

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

+ **O.M.P. 289/2015**

Reserved on: 07.08.2019

Date of Decision: 11.10.2019

MINISTRY OF ROAD TRANSPORT AND HIGHWAYS

..... Petitioner

Through: Mr.Sandeep Sethi, Sr. Adv.with
Mr.Ruchir Mishra, Mr.Mukesh Kr.
Tiwari, Mr.Sanjiv Kr. Saxena,
Mr.Ramneek Mishra, Mr.Abhishek
Rana and Mr.Sidhant Kumar,
Advs.

versus

L&T TRANSPORTATION INFRASTRUCTURE LTD. & ANR.

..... Respondents

Through: Mr.Dayan Krishanan, Sr.Adv. with
Mr.Arpan Behl, Adv. for R-1.
Mr.D.Balaraman and Mr.Anand
Sathiyaseelan, Advs. for R-2.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 has been filed by the petitioner challenging the Arbitral Award dated 12.12.2014 passed by the Arbitral Tribunal adjudicating the disputes that have arisen between the parties in relation to the Tripartite Concession Agreement dated 03.10.1997, executed between Larsen and Toubro Ltd. (L&T Ltd.) with the petitioner and the respondent no.2. The respondent no.1 herein is the assignee of L&T Ltd. under the Deed of

Assignment dated 25.11.1997. It is a subsidiary of L&T Ltd. and is the Special Purpose Vehicle created under the terms of the contract and for discharge of the obligations of L&T Ltd. contained therein.

2. Before adverting to the challenge to the Arbitral Award, some basic facts in relation to the Concession Agreement need to be noticed. The Concession Agreement was awarded on Build, Operate and Transfer (BOT) basis. It includes design, construction, maintenance and operation of 28 km of the Coimbatore Bypass on NH-47 at KM 141/00 on the Salem side merging with KM 171/200 on Palghat side of the same highway. It further included construction of an additional Two Lane Bridge across river Noyyal which is the Athupalam Bridge, as also maintenance of existing bridges.

3. The Arbitral Tribunal noticed the important dates in regard to the Concession Agreement in paragraph 8 of the Award, which is reproduced hereinbelow:

<i>Invitation of Tender on BOT basis</i>	<i>September 1995</i>
<i>Invitation of re-submission of bids for additional scope of work by including 2 lane Athupalam Bridge</i>	<i>16/12/1995</i>
<i>Date of submission of bid by M/s L&T</i>	<i>05/06/1997</i>
<i>Date of signing the Concession Agreement</i>	<i>03/10/1997</i>
<i>Deed of Assignment to M/s L& T TIL by L&T Ltd.</i>	<i>25/11/1997</i>
<i>Date of commencement of work of Athupalam Bridge & Bypass</i>	<i>03/12/1997</i>
<i>Date of commissioning of Athupalam Bridge</i>	<i>03/12/1998</i>
<i>Date of commissioning of Bypass</i>	<i>03/12/1999</i>
<i>End of Concession period for Athupalam Bridge</i>	<i>03/12/2018</i>
<i>End of Concession period for Bypass</i>	<i>03/12/2029</i>

<i>Length of Bypass</i>	<i>About 28 km</i>
<i>Cost of Project</i>	<i>Rs.104.40 Crores</i>

4. The majority of the Arbitral Tribunal, consisting of two Arbitrators has awarded a sum of Rs.136.22 crores to the respondent no. 1 along with interest towards loss of revenue sustained by the respondent no.1 for the Athupalam Bridge. This claim of the respondent no.1 was however, rejected by the Arbitrator in minority.

5. The first challenge to the Award is to the grant of the said claim in favour of the respondent no.1.

6. The learned senior counsel for the petitioner submits that this claim of the respondent no.1 was barred by limitation. He submits that in terms of Clause 2.14 of the Concession Agreement, a Steering Group (SG) was constituted for taking all project level decisions for the smooth implementation of the Concession Agreement. It had the representatives of the petitioner, the respondent no.2 as also the respondent no.1, the Concessionaire. Respondent no.1 raised a claim of financial compensation for loss of revenue in the form of collection of toll from Athupalam Bridge, however, the SG in its meeting held on 21.07.1999 recorded that the Concession Agreement does not provide for any cash compensation. Even in the meeting of the SG held on 18.04.2001, the respondent no.1 was advised to submit a proposal for compensation against loss of toll revenue considering the possible options of extension of period of concession or increase in toll rates or both. Grant of compensation in form of cash was not one of the options given to the

respondent no.1. The respondent no.1, if aggrieved by these decisions, could have challenged the same through arbitration only within a period of three years from the date of such decisions. However, the respondent no.1 invoked arbitration only on 18.03.2010, therefore, the claim of the respondent no.1 for grant of compensation in the form of cash was clearly barred by limitation.

