

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 24.05.2018

+ **O.M.P. (COMM) 445/2017**

**NATIONAL HIGHWAYS AUTHORITY
OF INDIA**

.....Petitioner

Versus

**TGV PROJECTS AND INVESTMENTS PRIVATE
LIMITED**

.....Respondent

Advocates who appeared in this case:

For the Petitioner :Mr Saurabh Banerjee and Mr Bikram
: Singh.

For the Respondent :Mr Samir SagarVasishta with Mr K. G.
: Gopalakrishnan and Mr Abhishek Pratap
: Singh.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. The petitioner (hereafter 'NHAI') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning the arbitral award dated 17.08.2017 (hereafter 'the impugned award') delivered by the Arbitral Tribunal comprising of three arbitrators, namely, Sh N.K. Bahri (Presiding Arbitrator), Sh J.N. Mathur and Sh S.S. Agarwal (hereafter 'the

Arbitral Tribunal'). The impugned award was delivered by majority with Sh J.N. Mathur entering a dissenting note.

2. The impugned award was rendered in the context of disputes that had arisen between the parties in relation to the 'Contract Agreement' dated 31.07.2015 (hereafter 'the Agreement') entered into between the parties, whereby the respondent (hereafter 'TGV') was granted the right to collect toll at Vempadu Toll Plaza situated at Km 795.498, for section Km 358.000 to Km 272.000 (changed to Km 830.525 to Km 714.255) of Anakapalli-Tuni Section of NH-5 (new NH-16) in the State of Andhra Pradesh.

3. The principal dispute between the parties relates to the claim of TGV for waiver of making weekly remittance for the period from 11.11.2015 to 10.12.2015 on account of floods and unprecedented rains, which had lashed the southern part of the country. The unprecedented rains had resulted in floods in Nellore and Chennai and had affected parts of Andhra Pradesh. TGV claimed that this had resulted in the drop in traffic by about 30% to 40% during the aforesaid period. According to TGV, the reduction in traffic due to floods was a *force majeure* condition within the meaning of Clause 25(b)(ii) of the Agreement. This was accepted by the Arbitral Tribunal. NHAI disputes that the said condition would fall within the scope of the *force majeure* clause.

Factual background

4. NHAI is a body constituted under the National Highways Authority of India Act, 1988, *inter alia*, for the purposes of development, maintenance and management of National Highways.

5. On 22.06.2015, NHAI issued a Notice Inviting Tender (NIT) for engagement of a user fee collection agency for collecting toll at Vempadu toll Plaza situated at Km 795.498 for section Km 358.000 to Km 272.000 (now changed to Km 830.525 to Km 714.255) Anakapalli-Tuni of NH-5 (New NH-16) in the State of Andhra Pradesh.

6. TGV submitted its financial bid pursuant to the aforesaid invitation, which was declared as the highest bid. Thereafter, NHAI issued a Letter of Acceptance (LOA) on 23.07.2015, following which, the parties entered into the Agreement.

7. On 04.12.2015, TGV sent a letter to NHAI, *inter alia*, stating the loss to the tune of 30% to 40% in the collection of toll due to decrease in the volume of traffic in the stretch of TADA-Nellore. TGV also claimed that a heavy rain down pour in Chennai had washed away bridges in Chennai-Nellore and other areas affecting the traffic on NH-5. It further stated that the floods were continuing. TGV claimed that the aforesaid events constituted *force majeure* under Clause 25(b)(ii) of the Agreement and requested NHAI to accept the same. TGV also stated that its estimated loss and user fee collection report would be sent in due course of time.

8. Thereafter, TGV sent a letter dated 28.12.2015 claiming that the Chennai based traffic had almost stopped, which had affected the collection of toll at the toll plaza in question. It also enclosed a tabular statement indicating the amount by which the daily toll collection fell short of the remittance required to be paid to NHAI during the period from 11.11.2015 to 10.12.2015. TGV further requested that the said events be considered as *force majeure*. In addition, TGV also claimed toll plaza maintenance charges at the rate of ₹75,000/- per day for a period of thirty days. The difference between the amount collected by TGV and payable to NHAI was quantified at ₹83,51,425/- and the claim on account of maintenance charges was quantified at ₹22,50,000/- (₹75,000/- x 30 days). Thus, in aggregate, TGV made a claim of ₹1,06,01,425/- (₹83,51,425/- plus ₹22,50,000/-).

