$~13 (2021)

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

% *Date of decision:22.07.2021*

\+ **FAO (COMM) 116/2021 & CM Nos.21732-34/2021**

NATIONAL HIGHWAYS AUTHORITY OF INDIA .....Appellant
Through: Mr. Saurabh Banerjee, Adv

versus

C P RAMARAO .....Respondent
Through: Mr. Angad Mehta, Adv.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE TALWANT SINGH

[Court hearing convened via video-conferencing on account of COVID-19]

RAJIV SHAKDHER, J.: (ORAL)

CM No.21733/2021

1. Allowed, subject to just exceptions.

CM No.21734/2021

2. The prayer made in the captioned application is to grant exemption from filing the requisite court-fee and attested affidavits.

2.1 The captioned application is disposed of with a direction to the applicant/petitioner to place on record the duly attested affidavit and deposit the requisite court-fee, within three days of this Court resuming its normal and usual work pattern, notwithstanding the judgement passed today in the main appeal.

FAO (COMM) 116/2021 & CM No.21732/2021 ***[Application filed on behalf of the appellant seeking stay on the operation of the impugned judgement dated 23.02.2021 and impugned award dated 12.12.2020]***

Preface: -

3. This appeal, in effect, is directed against the judgement of the learned Single Judge, dated 23.03.2021.

3.1. The appellant, i.e., National Highways Authority of India (hereafter referred as "NHAI") had assailed, before the learned Single Judge, in a petition, filed under Section 34 of the Arbitration and Conciliation Act, 1996 Act (in short '1996 Act'), the arbitral award dated 12.12.2020.

Background facts: -

4. Briefly, the aforementioned award came to be challenged in the backdrop of the following facts and circumstances.

4.1. The respondent was awarded a contract for "collection of user fee at Vemapadu toll plaza located at Km. 795.498 for the section from Km. 358.00 to Km. 272.00 (New Chainage from Km. 830.525 to Km. 741.255) [Ankaapalli to Tuni] of NH-5 in the State of Andhra Pradesh" (hereafter referred to as 'toll plaza').

4.2. A dispute arose, as between the parties referred to hereinabove, i.e., NHAI and the respondent, with regard to waiver of imposition of Goods of Services Tax (GST), which came into force with effect from 01.07.2017.

4.3. The respondent claimed waiver *qua* imposition of GST, in terms of clause 25(b) of the contract agreement obtaining between the parties, which was executed on 30.07.2016 (hereafter referred as 'contract agreement).

4.4. The Arbitral Tribunal, after perusing the evidence placed on record and hearing the representatives of parties, returned the finding of fact that, a *force majeure* event occurred, causing the respondent to suffer a "material adverse effect".

4.5. Aggrieved by the conclusion reached by the Arbitral Tribunal, NHAI, as noticed above, instituted a petition under Section 34 of the 1996 Act.

4.6. The learned Single Judge, dismissed the section 34 petition *via* the impugned judgement and, consequently, sustained the view taken by the Arbitral Tribunal.

Submissions advanced on behalf of NHAI: -

5. Mr. Sourabh Banerjee, learned counsel, who appears on behalf of NHAI, says that the judgment dated 23.02.2021, passed by the learned Single Judge, is flawed.

5.1. Mr. Banerjee, in support of this submission, relies upon the circular dated 16.03.2018, issued by the NHAI. (See: page 140 of the paper book). Mr. Banerjee says that a plain reading of paragraph 2 of the said circular would show that before waiver could have been claimed by the respondent qua user fee based on force majeure clause, it had to be ascertained whether the change in law with the introduction of GST brought about a material adverse effect in the collection of toll fee.

5.2. Mr. Banerjee says that, there was no material adverse effect and therefore, the conclusion reached by the Arbitral tribunal was erroneous.

