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

+ **O.M.P. (COMM) No. 79/2019 & I.A. Nos. 2688/2019 & 2689/2019**

Date of decision: 20th February, 2019

M/S NATIONAL HIGHWAYS AUTHORITY OF
INDIA

..... Petitioner

Through: Mr. S. Nanda Kumar with Ms.
Tanu Priya Gupta, Mr. M.S. Saran
Kumar and Ms. Deepika Nandu
Kumar, Advocates

versus

M/S PONDICHERRY TINDIVANAM TOLLWAY
LTD.

..... Respondent

Through: Ms. Priya Kumar with Mr. Tejas
Chhabra, Advocates

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL):

I.A. No. 2687/2019 (Exemption)

1. Allowed, subject to just exceptions.

CAV 166-167/2019

2. Since counsel for the respondent has entered appearance, the caveats are discharged.

O.M.P. (COMM) 79/2019 & I.A. Nos. 2688/2019 & 2689/2019

3. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (in short “1996 Act”).

4. Via this petition, National Highways Authority of India (“NHAI”) seeks to challenge an interim award dated 16.10.2018.

5. The interim award pertains to claim no. 6 lodged by the respondent.

6. Insofar as the other claims are concerned, arbitration proceeding is on.

7. Briefly, the contours of the case are as follows: The respondent was given a contract for strengthening the existing carriageway from Km. 0.000 to Km 37.920, on the Pondicherry-Tindivanam Section of National Highway No. 66, in the State of Tamil Nadu.

7.1 In addition to that the respondent was also required to widen existing four lanes and to carry out improvement, operation and maintenance throughout the concession period on Build, Operate and Transfer (BOT) basis.

8. The respondent’s grievance stemmed from the fact that there was diversion of traffic in a manner which impacted toll collection. This resulted in the respondent seeking adjudication via arbitration.

9. As indicated above, the Arbitral Tribunal is in the process of adjudicating other claims of the respondent apart from claim no.6 qua which the impugned award has been rendered.

10. The Arbitral Tribunal, insofar as claim no. 6 is concerned, whereby permission was sought by the respondent to construct an Auxiliary Toll Plaza at Km 32 on the project highway, has accepted the plea made in that behalf.

11. NHAI, being aggrieved, as indicated above, has preferred the instant petition against the decision rendered by the Arbitral Tribunal in that regard.

12. Mr. Nanda Kumar, who, appears on behalf of NHAI, has, *inter-alia*, assailed the interim award on the ground that as per the extant provisions of the Concession Agreement, in particular, Clause 6.1 and the National Highway Fees (Determination of Rates and Collection) Rules, 2008 (in short “2008 Rules”), the determination made by the Tribunal is flawed.

13. In other words, according to Mr. Kumar, the Arbitral Tribunal has stepped outside the jurisdiction conferred upon it in terms of provisions of the Concession Agreement and the 2008 Rules.

14. As indicated above, Mr. Kumar has relied upon Clause 6.1 of the Concession Agreement.

15. In addition thereto, Mr. Kumar also relies upon Schedule G of the Concession Agreement.

16. Besides this, Mr. Kumar has also placed reliance on Rule 8(2) of the 2008 Rules.

17. Furthermore, it is Mr. Kumar's contention that as per Clause 12.1 of the Concession Agreement, which is the disclaimer provision, the respondent is presumed to have known the conditions obtaining at site and therefore, the plea of construction of Auxiliary Toll Plaza could not have been accepted by the Arbitral Tribunal.

18. A perusal of the relevant part of the interim award would show that Arbitral Tribunal has placed its interpretation on the provisions of the Concession Agreement in particular Clause 6.1.

18.1 The Arbitral Tribunal, thereupon, has come to the conclusion that all that the said clause prohibits is collection of toll fee via one Toll Plaza and not construction of more than one Toll Plaza.

18.2 In the facts and circumstances of this case, the Toll Plaza as constructed is situate at Km 6 +572 metres.

18.3 If the decision of the Arbitral Tribunal is to be implemented, then concededly, the second Toll Plaza will get constructed at Km 32.

18.4 The interpretation given by the Arbitral Tribunal to Clause 6.1 after scouring the gamut of material put before it is a plausible interpretation and therefore, to my mind, no interference is called for.

19. I must also indicate that Mr. Kumar has also found fault with the interim award on the ground that the Arbitral Tribunal has purportedly by an *ipse dixit* quantified the value of loss.

19.1 In my view, this submission is also untenable as against the claim of Rs.45,48,70,968/- upto 31.07.2018; the amount of interest being quantified at Rs. 12,86,10,964/-, though no interest is allowed on the awarded amount at present, a sum of Rs. 20,00,000/- p.m. has been quantified as reasonable compensation subject to adjustment.

19.2 The reasoning of the Arbitral Tribunal in that behalf is contained in the following extract:-

“83. However, considering all aspects, the AT is of the view that loss of revenue due to traffic leakage amounting to Rs. 20,00,000/- per month would be a reasonable figure. The AT, accordingly, awards an amount of Rs. 20,00,000/- per month as compensation for losses due to leakage of traffic to the Concessionaire with effect from 30.11.2014, with the provision that this figure would be adjusted once the ATP is constructed and fully operational at Km 32. At the end of the 3 months after operationalization of ATP at Km 32 the toll collected at both the Toll Plazas during 3 months will be compared with the toll collected at Plaza at Km 6+572 during the 3 months preceding the operationalization of ATP at Km 32 and difference in the toll collected per month will be worked out. If the difference is more than Rs. 20,00,000/- per month, the increase shall be paid to the Concessionaire for the period starting from 30.11.2014. Similarly, if the difference is less than Rs. 20,00,000/- per

month, the decrease shall be recovered from the Claimant for the period with effect from 30.11.2014.

Accordingly, the AT awards an amount of Rs. 20,00,000/- x 46 months i.e. an amount of Rs. 9,20,00,000/- to the Claimant as compensation for the toll loss for the period from 01.12.2014 to 30.09.2018. The awarded amount shall be paid by the Respondent to the Claimant within 90 days from the date of the award.

Compensation for further period from 01.10.2018 up to the actual date of operationalization of the ATP shall also be payable to the Claimant by the Respondent at the rate of Rs. 20,00,000/- every month.

In case the Respondent fails to order construction of the ATP at Km 32, then the awarded amount shall be paid to the Concessionaire within 90 days of publication of the Award.

If the Respondent orders the construction of ATP within 90 days, the adjusted awarded amount based on above proposed procedure according to the amount of toll collected after the ATP is established at Km 32 shall be paid to the Concessionaire from 30.11.2014 onwards, as already specified hereinbefore within 90 days of the operationalisation of ATP.

84. Interest

As, far as interest is concerned, no interest is allowed on the awarded amount at present. However, once the final revenue loss figures are established based on actual traffic count as indicated above, an interest at the rate of SBI PLR+2% as per Clause 31.2 of the CA will be payable on the final monthly compensation amounts with effect from the end of following month till actual payment.”

20. Having examined the matter, in my opinion, no fault can be found with the award, therefore, I find no merit in the petition and same is, accordingly, dismissed.

21. Consequently, the captioned I.A.s have been rendered infructuous.

RAJIV SHAKDHER, J

FEBRUARY 20, 2019

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