7. On the other hand, the learned senior counsel for the respondent no.1 submits that the cause of action for claiming the above amount arose only on 12.03.2010 when the decision of the SG to affirm illegal termination of the Concession Agreement by the petitioner was communicated to the respondent no.1. As far as the Minutes of Meeting dated 21.07.1999 is concerned, the same did not create any cause of action and, in fact, amounts to an admission of liability on the part of the petitioner to compensate the respondent no.1 for the loss of toll revenue. It merely provided for the manner in which the respondent no.1 would be compensated for such loss. It is only with the illegal termination of the Concession Agreement that it became clear that the petitioner would not compensate the respondent no.1 for the loss suffered by it and therefore, invocation of arbitration by the letter dated 18.03.2010 was within the period of limitation.

8. I have considered the submissions made by the learned senior counsels for the parties and I am in agreement with the submissions made by the learned senior counsel for the respondent no.1.

9. The Minutes of Meeting dated 21.07.1999, though stated that the petitioner and respondent no.2 cannot compensate the respondent no.1 for the loss suffered by it in collection of toll as the Concession Agreement

does not provide for any such remedy, at the same time further stated that all legitimate claims of the respondent no.1 will be examined and considered as per provisions of the Concession Agreement. In a subsequent meeting held on 18.04.2001, the respondent no.1 was called upon to submit its proposal for compensation against the loss of toll revenue duly supported by the detailed cash flow and considering the following options:

- (a) Extension of concession period with the same toll rates as in the Agreement;
- (b) Suitable increase in toll rates keeping the concession period same as in the Agreement;
- (c) Suitable combination of A and B above.

10. The Arbitral Tribunal records that by a letter addressed by CE NH TN to a Regional Officer of the petitioner, the loss of revenue till 31.03.2001 suffered by the respondent no.1 was arrived at Rs.9,40,90,783/- on the basis of details worked out by Pallavan Transport Consultancy Services Ltd., which is a State undertaking, and respondent no.2 in consultation with the respondent no.1. Paragraph 51 of the Impugned Award is reproduced hereinbelow:

“(51)The loss of revenue till 31.3.2001 was arrived at Rs. 9,40,90,783/- on the basis of details worked out by PTSCL State Undertaking and Second Respondent in consultation with the claimant M/s L&T TIL. This figure of LOR has been intimated by CE NH TN to regional officer of First Respondent. The detailed calculations for the same are available in Exhibit C-25 SOC Vol-II. The GOI did not attempt to reduce nor even disputed this loss of revenue.”

11. Respondent no.1 in turn, from time to time, intimated the respondent no.2 about the loss sustained by it. Reference has been drawn to letters dated 22.11.2007 and 06.02.2010.

12. From the above, it is clear that the liability to compensate the respondent no.1 for the loss of toll revenue suffered by it at Athupalam Bridge, was not disputed. It was only the mode of recovery thereof, that was discussed. Whether the respondent no.1 is entitled to compensation in form of cash or not is a question distinct from the liability of the petitioner to so compensate the respondent no.1. As the petitioner has not produced any document on record by which it categorically denied its liability to compensate the respondent no.1 for the alleged loss of revenue, it cannot be said that the cause of action had arisen in favour of the respondent no.1 to claim such amount at any date prior to the date of decision of the SG to uphold the termination of the Agreement by the petitioner. Consequently, the claim of the respondent no.1 cannot be said to be barred by limitation.