9. NHAI responded to the aforesaid mails by an e-mail dated 29.12.2015 calling upon TGV to submit the documentary evidence along with server report in support of its claim. In response to the aforesaid e-mail, TGV sent a letter dated 29.12.2015 enclosing therewith photographs, user fee collection report and vehicle passing report in support of its claim.

10. On 18.04.2016, NHAI sent a letter rejecting TGV's claim by asserting that the claim was not tenable, as it did not qualify to be considered as *force majeure* under the Agreement.

11. In view of the above, TGV invoked the arbitration clause and the Arbitral Tribunal was constituted. Before the Arbitral Tribunal,

TGV made a claim for a sum of ₹1,06,01,425/- as well as interest under Clause 19 of the Agreement. The Arbitral Tribunal by majority rendered the impugned award accepting TGV's claim for loss on account of reduction in toll collection during the period 11.11.2015 to 10.12.2015 and awarded a sum of ₹83,51,425/- in its favour. TGV's claim for the sum of ₹22,50,000/- on account of toll maintenance charges for the period 11.11.2015 to 10.12.2015 was rejected but its claim for penalty/interest under Clause 19 of the Agreement was accepted. The Arbitral Tribunal awarded ₹6,36,086/- as penalty at the rate 0.2% for the first month of delay and 0.5% for the delay beyond one month quantified at ₹2,34,82,044/-. Thus, in aggregate, a sum of ₹3,24,69,554/- was awarded in favour of TGV.

Reasons and Conclusions

12. The Arbitral Tribunal (by majority) accepted the contention that TGV's claim for loss fall within the definition of *force majeure* events as contemplated under Clause 25(b)(ii) of the Agreement. One of the principal reasons indicated in the impugned award for accepting the claim is that NHAI had not rejected the same within the period of thirty days as specified under Clause 25(c)(i)(2) of the Agreement. Although, the Arbitral Tribunal has also accepted the claim for "*interest under Clause 19 of the Agreement*", the reasons for that are not discernible from the impugned award. It appears that the Arbitral Tribunal has awarded the said sum on the ground that NHAI had made no observations regarding the same.

13. The first and foremost question to be addressed is whether the reduction in volume of traffic passing through the toll plaza on account of rains and floods constitutes a *force majeure* event under Clause 25 of the Agreement. At this stage, it would be necessary to refer to Clause 25 of the Agreement. The relevant extract of the said Clause is set out below:-

“25. FORCE MAJEURE:

(a) NON-FORCE MAJEURE EVENT:

An event (i) which involves diversion of traffic of any kind, including but not limited to any diversion ordered/implemented by local authority or any State/Central Government for a period not exceeding 15 days in continuation; or (ii) where the road users opt to access/travel through the existing alternate free User Fee (toll) roads due to deteriorated road conditions/maintenance of road section. This may result into bypassing of User Fee Plaza/User Fee Collection Booths and use of any part of the said Section of the National Highway/said bridge by the users.

(b) FORCE MAJEURE EVENT:

Except as stated in Clause (a) above, Force Majeure event means an event or circumstances or a combination of events and circumstances referred to in this clause which are beyond the reasonable control of the Party or Parties to this Contract and which party could not have prevented or reasonably overcome with the exercise of its reasonable skill and care in relation to performance of its obligations pursuant to this Contract and which are of the nature, without limitation of those described below:

- (i) Publicly declared strike by registered and recognised association of Transporters exceeding 7 days. The date of going on strike and withdrawal or start of movement of traffic will be inclusive for the purpose of calculation of 7 days under this clause.
- (ii) Floods/Earthquake having materially adverse impact i.e. complete blockade of road.
- (iii) Act of war, invasion, armed conflict or act of foreign enemy, unexpected call up of armed forces, blockade, embargo, revolution, riot, sabotage, terrorism or act of such threat, or any other political or social event having material adverse impact on the performance of obligations of the parties thereof.
- (iv) Expropriation, acquisition, confiscation or nationalisation of the User Fee collection
- (v) Any change in law which has a material adverse effect on the obligation of the parties hereto.
- (vi) Any decision or order of a court or tribunal, which has a material adverse effect on the performance of obligations of the parties to this Contract.
- (vii) Suspension of traffic on the said section of National Highway/said bridge or any part thereof, exceeding 15 (fifteen) days at a stretch.
- (viii) Any event or circumstances of a nature analogous to the foregoing.

