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

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Date of decision: 14th October, 2019

+ **O.M.P.(I) (COMM.) 247/2019**

IRB AHMEDABAD VADODARA SUPER EXPRESS TOLLWAY
PRIVATE LIMITED Petitioner

Through Mr. Saurabh Kirpal, Mr. Sarthak
Sachdev, Mrs. Teressa Daulat and mr.
Mohnish P., Advocates.

versus

NATIONAL HIGHWAYS AUTHORITY
OF INDIA

..... Respondent

Through Ms. Padma Priya, Advocate.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J. (ORAL)

I.A. No. 14155/2019

1. This is application seeking condonation of delay of 28 days in filing the rejoinder.
2. Ms. Priya, learned counsel for the respondent, has no objection to the condonation of delay.
3. In view of the no objection and the reason stated in the application, the same is allowed. Delay of 28 days in filing the rejoinder is condoned.

4. Application is disposed of.

O.M.P.(I) (COMM.) 247/2019

5. The present petition has been filed under Section 9 of the Arbitration and Conciliation Act, 1996 (Act) with the following prayers:-

“A. Grant an extension, till the conclusion of the Arbitral proceedings, of the ad-interim protection granted to the petitioner vide Order dated 16.04.2019 in W.P. No. 3415 of 2019 by a Division Bench of Hon'ble Bombay High Court, from being faced with an action of termination of Concession Agreement dated 25.07.2011 in the contingency of default in payment of premium to the NHAI, while taking the undertaking of the petitioner on record before this Hon'ble Court that in the event the petitioner is unsuccessful in the arbitration, the premium for above period shall be payable by the petitioner on the principle of "premium deferment scheme" of the Central Government earlier agreed in supplementary agreement dated 06.06.2014 with applicable interest,

B. Grant ex parte ad interim orders in terms of Prayer A above;

C. Pass such further or other orders as it may deem fit and proper in the facts and circumstances of the case.”

6. Petitioner had filed a writ petition bearing No. 3415/2019 in the High Court of Bombay, seeking interim protection, being faced with an action of termination of the agreement on account of an alleged default in payment of premium to the NHAI. The High Court of Bombay had passed the following order on 16th April, 2019 granting interim protection to the petitioner:

"11. However, since we have noted that the petitioner is in arduous situation on account of existing statutory scheme which we have set out briefly in above paragraph, we deem it appropriate to exercise our jurisdiction conferred under Article 226 of the Constitution of India and for limited period we protect the petitioner Company from being faced with an action of termination of agreement in the contingency of default in payment of premium to the NHAI for the period of three months subject to the petitioners undertaking to the Court within the period of one week that in the event the petitioner is unsuccessful in the arbitration, the premium for above period shall be payable by the petitioner on the principle of "premium deferment scheme" of the Central Government earlier agreed in supplementary agreement dated 06.06.2014 with applicable interest. Needless to state that the petitioner would be entitled to claim further appropriate interim relief under the provisions of Sections 9 and 17 of the Arbitration and Conciliation Act 1996.

We make it clear that we have not deliberated on the issue on the merits of the matter and the opinion expressed by us is prima facie and the Board of Arbitrators would be at liberty to resolve the dispute strictly within the four corners of the agreement and the existing Statutory Scheme. As regards the challenge of the petitioner to Rule 7(1) of the National Highways Fee (Determination of Rates and Collection) Rules, 2008, we leave the said challenge open without going into the merits of the same at this stage. In the light of the aforesaid directions the Writ Petition stands disposed of".

7. A perusal of the order of the High Court of Bombay shows that the interim protection was granted for a period of three months, subject to an undertaking given by the petitioner. The said protection was to expire on 7th August, 2019. Prior to the expiry of the said period, the petitioner had filed the present petition.

8. On 6th August, 2019 when the present petition came up for admission, this Court had passed an order extending the protection given by the Bombay High Court, till the next date of hearing and the matter was listed on 27th August, 2019. The Court had also noted the submission of the respondent that the respondent had challenged the order of the High Court of Bombay before the Apex Court.

9. Respondent has filed reply to the present petition objecting to the extension of the interim order. One of the grounds raised is that the order of High Court of Bombay was challenged before the Apex Court.

10. The petitioner along with the rejoinder has placed on record the order passed by the Apex Court in the SLP bearing No. 21315/2019. The said order dated 11th September, 2019 reads as under:-

“After the impugned order has been passed, recourse to the Arbitration and Conciliation Act, 1996 has been resorted to by both sides appointing their respective arbitrators. The sitting of the arbitrators is yet to commence.

We are also informed that on an application being filed under Section 9 of the said Act by the respondent, the learned Judge of the Delhi High Court vide order dated 6th August, 2019 has given interim protection.

The result of the aforesaid is that the nature of interim protection would be worked out in those proceedings or before the arbitrator.

Learned Solicitor General for the petitioner expresses an apprehension that interim protection granted by the impugned order may be mis-construed as final interim arrangement. We see no reason for such an apprehension as the impugned order

clearly enunciates that the interim order would be as per the provisions of Sections 9 and 17 of the said Act and that they had not expressed any view on the merits of the matter as would influence the arbitrator.

The special leave petition is dismissed in the aforesaid terms.

Pending application shall also stand disposed of.”

11. A perusal of the order shows that the Hon’ble Supreme Court has not interfered with the order of the High Court of Bombay and infact the matter has been left to be decided by this Court under Section 9 and/or under Section 17 of the Act before the Arbitral Tribunal.

12. I have heard the learned counsels for the parties.

13. On 6th August, 2019, this Court had passed the following order:

“In my view as the Arbitral Tribunal could not be constituted for the reasons attributable to the respondent, the petitioner cannot be left remediless. As recorded in the order dated 16.04.2019, prima facie case in favour of the petitioner has already been established before the High Court of Bombay.

In view of the above, the interim order dated 16.04.2019 passed by the High Court of Bombay shall continue till the next date of hearing. The petitioner shall abide by the undertaking given before the High Court of Bombay on the same terms for the period of this extension as well.”

14. I am informed that both parties have nominated their Arbitrators and the arbitration proceedings will commence in the near future.

15. With the consent of the parties it is directed that this petition will be treated as an Application under Section 17 of the Act. The order passed by this Court on 6.8.2019 will continue till the decision of the Application under Section 17 of the Act by the Arbitral Tribunal.

16. Needless to say, that the Learned Arbitrator is at liberty to vary, modify, vacate or continue the said order.

17. Petition is disposed of in the above terms.

JYOTI SINGH, J

OCTOBER 14, 2019/yo/



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