13. On the merits of the claim, the learned senior counsel for the petitioner submits that the petitioner was under no obligation to indemnify any loss suffered by the respondent no.1 towards deficient recovery of toll from the Athupalam Bridge. He submits that the responsibility of the toll fee collection and the risk attached thereto was solely on the respondent no.1. He submits that in terms of Clauses 5.2 and 25.1 of the Concession Agreement, it was the sole responsibility of the respondent no.1 to take all steps for proper implementation of the Agreement. In terms of Clause 10.4 of the Agreement, the respondent

no.1 was in fact entitled to charge fees lesser than the agreed fee without affecting the concession period. There was no obligation on the petitioner for ensuring recovery of full toll for the respondent no.1. In fact, in terms of Clause 5.4 of the Concession Agreement, the respondent no.1 was to have carried out necessary field surveys and investigations with respect to the site of the Bridge. The respondent no.1, therefore, should have been aware of all local conditions prevalent at the site thereby bearing the risk attached thereto. He submits that in absence of any obligation on the part of the petitioner to ensure full recovery of the toll for the respondent no.1, the petitioner cannot be held to be guilty on the performance of the contract or liable to compensate the respondent no.1 for alleged loss of toll revenue.

14. I have considered the submissions made by the learned senior counsel for the petitioner, however, find no merit in the same. As noted hereinabove, the liability of the petitioner to compensate the respondent no.1 for loss of toll revenue was never denied. In fact, not only the Minutes of Meeting of the SG accept such liability of the petitioner, but also by the letter dated 01.04.1999, a senior Officer of the petitioner informed the respondent no.2 that the shortfall in revenue is due to refusal/reluctance on part of the users including Tamil Nadu State Corporation to pay the toll fee, which sends a wrong signal to the users of the bridge who use this as an excuse for evasion of toll. The letter further advised the respondent no.2 to ensure that respondent no.1 is extended help in checking the evasion of toll or as an alternate respondent no.2 may have to compensate the respondent no.1 for the loss being incurred by respondent no.1, which was to the tune of Rs.40 lacs per month. Later

by a letter dated 25.06.1999, even the Minister for Railways and Surface Transport, Government of India, advised the respondent no.2 of a similar consequence.

15. The Arbitral Tribunal has further noted that the loss of revenue on Athupalam Bridge accrued due to inefficiency and total negligence of the Government of India and refusal of the petitioner and respondent no.2 to provide support to the Concessionaire. The police did not render any assistance in enforcing toll, rather it encouraged vehicles to pass through defiantly without paying toll fee.

16. The relevant findings of the Arbitral Tribunal are reproduced hereinbelow:

“(82) The AT is of the majority view that the loss of revenue on Athupalam Bridge occurred due to inefficiency and total neglect of GOT and refusal to provide support, timely steps not being taken by respondents. There is the tripartite agreement signed and the terms of the same have to be acted upon and honoured by all the three parties. Five DO letters, two from Minister for MORTH and three from L&T officers apart from enumerable demand in writing from L&T officers did not cut much ice. The police did not render assistance in enforcing toll and help for collection of toll. Rather it encouraged vehicles to pass through defiantly without paying toll fee by creating scenes of violation even though they were in a position to render the required assistance.

(83) L&T TIL wrote to every level of police officers i.e. DIG, Commissioner police, SP, DSP. The EE NH also wrote to police. The EE supplied, list of non paying vehicles category wise to RTO and police. The concessionaire requested for 4x1 police at its own cost. There was only lip sympathy to L&T and empathy towards cause of collection of toll fee.

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(85) Can such a situation help in building roads on BOT basis when the very first project is treated casually and made to fail? As

vehemently argued by both the respondents, no doubt under para 4.1 CA it is the duty of concessionaire to collect toll but AT can't and should not ignore the fact that in absence State support by creating proper environs by way of effective police help etc. the concessionaire was made to fail. Under Clauses 6.6, 6.7 and 14.2 of the concession agreement it is the duty of Govt. of TN to check and monitor the quality, progress and standards of the toll facility through Engineer-in-charge. It has right to check the fee collection to ensure that the same is as per terms of the CA. The Govt. of TN has to supervise the work of construction, maintenance and operation of the toll facility at its own cost. It is realizing Rs.15 lacs supervision fee (subject to WPI linked price variation] per annum in advance from L&T. The GOT has miserably failed in implementation of the project. It is our [majority AT] strong view that LOR is payable by respondents and due to concessionaire. ”

17. The petitioner having awarded the contract on a Build, Operate and Transfer basis to the respondent no.1, wherein the respondent no.1 is to recover its costs and reasonable return from the collection of toll, cannot wash its hands of its responsibility to ensure a conducive environment for collection of such toll. The power of 'State' could only have been exercised by the petitioner and the respondent no.2 for ensuring collection of the toll in fact, as noted by the Arbitral Tribunal, the major defaulters were the Tamil Nadu State Road Transportation and Kerala State Road Transport.