Either party to this Contract shall be entitled to suspend or excuse performance of his obligations, including remittance of installments by the Contractor to the Authority for the period of continuance of the Force Majeure event, under this Contract to the extent that such performance is impeded by an event of Force Majeure

prevailing continuously for more than 7 (seven) days at a time (or continuously for more than 3 (three) days at a time in case of no user fee collection at all at the toll plaza) for reasons not attributable to the Contractor.

(c) PROCEDURE FOR FORCE MAJEURE:

(i) NOTICE:

- (1) If a party claims relief on account of a Force Majeure event, then the Party claiming to be affected by the Force Majeure event shall, as soon as reasonably practicable and in any event within 7 days of becoming aware of the Force Majeure event, give notice giving details of the effects of such Force Majeure on the Party's obligations under this Contract to the other Party in writing, including the dates of commencement and actual/likely date of cessation of such Force Majeure and its effects, with necessary supporting documents and data.
- (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.

(ii) CONSULTATION AND DUTY TO MITIGATE:

- (1) The Party claiming relief under Force Majeure shall, at its own cost, take reasonable steps to remedy and mitigate the effects of the Force Majeure event and restore its ability to perform its obligations under this Contract as soon as reasonably possible. The Parties shall consult with each other to determine the measures to be implemented to minimise the losses of either Party as a result of the Force Majeure event.

- (2) The Party affected by Force Majeure shall keep the other Party informed of such efforts to remedy and make reasonable efforts to mitigate on a continuous basis and shall provide written notice of the resumption of performance hereunder.
- (3) Notwithstanding anything contrary to the specifically stated in this Contract no party shall be relieved of its obligations under this Contract by reason of impossibility of performance or any other circumstance whatsoever not beyond its control.
- (4) Any Party claiming cessation of the event of Force Majeure may, if the other party has not served a notice of resumption of performance, give notice to the other party, of cessation of such event, notifying the date of alleged cessation and unless the party to whom such notice is given does not dispute the same within 30 days of the receipt of such notice the Force Majeure event shall be deemed to have ceased to consequences thereof and shall be deemed to have come to an end on the date so notified.
- (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 .

(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.

(iv) The Authority on behalf of the Authority is authorised specifically to settle claims for force majeure events.”

14. As to what constitutes a *force majeure* event has to be determined in terms of Clause 25(a) and 25(b) of the Agreement. Whereas, Clause 25(a) of the Agreement specifies events, which would not constitute a *force majeure* event, Clause 25(b) of the Agreement lists out the events that would be considered as such.

15. Admittedly, there was no diversion ordered or implemented by any local authority or any State or Central Government. Further, this was not a case where the road users had opted to access/travel through an alternate route due to the deteriorated conditions of the highway in question. Thus, plainly, the events, which TGV claimed to be *force majeure* events fell outside the scope of Clause 25(a) of the Agreement and TGV’s claim could not be rejected under that clause.

16. In view of the above, the limited question to be addressed is whether the events fall within the scope of Clause 25(b) of the Agreement. At this stage, it would be necessary to examine the events, which according to TGV, constituted *force majeure* events. TGV had

claimed that Chennai, Southern part of the Andhra Pradesh and Pondicherry were seriously affected due to heavy rain during the period November-December, 2015. It claimed that Chennai was badly affected due to heavy rainfall and was flooded for about two weeks during the period in question resulting in the city of Chennai coming to a complete standstill. TGV claimed that the industries were closed for several weeks even after the water had receded. NHAI also claimed that rainfall had flooded National Highway at Ch. 138 and 139 in the Tada-Nellore stretch and, consequently, onward and inward traffic on NH-5 was cancelled resulting in considerable reduction in traffic.