Submissions advanced on behalf of the respondent: -

6. On the other hand, Mr. Angad Mehta, who appears on advance notice on behalf of the respondent, contends to the contrary. In support of his submission that, the change in law did bring about a material adverse effect, insofar as the respondent was concerned, our attention has been drawn by Mr. Angad to two separate reports submitted by the Project Directors, who were concerned with the aforementioned toll plaza, as regards the shortfall in collection of toll fee. According to Mr. Angad, the loss suffered by the respondent had been quantified at Rs.1,03,88,126/-

Analysis and reasons: -

7. We have heard the learned counsel for the parties and perused the record.

7.1. In our view, there were two issues, which had been correctly crystallized by the Arbitral Tribunal, that arose for consideration: first, whether the introduction of the GST, w.e.f. 01.07.2017, constituted a change in law as per clause 25(b) of the contract agreement, obtaining between the parties. Second, whether the change in law had brought a "material adverse effect" in the collection of toll fee by the respondent.

7.2. For the sake of convenience, the relevant clause 25(b) of the contract agreement is extracted hereinafter:

> "***25. (b) FORCE MAJEURE EVENT:***
>
> *Except as stated in Clause (a) above, Force Majeure event means an event or circumstances or a combination of events and circumstances referred to in this clause which are beyond the reasonable control of the Party or Parties to this Contract and which party could not have prevented or reasonably overcome with the exercise of its reasonable skill and care in relation to performance of its obligations pursuant to this Contract and which are of the nature, without limitation of those described below:*
>
> *(i) Publicly declared strike by registered and recognised association of Transporters exceeding 7 days. The date of going on strike and withdrawal*
> *or start of movement of traffic will be inclusive for the purpose of calculation of 7 days under this clause.*
> *(ii) Floods/Earthquake having materially adverse impact i.e. complete blockade of road.*
> *(iii) Act of war, invasion, armed conflict or act of foreign enemy, unexpected call up of armed forces, blockade, embargo,*

revolution, riot sabotage, terrorism or act of such threat, or any other political or social event having material adverse impact on the performance of obligations of the parties thereof.
(iv) Expropriation, acquisition, confiscation or nationalisation of the User Fee collection
***(v) Any change in law which has a material adverse effect on the obligation of the parties hereto**.*
(vi) Any decision or order of a court or tribunal, which has a material adverse effect on the performance of obligations of the parties to this Contract.
(vii) Suspension of traffic on the said section of National Highway/said bridge or any party thereof, exceeding 15 (fifteen) days at a stretch.
(viii) Any event or circumstances of a nature analogous to the foregoing.

Either party to this Contract shall be entitled to suspend or excuse performance of his obligations, including remittance of instalments by the Contractor to the Authority for the period of continuance of the Force Majeure event, under this Contract to the extent that such performance is impeded by an event of Force Majeure prevailing continuously for more than 7 (seven) days at a time (or continuously for more than 3 (three) days at a time in case of no user fee collection at all at the toll plaza) for reasons not attributable to the Contractor."

[Emphasis is ours]

7.3. As noted above by us, the Arbitral Tribunal returned a finding that, the introduction of GST not only brought about a change in law but also adversely affected the interests of the respondent.

7.4. It cannot, but be accepted, by NHAI that, with the introduction of the GST, a change of law was brought about, as a number of indirect taxes were subsumed in The Central Goods and Services Tax Act, 2017. Therefore, this part of clause 25(b) presents no difficulty.

7.5. The other part of clause 25(b) as to, whether the change in law had brought about a "material adverse effect" upon the respondent, required appraisal of evidence, analysis, and a factual finding to support the respondent's case before the Arbitral Tribunal. *Qua* this aspect, the Arbitral Tribunal, as noticed above, relied upon the reports of two separate Project Directors, dated 04.07.2018 and 10.08.2018 to reach the conclusion that respondent's interest had been adversely impacted.