18. Therefore, the petitioner can certainly not claim immunity from compensating the respondent no.1 of the loss suffered by it.

19. It is further contented by the learned senior counsel for the petitioner that, in any case, there was no provision in the agreement for

grant of compensation, in form of cash to the respondent no.1. Compensation, if any, could have been granted only in form of extension of the concession period or increase in the toll rates or a combination of both. In absence of any term in the contract providing for compensation in form of cash, the Arbitral Tribunal has no right in granting the same.

20. I again cannot agree with the submissions made by the learned senior counsel for the petitioner. It is not the case of the petitioner that there is any clause in the Concession Agreement prohibiting grant of compensation in the form of cash. In the absence of any such prohibition, it cannot be said that the Arbitral Tribunal has awarded a claim in contravention of any contractual term. The relief to be granted by the Arbitral Tribunal has to be considered by the Arbitral Tribunal in the facts of each case and the Award passed by the Arbitral Tribunal cannot be set aside merely because the relief could have been molded in a manner other than the one adopted by the Arbitral Tribunal.

21. I may also note that the Arbitral Tribunal has, while granting compensation in form of cash, also relied upon a similar grant of cash compensation by the petitioner itself for the additional work granted to the respondent no.1 for construction of Chettiapalayam Road Over Bridge. In terms of Clause 6.9 of the Concession Agreement, incase, the petitioner desires to have additional works to be carried out by the respondent no.1, the compensation was in form of the increase in the concession period and/or fee rates. Therefore, even in such a case, the contract did not provide for compensation in form of cash, however, admittedly, it was given to the petitioner.

22. On the claim of compensation, the learned senior counsel for the petitioner lastly argued that there was no proof submitted by the respondent no.1 with respect to quantification of this claim. In the absence of any proof, the same could not have been granted. He submits that the Arbitral Tribunal has wrongly proceeded on an assumption that the petitioner accepted such quantification. The Arbitral Tribunal itself has recorded objection of the petitioner towards the quantification of such claim and absence of proof in support thereof.

23. As far as the quantification of the claim is concerned, the Arbitral Tribunal, though has noted that the petitioner did not challenge the same, has also based its findings on other factors. The relevant finding of the Arbitral Tribunal is reproduced hereinbelow:-

“(76) LOR upto 31.3.2001 is Rs. 9.409 Cr. as per PTSCCL's report, and worked out jointly with Second Respondent being the aggregate loss (C-32) sustained. The project was viable only after adding one additional bridge at Athupalam even according to both respondents.

<i>Loss as intimated during the meetings on 12.02.1999</i>	<i>Rs. 0.935 Cr.</i>
<i>Reported by L&T TIL Upto June 2000</i>	<i>Rs. 7.46 Cr.</i>

<i>As worked out by Executive Engineer, NH &PTSCCL's upto 31.03.2001</i>	<i>Rs.9.409 Cr.</i>
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Reported by L&T TIL to Sery. MoRTH vide letter dated 15.05.2003

<i>Reported by L&T TIL upto 31.03.2003</i>	<i>Rs.17.13 Cr.</i>
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<i>Reported by L&T TIL upto 31.05.2004</i>	<i>Rs.20.63 Cr.</i>
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<i>Reported by L&T TIL upto 31.07.2005</i>	<i>Rs.23.899 Cr.</i>
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<i>Reported by L&T TIL upto 31.08.2005</i>	<i>Rs.24.14 Cr.</i>
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Reported by L&T TIL upto 31.10.2007

Rs.31.58 Cr.

Cumulative LOR from 12/98 to June 2011

Rs.71.96 Cr.

(without interest)

and Rs.134.91 Cr.

(with interest)

Cumulative LOR from 12/98 to Oct. 2011 works out to Rs.77.09 Cr.

(without interest) and

Rs.146.07 Cr.

(with interest)

As per MoRTH Minister's DO letter dated 25.06.1999 to the Chief Minister TN was required to pay Rs. 40.00 lacs per month to L&T TILL from 01.01.1999 upto 31.12.2014 i.e. 16 years without any interest

Rs. 76.80 Cr.”

