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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO(OS) (COMM) 110/2019**

NATIONAL HIGHWAYS AUTHORITY OF INDIA Appellant
Through Ms. Maninder Acharya, ASG with
Ms. Tanupriya Gupta & Mr. Viplav
Acharya, Advocates
versus

M/S PONDICHERY TINDIVANAM TOLLWAY LTD
..... Respondent
Through Ms. Priya Kumar, Mr. Tejas Chhabra
& Mr. Anand Chichra, Advocates

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE TALWANT SINGH

ORDER
10.07.2019

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Caveat No. 520/2019

1. Since counsel for the Respondent has entered appearance today, the caveat stands discharged.

FAO(OS) (COMM) 110/2019 & CM Appl. No. 23175/2019 (stay)

2. The National Highways Authority of India (NHAI) in this appeal challenged the impugned order dated 20th February, 2019 passed by the learned Single Judge dismissing the Appellant's OMP (Comm) 79/2019 filed under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenging an interim award dated 16th October, 2018.

3. 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 (NH) No. 66 in the State of Tamil Nadu.

4. The contract was on the Build, Operate and Transfer (BOT) basis. The Respondent was required to widen the existing four lanes and to carry out improvement, operation and maintenance throughout the concession period. Clause 6.1 of the concession agreement (CA) enabled the concessionaire (in this case the Respondent) during the operation period, “to levy, collect and appropriate the fees from the users of the project highway at one Toll Plaza pursuant to and in accordance with the notification”. Under clause 3.2 (iv) of the CA the concessionaire was entitled to:-

"iv. levy, demand, collect and appropriate the Fees from vehicles and persons liable to payment of Fees for using the Project Highway or any part thereof and refuse entry of any vehicle to the Project Highway if the due Fee is not paid;" .

5. The term ‘Toll Plaza’ was defined as:

“the 'structures' and 'barriers' erected on the Project Highway for the purpose of regulating the entry/exit of vehicles in accordance with the provisions of this Agreement.”

6. According to the Respondent/Claimant there is no prohibition in the CA for having more than one Toll Plaza. It contended that there was a leakage of traffic and an additional/auxiliary toll plaza was to be put up; the construction cost of which would be borne by the Respondent. When the parties were unable to resolve the disputes the matter came to be referred to a three member Arbitral Tribunal (AT) which passed an interim award on 16th October, 2018.

7. The AT took up Claim No.6 on priority basis for consideration for the purposes of passing an interim award filed by the Respondent in terms of which it sought approval of the NHAI for establishment of the Additional/ Auxiliary Toll Plaza. The Respondent also claimed damages for loss of Toll revenue from the Commercial Operational Date (COD).

8. The Respondent made a request before the AT that Claim No.6 should be considered at the first instance even before the other claims were adjudicated. This plea was not opposed by the NHAI. However, the NHAI objected to the claim contending that the erection of an Auxiliary Toll Plaza (ATP) was not permitted under the CA.

9. The AT in the impugned order noted in the discussion under Claim No.6 that this claim itself was in two parts. The first claim was that the Respondent was seeking permission for construction of the ATP at Km 32 at the Tindivanam end of project highway. The second part of the claim was for compensation of loss of toll due to leakage of traffic from the date of Commercial Operational Date till the approval of the ATP.

10. In the interim Award dated 16th October, 2018 the claim of the Respondent was upheld as being justified. It was noted by the AT that several letters have been exchanged between the parties on the issue of leakage of traffic. The AT itself undertook the site visit on 9th & 10th July, 2018 and observed the leakage of traffic from and to the Sedarpet Industrial Area. Factually, it was held by the AT that “it is clear that there is leakage of traffic from the Project highway and a number of vehicles are using the

road but do not pay any toll as they are not passing through the existing Toll Plaza at Ch. 6+572.”

11. A collective reading of the CA, the Fee Notification and Fee Rules led the AT to the conclusion that there was no bar on erecting an ATP. The only condition was that “Fee can be collected from the users only at One Toll Plaza but it does not prohibit erection of more than one Toll Plaza, which even as per the definition can be more than one.” For construction of the ATP at Km 32 at the cost of the Respondent it was directed that land would be provided by the NHAI free of cost. Further after the establishment of the ATP “a vehicle shall pay toll at the first point of entry only i.e. either at Km. 6+ 572 or at Km. 32. The systems installed at ATP shall be with the approval of the NHAI.”

12. In the operative portion of the interim Award, the AT awarded the Respondent Rs.20 lakhs per month as compensation of losses due to leakage of traffic with effect from 30th November, 2014 and clarified that “this figure would be adjusted once ATP is constructed and fully operational at Km-32.” The AT awarded Rs.20 lakhs for 46 months, i.e. Rs. 9.2 crores to the Respondent as compensation for the toll loss for the period 1st December, 2014 to 30th September, 2018 and further directed the payment to be made within 90 days of the interim award.

13. It was further held

“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.”

14. It was further clarified by the AT that:

“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 this 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.”

15. The NHAI challenged the above interim Award by filing OMP 79/2019 which was dismissed by the learned Single Judge by the impugned order. The learned Single Judge held that the interpretation by the AT of Clause 6.1 of the CA was a plausible one and did not call for interference. As regards quantifying the value of loss again, the learned Single Judge was of the view that against a claim of Rs. 45,48,70,968/- upto 31st July, 2008 and interest being quantified at Rs. 12,86,10,964/-, a payment of Rs. 20 lacs per month should be construed to be a reasonable compensation subject to adjustment.

16. This Court has heard the submissions of Ms. Maninder Acharya, learned ASG of India appearing for the NHAI. Her submission was that the interpretation placed by the AT on Clause 6.1 of the CA was erroneous as it admitted only one possible interpretation namely that there cannot be more than one Toll Plaza.

17. This Court agrees with the approach adopted by the learned AT and its conclusion that the language of Clause 6.1 of the CA does not indicate that only one Toll Plaza is to be constructed. It only says that the concessionaire is to collect the fee at one Toll Plaza. Even if there is more than one Toll Plaza, the collection has to be at one of them only. At the second Toll Plaza the vehicle having paid fees at the first one will pass through without payment of fees. Ms. Priya Kumar learned counsel appearing for the Respondent assures the Court that the understanding of the Respondent is likewise.

18. It was then submitted by Ms. Acharya that even assuming the second Toll Plaza is permissible, people coming through the second Toll Plaza should not be asked to pay the fee for the entire stretch but only the proportionate distance from where they entered the highway.

19. The Court is unable to agree with this submission for the simple reason that those entering the highway at the second Toll Plaza have avoided the first Toll Plaza and it is to prevent such leakage that the second Toll Plaza has become necessary. In that view of the matter, the interpretation placed by the AT cannot be found fault with.

20. As regards the quantification of loss with the construction of Additional Toll Plaza it has been clarified that it is subject to adjustment in the final figures that will be determined by the AT. The Court does not see any reason why it should interfere and exercise its jurisdiction under Section 37 of the Act.

21. There is no merit in this appeal. It is accordingly dismissed. The application is also dismissed.

22. *Dasti* under signatures of court master.

S. MURALIDHAR, J.

TALWANT SINGH, J.

JULY 10, 2019

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