

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

Judgment reserved on: 13.12.2018
Judgment pronounced on: 17.01.2019

+ ARB. A. (COMM.) 10/2018 & I.A. 3194/2018

NATIONAL HIGHWAYS AUTHORITY OF INDIA Appellant
Through **Ms. Gunjan S. Jain, Adv.**
versus
VIL ROHTAK JIND HIGHWAY PRIVATE LIMITED Respondent
Through **Mr. T.K. Ganju, Sr. Adv. with Mr. Krishna Vijay Singh, Mr. Manish Dembla, Mr. Nachiketa Goyal and Mr. Parakram Roy, Advs.**

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.

1. This is a petition filed under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 (in short "1996 Act") against the order dated 12.01.2018 passed by the Arbitral Tribunal.
2. By virtue of the said order the Arbitral Tribunal disposed of the application filed by the appellant i.e. National Highways Authority of India (hereafter referred to as "NHAI") and an application filed by the respondent i.e. VIL Rohtak-Jind Highway Pvt. Ltd. (hereafter referred to as "VIL").
3. NHAI, evidently, had moved an application for early hearing and vacation of interim order dated 25.07.2016 passed by this Court while VIL had moved an application for seeking stay and withdrawal of notices dated 08.08.2015, 17.11.2015 & 13.07.2016 issued by NHAI.
4. As indicated above, both these applications were disposed of by the Arbitral Tribunal via the impugned order.
5. In order to adjudicate upon the appeal, the following broad facts need to be noticed.

5.1 In and about February, 2011, NHAI had issued Notice Inviting Tender (in short 'NIT') for 4 laning of Rohtak-Jind Highway from km 307.000 to km 347.800 of National Highway NH-71 and connecting link from km 347.800 of NH-71 to km 9.400 of NH-71A in the State of Haryana (hereafter referred to as "subject project"). The subject project was to be executed as BOT (Toll) basis on DBFO pattern under NHDP Phase-III.

5.2 VIL against the NIT issued by NHAI preferred its bid and, consequently, was declared successful.

5.3 Resultantly, a Letter of Award (LoA) dated 23.12.2011 (in short "LOA") was issued in favour of VIL. The price bid quoted by VIL was Rs.68.5 crores which was 24.183 % of the estimated total cost of the subject project. Concededly, the estimated total cost of the subject project is Rs.283.25 crores.

5.4 As a consequence of the LOA being issued in favour of VIL, parties proceeded to execute a Concession Agreement (in short "C.A."). The C.A. was executed on 07.03.2012. The C.A. had a tenure of 30 years which commenced from the appointed date and included the period of 2 years allocated for construction of the subject project. *Inter alia*, the C.A. provided the mode and manner in which it could be terminated.

5.5 It is also pertinent to note that the appointed date for the completion of the subject project, as agreed to between the parties, was 09.10.2013 and the schedule date for completion of the very same project was fixed as 08.10.2015.

5.6 In terms of the C.A., a performance bank guarantee dated 03.09.2012 towards performance security in the sum of Rs.14.16 crores was furnished by VIL.

5.7 It is also not in dispute that the first and second milestones were achieved by VIL only in the grace period. The first milestone was achieved on 24.07.2014 while the second milestone was achieved on 07.01.2015. The first milestone required VIL to achieve 10% financial progress of the Total Capital Cost. VIL was required to reach this milestone on 08.04.2014. Likewise, insofar as the second milestone was concerned, VIL was to achieve 35% financial progress of the Total Capital Cost and start of structure. The due date for achieving this milestone was 08.10.2014.

5.8 However, insofar as the third milestone was concerned whereby VIL was to achieve financial progress equivalent to 70% of the total capital cost it failed to reach the said milestone even after recourse having been taken to the grace period. The due date for the third milestone in the usual course was 10.04.2015. However, if the grace period were to be included VIL ought to have reached this milestone by 09.07.2015.

5.9 In the interregnum, NHAI, it appears, had released first tranche of the grant amounting to approximately Rs.33 crores. It appears that VIL had sought release of the Performance Bank Guarantee furnished by it. The Independent Engineer (in short "I.E.") appointed for the project made a recommendation in that behalf on 23.04.2015. The I.E. recommended that the Performance Bank Guarantee could be released as VIL was not in breach since the grace period at that juncture qua the third milestone had still not been exhausted.

6. Apparently, on 15.06.2015, VIL sought extension of time for completion of subject project. The extension of time was sought by VIL, *inter alia*, on the ground that Right of Way (ROW) was not available in the Rohtak bypass, there was delay in felling trees, shifting utilities etcetera. This was, broadly, the reason given by VIL for not being able to commence

work on all projects and other structures. The I.E. on 16.06.2015 had declined the request of VIL on various counts including the ground that 40 kms of road length was available since the beginning of the subject project and as against this VIL had not completed work even in 1 km stretch.

6.1 It appears that, in and about 17.6.2015, the senior lender amongst the consortium of banks, that is, Central Bank of India, (in short 'senior lender bank') had conveyed that it was not inclined to disburse further funds qua the subject project for a variety of reasons which included, amongst others, non-payment of dues by the guarantor, non-payment of taxes, non-filing of returns, lack of proof of infusion of equity and retention of money owed to the sub-contractor. In the very same letter, senior lender bank emphasized the fact that overdue amounts were not paid and hence pre-condition for release of funds was not fulfilled.

6.2 Furthermore, it appears that I.E. on 17.7.2015 wrote to VIL that since it had failed to achieve the third milestone by the scheduled date i.e. 10.4.2015, it had opened itself to imposition of damages in terms of Clause 12.4.2 of the C.A. According to the I.E., the quantum of damages which were payable upto 17.7.2015 was a sum of Rs.11.328 lakhs.

