regarding land acquisition and compensation in respect of 1.7 Kms of stretch was also not disclosed to the Claimant. Then there is a further non-disclosure of the fact that old Yamuna Bridge was closed from 18.01.2013. These important facts should have been disclosed in the Tender documents to enable the bidders to take considered decision before bidding. Even on 27.06.2014 during the cross-examination of Mr. Naveen Mishra, an opportunity was available to the Respondents to explain the reasons for not incorporating the relevant facts in the Contract Agreement but the Project Director of Respondents failed to take the benefit of the said opportunity. These misrepresentations and conscious omissions on the part of Respondent before entering into a Contract dated 07.03.2013 makes the Contract voidable at the option of Claimant. Even otherwise as per rule-3 the Collection of toll was impermissible in view of the fact that the 1.7 Km portion of road was incomplete. The Respondent being a statutory agency is expected to adhere to the same standards of fairness and circumspection as would be expected in Contracts directly entered into by the State or by public Sector Undertakings, especially when there is inequality of bargaining power as in the present case. It is settled law that the instrumentality of State is expected to act in all fairness even in the Contractual matters, it cannot act as the merchant of Venice. Therefore, the principle laid down in the catena of judgements and more particularly in the case of *United India Insurance Co. Ltd. v. Manubhai Dharmasinbhai Gajera* [(2008) 10 SCC 404]

would in my opinion, squarely apply with equal force to the conduct of the Respondent herein, being a statutory agency in the present case, hence, in the light of above, the Issue Nos. 2 and 3 are decided accordingly in favour of the Claimant and against the respondent.”

20. The above shows that the learned arbitrator has noted a number of facts on the basis of which he has come to the conclusion that the contract was voidable at the option of the respondent. A finding is also recorded that under rule 3 of the National Highways Fee (Determination of Rates and Collection) Rules, 2008, the collection of toll was not permissible in view of the incomplete highway.

21. Regarding the finding recorded that the contract is voidable at the option of the respondent, I may look at the statutory provisions.

22. Sections 17, 18 and 19 of the Contract Act read as follows:-

"17.Fraud' defined.—'Fraud' means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:-

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to

them, it is the duty of the person keeping silence to speak, or unless his silence, is, in itself, equivalent to speech.”

“18. “Misrepresentation” defined.—“Misrepresentation” means and includes

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains an advantage of the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him;

(3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement.”

“19. Voidability of agreements without free consent.—When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception —If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable."

23. Hence, a fraud takes place where somebody leads a man to suffer damages by willfully or recklessly causing him to believe and act on falsehood. It is a fraud, if a party makes representations which he knows to be false and injury ensues whereon. Reference in this context may be had to the judgment of the Supreme Court in *Venture Global Engineering LLC v. Tech Mahindra Ltd. & Anr.*, (2018) 1 SCC 656.

24. However, under section 19 of the Contract Act, an exception is carved out. If a party, whose consent was caused by misrepresentation or by fraud, had the means of discovering the truth with ordinary diligence, Section 19 has no application.

25. The exception is also explained in the judgment of the Nagpur High Court in the case of *Premchand vs. Ram Sahai and Anr.*, AIR1932 Nag. 148 where the court held as follows:-

"9. Apart from this I am of opinion that, even if Ballulal had been deceived, still the exception to S. 19, Contract Act, would apply, as he had the means of discovering the truth with ordinary diligence. I would here point out that there is a difference in this matter apparently between English law and the law as laid down in the Contract Act. Under English law the fact that a party who is induced to contract by misrepresentation might by ordinary care have ascertained that the representation was false is no defence to an action for rescission if the party was really deceived: see *Venezuela Central Ry. Co. v. Kisch* [1867] 2. H.L. 99=36 L.J. Ch. 849=16 L.T. 500=15 W.R. 821; but under the exception to S. 19, Contract Act, even if the party is deceived by misrepresentation or by silence, fraudulent

within the meaning of S. 17 of the Act, he cannot avoid the contract if he had the means of discovering the truth with Ordinary diligence. In *Morgan v. Government of Haidarabad* [1888] 11 Mad. 419, it was held that this exception would not apply where there had been active concealment of an important fact in order to deceive the other party and to induce him to enter into the contract; but in the present case I do not think that the evidence will warrant a finding that there was such active concealment on the part of Ramsahai. In *Jogendra Nath Goswami v. Chandra Kumar Mozumdar* MANU/WB/0005/1914; A.I.R. 1914 Cal. 661=24 I.C. 193=42 Cal. 8 it was held that the plaintiff had not the means of discovering the truth with ordinary diligence, but it was not held that, if the plaintiff had the means of so discovering the truth, the exception would not apply."

