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

Date of Decision: 1st December, 2021

+ **O.M.P.(I) (COMM.) 392/2021 & I.A. 15789/2021**

BAMANBORE TOLLWAY PRIVATE LTD. Petitioner

Through: Mr. Nakul Dewan, Senior Advocate
with Mr. Mahesh Sahasranaman, Ms.
Geetanjali Murti and Mr. Sambit
Nanda, Advocates.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA & ANR.

..... Respondents

Through: Mr. Abhay Gupta, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA HYBRID MODE]

SANJEEV NARULA, J. (Oral):

1. The present petition under Section 9 of the Arbitration and Conciliation Act, 1996 [*hereinafter, "the Act"*] has been filed seeking interim measures pending constitution of the Arbitral Tribunal against coercive recovery by NHAI towards damages due to failure of repair and maintenance work on project assets.

THE DISPUTE

2. The facts leading to the present petition are as follows:

2.1. Petitioner – Bamanbore Tollway Private Ltd. [*hereinafter*, “**BTPL**”] and Respondent No. 1 – National Highways Authority of India [*hereinafter*, “**NHAI**”] entered into a Concession Agreement dated 26th April, 2018 *inter alia* for ‘*Tolling, Operation, Management, Maintenance & Transfer of National Highway stretch of Bamanbore to Garamore Section (from km 182+600 to km 254+537) of NH8A*’ [*hereinafter*, ‘**Project Highway**’] in Gujarat on a Toll-Operate-Transfer (‘TOT’) Basis for a period of 30 years.

2.2. Pursuant to a joint-inspection carried out on 25th April, 2020 along with representatives of BTPL, the Independent Engineer [*hereinafter*, “**IE**”], *vide* letter dated 27th April, 2020, listed out defects in the work that required repair and maintenance. Subsequently the damages were quantified and proposed at Rs. 1,55,652/- in compliance with Article 15.8.1(b) of the Concessionaire Agreement. This was followed by another communication dated 18th August, 2020, wherein the IE, pursuant to inspection carried out at the project site on 12th August, 2020, listed out further defects. On the basis of said defects, the IE proposed that damages under Clause 15.8.1(b) be fixed at Rs. 2 lacs per day, till the repair work was completed by BTPL.

2.3. BTPL responded to the afore-noted communications *vide* letter dated 24th August, 2020 contending that defects had been rectified. It submitted a compliance report to that effect, enclosing photographs of repairs carried out. In the meantime, NHAI on 31st March, 2021, on basis of the letter of IE proposing the damages, called upon the Petitioner to make a payment of Rs. 4,09,55,652/- as per Article 15.8.1. BTPL *vide* letters dated 7th April, 2021

and 9th June, 2021, refuted all allegations levelled against it in detail, and also called upon NHAI to withdraw the Demand Notice dated 19th June, 2020.

2.4. NHAI issued an escrow invocation letter dated 2nd November, 2021 threatening recovery of an amount of Rs. 4,09,55,652/- from an escrow account No. 038305001943 maintained by BTPL at ICICI Bank, Chembur Basant Cinema Branch, Mumbai.

2.5. In this background, BTPL has filed the present petition seeking interim protection of restraining NHAI from coercive recovery of damages from the aforesaid escrow account or such other means.

3. Mr. Nakul Dewan, Senior Counsel for BTPL, states that the action of NHAI is completely arbitrary and unreasonable, and makes the following submissions:

3.1. The action of NHAI for recovering damages from the escrow account is contrary to contractual terms. NHAI's right to remedial measures is stipulated under Article 15.9 of the Concessionaire Agreement, which reads as follows:

“15.9 Authority's right to take remedial measures

15.9.1 In the event the Concessionaire does not maintain and/or repair the Project Highway or any part thereof in conformity with the Maintenance Requirements, the Maintenance Manual or the Maintenance Programme or Safety Requirements, as the case may be, and fails to commence remedial works within 15 (fifteen) days of receipt of the O&M Inspection Report or a notice in this behalf from the Authority or the Independent Engineer, as the case may be, the Authority shall, without prejudice to its rights under this Agreement including Termination thereof, be entitled to undertake such remedial measures at the risk and cost of the Concessionaire, and to recover its cost from the Concessionaire. In addition to recovery of the aforesaid cost, a sum equal to 50% (fifty per cent) of such cost shall be paid by the Concessionaire to the Authority as Damages. For the avoidance of doubt, the right of the Authority under

this Clause 15.9.1 shall be without prejudice to its rights and remedies provided under Clause 15.8.