6.3 This propelled NHAI to issue a cure notice to VIL on 8.8.2015. According to NHAI, the progress report available qua civil works for the months of April, May and June, 2015, showed that the work worth Rs.2 Crores, Rs. 5 Cores and Rs.0.5 Crores had been completed by VIL.

6.4 Furthermore, according to NHAI financial progress which was achieved till June, 2015 was to the extent of 38%. VIL, according to NHAI, had been able to carry out only clearing and grubbing work which, is the foundation layer for construction of further layers that had to be put up at the project site.

6.5 Given this situation, on 17.11.2015 a notice of Intention to Terminate (in short “ITT”) was served by NHAI on VIL. A copy of ITT was also served on the representative of the lenders. The reason the copy of the ITT was served on the lenders’ representative was to enable the lenders to exercise the right of substitution so as to protect their investment in the subject project.

6.6 As expected, VIL filed its reply to the ITT. This reply is dated 3.12.2015. In the reply, VIL offered its explanation for not being able to commence civil construction work at the project site.

6.7 It is in the background of these circumstances that a joint meeting of the representatives of NHAI and VIL was convened on 8.4.2016 to review the progress of the subject project. The Minutes of Meeting though were generated on 25.4.2016. A perusal of the Minutes of Meeting would show that at this meeting, the Project Director (PD) NHAI took, *inter alia*, the stand that VIL had not carried out any work at the site since July 2015, save and except some work in February and March, 2016. Accordingly, senior lender bank was advised to suggest a substitute concessionaire in place of VIL, failing which NHAI would be constrained to terminate the C.A. Time for this purpose was accorded till 19.05.2016.

6.8 It appears that on 18.5.2016, senior lender bank wrote to NHAI that VIL had diverted the mobilisation advance to the extent of Rs.90 crores and that VIL was no longer interested in commencing the work at the project site.

6.9 According to NHAI, given this backdrop, it had no choice but to issue notice for terminating the C.A. Accordingly, NHAI issued a termination notice dated 13.7.2016, which was to take effect from 23.7.2016.

6.10 On 14.7.2016, the I.E. informed the PD, NHAI, that VIL had not carried out any work between the 25.6.2016 and 14.7.2016 due to non-availability of manpower and machinery. Furthermore, NHAI was informed that VIL had demobilized its machines installed at the project site and that even the loader had been taken away by the concerned contractor(s) as their bills had not been settled.

6.11 In response to the termination notice, VIL served a reply dated 18.7.2016 on NHAI. Interestingly, according to NHAI, *inter alia* in the reply an admission had been made by VIL that nearly 85.31% of the required land was made available to it within 90 days of the appointed date. VIL, it appears, also accepted the fact that it had agreed to 9.10.2013 being declared as the appointed date provided the requirement to fulfill the conditions precedent was waived.

6.12 In sum, in defence, VIL raised the grievance that it could not discharge its obligations under the C.A. as 100% ROW free from all encumbrances was not made available to it.

6.13 The record shows that VIL assailed the termination notice dated 13.7.2016 by way of a petition being WP (C) No.6305 of 2016. This writ petition was, ultimately, dismissed as withdrawn on 22.7.2016 with liberty being given to VIL to initiate a proper proceedings under Section 9 of the 1996 Act. Consequently, on the very same date i.e. 22.7.2016, VIL filed a Section 9 petition, which was numbered as: OMP(I) (COMM.) No.310 of 2016. In this petition, this Court passed an order dated 25.7.2016 whereby NHAI was injuncted from taking coercive measures against VIL.

6.14 According to NHAI, this direction was issued to enable parties to explore the possibility of arriving at an amicable settlement and to trigger revival of the subject project.

6.15 During the pendency of OMP(I)(COMM) No.310/2016, this Court, on 26.9.2016, directed the I.E. to submit a report as to whether the work on the project site was commenced in right earnest by VIL, since, it was the stand of VIL that the termination notice dated 13.07.2016 was conditional in nature, and therefore would not take effect if the work was resumed in right earnest by VIL within the notice period (i.e. 13.7.2016 to 22.7.2016). The I.E. filed an affidavit dated 06.10.2016 in the Court as regards the work carried out by VIL. In the I.E.'s affidavit it was indicated that a miniscule amount of work had been commenced by VIL with effect from 22.7.2016.

6.16 The stand of NHAI that the C.A. stood terminated was recorded by the Court in the proceedings dated 8.11.2016.

6.17 Evidently, on 7.11.2016, a joint meeting of the representatives of NHAI, senior lender bank and VIL was convened to explore the possibility of the work at the project site being resumed. Since, VIL did not commit to infusion of funds in the subject project, the conclusion which NHAI drew was that it had no intention of completing the subject project.

6.18 The record also shows that this Court vide order dated 17.11.2016 at the request of the counsel for VIL had directed that a meeting of the MD of VIL and the Chairperson of NHAI should be convened to attempt an amicable resolution of the dispute. Consequently, on 14.12.2016, a meeting was held between the Chairperson of NHAI and the MD of VIL. At this meeting, it emerged that VIL had diverted funds from the escrow account and that between July, 2015 and November, 2016, VIL had carried out work worth only Rs.8 Crores. Furthermore, it also emerged that VIL was not ready to bring back the diverted amounts to the escrow account.

6.19 In a nutshell, according to NHAI, what emerged was that even if the date for execution of the subject project was extended, VIL did not have the

requisite financial wherewithal to complete the subject project. According to NHAI, a minimum sum of Rs.300 Crores at that point in time was required for completion of the project.