26. A reference may also be had to Clause 9 of the agreement between the parties that was signed on 07.03.2013. Clause 9(a) and (b) read as follows:-

"9. DIVERSIONS:

(a) The Contractor has surveyed the said section of National Highway or the said bridge and surrounding area including any access or diversion(s) and the contractor has submitted its bid taking into consideration all such access or diversion(s) or any diversion of traffic due to deterioration in road conditions or closure of road for maintenance work, whether existing or likely to come in future which any road user may opt, 'inter alia, to avoid payment of the User Fee by-passing the User Fee collection booths.

(b) The Contractor undertakes that, he shall not make any claim for any decrease in traffic on the ground of diversion of the traffic as per Clause 9 (a) above, even if such diversion did not exist at the time of submission of the bid by the Contractor.

xxx"

27. In view of the above provisions of the contract, it was for the respondent to have surveyed the highway and the bridge and the surrounding areas including any access, diversions, deterioration in road conditions and closure of road etc. before making a bid. Even otherwise, it is obvious that any prudent man making a bid for collection of toll fees for a highway would have surveyed the highway prior to signing of the contract. This survey was obviously required to access the revenue potential and to determine the amount of the bid to be made. The fact as noted by the award i.e. that a stretch of 1.7 Kms was incomplete at the Kalpi stretch and the closure of the old Yamuna Bridge are such facts that a prudent man with ordinary diligence could have easily discovered. A drive down the highway would have revealed that the Kalpi stretch is still not completed and is likely to take some time. It will reveal that the stretch would cause traffic jams. It would also be obvious to a prudent man that in the initial phases, when toll is levied for using the highway the local population, is bound to agitate and resist payment of toll levy. A prudent man with ordinary diligence can discover all these facts. Hence, even if the conduct of the petitioner suffers from misrepresentation, in view of the exception to Section 19 of the Contract Act no relief could be granted to the respondent on the reasoning of the award. The learned arbitrator has completely ignored the provisions to section 19 of the Contract Act and clause 9 of the Agreement between the parties and has erroneously and wrongfully come to a conclusion that the contract is voidable. The conclusions of the Award in this regard are liable to be set aside.

28. I may also deal with another aspect noted by the learned arbitrator as a ground to grant relief to the respondent. The learned Arbitrator has recorded

a finding that the petitioner lacked the powers to issue a tender in view of Section 6 of the National Highways Authority of India Act and Rule 3 of the National Highways Fee (Determination of Rates and Collection) Rules 2008. Rule 3 of the said Rules reads as follows:-

“3. Levy of Fee:

(1) The Central Government may by notification levy fee for use of any section of national highway, permanent bridge, bypass or tunnel forming part of the national highway, as the case may be, in accordance with the provisions of these rules:

PROVIDED that the Central Government may, by notification, exempt any section of national highway, permanent bridge, bypass or tunnel constructed through a public funded project from levy of such fee or part thereof, and subject to such conditions as may be specified in that notification.

(2) The collection of fee levied under sub-rule (1) of rule 3, shall commence within forty-five days from the date of completion of the section of national highway, permanent bridge, bypass or tunnel, as the case may be, constructed through a public funded project.

(3)

(4) No fee shall be levied for the use of the section of national highway, permanent bridge, bypass or tunnel as the case may be, by two wheelers, three wheelers, tractors and animal-drawn vehicles."

Provided that three wheelers, tractors and animal-drawn vehicles shall not be allowed to use the section of national highway, permanent bridge, bypass or tunnel, as the case may be, where a service road or alternative road is available in lieu of the said national highway, permanent bridge, bypass or tunnel;

Provided further that where service road or alternative road is available and the owner, driver or the person in charge of a two-wheeler is making use of the section of national highway, permanent bridge, bypass or tunnel, as the case may be, he or she shall be charged fifty per cent of the fee levied on a car.

Explanation.- For the purpose of this rule:-

(a) “alternative road” means such other road, the carriageway of which is more than ten metres wide and the length of which does not exceed the corresponding length of such section of notational highway by twenty per cent thereof.

(b) “service road” means a road running parallel to a section of the national highway which provides access to the land adjoining such section of the national highway.

(5) The fee notified by the Central Government under these rules shall be rounded off and levied in multiple of the nearest Rupees five.”

29. Hence, the Central Government may issue a notification for levy of fees for any section of national highway. To interpret this as the learned Arbitrator has done to imply that the power to collect toll fee only arises when the national highway is complete in all respects is clearly an erroneous interpretation. A reading of the rules makes it obvious that the Central Government can clearly issue a notification for any section of the national highway. Hence, if a part of a section is complete, it cannot follow from a reading of the Rule that the Central Government does not have any powers to issue a notification for collection or levy fee for the portion of the highway that is complete. Such an interpretation is entirely misplaced and is wholly contrary to the language of the Rule.