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(89) The claims of Claimant, which has been calculated on the basis of traffic study conducted by PTSCCL (Govt. of TN Organization] and acceptable to both the parties the total of claim comes to Rs. 77.09 cr. till 31.10.2011 as per C-43 of SOC. This is the principal amount. The AT by majority view allows 12 % simple interest per annum on this amount from 31.10.2011 till the date of award i.e. 12.12.2014.

The SG in its meeting held on. 18.4.2001 has allowed a sum of Rs. 4.13 cr. against claim of Rs. 6.32 cr. in cash for construction of Chettipalayam ROB. This over bridge was an additional work within the 28 km boundary limits of the bypass project. This was obviously got executed under this very concession agreement. The SG in case of Athupalam bridge is contending that there is no way GOVT of Tamilnadu or Govt. of India can compensate the concessionaire in cash but allowed the construction of said

over bridge and compensated the same concessionaire in cash. This is quite strange. For the same project the SG in the same meeting dated 18.4.2001 allowed cash payment for construction of over bridge being additional work on Chettipalayam ROB. It is irrational to apply two different yard sticks for the compensation? While the cash compensation is valid for additional ROB, yet it is strange to contend as not possible to compensate the loss of revenue in respect to Athupalam Bridge. The calculation of loss of revenue as set out in the written response of claimant is fairly correct and the same deserves to be accepted.”

24. A reading of the above would clearly show that the Arbitral Tribunal has quantified the claim on the basis of the report of PTSCL, a Government Organization, as also the letters written by the petitioner and the Minister, MoRTH. It cannot, therefore, be said that the quantification is without any evidence. I see no reason to interfere with this finding of the Arbitral Tribunal.

25. The learned senior counsel for the petitioner further challenges the Arbitral Award holding the termination of the contract as illegal. He firstly submits that the termination of the Agreement had been accepted by the respondent no.1 and the only dispute to be adjudicated by the Arbitral Tribunal was the amount of compensation payable by the petitioner to the respondent no.1.

26. Relying upon the letter dated 24.02.2006, issued by respondent no.1 to the petitioner, he submits that the respondent no.1 itself claimed termination payments under Clause 16 of the Concession Agreement claiming *force majeure* conditions. The only dispute thereafter was with respect to the quantification of the claim of the respondent no.1. As far

as the factum of termination of the contract is concerned, the same could not have been put to dispute.

27. On the other hand, the learned senior counsel for the respondent no.1 submits that the letter dated 24.02.2006 was clearly addressed as being without prejudice to the rights of the respondent no.1 under the Concession Agreement. He submits that this letter was not admissible in evidence under Section 23 of the Indian Evidence Act, 1872. In fact, thereafter various options were tried to make the contract workable, however, the petitioner remained adamant on terminating the contract. This was clearly put in issue before the Arbitral Tribunal and therefore, it cannot be said that the Arbitral Tribunal has no right to consider the validity of the termination of the Concession Agreement.

28. I have considered the submissions made by the learned senior counsel for the parties. Admittedly, letter dated 24.02.2006 of the petitioner was marked 'without prejudice' to its rights under the Concession Agreement. Though, the respondent no.1 raised a claim for termination payment, the same was not accepted by the petitioner. In a subsequent meeting held on 29.03.2007, the respondent no.1 was called upon to give proposal for four laning of the Coimbatore bypass which included the continuation of the Concession Agreement. It was only by the letter dated 11.05.2009, that is much after the letter dated 24.02.2006 relied upon by the petitioner, that the petitioner issued a notice of termination under Clause 16.2.3 (ii) of the Concession Agreement, which was confirmed by the SG in its meeting held on 12.02.2010. The respondent no.1 never accepted this termination and in fact, not only

invoked arbitration but also filed an application under Section 9 of the Act before the Court.

29. This Court by an order dated 26.03.2010 *inter alia* directed as under:

“7. Accordingly, therefore, until further orders unless so varied by the court, the respondent is restrained from in any manner interfering with the operations and maintenance of the BOT project as constructed by the petitioner under the Concession Agreement dated 3.10.1997. The respondent is enjoined from in any manner taking over possession of the project except through the due process of courts and law.”