6.20 It is in these circumstances that on 21.12.2016, counsel for VIL took the stand that it would have VIL deposit substantial funds in the escrow account to establish its credentials. At this hearing, NHAI appears to have taken the stand that the amount which VIL was required to deposit in the escrow account was a sum of Rs.90 Crores (as adverted to in paragraph 3.1 of the Minutes of Meeting dated 14.12.2016).

6.21 In this background, NHAI filed an affidavit dated 3.1.2017 before this Court in OMP(I) (COMM)No.310/2016. Via the affidavits, the Court was informed that it had examined VIL's proposal and found that the same was bereft of means for fund infusion and did not identify proper resources for completion of the subject project. It was conveyed that the proposal was conditional and was filed only with the intention of delaying the subject project.

6.22 Having regard to the aforesaid, the learned Single Judge vide order dated 9.1.2017, vacated the interim order dated 25.7.2016, *albeit*, after noticing that VIL was unable to demonstrate its financial capability to execute the subject project even if the banks were to disburse the entire balance amount sanctioned in its favour.

6.23 Being aggrieved, VIL preferred an appeal against the order dated 9.1.2017. The Division Bench set aside the order and directed that the matter be decided on merits. Consequently, on 20.1.2017 when the matter was received on remand by the learned Single Judge, it was renotified for 23.2.2017.

6.24 In the interregnum, on 16.2.2017, the Arbitral Tribunal was constituted as per the conditions contained in this Court's order dated 20.1.2017. Since, at the hearing held on 23.2.2017, on behalf of VIL, the stand taken was that not even an inch of land was available, which was free of hindrance, a direction was issued by the learned Single Judge to the I.E. to survey the entire site and submit a detailed report as to the status of the subject project.

6.25 Consequently, on 12.4.2017, the I.E. submitted a report wherein it was, inter alia, stated that on the road length of 48.60 km impediments in the form of structures were found on a road length of only 1.26 km. In other words, nearly 47 km of land was available, which was free from hindrances. The I.E. also observed that on this stretch (i.e. 47 km of land) the work completed by VIL uptill March, 2017 was that 30.80%.

6.26 Furthermore, the I.E. appears to have also given details of utilities that had been shifted and the extent to which environmental and forest clearances which had been obtained. In sum, according to the I.E., VIL could have proceeded with the execution of the subject project as hindrances were found only on a small stretch of the road length.

6.27 On 12.5.2017, the learned Single Judge disposed of OMP(I) (COMM) No.310/2016 by having it placed before the Arbitral Tribunal. A direction was issued that the Arbitral Tribunal would treat the petition filed under Section 9 as an application under Section 17 of the 1996 Act. Liberty was also given to the Arbitral Tribunal to confirm, vacate or modify the interim order dated 25.7.2016 passed by this Court.

7. It is in this context that the applications were moved not only by NHAI for early hearing and for vacation of the interim order, but also by

VIL for issuance of directions for staying and withdrawing notices, to which, I have made a reference above.

8. The Arbitral Tribunal, as alluded to above, right at the beginning, disposed of both the applications via the impugned order.

9. In support of the appeal, arguments were advanced by Ms. Gunjan S. Jain, Advocate, while on behalf of VIL, submissions were advanced by Mr. T.K. Ganju, Senior Advocate, as instructed by Mr. Krishna Vijay Singh, Advocate.

10. Ms. Jain, broadly, made the following submissions:

- (i) There was enormous amount of delay in disposing of NHAI's application for vacation of stay. In this behalf, reference was made to the fact that submissions were heard by the Arbitral Tribunal on 3.7.2017, 1.8.2017, 2.8.2017, 14.9.2017, 15.9.2017, 14.10.2017 and 28.11.2017 before the impugned order was passed.
- (ii) The continuation of the interim order, in effect, has resulted in specific performance of a determinable contract when compensation can be an adequate remedy if NHAI was found to be in breach of its obligation.
- (iii) The abandonment of the work including maintenance of the subject site since July, 2015 by VIL involves danger to the transiting public.
- (iv) The Arbitral Tribunal while granting the interim relief has failed to take into account three well established tests, which are necessary for concluding as to whether an interim order should be passed in a given matter. These tests being: (i)

whether or not a good *prima facie* case is made out, (ii) balance of convenience and (iii) irreparable injury, which cannot be compensated in terms of money. A perusal of the impugned order would show that the Arbitral Tribunal instead took into account circumstances, which were far removed from the three tests adverted to above.

(iv)(a) By way of an example, it was pointed out that a reference was made to the fact that NHAI proposed to blacklist VIL. This submission, according to the counsel, was not made in the pleadings filed with the Arbitral Tribunal, but was introduced in the written synopsis filed before the Arbitral Tribunal.

(iv)(b) It is a matter of record that the Arbitral Tribunal took into account this aspect as one of the factors for granting an injunction without noticing that the list containing VIL's name stood withdrawn on 3.11.2017.

(iv)(c) Insofar as the other reasons are concerned, which are set out in the impugned order, such as arrangement of funds by VIL, had no basis. As a matter of fact, VIL had abandoned the work since July, 2015, the machinery and manpower had been demobilized, as noted by the I.E. Therefore, on facts, VIL had made out no case let alone a *prima facie* case, which would have demonstrated that it had a necessary wherewithal to complete the project.

(v) The subject project was a public utility project which NHAI was bound to complete within the given time frame. In other

words, the delay in completing the subject project and the continued stay entailed heavy costs to the public at large.

