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

Date of Decision : 28.11.2019

+ W.P.(C) 12491/2019 & CM No.50993/2019

PINK CITY EXPRESSWAY PRIVATE LIMITED Petitioner

Through Ms.Kiran Suri,Sr. Adv. with
Mr.Suryadeep Singh, Ms.Radha
Tarkar and Ms.Aishwarya Kumar,
Advs.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Respondent

Through Ms.Padma Priya and Mr.Dhruv
Narayan, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition has been filed by the petitioner *inter alia* praying for the following reliefs:

“a) Issue a writ in the nature of Mandamus, or any other appropriate writ, order or direction, thereby, restraining the Respondent from interfering with the right of the Petitioner to collect the User Fee (Toll) On the Gurgaon - Kotputli - Jaipur Section of National Highway No. 8 (Km 42.70 to 273) in accordance with the terms of Concession Agreement dated 06.06.2008.

b) Issue an appropriate writ, order or direction, thereby, quashing the Letters of Award (LOAs) No.NHAI/13013/547/CO/19-20/E-quotation/Shahjahanpur

*Fee Plaza/144439 dated 21.11.2019;
NHAI/13013/547/CO/19-20/E-quotation/Daulatpura Fee
Plaza/144440 dated 21.11.2019 and
NHAI/13013/547/CO/19-20/E-quotation/Manohapur Fee
Plaza/144441 dated 21.11.2019 issued by the
Respondent.”*

2. It is the case of the petitioner that the petitioner was awarded the Concession Agreement dated 06.06.2008 with respect to Six-Laning of Gurgaon-Kotputli–Jaipur Section of NH-8 from Km 42.70 to Km 273.00 (Length - 225.60 Km) in the State of Haryana and Rajasthan to be executed as BOT (Toll) on DBFO pattern under NHDP Phase-V.
3. In terms of the said Concession Agreement, the petitioner is entitled to collect the toll fee from the users at three toll plazas which are situated at Daulatpura, Shahjahanpur and Manohapur.
4. Clause 25.4 obliges the petitioner to pay a ‘Premium’ in the form of Additional Concession Fee as set forth under Clause 26.2.1 and in the manner set forth under Clause 26.4 of the Concession Agreement.
5. Clause 26.2.1 of the Concession Agreement provides for the payment of “Additional Concession Fee” and reads as under:

“26.2 Additional Concession Fee

26.2.1 Without prejudice to the provisions of Clause 26.1, the Concessionaire agrees to pay to the Authority for the 1st (First) year of the Concession Period, but commencing from the day falling after -16812 (Minus Sixteen Thousand Eight Hundred and Twelve) days from Appointed Date, a Premium in the form of an additional Concession Fee equal to 48.06% (Forty eight point zero six per cent) of the total Realisable Fee during that year; and for each subsequent year of the Concession Period, the Premium shall be determined by increasing the proportion of Premium to the total Realisable

Fee in the respective year by an additional 1% (one percent) as compared to the immediately preceding year. For the avoidance of doubt, the Premium for the 2nd (Second) and 3rd (Third) years shall be equal to 49.06% (Forty nine point zero six per cent) and 50.06% (Fifty point zero six per cent) respectively of the total Realisable Fee for the respective years.”

6. Clause 26.4 of the Concession Agreement provides that the Concession Fee is to be paid on a monthly basis.

7. It is contended by the petitioner that the respondent alleging certain defaults of the Concession Agreement by the petitioner, issued E-Tender Notification for Fixed Remittance Toll Collection for the above three toll plazas. Based on the bids received, the respondent has now issued the Impugned Letters of Award. In the Letters of Award (LOAs), the bids that have been accepted by the respondent are as under:

Toll Plaza	Toll remittance per day (in lacs)
Shahjahanpur	Rs.95.51
Manohapur	Rs.47.74
Daulatpura	Rs.30.30

8. The learned senior counsel for the petitioner submits that the LOAs have been issued at an amount which is much lower than what was being collected by the petitioner as daily collection from the abovementioned toll plazas and deposited in the escrow account in terms of the Concession Agreement. She submits that therefore, the respondent would be not suffering a loss by awarding such LOAs and as the

petitioner is equally interested in this allotment, consequently, the petitioner would also be suffering a loss. She further submits that the escrow account was also being maintained for the benefit of the lenders and therefore, the loss would also be suffered by the lenders.