7.6. For the sake of convenience, the relevant portion of the aforementioned report dated 04.07.2018 is extracted hereunder:

> "*Sub: NHAI, PIU-Rajamahendravaram - Collection of User Fee on the basis Competitive bidding at Km.795.498 (at Vempadu Toll Plaza) for the section from Km Anakapalli to Tuni from Km.830.553 to Km.741.255 {Kolkata, Chennai) of National Highway No.16 (Old NH·5) in the state of Andhra Pradesh. Request of agency M/s. C.P.Ramarao to grant Force Majeure on the implementation of GST from 01.07.2017 to 04.08.2017- Reg.*
>
> ***xxx xxx xxx***
>
> *In continuation of this office letter vide reference 14th &. 15th cited and further directions from RO, Vijayawada vide reference 18th cited, the proposal has been compared and the following remarks are here with submitted for perusal:*
>
> *1. The average daily collection of July 2017 was compared with average daily collection of July 2016 and noticed that 5.700% is more in collection, this office has also taken into the consideration the APC in RFP which was hosted by NHAI for the year 2015-16 for an amount of Rs. 96.5 crores and for 2016-17 is Rs.119.11 crores. After taking the above into consideration the collection is about 23.43% was more for the year 2016-17 when compared with 2015-16. The net reduction in collection after taking the above into consideration is 17.73%.*

2. The average daily collection of July 2017 was compared with daily collections of April 2017, May 2017 &. June 2017 and noticed that 16.199% reduction in collection.

3. The average daily collection of July 2017 was compared with average daily collections of Aug 2017, Sept 2017 & Oct 2017 and noticed that 5.88% reduction in collection.

The loss claimed by M/s C.P.Ramarao as per agreement conditions from 01.07.2018 to 04.08.2018 is Rs. 1,03,88,126/- which is about 9.12%.

In view of the above, this office is the opinion that some loss has occurred in the collection of user fee at Vempadu on implementation of GST w.e.f., 01.07.2017, as such the loss claimed by the agency M/s C.P.Ramarao for an amount of Rs.1,03,88,126/- is herewith recommended for kind perusal and taking further necessary action."

7.7. Likewise, the second report, generated by a different project director, dated 10.08.2018, arrived at a similar conclusion. The relevant portion of the said report is extracted hereunder:

"*Sub: NHAI, PIU-Rajamahendravaram - Collection of User Fee on the basis Competitive bidding at Km.795.498 (at Vempadu Toll Plaza) for the section from Km Anakapalli to Tuni from Km.830.553 to Km.741.255 {Kolkata, Chennai) of National Highway No.16 (Old NH·5) in the state of Andhra Pradesh. Request of agency M/s. C.P.Ramarao to grant Force Majeure on the implementation of GST from 01.07.2017 to 04.08.2017- Reg.*

xxx xxx xxx

In continuation of this office letter vide reference 14th, 15th & 19th cited and further directions from RO, Vijayawada for comparison of commercial vehicles traffic with the previous period and *succeeding period, this office has obtained the traffic from the respective contractors and the same have been compared and the following were noticed:*

1. The average daily traffic of July 2017 was compared with average daily traffic of July 2016 and noticed that 1.362% declined is noticed in traffic, but as per the bidding hosted by NHAI for vempadu toll plaza from 2015-16 to 2016-17, it is clearly noticed that about 23.43% increase in bidding amount. If we considered this percentage of increased bidding amount on the above decline in traffic the total decline % would be 24.79% (1.362%+23.43%). However while comparison of APC percentage on category wise it was noticed that for the F.Y.2015-16 the LMV category percentage was fixed to 17% but whereas the same was fixed for the F.Y.2016-17 is 13%. As such the commercial vehicle % was increased about 4% during the F.Y.2016-17. ***By considering all the above, 20.793% overall reduction is noticed.***

2. The average daily traffic of July 2017 was compared with average daily traffic of April 2017 May 2017 & June 2017 and noticed that 15.413% reduction in traffic.

3. The average daily traffic of July 2017 was compared with average daily traffic of Aug 2017, Sept 2017 & Oct 2017 ***and noticed that about 1% reduction in traffic.***

The loss claimed by M/s C.P. Ramarao as per agreement conditions from 01.07.2018 to 04.08.2018 is Rs.1,03,88,126/- which is about 9.12% on their weekly collection.