30. In view of the above, it cannot be said that the question of legality of the termination notice was not an issue before the Arbitral Tribunal or could not have been adjudicated upon by the Arbitral Tribunal. It also cannot be said that the letter dated 24.02.2006 of the respondent no.1 amounted to acquiescence or waiver on its part to challenge such termination of the Concession Agreement.

31. On the merits of the termination, the learned senior counsel for the petitioner defends the termination by contending that not only was the respondent no.1 in breach of its contractual obligations under Clause 6.5 of the Concession Agreement to construct additional lanes on the bypass, but also because the parties could not arrive at a settlement on the terms of such construction of the bypass, the petitioner acted within its rights to terminate the Agreement. He submits that Clause 6.5 of the Concession Agreement clearly provides that the petitioner had a right to call upon the respondent no.1 to construct additional lanes, failing which the petitioner could either construct a new bypass or terminate the Concession

Agreement for the default of the respondent no.1. For such additional lanes to be constructed, in terms of Clause 6.9, the respondent no.1 could seek compensation only in form of increase of the concession period and /or fee rates. The respondent no.1, however, started demanding arbitrary compensation for construction of the additional lanes and thereafter proposed allotment of additional work as a condition for such construction. As the same was not agreeable to the petitioner, the petitioner had no choice but to terminate the Agreement.

32. On the other hand, the learned senior counsel for the respondent no.1 submits that the termination notices dated 11.05.2009 and 19.11.2009 were clearly unsustainable under Clause 16 of the Concession Agreement. He submits that the respondent no.1 never refused to construct the additional lanes. In fact, even without asking the respondent no.1 to construct the same, the petitioner had issued a tender which included the Coimbatore bypass. This was immediately protested by respondent no.1. In the meeting held on 29.03.2007, the respondent no.1 was called upon to submit a proposal for carrying out the work of four laning of the bypass. This included allotment of additional area. The respondent no.1 submitted such proposal which also included the option of the increase in the toll rates. He submits that the petitioner, therefore, can neither claim breach of contract by respondent no.1, nor occurrence of any *force majeure* condition to justify the termination of the contract and equally, the finding of the Arbitral Tribunal in this regard cannot be faulted.

33. I have considered the submissions made by the learned senior counsels for the parties. Before advertng to them in detail, a few clauses

of the Concession Agreement may be noticed and are reproduced hereinbelow:

“6.5 The Government of Tamilnadu shall ensure that no alternate facility to the bypass is constructed within a radius of 20 km during the concession period. However, if the traffic on the bypass substantially increases, the Company shall on a notice being given to this effect by GOI provide additional lanes in the bypass within a specified period failing which the Government may either construct a new bypass or terminate the Concession agreement for Company’s default.”

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“6.9 In case GOI desires to have additional works to be carried out by the company beyond the Scope of the Project detailed in Clause 7, the concession period and/or fee rates shall be suitably increased based on analysed market rates to be approved by the Steering Group to compensate the Company on this account as decided by the Steering Group.”

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“16. FORCE MAJEURE

16.1 As used in this Agreement a Force Majeure Event shall mean any or all of the acts or events set out in Section 16.2 hereinafter which completely prevent the party claiming Force Majeure (the “Affected Party”) from performing its obligations under this Agreement or complying with any conditions required by other parties hereto under and in accordance with the provisions of this Agreement and which act or event is (i) beyond the reasonable control and not the fault of the Affected Party, and (ii) the Affected Party has been unable to overcome such act or event and its effect on the obligations of the affected party under this agreement by the exercise of due diligence and reasonable efforts.

16.2 For the purposes of this Section 16 of the Agreement, Force Majeure Event shall mean one or more of the following acts or events:

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16.2.3 GOI Political Event

(i) Change in Law adversely and materially affecting toll rights of the Concession Company.

Explanation: (a) the enactment of any new Indian law or Indian Directive;

(b) the repeal in whole or in part (unless re-enacted with the same effect), or modification of any existing Indian law or Government Directive;

(c) A change in the interpretation or application of any Indian law or Government Directive such interpretation being legally binding on the parties to this Agreement.

(ii) expropriation or compulsory acquisition by any Indian Governmental Agency or any State Government Agency of any material assets or rights of the Company.

(iii) any other unlawful or unauthorized action on the part of GOI occurring after Financial Close which is directed against the Project (other than action taken in connection with or pursuant to a commercial contract between the GOI and the Company).”