11. On the other hand, Mr. Ganju made the following submissions:

- (i) Firstly, the appeal is *mala fide* inasmuch as NHAI stalled the grant of consent to extend time for conclusion of arbitration proceedings for nearly six months. Had the extension been acceded to by NHAI, the arbitration proceedings could have progressed and would, perhaps, by now have neared completion.
- (ii) The interim order passed by this Court was continued by Arbitral Tribunal as it was of the view that it would be in the interest of parties if the matter is heard and decided on merits. Therefore, the vacation of interim order, at this stage, which has continued for nearly 22 months would cause an imbalance, a situation which the Arbitral Tribunal was keen to avoid pending adjudication of the dispute on merits.
- (iii) NHAI which is an instrumentality of the State is bound by law to act fairly and reasonably even when it operates in the realm of private contracts. Courts in the past have interfered, where obeisance is not paid by State and its instrumentalities to these aspects, prior to termination of contracts. Reliance in this behalf was placed on the following judgments:
 - a. *Gwalior-Jhansi Expressway Limited vs. National Highway Authority of India*, (2014) 209 DLT(CNB) 11.
 - b. *Hyderabad Cricket Association vs. Visaka Industries Limited*, (2012) 1 Arb. LR 341

- c. *Pioneer Publicity Corporation vs. Delhi Transport Corporation & Anr.* , 2003 (1) Arb LR 672 (Delhi)
 - d. *Atlas Interactive (India) Private Limited vs. Bharat Sanchar Nigam Limited & Anr.*, (2006) 126 DLT 504
 - e. *Softline Media Ltd. vs. Delhi Transport Corporation*, 2002 Supp Arb LR 632
 - f. *KSL & Industries Ltd. vs. National Textiles Corporation Ltd.* , 2012 SCC Online Del 4189.
 - g. *Bakshi Speedways vs. Hindustan Petroleum Corporation Limited* 162 (2009) DLT 638.
- (iv) That the C.A. is different from an EPC contract. In contracts of like nature, the entire or a substantial amount of investment is made by the contractor in the hope that he will recover the investment and make profits over a period of time; the tenure of these contracts being long. In this case, VIL is to recover its investment from toll charges over a period of 28.5 years. The C.A., therefore, could not have been terminated except for justifiable cause. The C.A. is not an agreement which is determinable as understood in the matter of *IOCL Vs. Amritsar Gas Services Ltd*, (1991) 1 SCC 533.
- (v) VIL's case falls within the ambit and scope of the provisions of Section 14(3)(c) of the Specific Relief Act, 1963 (in short "SR Act").
- (vi) The C.A. envisages collection of toll once 75% of the construction is completed by VIL. Clause 37.3.1, in fact, prohibits payment of any compensation or termination payment

to VIL in case termination is made prior to the project reaching the commercial operation date i.e. prior to completion of at least 75% of the construction. Therefore, if NHAI is permitted to terminate the contract at this stage, VIL would not be able to claim any compensation on account of the provision made in Clause 37.3.1 of the C.A. Furthermore, it would be impossible for VIL to calculate damages, which would translate into loss of entitlement to collect toll over the next 28.5 years.

(vii) VIL has invested a huge amount of money in the subject project. In this behalf, reference was made to the fact that Rs.72.36 crores have been invested in the form of equity and a further sum of Rs.132.50 Crores in the form of loan out of a total sanctioned loan facility of Rs.270 Crores. In all, VIL has invested, approximately, a sum of Rs.205 Crores on the subject project which would be lost if the purported termination of the C.A. is sustained. VIL would not only lose the investment already made, but would also be saddled with the liability in the form of interest.

(viii) The purported notice of termination dated 13.7.2016 was conditional inasmuch as it required NHAI to demonstrate that it had resumed the work of construction in right earnest.

(viii)(a) In this behalf, reference was made to letters dated 18.7.2016 and 20.7.2016 to demonstrate that the lender banks were in the process of approving a revised financial plan and that VIL had recommenced work on the subject project.

(viii)(b) In support of this submission, reliance was also placed on the letter dated 20.7.2016 issued by the senior lender bank,

whereby, a request was made to NHAI to withdraw the termination notice as VIL had recommenced work on the subject project. The contention was made in the context of the leeway given in the termination notice that VIL had undertaken works on the subject project during the period spanning between July and August, 2016 and also between October and December, 2016.

- (ix) Despite VIL not having reached the third milestone within the designated time span, the I.E. vide his letter dated 23.4.2015 had indicated that VIL was not in default. This aspect was also reiterated by NHAI in its own letter dated 27.4.2015. However, for the reasons best known, the I.E. did a complete summersault when VIL asked for extension of time. The extension of time was rejected by the I.E. vide his letter dated 16.6.2015. This u-turn of the I.E. was on account of the complaint lodged by VIL against the conduct of, one, Mr. Saroj Kumar Sanjeev, who was associated with subject project. The complaint was made by VIL vide its e-mail dated 17.4.2015. The fact that NHAI had sought comments on the complaint is evident on perusal of its own communication dated 22.4.2015.
- (x) That hindrances were placed at every kilometer of the project site is apparent upon perusal of the I.E's i.e., survey report appended as Annexure R-30 to the said report. The contention was that laying of WMM (Wet Mix Macadam), DBM (Dense Bituminous Macadam) and BC (Bituminous Concrete) mechanically was not feasible due to the hindrance placed in the project stretch.