9. The learned senior counsel for the petitioner further submits that on an earlier occasion, in April, 2018, when the respondent decided to offer the LOAs to a third party for toll collection at the abovementioned locations, as the bid amount received for two locations was lesser than what was being collected by the petitioner, a decision was taken not to offer the same to the third party. The toll collection for the third location, where the bid amount was more than the amount being collected by the petitioner, was only awarded. However, in the present occasion the respondent has issued LOAs for all the locations, even though, the amount offered by the third party(s) is lower than the amount that is being collected by the petitioner and deposited in the escrow account.

10. On the other hand, the learned counsel for the respondent submits that the petitioner is in default of its obligation under the Concession Agreement, inasmuch as the petitioner has failed to abide by the payment schedule of the One Time Fund Infusion Scheme, as also the toll remittance. There are other faults also that have been committed by the petitioner. Drawing reference to Clause 36.1 and 36.2 of the Concession Agreement, she submits that the respondent, for the above defaults, would be entitled to suspend all the rights of the concessionaire/petitioner under the Concession Agreement, including the petitioner's right to collect the toll fee and other revenue, pursuant

thereto. She submits that the respondent is entitled to issue the LOAs even though the amount being received pursuant thereto is lower than what is being remitted by the petitioner.

11. The learned counsel for the respondent further submits that as the disputes involved in the present petition are contractual in nature, this Court should not entertain the same and relegate the petitioner to its contractual remedy.

12. The learned senior counsel for the petitioner disputes the allegation of default by the petitioner. However, without prejudice to the rights and contentions of the petitioner, submits that the petitioner is ready and willing to deposit at a minimum the amount, that is presently being collected from the above locations to the escrow account so as to minimize any claim of damages that may accrue to either party. She submits that presently for the above toll plazas the minimum amount that is being collected and deposited in the escrow account, is as under:

Toll Plaza	Toll remittance per day (in lacs)
Shahjahanpur	Rs.107.0
Manohapur	Rs.48.76
Daulatpura	Rs.32.876

13. She submits that in case the daily collection is more than the amount mentioned hereinabove, the same shall also be deposited by the petitioner in the escrow account without prejudice to the rights and contentions of the petitioner. The duration of remittance shall be, however, in terms of the Concession Agreement.

14. I have considered the submissions of the learned counsels for the parties. As far as the objection of maintainability of the petition is concerned, it is settled law that even in matters of contract, the respondent, being State cannot act arbitrarily or unreasonably especially where public money is involved. The respondent is yet to exercise its right under Clause 36.1 of the Concession Agreement. The disputes pertaining to whether the petitioner is in default and whether the respondent is entitled to exercise its right under Clause 36.1 of the Concession Agreement are, however, not to be determined in the present petition as they are not before this Court. The limited dispute before this Court is whether the decision of the respondent to allow collection of toll from the above three locations through third parties at offers reflected in the LOAs can be sustained applying the principles enshrined under Article 14 of the Constitution of India.

15. It is not disputed that the offer that is being made by the petitioner and as recorded hereinabove, is of a higher amount than what would be collected in terms of the LOAs. Even assuming that the respondent is entitled to order suspension of the Concession Agreement under Clause 36 of the Concession Agreement and thereafter take further action against the petitioner, the respondent would remain bound by an obligation to minimize its losses. The same can be done only when the respondent is able to collect the higher amount of toll as is being offered. Equally, the interest of the lenders would also be prejudicially affected if the respondent is to collect a lower toll.

16. In view of the above, the undertaking of the petitioner that it would pay the minimum amount for the three locations as has been

mentioned hereinabove, in the escrow account in accordance with the remittance schedule as provided in the Concession Agreement, the respondent is restrained from taking further action on the basis of the LOAs that have been issued and are Impugned in the present petition.

17. In case, the petitioner is in default in making deposits in terms of the offer that has been recorded hereinabove and accepted by this Court, apart from taking other action, the respondent would be entitled to immediately suspend such rights of the petitioner and act in accordance with the Concession Agreement.

18. The petitioner shall file an undertaking by way of an affidavit in terms of the above referred offer, as accepted by this Court, within a period of three weeks from today.

19. This order, however, shall be without prejudice to the rights of the respondent to proceed in accordance with the Concession Agreement as far as suspension or further action against the petitioner is concerned. It is made clear that in case the respondent would initiate any such action, the petitioner would be within its right to challenge the same in accordance with the law.

20. In view of the above, the petition is disposed of, with no order as to costs.

Dasti.

NAVIN CHAWLA, J

NOVEMBER 28, 2019/Arya