30. When words of statute are clear and unambiguous, recourse cannot be had to principles of interpretation other than the literal rule (Re.: *Raghunath Rai Bareja and Anr. vs. Punjab National Bank and Ors.*, (2007) 2 SCC 230).

The interpretation of Rule 3 of the 2008 Rules by the learned Arbitrator and the conclusions suffer from serious flaws and thus, is liable to be set aside.

31. The Supreme Court in *Venture Global Engineering LLC v. Tech Mahindra Ltd. & Anr.* (supra), noted as follows:

“84. So far as expression “public policy of India” in the context of arbitration cases is concerned, this Court examined the meaning, scope and ambit of this expression for the first time in *Renusagar Power Co. Ltd. v. General Electric Co.* [*Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644] in the context of the Foreign Awards (Recognition and Enforcement) Act, 1961. It was then examined in *ONGC Ltd. v. Saw Pipes Ltd.* [*ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705] [*ONGC (I)*] and then again in another case of *ONGC Ltd. v. Western Geco International Ltd.* [*ONGC Ltd. v. Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] [*ONGC (II)*]. It was recently examined in *Associate Builders v. DDA* [*Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , in the context of Section 34 of the Arbitration and Conciliation Act, 1996.

85. In between this period, this Court had also examined the expression in some cases. However, in *Associate Builders case* [*Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , this Court examined the expression in detail in the light of all previous decisions referred above on the subject. R.F. Nariman, J. speaking for the Bench held that the law laid down in *ONGC (I)* [*ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705] and *ONGC (II)* [*ONGC Ltd. v. Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] has been consistently followed by this Court till date. His

Lordship further clarified the meaning of expression “public policy of India” and what it includes therein and held that violation of the provisions of the Foreign Exchange Act, disregarding orders of superior courts in India and their binding effect, if disregarded, would be violative of the Fundamental Policy of Indian Laws. It was, however, held that juristic principle of “judicial approach” demands that a decision be fair, reasonable and objective. In other words, a decision which is wholly arbitrary and whimsical would not be termed as fair, reasonable or an objective determination of the questions involved in the case. It was also held that observance of audi alteram partem principle is also a part of juristic principle which needs to be followed. It was held that if the award is against justice or morality, it is against public policy. It was held that if there is a patent illegality noticed in the award, it is also against public policy.”

32. The Supreme Court in *Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd.*, AIR 2003 SC 2629/(MANU/SC/0314/2003), held as follows:

“53. It is true that if the arbitral tribunal has committed mere error of fact or law in reaching its conclusion on the disputed question submitted to it for adjudication then the Court would have no jurisdiction to interfere with the award. But, this would depend upon reference made to the arbitrator: (a) If there is a general reference for deciding the contractual dispute between the parties and if the award is based on erroneous legal proposition, the Court could interfere; (b) It is also settled law that in a case of reasoned award, the Court can set aside the same if it is, on the face of it, erroneous on the proposition of law or its application; (c) If a specific question of law is submitted to the arbitrator, erroneous decision in point of law does not make the award bad, so as to permit of its being set aside, unless the Court is satisfied that the arbitrator had proceeded illegally.

54. In the facts of the case, it cannot be disputed that if contractual term, as it is, is to be taken into consideration, the

award is, on the face of it, erroneous and in violation of the terms of the contract and thereby it violates Section 28(3) of the Act. Undisputedly, reference to the arbitral tribunal was not with regard to interpretation of question of law. It was only a general reference with regard to claim of respondent. Hence, if the award is erroneous on the basis of record with regard to proposition of law or its application, the Court will have jurisdiction to interfere with the same.”

33. In the present case, the learned arbitrator has completely ignored the statutory provisions and erroneously concluded that the contract is voidable at the option of the respondent. He has completely misinterpreted rule 3 of the 2008 Rules. The award is wholly contrary to the substantive provisions of law and is patently illegal and is clearly contrary to the public policy of India. Accordingly, I set aside the award. I may only note that I have not in any manner dealt with any finding of fact recorded by the learned arbitrator and their consequences on the relief claimed by the respondent.

34. As per the arbitration clause, it is the petitioner who has to nominate an arbitrator. The petitioner may re-nominate a fresh arbitrator as per the arbitration clause as per law. The record of the old Arbitrator be sent to the new Arbitrator. It will be open to the newly appointed Arbitrator to seek any additional documents, pleadings or evidence from the parties if he so considers appropriate.

35. The petition stands disposed of as above. All pending applications, if any, also stand disposed of.

(JAYANT NATH)
JUDGE

JULY 03, 2018

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