- (xi) The fact that the lender banks were willing to disburse the requisite funds since August, 2016 provided NHAI extended commercial operation date emerges upon perusal of letters dated 29.8.2016 and 10.10.2017.
- (xii) It is clear that if NHAI were to extend time for completion of the subject project, banks would disburse funds and VIL would be able to achieve provisional operational commercial date within a period of nine months and final commercial operation date within a period of one year. On the other hand, if NHAI were to press for continuation of the termination notice, a period of at least one year would be required for commencement of construction by which time costs would escalate and NHAI could be required to give a higher grant. Therefore, it would be in the interest of public at large if VIL were allowed to complete the subject project.
- (xii)(a) By way of example, reference was made to another CA, pertaining to adjoining Jind-Punjab border Section of NH 71 executed by NHAI. This CA was terminated on 31.7.2015, whereupon, a new tender was awarded only on 30.3.2017 i.e. after a delay of nearly twenty (20) months. The appointed date for the new tender was declared as 5.6.2017.
- (xiii) There was no diversion of funds as alleged or at all. The lender bank's relevance to this aspect in its letter dated 18.5.2016 was on account of a misunderstanding and once the misunderstanding was removed, this issue was not raised by the lender bank.

- (xiv) The fact that lender banks had agreed to disburse funds would show that the allegation of diversion was not made out. VIL in this behalf sought to place reliance on letter dated 29.12.2016. The submission that general public was being inconvenienced on account of non-maintenance of the subject highway was untenable as NHAI had been maintaining the same and, resultantly, had filed a counter claim seeking a reimbursement of sum of Rs.10.27 crores for maintaining the project Highway.
- (xv) A perusal of Clause 9.3 of the C.A. and Clause 8 of the Performance Bank Guarantee would show that it was conditional. NHAI was required to release the subject bank guarantee (given towards performance security) upon VIL expending in aggregate not less than 20% of the project cost. The only caveat entered in the aforementioned provisions was that the performance security will not be released if VIL was in breach of its obligations under the C.A. The performance security i.e. the bank guarantee was to remain in force for a period of one year from the appointed date. VIL had already fulfilled the aforementioned conditions and therefore, ought to have been released of its obligation to maintain a performance security which was given in the form of a performance bank guarantee. In this behalf, it was pointed out that the period of one year from the appointed date had expired on 8.10.2014 and that VIL had already spent more than 20% of the capital cost by that date. The fact that the I.E. as also the PD, NHAI had recommended release of performance security i.e. the subject performance bank guarantee, was sought to be demonstrated by relying upon the letters dated 23.4.2015 and 27.4.2015 issued by aforementioned functionaries. In support of the submission

that the subject bank guarantee was conditional, the following judgments were relied upon:

(a) *Hindustan Construction Co. Ltd. Vs. State of Bihar and Others*, (1999) 8 SCC 436.

(b) *Larsent & Turbo Limited Vs. Maharashtra State Electricity Board and Others*, (1995) 6 SCC 68.

(xvi) This Court ought to interfere with the order of the Arbitral Tribunal only if it finds the order to be perverse and unsustainable in law. The argument was, that the scope of interference was narrow and ordinarily, the Court, is averse in interdicting discretion employed by the Arbitral Tribunal. In this behalf reliance was placed on the following judgments:

(a) *Bakshi Speedways vs. Hindustan Petroleum Corporation Limited*, 162 (2009) DLT 638.

(b) *Emaar MGF Land Limited vs. Kakade British Realities Pvt. Ltd. & Anr.* 2013 (4) ARBLR 349 (Delhi).

(c) *Ircon International Limited vs. Simplex Projects Limited*, 2016 (6) ARBLR 61 (Delhi).

(d) *Metro Buildtech Pvt. Ltd. vs. Standard Chartered Bank*, 2012 (2) ARBLR 391 (Delhi).

(e) *Subhash Chandra Chachra and Ors. vs. Ashwani Kumar chachra and Anr.* 2007 (1) ARBLR 288 (Delhi).

Reasons

12. I have heard the counsel for the parties and examined the record.

13. A perusal of the impugned order would show that the Arbitral Tribunal has refused to vacate the stay granted by this Court, despite an application moved by NHAI in this behalf, for three broad reasons.

13.1 Firstly, that there was a likelihood that VIL would be blacklisted for three years and the subject project if re-tendered during the pendency of the arbitration proceedings would be detrimental to the interest of VIL as damages may not be an adequate remedy.

13.2 Secondly, the conclusion of the arbitration proceedings would not take much time. At that point in time, it is required to be noted that only pleadings stood completed.

13.3 Thirdly, VIL had contended that it had managed to arrange funds and if opportunity was accorded, it could revive the project and have the same completed.

14 In sum, the Arbitral Tribunal observed that till legalities qua termination of the contract which had emerged were adjudicated upon, the interim order passed by this Court should continue to operate.

14.1 It must be noted that the Arbitral Tribunal also adverted to the fact that it was conscious of the fact that inconvenience was caused to the general public when completion of the subject project was delayed. Therefore, the Arbitral Tribunal, as a logical corollary, directed expeditious hearing in the main matter. Furthermore, liberty was also given to NHAI to seek vacation of the order if VIL were to delay the conclusion of the arbitration proceedings.

15 It is in this context that the prayer made by NHAI to deduct the amounts towards purported claims from the grant which remained to be released in favour of VIL was disallowed.

15.1 Furthermore, NHAI was restrained from encashing the subject performance security granted in the sum of Rs.14.16 Crores. The observation made in this behalf by the Arbitral Tribunal was that the relative

merits of the arguments of both sides in relation to Clause 9.3 of the C.A. would be examined at the stage of final hearing of the matter.

15.2 However, the prayer made by VIL to extend the timeline for achieving the third milestone and for permitting completion of the subject project was also disallowed.

