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

Date of Decision: 25th August, 2021

+ **ARB. A. (COMM.) 38/2021, I.A. 9659/2021 & I.A. 9660/2021**

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Appellant

Through: Mr. Sudhir Nandrajog, Senior Advocate with Ms. Sangeeta Bharti and Ms. Mehak Kanwar, Advocates.

versus

WAINGANGA EXPRESSWAY PVT. LTD. Respondent

Through: Mr. Manoj K. Singh, Mr. Nilava Bandopadhyay, Ms. Moonmoon Nanda and Ms. Divya Kashyap, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J. (Oral):

1. Appellant- National Highways Authority ('NHAI') is aggrieved with the interim order passed by the Arbitral Tribunal ('AT') dated 15th June, 2021 whereby the AT has allowed the application filed by the Respondent- Wainganga Expressway Private Limited (in short 'WEPL') under Section 17 of the Act.

Brief Facts-

2. Before dealing with the contentions of the parties, it would be apposite to note the factual background leading to the present appeal. The same is summarised as follows:

2.1. The Appellant invited proposals *vide* Request For Qualification (RFQ) dated 11th November, 2010 for shortlisting of bidders for construction, operation and maintenance of Nagpur-Wainganga (Bhandara) Bridge Section of NH-06 from 498 km to 544.20 km in Maharashtra (Project Highway) on Design, Build, Finance, Operate and Transfer (in short 'DBFOT') basis.

2.2. Pursuant thereto, NHAI shortlisted certain bidders including *inter alia* JMC Projects (India) Limited (in short 'JMC') by way of Request for Proposal (RFP) dated 3rd March, 2011. JMC's bid was accepted by NHAI *vide* letter dated 9th May, 2011. Thereafter, JMC incorporated Wainganga Expressway Private Limited ('WEPL')-the Respondent herein, as a SPV, to undertake and perform the obligations and exercise rights on its behalf.

2.3. A Concession Agreement (CA) was executed between NHAI and WEPL on 21st June, 2011 in connection with the Project Highway.

2.4. On account of disputes arising in respect of the Project Highway, WEPL invoked arbitration, which led to the appointment of the AT. WEPL is the claimant and NHAI is the counter-claimant in the on-going arbitration proceedings.

2.5. The AT *vide* order dated 14th January, 2021 has framed the issues which arise for consideration.

2.6. WEPL filed an application under Section 17 of the Act seeking interim reliefs *inter alia* restraining the NHAI from making any demand for recovering any amount on account of Additional Concession Fee (Premium) or interest related to Additional Concession Fee (Premium) from the WEPL and restraining NHAI from withdrawing any amount on account of Additional Concession Fee (Premium) or interest related to Additional Concession Fee (Premium) from Escrow Account, till passing of the award.

2.7. The afore-said application has been decided by the AT *vide* impugned order dated 15th June, 2021, granting interim relief to the WEPL, restraining the Appellant from realizing its Additional Concession Fee (Premium), arrears as well as current, together with interest, up to the month of June, 2021.