17. It is not disputed that Nellore is at a distance of about 552 kilometers from the toll plaza in question; Pondicherry is 882 kilometers from toll plaza; and Chennai is 725 kilometers from the toll plaza in question. Thus, there is no dispute that the stretch of National Highway for which toll was being collected at the Vempadu Toll Plaza was not physically affected by any floods. The case set up by TGV is that there was no reduction in the volume of traffic on account of flooding in destinations to which the National Highway would eventually feed. TGV claimed that the said events fell within the scope of Clause 25(b)(ii) or Clause 25(b)(viii) of the Agreement. A plain reading of Clause 25(b)(ii) of the Agreement indicates that it contemplates floods and earthquakes having a materially adverse impact (i.e. complete blockade of road). Admittedly, the road in question was not completely blocked. Thus, on a plain reading of

Clause 25(b)(ii) of the Agreement, the events, which TGV claimed as *force majeure* events, cannot fall within the scope of Clause 25(b)(ii) of the Agreement. Clause 25(b)(viii) of the Agreement is also not applicable for the reason that the said clause contemplates events or circumstances, which are analogous in the nature to the other sub clauses as listed out under Clause 25(b) of the Agreement. Thus, for an event to fall within the scope of sub-clause (viii) of Clause 25(b) of the Agreement, it would be necessary that it has a similar adverse effect. The adverse effect contemplated as a result of floods or earthquakes is one of the complete blockade of the road in question. Therefore, flooding of Chennai, which merely caused reduction in the volume of traffic during the period in question would, obviously, not qualify as an event of “*an analogous nature*” as covered under Clause 25(b)(viii) of the Agreement.

18. For the aforesaid reasons, this Court is of the view that the impugned award to the extent that it awards the claim of ₹83,51,425/- for loss due to reduction in the volume of traffic is contrary to the terms of the Agreement and, therefore, is not sustainable.

19. The Arbitral Tribunal (by majority) was also persuaded to pass the impugned award for the reason that NHAI had not responded to TGV’s notices dated 04.12.2015 and 28.12.2015 within the period of thirty days, as contemplated under Clause 25(c)(i)(2) of the Agreement. Although, NHAI was obliged to raise a dispute regarding TGV’s claim within a period of thirty days, a failure to do so would

not necessarily entitle TGV for waiver of its payment obligations under the Agreement.

20. The Arbitral Tribunal has also awarded penalty under Clause 19 of the Agreement, which is quantified at ₹6,36,086/- for the first month and ₹2,34,82,044/- for a further delay beyond one month. The statement of claims filed by TGV before the Arbitral Tribunal indicates no foundation for the aforesaid claims. TGV had merely stated in the penultimate paragraph of the Statement of Claims that “*it was also entitled for interest under Clause 19 of the Agreement*”.

21. Clause 19 of the Agreement is set out below:

“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.”

22. It is apparent that Clause 19 of the Agreement provides for penalty for failure to pay installments. In terms of Clause 19(i) of the Agreement, NHAI is entitled to levy penalty at the rate 0.2% per day for the initial one month of delay in making the remittances and 0.5%

per day for further delay beyond the period of one month. Clause 19 of the Agreement does not contemplate payment of any interest or penalty to the Contractor. Thus, this Court finds it difficult to understand the reasons that prompted the Arbitral Tribunal to make an award of ₹2,41,18,130/- (₹6,36,086/- plus ₹2,34,82,044/-) in favour of TGV on the basis of Clause 19 of the Agreement. The award, in this regard, is patently illegal, perverse, unreasoned and, therefore, contrary to the public policy of India.

23. The learned counsel appearing for TGV had referred to the decisions of the Supreme Court in *Associate Builders v. Delhi Development Authority*: AIR 2015 SC 620; *Sumitomo Heavy Industries Limited v. Oil and Natural Gas Corporation Limited*: (2010) 11 SCC 296 as well as the decision of this Court in *National Highways Authority of India v. N.K. Toll Road Limited*: O.M.P. (COMM) 126/2017, decided on 23.03.2017 in support of his contention that the scope of Judicial Review under Section 34 of the Act was limited and this Court would not sit in appeal over the decisions of the Arbitral Tribunal.

24. There is no quarrel with the aforesaid proposition of law. Undoubtedly, the scope of judicial review under Section 34 of the Act is limited. However, it is well settled that an award, which runs contrary to the terms of the Agreement would squarely fall within the scope of Section 34(2)(b)(ii) of the Act. In this case, the impugned award is not only contrary to the terms of the Agreement, the decision to award interest/penalty under Clause 19 of the Agreement is *ex facie*

perverse and fails the *Wednesbury* test of reasonableness. Thus, the impugned award is not sustainable on the grounds as are set out under Section 34(2)(b) (ii) of the Act as well as Section 34(2)(a) of the Act.

25. In view of the above, the impugned award is set aside. The parties are left to bear their own costs.

MAY 24, 2018

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VIBHU BAKHRU, J