15.3 Insofar as the submission made on behalf of NHAI that granting extension of time would tantamount to allowing specific performance of the C.A. was concerned, the Arbitral Tribunal observed that if this submission of NHAI was accepted at this stage, it would amount to giving final relief at an interim stage which was impermissible under the provisions of Section 17 of the 1996 Act.

15.4 Based on a similar rationale, VIL's plea for withdrawing notices dated 8.8.2015, 17.11.2015 and 13.7.2016 was also disallowed. Likewise, the prayer made by NHAI that it should be permitted to re-tender the remaining work was, thus, also disallowed. The prayer made for award of costs by both VIL and NHAI was disallowed with the observation that the same would be considered at the final hearing of the matter.

16 Before I proceed further, I may only indicate that two aspects that arose for consideration *vis-à-vis* the arbitration proceedings, qua which, orders were passed by me.

16.1 The first aspect was subject matter of order dated 15.10.2018, which was passed by me, in OMP (MISC.)(COMM.) No.42/2018, filed by VIL, under Section 29A of the 1996 Act. By this application, VIL had sought extension of time for conclusion of arbitration proceedings which was resisted by NHAI, principally, on the ground that it was aggrieved by the order dated 12.1.2018 passed by the Arbitral Tribunal, which is the order that is impugned in the instant appeal.

16.2 After having regard to the entirety of the circumstances and given the fact that the matter had reached by then, the stage of admission and denial of documents and filing of evidence, I had via order dated 15.10.2018 extended time to conclude the arbitration proceedings by a period of 12 months.

16.3 The second aspect which came to the fore was when a plea was raised on behalf of NHAI that the rigour of order dated 25.07.2016 ought to be relaxed till such time the appeal was heard and disposed of. Vide order dated 13.11.2018, I granted NHAI the liberty to open fresh tenders, subject to the condition that a final contract would not be executed with new concessionaire till further orders of the Court. With regard to this aspect, during the course of the final arguments in the appeal, I was informed by the counsel for NHAI that the tenders, though, opened, had not been fully examined.

17 Given this factual context and the essential ingredients of the impugned order, to my mind, what I am required to consider is (i) as to whether the Arbitral Tribunal has misdirected itself in disposing of the application filed by NHAI. The reason why I am examining the impugned order from the point of view of the reliefs sought in the application filed by the NHAI only, is that, VIL has not come up in appeal against the said order.

17.1 Suffice it to say that the bench mark for this Court, if I may use that expression, for interfering with the interim order passed by an Arbitral Tribunal in an ongoing arbitration proceedings would be whether or not the Arbitral Tribunal has committed an egregious error of law by ignoring the settled principles of law which has resulted in impacting the the rights of the

parties (See *Wander Ltd. and Anr. V Antox India P. Ltd.*, 1990 (Supp) SCC 727 at page 733 para 14¹)

17.2 Since, the Arbitral Tribunal was hearing an interlocutory application under Section 17 of the 1996 Act wherein vacation of stay of the order passed by this court on 25.07.2016 was sought, it was bound to deal with the pleas made by NHAI for vacating the order of stay by resorting to principles which are analogous to principles employed while disposing of an interlocutory application under Order XXXIX Rules 1 & 2 of the Code of Civil Procedure, 1908 (in short 'CPC'). The time tested guidelines which Courts have enunciated for this purpose are:

- (i) First, whether or not the party seeking interim relief has, *prima facie*, a good chance of succeeding in the case; vexatious and frivolous applications need to be rejected right in the beginning.
- (ii) Second, where does the balance of convenience lie. If the balance of convenience stands on an even keel, then, the comparative strength of each party's case may have to be assessed.
- (iii) Whether the failure to grant injunction would lead to irreparable injury which could not adequately compensated by payment of money.

¹ 14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in *Printers (Mysore) Private Ltd. v. Pothan Joseph* [(1960) 3 SCR 713 : AIR 1960 SC 1156] : (SCR 721)

"... These principles are well established, but as has been observed by Viscount Simon in *Charles Osenton & Co. v. Jhanaton* [1942 AC 130] '...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case'."

The appellate judgment does not seem to defer to this principle.

18 In this case, as noted above, the Arbitral Tribunal has provided three broad reasons. First, that there is every likelihood of VIL being blacklisted for a period of three years.

18.1 The petitioner's counsel, in this behalf, vehemently argued that this was an aspect which was not even alluded to by VIL in its pleadings and that it was introduced after the conclusion of arguments by a sleight of hand in the written submissions.

18.2 Furthermore, during the course of proceedings, Ms. Jain pointed out, a fact which was not disputed before me by Mr. Ganju that initially a list was taken out of those entities which had been blacklisted which included VIL, which, was, however, withdrawn on 03.11.2017 prior to the impugned order being passed. Besides this, Ms. Jain in no uncertain terms informed me that there was no proposal to blacklist VIL and that in any event, if that step was taken, it would have to be preceded by a show cause notice, followed by an opportunity to VIL to file a reply and being heard in support of its defence.

18.3 Clearly, in view of the above, the reason given by the Arbitral Tribunal that VIL carried an apprehension that it would be blacklisted was bereft of factual basis. As a matter of fact, since VIL had introduced this aspect in its written submission, it ought to have submitted a supplementary submission, once, NHAI had withdrawn VIL's name from the list of entities who, NHAI, had decided to blacklist.

18.4 The other reason given by the Arbitral Tribunal that the arbitration proceedings would conclude in near proximity was, perhaps, based on the fond hope that despite the adversarial stand taken by the parties, they would assist the Arbitral Tribunal in concluding the proceedings in quick time.