3. Aggrieved by the aforesaid directions, NHAI has preferred the instant appeal.

Contentions of the parties-

4. Mr. Sudhir Nandrajog, Senior Counsel on behalf of NHAI, has *inter alia* made the following submissions:

- (i) The AT has exceeded its jurisdiction in granting the interim relief to WEPL, ignoring the fact that the restraint sought by them is included in its claim for damages made in prayer (a) of the Statement of Claim. This claim can be allowed only after the parties have proven the same in accordance with law. Allowing the interim application amounts to grant of final relief at an interim stage.
- (ii) The direction in the impugned order for payment of meagre amount of Rs. 27,00,000/- per month to NHAI, which the AT deemed to be 'fair and reasonable' as compared to the actual Additional Concession Fee (Premium) amount of Rs. 2,20,66,666/- which was payable monthly fee in terms of the contractual provisions, is contrary to the spirit of the contract and thus, the AT acted beyond its jurisdiction.
- (iii) The AT has overlooked Article 26 of the CA which stipulates that Additional Concession Fee (Premium) shall be treated as part of the Concession Fee. WEPL understood that the concession fee was inclusive of the Additional Concession Fee (Premium) and for this reason it had regularly paid the Additional Concession Fee (Premium) till December, 2019. Subsequently, in April, 2021 with the intent to avoid its obligations under the terms of the CA, they invented an erroneous interpretation that the provisions of the Escrow Agreement prevailed over the CA.
- (iv) The AT has acted contrary to the specific and unambiguous terms of the CA which mandated payment of Concession Fee due and payable to the Authority- NHAI, in priority, over the monthly proportionate provision of debt service payments due in an Accounting

Year in respect of Subordinated Debt, as stipulated in the waterfall mechanism as provided under Article 31.3 of the CA. The AT has failed to appreciate Clause 11.3 of the Escrow Agreement which particularly mentions that in the event of any conflict between CA and the Escrow Agreement, the provisions of the CA shall prevail. The AT has not given any finding on how to reconcile and harmoniously read the provisions of the two Agreements.

(v) The AT has overlooked Article 44.3.5 which specifically directed the parties i.e., the Concessionaire-WEPL and the Employer-NHAI to perform its obligations pending award in any arbitration proceedings.

(vi) The AT failed to notice that if WEPL was unable to pay the Additional Concession Fee (Premium), it ought to have invoked Article 29.2 of the CA for seeking modification of the Concession Period or Article 37 for termination of the CA.

(vii) The impugned order has gravely prejudiced NHAI as, on account of stoppage of payment of Additional Concession Fee (Premium), the funding of important infrastructure projects of NHAI are suffering.

(viii) The relief granted is based on assumptions, surmises and conjectures.

5. Countering the submissions made by the NHAI, the arguments made by Mr. Manoj K. Singh, counsel for WEPL can be summarized as follows:

(i) The AT has observed that the issues raised by both the parties presented a substantial *prima facie* case deserving elaborate adjudication. Pending final adjudication of any issue, which cannot be

done at an interim stage, the AT has proceeded to grant relief to WEPL by balancing the rights/equity between the parties. In these circumstances, the view taken by the AT, of granting interim relief cannot be faulted with.

(ii) The injunction order only temporarily defers the claims of the NHAI and no adverse consequence or injury would be suffered by NHAI if the payment of the Premium was to be deferred.

(iii) The direction of the AT to the Respondent to make only a part payment of the premium amount is necessary as otherwise the Respondent's loan account would be declared as a non-performing asset. This Court cannot venture into deciding the rights and obligations of the parties by interpreting the clauses of the CA.

(iv) On merits also, the AT has formed a *prima facie* case for the grant of injunction. This view taken by the Tribunal cannot be a subject matter of the present proceedings, having regard to the limited and restricted scope of interference under Section 37(2)(b) of the Act.

(v) The Project Highway is built on a DBFOT basis, WEPL has a concession period (including the construction period). During this period, WEPL has to recover the cost incurred by it to construct the Project Highway and recover the recurring cost of making payments towards Premium and Operation & Maintenance, which it can only do by collecting toll. Toll collection has taken a hit since NHAI, in breach of its contractual obligations, has allowed the construction of competing roads in and around the Project Highway and this has resulted in traffic flow being drastically reduced. Thus, the only source of revenue for WEPL has shrunk due to the actions of NHAI.

(vi) As per the terms of the Escrow Agreement, the funds deposited in the Escrow Account are to be used by the Respondent to discharge multiple liabilities like taxes, payments relating to construction etc. Further, Clause 4.1 of the Escrow Agreement clearly states that for the purposes of withdrawals, concession fee and premium are two different incidents. Premium is posted after debt service obligations and debt service obligations assumes higher priority than premium payment in the waterfall mechanism prescribed. NHAI's own circular dated 4th September, 2019 has identified the priority of debt before premium assigned under the Escrow Agreement and has recorded that Escrow Agreement has to be amended to make premium a part of the concession fee for priority in recovery over debt obligations. In the absence of any such amendment, the order of priority given in the Escrow Agreement will prevail.