15.9.2 In the event of non- payment by Concessionaire of such delinquent amount forthwith and in any case within seven days of issue of written notice by Authority the Authority shall have the right and the Concessionaire hereby expressly grants to the Authority the right to recover the costs and Damages specified in Clause 15.9.1 directly from the Escrow Account, and for that purpose, the Concessionaire hereby agrees to give irrevocable instructions to the Escrow Bank to make payment from the Escrow Account in accordance with the instructions of the Authority under this Clause 15.9.2.”

[emphasis supplied]

3.2. Under Article 15.9.2, NHAI’s right to recover delinquent amount and damages from the escrow account, is subject to due compliance of the conditions stipulated in Article 15.9.1. NHAI has to first carry out the remedial measures at the risk and cost of BTPL, as provided in Article 15.9.1, and only then can it make a recovery for delinquent amount and damages.

3.3. The proposed recovery by NHAI under the Demand Notice has been done purely on the basis of damages calculated unilaterally by them – which BTPL strongly disputes. Since the imposition of damages is in dispute, NHAI cannot recover the same from the escrow account.

3.4. The right to recover damages under Article 15.8.1 cannot be understood to mean that NHAI can resort to recovery from the escrow account as provided under Article 15.9.1. NHAI can invoke the said Article only in the event BTPL fails to commence remedial works within 15 days of the O&M Inspection Report Notice, provided NHAI undertakes remedial measures at the risk and cost of BTPL. Only if the BTPL fails to pay the delinquent amount, can NHAI recover the costs and damages specified in Article 15.9.1 from the Escrow Account.

3.5. BTPL had successfully and diligently carried out all the rectifications despite the difficulties faced due to COVID-19 lockdowns. The same were communicated to the IE with photographs evidencing the repair work. The detailed communications dated 7th April, 2021 and 9th June, 2021 have not been denied or responded to by NHAI.

3.6. The computation of damages at Rs. 4,09,55,652/- is completely arbitrary and is wrongly founded on an allegation that defects remain uncured, despite BTPL establishing to the contrary – that work had indeed been carried out in terms of the communications referred above. On the receipt of the letters from the IE, BTPL had *vide* 25th November, 2021 reiterated that it had completed all its obligations. The quantum of damages computed by IE and NHAI is *ex facie* arbitrary, excessive and erroneous. BTPL also requested for the withdrawal of the said demand and grant of an opportunity to demonstrate as to why the imposition of liquidated damages was not warranted, but no response was received for the same.

3.7. The recovery from the escrow account under Article 15.9 is impermissible without taking recourse under Articles 20.6 and 37 of the Agreement.

4. Mr. Abhay Gupta, counsel for NHAI, controverts the contentions made by Mr. Dewan and submits that NHAI had to take recourse under Article 15.8.1 on account of BTPL's failure to carry out the repairs, despite having been duly notified. He submits that the terms of the contract clearly

provided the right of recovery of damages from the Escrow Account. In this regard, he places reliance upon Articles 23A.3, reads as under:

“23A.3 Withdrawals during Concession Period

23A.3.1 The Concessionaire shall, at the time of opening of Escrow Account, give irrevocable instructions, by way of an Escrow Agreement, to the Escrow Bank instructing, inter alia, that deposits in the Escrow Account shall be appropriated in the following order every month, or at shorter intervals as necessary, and if not due in a month then appropriated proportionately in such month and retained in the Escrow Account and paid out therefrom in the month when due:

- (a) all taxes due and payable by the Concessionaire for and in respect of the Project Highway;*
- (b) all payments relating to construction of the Project Highway, subject to and in accordance with the conditions, if any, set forth in the Financing Agreements;*
- (c) O&M Expenses and other costs and expenses incurred by the Authority in accordance with the provisions of this Agreement, and certified by the Authority as due and payable to it;*
- (d) monthly proportionate provision of debt service payment due in an Accounting Year*
- (f) **all payments and Damages certified by the Authority as due and payable to it by the Concessionaire;** and*
- (j) balance, if any, in accordance with the instructions of the Concessionaire.”*

[Emphasis supplied]

5. He argues that sub-Article (f) of the afore-noted provision evidently includes damages certified by NHAI which can be recovered from the escrow account. This he submits is in consonance with Clause 4.1.1.(f) of the Escrow Agreement dated 30th March, 2021.