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“16.9.2 Any notice pursuant to this Article shall include full particulars of:

- (i) the nature of each Force Majeure Event which is the subject of any claim for relief under this Agreement;
- (ii) the effect which such Force Majeure Event is having on the affected party’s performance of its obligations under this Agreement;

- (iii) *the measures which the affected party is taking, or proposes to take, to alleviate the impact of those Force Majeure Events; and*
- (iv) *any other information relevant to the affected party's claim.*

For so long as the affected party continues to claim to be affected by a Force Majeure Event, it shall provide the other party with regular (and not less than monthly) written reports containing;

- (1) *the information called by this Article; and*
- (2) *such other information as the other party may reasonably request the affect party claiming the relief."*

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"17. TERMINATION ON COMPANY DEFAULT:

17.1 Save as otherwise provided in this Concession Agreement, if the company:

- i fails to commence the works on Site within three months from the date of commencement; or*
- ii fails to complete the construction works within the construction period from the date of commencement or within such extension as may be granted by the Government;*
- or iii repeatedly and persistently remains in breach of any of his material obligations under this Concession Agreement; or*
- iv Undergoes winding up proceedings or goes into liquidation whether compulsory or voluntary (except for the purpose of reconstruction, amalgamation or other similar purposes not involving the realization of the assets) or suffers an execution on his goods, or becomes insolvent or compounds with or makes similar arrangements with its creditors or does any act frustrating his ability to fulfill his obligations under this Concession Agreement;*
- v If the Company reduces its equity in the SPV to less than 51% during the construction period and to less than 26% equity during the balance of concession period arising from*

the sale, assignment, transfer or other disposition of capital stock by the SPV during the Concession Period.

the GOI may, without prejudice to any other right or remedy it may possess, terminate this concession at any time after expiry of 90 (ninety) days after issuing of written notice to the company indicating GOI's intention to terminate this concession.

17.2 If the Concession is terminated in accordance with Clause 17.1 the company shall not be compensated."

34. The termination notice dated 11.05.2009 invoked Clause 16.2.3(ii) for termination of the Concession Agreement. It is reproduced hereinbelow:

"Please refer to the correspondence resting with your letter No.LTCD/DPDEU/L&TTL/DPDEU/01, dated February 24, 2006 intimating the amount of termination claim as Rs.273.05 crores in the event of termination of existing Concession Agreement of Coimbatore bypass. In this context Ministry's letter of event number, dated 28th July, 2006 may be referred wherein the compensation payable as Rs.122.02 crore as per clause 16.6.3(e) of the Concession Agreement was conveyed. This amount then intimated will further get reduced now as balance period has got reduced.

Subsequent to the above, several discussions have been held in the Ministry with your representatives. However, these discussions have not resolved the issue till date and the work of four-laning of NH 47 from km 100 to km 182 including Coimbatore bypass is getting delayed.

In view of the above and under the circumstances, the appropriate option available with the Ministry to achieve the objective of four-laning from km 100 to km 182 of NH 47, is to terminate this Concession Agreement. Accordingly, this letter should be treated as a notice for termination under clause 16.2.3(ii) of the Concession Agreement."

35. The termination notice dated 19.11.2009 further reads as under:

“Please refer to the notice of termination of the concession for the project of Coimbatore bypass issued vide this Ministry’s letter No.RW/NH-12014/528/2000-TN/NH-8(pt) dated 11th May, 2009. Reference is also invited to your letter No.Nill dated 30th June, 2009 wherein it has been accepted that the copy of termination notice from the Ministry has been received by you on 30th June, 2009.

2. Your comments/observations have been considered and it is decided that the proposal of the concessionaire to undertake the 4-laning of bypass in the form of annuity structure is not acceptable as this is not based on competition bidding. Your earlier proposal of combining the bypass along with widening 11/km stretch upto Kerala border was already examined by the Ministry and rejected as the same is beyond the scope of the concession.

3. In view of the foregoing, you are once again notified to Act in accordance with the Clause 16.6.3(f) considering the termination notice issued by the Ministry vide letter No.RW/NH-12014/528/2000-TN/NH-8(pt) dated 11th May, 2009 as final. The clause 16.6.3(f) is reproduced as follows:

16.6.3(f)-(i) execution of transfer deeds and other writings in favour of GOI, transferring and assigning the Project Assets to GOI; and

16.6.3(f)-(ii) delivery of possession of the Project and Project Assets to GOI, whichever is later, free from all encumbrances, charges and liens whatsoever.