18.5 To my mind, it was incumbent upon the Arbitral Tribunal to dispose of NHAI's application for vacation of stay on merits at the earliest. This approach was necessitated, especially, given the fact that NHAI continues to take the stand that each day's delay was leading to cost escalation.

18.6 The diffidence of the Arbitral Tribunal in passing an order on merits appears to emanate from the fact that, firstly, it did not wish to try the issues twice, and secondly, that it did not want to pass an interim order which was substantially the same as the final order.

18.7 In my view, where circumstances demand Arbitral Tribunals like Courts cannot avoid taking a decision on merits simply because it will result in trying the matter twice over or for the reason that interim relief would mirror what would be substantially the final relief claimed in the action. If there is no uncertainty qua the legal right of the party claiming relief, injunction should follow even if it amounts to giving almost wholly the final relief. The statement of law in Halsbury's Laws of England, Vol 12, Fifth Edition, page No. 110, Para 581 exemplifies this position.

“The tendency is to avoid trying the same question twice and to grant injunctions only in clear cases. However, where there is no doubt as to the legal rights an interim injunction will be granted, and it is no objection that the relief so granted is substantially the same as the whole relief claims in the action except that it is only to endure until the hearing of the action.”

18.8 The Arbitral Tribunal in this case has deferred giving even its *prima facie* view, amongst others, on the following aspects to await conclusion of trial:

- (i) Was issuance of termination notice by NHAI justified?

- (ii) Was there a diversion of funds by VIL?
- (iii) Did VIL carry out the work in right earnest between 13.07.2016 and 22.07.2016?
- (iv) Did VIL's case fall within the ambit of Section 14 (3)(c) (i) to (iii) of the S.R. Act?
- (v) Was the C.A. determinable in nature and therefore the only remedy available to VIL was by way of damages?
- (vi) Did VIL have the financial wherewithal to bring in funds to complete the subject project?
- (vii) Were the lenders on board in having VIL complete the subject project?
- (viii) Did NHAI act arbitrarily and/whimsically in issuing the termination notice?
- (ix) Is continuance of injunction causing detriment to public interest?
- (x) Would damages in a case like this be an adequate remedy?
- (xi) Was the performance bank guarantee conditional and if so, were conditions met?

18.9 Had the Arbitral Tribunal directed itself to the aforementioned aspects, it would have been able to fathom whether or not VIL had a *prima facie* case, where the balance of convenience lay and whether vacating the order of injunction would cause irreparable injury to VIL.

18.10 While it is incumbent upon any adjudicatory forum which is invested with the necessary power to protect rights of a claimant till the matter is finally adjudicated upon after evidence is led in the matter, it is equally important to consider as to whether preventing the respondent from taking recourse to its legal rights would cause injury which cannot be adequately compensated in monetary terms if the respondent were to finally succeed in

the matter (See *American Cyanamide Co. Vs. Ethicon*, (1975) 1 ALL LR 504 @ 509). Also see the judgment of the Supreme Court in *Transmission Corpn. Of A.P.Ltd and Others v Lanco Kondapalli Power (P) Ltd.* (2006) 1 SCC 540 wherein, the following observations were made:

“37. We are, however, not oblivious of the subsequent development of law both in England as well as in this jurisdiction. The Chancery Division in Series 5 Software v. Clarke [(1996) 1 All ER 853] opined: (All ER p. 864c-e)

“In many cases before American Cyanamid [(1975) 1 All ER 504 : 1975 AC 396 : (1975) 2 WLR 316 (HL)] the prospect of success was one of the important factors taken into account in assessing the balance of convenience. The courts would be less willing to subject the plaintiff to the risk of irrecoverable loss which would befall him if an interlocutory injunction was refused in those cases where it thought he was likely to win at the trial than in those cases where it thought he was likely to lose. The assessment of the prospects of success therefore was an important factor in deciding whether the court should exercise its discretion to grant interlocutory relief. It is this consideration which American Cyanamid [(1975) 1 All ER 504 : 1975 AC 396 : (1975) 2 WLR 316 (HL)] is said to have prohibited in all but the most exceptional case. So it is necessary to consider with some care what was said in the House of Lords on this issue.”

38. In Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd. [(1999) 7 SCC 1] this Court observed that Laddie, J. in Series 5 Software [(1996) 1 All ER 853] had been able to resolve the issue without any departure from the true perspective of the judgment in American Cyanamid [(1975) 1 All ER 504 : 1975 AC 396 : (1975) 2 WLR 316 (HL)] . In that case, however, this Court was considering a matter under the Monopolies and Restrictive Trade Practices Act, 1969....”

(emphasis is mine)

19 The Arbitral Tribunal by deferring giving its *prima facie* view on the issue alluded to above has unwittingly, perhaps, skewed the rights of parties.

20 The third reason given by the Arbitral Tribunal that VIL was attempting to arrange the funds to revive the project seems, to my mind, nebulous; an aspect which I have adverted hereinabove as well. The reason, I say so, is that a senior lender bank vide letter dated 18.05.2016 had indicated that VIL had diverted mobilization advance to the extent of Rs. 90 crores and that it was no longer interested in commencing the work at the project site. Reference made on behalf of VIL to the letters dated 18.07.2016 and 20.07.2016 of the senior lender to demonstrate that the banks were in the process of approving a revised financial plan and that VIL had recommenced work at the subject site had to be tested in the context of the stand taken by VIL in this Court on 21.12.2016 in OMP (I) (COMM) No.310/2016 that it would deposit substantial funds in the escrow account to establish its credentials. In this regard, the Minutes of Meeting dated 14.12.2016 and affidavit of NHAI dated 03.01.2017 was also required to be appraised by the Arbitral Tribunal.