ANALYSIS AND FINDINGS

6. The Court has considered the contentions of the counsels. The right of recovery of damages and delinquent amount towards remedial measures undertaken under Article 15.9.1 by way of recovery from the escrow account – as provided under Article 15.9.2, is independent of the remedies provided under Article 15.8. This becomes apparent from a bare reading of

Article 15.9.1 which *inter alia* provides “[...]for the avoidance of doubt, the right of the authority under this Clause 15.9.1 shall be without prejudice to its rights and remedies provided under Clause 15.8.”. This Article further provides that “the Authority shall, without prejudice to its rights under this Agreement including Termination thereof, be entitled to undertake such remedial measures at the risk and cost of the Concessionaire” thereby suggesting that carrying out remedial measures is at the option of NHAI.

7. At this juncture, it would be apposite to refer to Article 15.8. The same is exacted hereinbelow:

“15.8 Damages for breach of O&M obligations

15.8.1 In the event that the Concessionaire fails to repair or rectify any defect or deficiency set forth in the Maintenance Requirements within the period specified therein or is in breach of the Maintenance Programme, Maintenance Manual and/or Safety Retirements, it shall be deemed to be in breach of this Agreement and the Authority shall be entitled to recover Damages, to be calculated and paid for each day of delay until the breach is cured, at the higher of (a) 0.5% (zero point five per cent) of Performance Security, and (b) 0.1% (zero point one per cent) of the cost of such repair or rectification as estimated by the Independent Engineer. Recovery of such Damage shall be without prejudice to the rights of the Authority under this Agreement, including the right of Termination thereof, and in the event of non-payment by Concessionaire of such delinquent amount forthwith and in any case within seven days of issue of written notice by Authority, the same shall be recovered by encashment of Performance Security in which case the provisions of clause 9 shall apply.

15.8.2 The Damages set forth in Clause 15.8.1 may be assessed and specified forthwith by the Independent Engineer; provided that the Authority may, in its discretion, demand a smaller sum as Damages, if in its opinion, the breach has been cured promptly and the Concessionaire is otherwise in compliance with its obligations hereunder. The Concessionaire shall pay such Damages forthwith. ”

[Emphasis supplied]

8. Article 15.8 pertains to damages for breach of ‘Operation & Maintenance Obligations’. Article 15.8.1 stipulates the mechanism for calculation of damages required to be paid in the event of breaches, which is

to be calculated and paid for each day of delay until the breach is cured. Under the said Article, damages are fixed at 0.5% of the Performance Security and 0.1% of the cost of repairs or rectification (as estimated by the IE). These damages can be levied till such time breach is cured and thus do not contemplate remedial measure as a pre-condition for levy. Concededly, NHAI has levied damages under this Article. *Prima facie*, damages contemplated under Article 15.8.1 are in the nature of pre-estimation of compensation for the damages suffered on account of breach. Therefore, BTPL's contention that – in the event damages are suffered by NHAI, on account of BTPL failure to repair or rectify any defect or deficiency set forth, NHAI has to first necessarily, take remedial measure(s) – is unmerited.

9. Article 15.8.1 provides for the recovery of the delinquent amount, by way of encashment of performance guarantee. Although it does not specifically provide the right to take recourse to the escrow account, this Article has to be dealt harmoniously with Article 23A.3.(f) – whereby the parties have agreed that withdrawals from the escrow account can also be apportioned towards payment of damages certified by NHAI. The court does not find merit in the submission of Mr. Dewan that damages contemplated under Article 23A.3.(f) are to be restricted to undisputed damages. There is no such distinction apparent from the reading of the provision.

10. The Court also does not find merit in the contention of Mr. Dewan that permitting NHAI to take recourse to escrow account would do violence to the contractual terms. The terms of the contract have to be given natural

and ordinary meaning by looking at the language of the Article and the commercial context in which they were drafted. The plain reading does not suggest that damages referred in the Article are only those that are admitted. Parties have categorically specified that the damages certified by NHAI as due and payable to it by BTPL can also be recovered from the escrow account. In the *prima facie* opinion of the Court, Sub-Article (f) of Article 23A.3 would also include the damages asserted under Article 15.8.1. Although the Court at this stage would not like to venture into the question as to whether the repairs have been indeed been carried out by BTPL, it may be pertinent to mention that NHAI has pointed out that defects in the Chainage mentioned in Annexure II, pointed out by IE *vide* letter dated 18th August, 2020 are with respect to Chainage 242460 etc., whereas, *prima facie*, the communications placed on record by BTPL dated 24th August, 2020 to contend that the defects had been rectified shows that defects pertain to Chainage 183+000, 184+140 etc.

11. In view of the above, the Court does not find that the ‘trinity test’ has been satisfied by BTPL for grant of an interim measure. Both, the *prima facie* case and the balance of convenience are grossly missing in the present case for the reliefs sought. Thus, there is no merit in the present petition.

12. Dismissed, along with pending application.

SANJEEVNARULA, J

DECEMBER 1, 2021

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