It may further be noted that this is without prejudice to any other remedies available to the Ministry under the concession agreement.”

36. A reading of the above termination notices would clearly show that the petitioner did not invoke Clause 17 of the Concession Agreement

which provides for termination of the Concession Agreement for default of the Concessionaire/respondent no.1. The petitioner, on the other hand, invoked Clause 16.2.3 (ii) which provides for termination of the Concession Agreement for 'GOI Political event' in form of 'Expropriation or compulsory acquisition by any Indian governmental agency or any State Government agency of any material assets or rights of the company.'

37. The Arbitral Tribunal has rightly held that in the facts of the present case, there was no expropriation or compulsory acquisition and therefore, there was no Force Majeure event justifying the termination of the Agreement.

38. As noticed by the Arbitral Tribunal, the Government of India on 25.07.2003, issued a certificate that it has engaged M/s Sanrachna Multipurpose Consultancy Services Pvt. Ltd., Bhopal as Detailed Project Report (DPR) Consultant for preparing DPR from KM 100 to KM 182 (Kerala Border). This included stretch of the Coimbatore bypass as well. The petitioner protested against the same by its letters dated 19.02.2004 and 18.11.2004. The respondent no.1, in the meeting of the SG held on 18.12.2006, even offered to construct the four laning for the entire stretch of KM 100 to KM 182. This was declined as being beyond the terms of the Concession Agreement. In the meeting held on 29.03.2007, the respondent no.1 was called upon to give a proposal for four laning of Coimbatore bypass. A suggestion was also given to do away with the Athupalam Bridge and instead the respondent no.1 will be allowed to extend the four laning up to Kerala border (KM 182) and collect user fee from the users of this facility. Respondent no.1 submitted the proposal

and the petitioner by a letter dated 06.07.2007 called upon the respondent no.1 for a meeting to discuss the same. Therefore, clearly the respondent no.1 never refused to construct the additional lanes in the Coimbatore bypass, in fact, it was insisting that the said contract be allotted to the respondent no.1 alone. The respondent no.1, therefore, cannot be said to be in breach of its contractual obligations. Its suggestion of carrying out the four laning work for the entire stretch between KM 100 to KM 182 and/or for the additional area of 11 kilometers up to Walayar (Tamil Nadu/Karnataka Border) cannot be said to evidence its refusal to carry out the four laning work. In fact, as submitted by the learned senior counsel for the respondent no.1, in terms of Clause 6.5 of the Concession Agreement, the petitioner could have called upon the respondent no.1 to construct additional lanes only where the traffic on the bypass substantially increased. No such case of increase of traffic requiring construction of the additional lanes has been set up by the petitioner from the correspondence. It is clear that the additional lanes were been constructed as a part of a larger project of construction of four lane highway from KM 100 to KM 182 and not because of any increase in traffic on the Coimbatore bypass.

39. In view of the above, the finding of the Arbitral Tribunal that the termination of the Agreement was unsustainable cannot be said to be perverse or warranting any interference from this Court.

40. The last challenge of the petitioner is to the direction of the Arbitral Tribunal to award the four laning project for the Coimbatore bypass to the respondent no.1. The learned senior counsel for the petitioner submits that such a direction would amount to grant of specific

performance of the contract for construction, which cannot be sustained. He submits that in fact, the Arbitral Tribunal itself has directed both the parties to work out the new toll rates which would be required as a consequence of the above direction.

41. This issue need not detain me as the learned senior counsel for the respondent no.1 has no objection if this direction is set aside by this Court, leaving it open to the parties to work out the issue of four laning of the Coimbatore bypass in accordance with the Concession Agreement, meaning thereby, that in case the petitioner seeks to have the lanes increased on the bypass, it would call upon the respondent no.1 to do the same in accordance with the terms of the Concession Agreement.

42. In view of the above concession by the respondent no.1, the direction of the Arbitral Tribunal as contained in paragraph 104 of the Impugned Award is set aside.

43. In view of the above discussion, the challenge to the Impugned Award, except to the direction contained in paragraph 104 thereof, is dismissed. The parties shall bear their own costs.

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NAVIN CHAWLA, J

OCTOBER 11, 2019
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