20.1 As noted above, the Arbitral Tribunal failed to even come to a *prima facie* finding that VIL had the requisite resources to fund the project. In fact, as noted in the narration of events above, it was the stand of NHAI at the meeting held between its Chairperson and the MD of VIL that it would require infusion of a minimum of Rs.300 crores for the subject project to be completed.

21 Apart from what is flagged hereinabove, the Arbitral Tribunal failed to examine the various reports submitted by the I.E. as to the quantum of work completed in the subject project against the total ROW available to VIL to execute its work. The report of the I.E. submitted on 12.04.2017 to

this Court which indicated that up till March, 2017 on a road length of 48.60 kms, VIL had completed only 38% of the work was an aspect which the Arbitral Tribunal ought to have taken into account. The I.E. seems to have completely debunked the stand of VIL that since there were impediments in the form of structures etcetera, it could not execute its work. The I.E. categorically opined that impediments in the form of structures were found only on a road length of 1.26 kms against the available stretch of 48.60 kms.

21.1 Therefore, both, the assessment of the quantum and value of the work executed by VIL was a factor which was required to be taken into account by the Arbitral Tribunal in order to take the view as to whether VIL had set up a *prima facie* case for continuance of order of injunction.

21.2 In this behalf, the Arbitral Tribunal was also required to deal with the assertion of VIL that NHAI was required to provide 100% ROW free from all encumbrances before it could be called upon to discharge its obligation. None of these aspects were noticed by the Arbitral Tribunal. The Arbitral Tribunal, as noted above, also failed to deal with a legal issue which was as to whether or not the C.A. was determinable and if it not, given the facts and circumstances obtaining in this case, NHAI was justified in terminating the C.A. The justification of termination was sought to be made out by NHAI by adverting to the following facts:

- (i) That VIL had abandoned the work and had de-mobilized the men and machinery from the subject site since July, 2015.
- (ii) NHAI had issued an ITT as far back as on 17.11.2015 followed by a termination notice dated 13.07.2016. There was nearly an eight months gap between the two events, despite which no substantial corrective measures were taken by VIL.

21.3 The impugned order does not advert to any of these aspects and thus, in a sense, gives credence to the plea advanced before me on behalf of NHAI that the Arbitral Tribunal has failed to address itself to the question that failure to vacate the injunction order could cause injury to public interest.

21.4 I must reemphasize VIL's argument that the C.A. could be specifically enforced, notwithstanding the stand of NHAI that it was determinable in nature, which is based on the contention that it falls within the scope and ambit of the provisions of Section 14 (3)(c) of SR Act —was not examined by the Arbitral Tribunal.

21.5 In this context, the submission made on behalf of VIL that it had invested moneys to the tune of Rs.205 crores, both in the form of equity and loan and if NHAI was allowed to continue with its stand on termination of the C.A., it would result in huge loss both in terms of interest liability and failure to recoup its investment has not been adverted to at all by the Arbitral Tribunal.

21.6 VIL has argued before me in this context that the C.A. envisages collection of toll once 75% of the construction was completed by VIL. The period of toll under the C.A. being as long as 28.5 years, it was contended on behalf of VIL that it was not possible to quantify the loss and recover damages, if NHAI was permitted to re-tender the subject project.

21.7 The Arbitral Tribunal, in my view, was required to deal with the submissions of VIL and the counter submissions of NHAI in respect of this issue as well and then formulate a view as to whether the contention of NHAI that the C.A. was determinable was correct. Furthermore, the Arbitral Tribunal was required to consider that even if the C.A. was

determinable, whether VIL could take advantage of the provisions of Section 14 (3)(c)(i) to (iii).

22 Given the fact that the Arbitral Tribunal has failed to decide any of these vital issues, I am of the view that the impugned order would have to be set aside and the matter would have to be re-heard by the Arbitral Tribunal.

22.1 But before I do so, I must take note of the submission made by Mr. Ganju that the failure on the part of the Arbitral Tribunal to consider its plea in support of continuation of the injunction order cannot result in placing VIL at a disadvantage as it had enjoyed the benefit of interim protection for a period of more than two years, coupled with the fact that the matter now is at final stage of evidence.

23 Thus, having regard to the foregoing discussion, I am inclined to dispose of the appeal with the following directions:

- (i) The impugned order dated 12.01.2018 to the extent that it rejected the plea of NHAI for vacating the interim order dated 25.07.2016 shall stand set aside.
- (ii) The Arbitral Tribunal shall rehear and dispose of the interlocutory application filed by NHAI within a period of three weeks.
- (iii) During the aforementioned period, NHAI will not proceed to award the subject project to a new concessionaire.
- (iv) Upon expiry of a period of three weeks from the date of receipt of a copy of this judgement, the restraint put on NHAI of not awarding the contract to a new concessionaire vide order dated 13.11.2018, passed in the instant proceedings, will dissolve automatically, to be supplanted with the order of the Arbitral Tribunal.

(v) Parties and their counsel will appear before the Arbitral Tribunal on 21.01.2019 at 03:00 PM. In case the date given by me is not convenient, the Arbitral Tribunal is requested to fix another date which is proximate to the date given above.

24 However, given the facts and circumstances obtaining in this case, parties will bear their own costs.

25 Needless to say, anything said hereinabove will not impact the decision that the Arbitral Tribunal may take while deciding the interlocutory application of NHAI.

RAJIV SHAKDHER
(JUDGE)

JANUARY 17, 2019/pmc/a