Findings-

6. The Court has considered the contentions advanced by the counsel for the parties. It would first be appropriate to note the relevant observations made by the AT in the impugned order which are as follows:

“23. The preliminary objections raised on behalf of the Respondent bearing on the maintainability of the interim reliefs based on the provisions of Act, 1963 need be addressed at the outset. In the opinion of the Tribunal, the bar on the grant of injunction in a suit under the said legislation involving a contract relating to an infrastructure project specified in the Schedule thereof is not attracted to the facts of the present case as the interim reliefs prayed for if granted, would not cause impediment or delay in the progressor completion of such infrastructure project. Though a road infrastructure project is involved therein, the interim reliefs sought for, have no bearing whatsoever on the progress or completion thereof.

Section 38 of Act, 1963 on which reliance has been placed by the Ld. Senior Counsel for the Respondent, at the first place deals with perpetual

injunctions and not temporary injunctions as prayed for by the Claimant. That apart, having regard to the persistent apprehension expressed on behalf of the Claimant that rejection of the interim reliefs, having regard to its fragile financial status, would disable it to service its debt for which its loan account would be declared as 'Non Performing Asset' leading to disastrous irreparable consequences, not compensable in terms of money, the Tribunal is not inclined to refuse consideration of the Claimant's request for interim reliefs on merit. On the same measure, the cavil founded on Section 41(h) of Act, 1973 cannot be sustained, lest dismissal of the Application in limine without examining the inherent merit thereof leads to irreversible consequences. No equally efficacious relief, in the aftermath of the declaration of the Claimant's loan account as Non Performing Asset is readily comprehensible. The preliminary objections based on law as above therefore do not commend for acceptance.

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25. Having regard to the spectrum of the issues raised in the Application and the weighty rival contentions stemming therefrom, the Tribunal is of the considered view that the same present a cognizable prima facie case demanding in depth adjudication thereof on merits. It is a matter of record that pursuant to a scheme of the Ministry of Road Transport and Highways, Government of India, for rationalization of Premium quoted by concessionaires in respect of National Highway Projects which were stressed and were expecting further financial stress in view of lesser expected toll revenue generation compared to the estimated toll revenue at the time of bidding, the Claimant had applied to avail the benefit of deferment of Premium in terms thereof and was sanctioned the same by the Respondent by its letter dated 26.12.2014 subject to the conditions mentioned therein. Subsequent thereto, the Supplementary Agreement dated 20.01.2015 was executed between the Claimant and NHAI, whereby the Claimant accepted all such conditions for rescheduling of the Premium amount. The effect of the Supplementary Agreement dated 20.01.2015 and the terms thereof, remains to be examined after the parties adduce evidence and arguments are advanced on their behalf. Such deferment of Premium was for the period from 2014-2015 to 2023-2024.

Vis-a-vis the roads alleged by the Claimant to be competing roads setup by the Respondent in breach of Clause 6.3 of the CA during the years from 2014 to 2019 after the execution of the Concession Agreement, the assertion of the Respondent to the contrary is that none of these roads is a competing road within the meaning of the CA and that these roads had been in existence and in use from before the bidding. Whether these roads are 'competing roads' within the meaning of Article 48.1 of the Concession Agreement, remains to be seen after the parties adduce evidence and arguments are advanced on their behalf on merits. The pleadings of the parties and the affidavit of evidence of their witnesses, pending their cross

examination also substantially endorse these rival projections. The aspects of variation if any, in the traffic on the Project Highway and the toll revenue also demand detailed evaluation. A forensic analysis of the relevant provisions of the CA and EA is also warranted to decide the debate with regard to the correct waterfall mechanism for withdrawals from the Escrow Account. All these are feasible in the final adjudication of the issues already framed. As it is, the reference is fixed from 22.06.2021 for recording of the evidence of the Claimant's witnesses and is therefore, at a relatively advanced stage.