In view of the above, this office has noticed that some loss has occurred in the collection of user fee at Vempadu on implementation of GST w.e.f. 01.07.2017, as such the loss claimed by the agency M/s. C.P. Ramarao for an amount of Rs.1,03,88,126/- is herewith recommended for taking further necessary action*."*

[Emphasis is ours]

7.8. We may also note that, the learned Single Judge, in paragraph 30 of the impugned judgement, has also noticed the reports of the Project Directors insofar as the loss which was suffered by the respondent, as regards the user fee, on account of imposition of GST. Observations made, in that behalf, in the impugned judgement, are extracted hereunder:

> "30. Undeniably, the said event had been duly notified to NHAI. The Arbitral Tribunal also noted that NHAI had not disputed the said claim at the material time. It was also noticed that two independent PDs had evaluated the said claim and had also made their recommendations. The Tribunal further held that the question – whether the introduction of GST had any material adverse effect – could be determined by assessing the impact of the said change on the respondent's ability to discharge his obligations under the Agreement. The PDs had assessed the loss during the period from 01.07.2017 to 04.08.2017 at ₹1,03,88,126/-. The Arbitral Tribunal held that the said amount could not be considered as immaterial and therefore, concluded that a force majeure event, as contemplated under Sub-clause (v) of Clause 25(b) of the Contract Agreement, had occurred."

7.9. Having regard to the aforesaid, in our view, the conclusion arrived at by the Arbitral Tribunal and the learned Single Judge cannot be faulted.

8. We may also note that, the learned Single Judge, while rejecting the petition of the NHAI, filed under Section 34 of the 1996 Act, noticed a judgment of the coordinate Bench [which was referred to by the counsel for the respondent], involving an entity, going by the name Sahakar Global Limited. Reference to the said judgement is made in paragraph 33 and 37 of the impugned judgment.

8.1. Mr. Angad pointed out that, the NHAI has accepted the judgement rendered by this Court in ***National Highways Authority of India vs. Sahakar Global Limited***, MANU/DE/1826/2020 : 2020[42] G.S.T.L. 205.

8.2. We are also informed by Mr. Angad that, pursuant to the aforesaid judgment, NHAI has released the amount held back on account of GST, insofar as Sahakar Global Limited is concerned. In this behalf, Mr. Angad has screen-shared a letter dated 02.01.2021, issued by the Project Director, NHAI, PIU Rajkot evidencing the aforesaid transaction. The said letter is taken on record. The relevant portion of the said letter is extracted hereafter.

> "Ref.: NHAI/PIU-Rajkot/Sahakar Global-Vaghasia TP/2143
>
> Dated 02.01.2021
>
> TO
> M/s Sahakar Global Limited,
>
> **xxx** **xxx** **xxx**
>
> Sub. Vaghasia Free Plaza for the section from Km 183.500 to 254.000 (Bamanbore -Garamore Section) of NH - 8A in the state of Gujarat- Court case filled by NHAI in Delhi High Court against the toll collecting agency M/ S Sahakar Global Ltd. Reg. Payment Confirmation letter
>
> **xxx** **xxx** **xxx**
>
> Sir,
> With reference to the above subject letter NHAI F&A unit has release payment for above Bank Account as per given detail M/S Sahakar Global Ltd., Account No- xxx xxx xxx, Bank Name- xxx Branch, IFSC Code -xxx, Net payment to fee collecting agency after statutory deduction are as under:-
>
> a) **Claim on Account of loss in collection Due to implementation of GST 1,17,93,603/-**
>
> **xxx** **xxx** **xxx**
>
> Yours faithfully,
> Pankaj Kumar Roy
> Project Director
> NHAI, PIU Rajkot"

[Emphasis is ours]

8.3. We have queried Mr. Banerjee. Mr. Banerjee has obtained instructions. He states that the money has been released to Sahakar Global Limited in terms of the aforesaid letter dated 02.01.2021, issued by PIU-Rajkot, NHAI.

Conclusion: -

9. Given the foregoing, we find no merit in the present appeal. The appeal is, accordingly, dismissed. Pending application(s) shall also stand closed.

10. The case papers shall stand consigned to record.

RAJIV SHAKDHER, J

TALWANT SINGH, J

JULY 22, 2021

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Click here to check corrigendum, if any