26. The categorical and consistent plea of the Claimant has been that in view of reduction in its income from toll revenue, it is in cash negative so much so that it is presently in a position barely to maintain the Project Highway, service its debts and meet its establishment costs and that if it is required to pay the Premium and that too before the Debt service, it would fail to make the payments towards its debts as a result whereof, its loan account would be declared as a Non Performing Asset and it would be exposed to a spate of legal actions. As a consequence thereof, it would be declared a willful defaulter, and besides being drawn to insolvency proceedings would be ousted from the Project and commercially ruined for all intents and purposes. The Respondent has not offered any observation in this regard except stating that the alleged poor financial status is due to inept calculation of its business risks and inefficient administration of its financial obligations.

The fallout of the declaration of the Claimant's loan account to be a Non Performing Asset as recited hereinabove are encompass legally comprehended consequences. Not only thereby, the Claimant would be exposed to a series of litigation, it would generally suffer irreparable loss, prejudice and injury. It is not unlikely as well, that following the initiation of any action under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 by the lenders of the Claimant consequent upon its failure to pay its debts, even the Project Highway may become the subject matter of such proceedings, thereby impacting upon its operation as well. Institution of insolvency proceedings against the Claimant and loss of its business reputation, goodwill and prospects are also foreseeable consequences. In the opinion of the Tribunal these constitute irreparable injury and cannot be compensated in terms of money.

As in the opinion of the Tribunal, the issues raised in the Application present a substantial prima facie case deserving elaborate adjudication, it is considered inexpedient at this stage, having regard to the above possible detrimental consequences that may visit the Claimant, to wholly deny the interim reliefs sought for.

On the other hand, as the final adjudication of the reference involving the same and other related issues is likely to be completed shortly, grant of the injunction as sought for, would for the present only imply that

the receipt by the Respondent, of the Premium amount claimed to be due under the contract, if it is eventually found to be entitled thereto, would stand temporarily deferred. No adverse consequence or injury comparable to those likely to be suffered by the Claimant, would be encountered by the Respondent. The balance of convenience thus is also in favor of the grant of the interim reliefs. Further, the Tribunal, in the attendant facts and circumstances, is of the considered view, that the status quo of the subject matter of the reference be maintained till the final adjudication thereof is complete.

In the above overall legal and factual premise, the Tribunal is of the unhesitant opinion that on the measure of prima facie case, balance of convenience and irreparable injury, the Claimant is entitled to the interim reliefs as prayed for in the Application.

27. The above notwithstanding, the Tribunal being mindful of the contractual obligations of the parties and balancing as well, their rights thereunder, is of the considered view that pending final adjudication of the reference, the Claimant ought to be directed to pay some percentage of the premium amount presently payable, as an interim arrangement, without prejudice to the rights and contention of the parties. In the estimate of the Tribunal, on a consideration of the materials on record presently available, a lump sum of Rs.27,00,000/- (Rupees Twenty Seven Lakhs) per month would be fair and reasonable. As due to the restraints on vehicular movements in the wake of the curfew/ lockdown imposed following the resurgence of Covid-19 Pandemic, there is every likelihood that the traffic on the Project Highway has reduced on this count and the toll collection has been adversely affected thereby and that the situation would take some more time to improve, the Tribunal considers it to be just and proper to direct payment of the above amount of premium as an interim measure, from the month of July, 2021. The realization of Premium, arrears as well as current, together with interest thereon, up to the month of June, 2021, is hereby stayed."

(Emphasis Supplied)

7. On a bare perusal of the afore-noted observations made in the impugned order, it manifests that the AT is of the opinion that the issues arising in arbitration would require elaborate adjudication, in-depth analysis of the contractual provisions and that would necessitate evidence being adduced by the parties. The adjudication on the construction of the contract terms is thus, rightly deferred to the stage of final adjudication.

8. Pending final adjudication, for grant of an interim measure, the AT applied the three-prong test of (a) *Prima facie* case; (b) balance of convenience and (c) irreparable harm or injury and found that there is a substantial *prima facie* case in favour of WEPL, deserving elaborate adjudication. The AT also found the balance of convenience in favour of the applicant, for the grounds and reasons, taken note of in the extracted portion of the impugned order. On the third aspect of irreparable harm also, the AT has examined and found the case fit for grant of an injunction. Thus, the threshold for grant of injunction was met. At the same time, the observations made in para 27 extracted above show that the AT was mindful of the contractual obligations of the parties. Thus, the AT, struck a balance between the conflicting rights of the parties, pending final adjudication of the reference, and worked out an interim arrangement, without prejudice to the rights of either party.

9. Thus, at this juncture, the AT has not taken a firm view regarding the competing rights and obligations of the parties under the terms of the CA and the Escrow Agreement. The exercise of discretion by the AT for grant of interim order is based on the settled principles of law regulating grant or refusal of interlocutory injunctions. The Court does not find the exercise of discretion to be arbitrary, capricious or perverse. Before this Court, the entire line of arguments, advanced by Mr. Nandrajog, is based on interpretation of the provisions of the CA and the Escrow Agreement and the interplay thereunder, on which the AT is yet to take a view. Since the AT has deferred a decision on issues which lie in its exclusive domain, in absence of any

perversity in the impugned order, the Court finds no reason to interfere with the impugned order under Section 37(2)(b) of the Act and substitute its own discretion with the one exercised by the AT. Further, we must note that the arbitration proceedings have advanced to the stage of trial where the cross-examination of the Respondent's witnesses is in progress.

10. Mr. Singh had argued that the Project Highway was conceived on DBFOT basis. WEPL as a concessionaire has been allocated the project with a concession period of 18 years (including construction period of 910 days) which is to be reckoned from the appointed date i.e., 9th April, 2012. Since the Project Highway is based on DBFOT model, the entire investment is done by the Concessionaire - WEPL and NHAI, the beneficiary, enjoys the Project Highway and the profits therefrom in the form of premium payable by WEPL. He has further submitted that WEPL has already constructed the Project Highway by incurring a sum of more than Rs.484.19 Crores and the only way available with WEPL to recover this expenditure along with the recurring cost of the Operation and Maintenance and payment of Premium to NHAI and to get reasonable return from the project, is collection of toll. Since NHAI is in breach of its obligations under the CA and has constructed/ allowed construction of competing roads and/or alternate roads in and around the Project Highway which is adversely impacting the traffic flow on the Project Highway, it has drastically impacted the toll collection which is the only source of revenue for WEPL. These reasons have led WEPL, to make a claim before the AT seeking declaratory leave regarding waiver of payment of premium apart from the other claims of damages etc. It has been further pointed out that WEPL has suffered from a cash shortfall of Rs. 2.52

Crores as on 30th April, 2021 and despite the negative cash flow, it has deposited a premium of Rs. 87.09 Crores upto November, 2020.

11. All the aforementioned factors and the likely adverse impact of the denial of injunction on the Project Highway, have weighed with the AT, to find the right note to maintain a balance, pending final adjudication of reference. This was necessary and is a relevant consideration for grant of interim measures.

12. Accordingly, the Court does not find any ground to interfere with the impugned order and accordingly, the present appeal is dismissed. The pending applications also stand disposed of.

13. Needless to say, the AT will decide all the issues, without being influenced by the observations made by this Court which are only *prima facie* in nature.

AUGUST 25, 2021

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(corrected and released on 10th September, 2021)

SANJEEV NARULA, J