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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of decision: 21.03.2022

+ FAO(OS) (COMM) 52/2022 & CM No.10331/2022

NATIONAL HIGHWAYS AUTHORITY OF INDIA.....Appellant

Through Mr Parag P Tripathi, Sr Advocate
with Mr Anirudh Dusaj, Ms Shivangi
Khanna and Ms Madhu Sweta,
Advocates.

versus

SUPREME PANVEL INDAPUR TOLLWAYS
PRIVATE LIMITED

.....Respondent

Through Dr Amit George with Mr S P
Mukherjee, Mr Avinash Shukla, Mr
Jeewesh Prakash, Mr Piyo H Jaiman,
Mr Bharat R and Mr Amol Acharya,
Advocates.**CORAM:****HON'BLE MR JUSTICE RAJIV SHAKDHER****HON'BLE MR JUSTICE JASMEET SINGH****[Physical Hearing/Hybrid Hearing (as per request)]****RAJIV SHAKDHER, J. (ORAL):**

1. On the previous date, i.e., 16.03.2022, we had heard the learned counsel for the parties at some length, and, thereafter, captured, in a sense, the lay of the land.
2. For the sake of convenience, the relevant part of the order dated 16.03.2022 is set forth hereafter:

“1. This appeal is directed against the order dated 08.02.2022, passed by the learned single judge in OMP(I)(Comm) No.382/2021.

2. To be noted, this order was passed in a petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 [in short, “the Act”] by the respondent.



3. The record shows that the petitioner and the respondent, *inter alia*, entered into a Concession Agreement dated 21.01.2011 [in short “CA”].

3.1. It appears that the disputes arose between the parties which led to the appellant serving upon the respondent, a notice of intention to terminate the CA. This notice was issued on 16.10.2020.

3.2. This was followed by a termination notice dated 17.11.2021. It is this step, which impelled the respondent to approach the Court in a Section 9 petition.

3.3. The learned single judge, via order dated 23.11.2021, directed the appellant not to take coercive steps, pursuant to the termination notice dated 17.11.2021.

3.4. The impugned order i.e., the order dated 08.02.2022, which followed this order i.e., the order dated 23.11.2021 was, concededly, passed, based on an oral clarification sought on behalf of the appellant. The relevant observations made in the impugned order of the learned single judge are captured in paragraphs 5 to 7. For the sake of convenience, the same are extracted hereafter:

“5. Pertinently, the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 has been preferred by the petitioner seeking stay of respondent's communication dated 17.11.2021 and thereby, restraining the respondent from any coercive action upon it. In this light, this Court vide order dated 23.11.2021 had restrained the respondent to take any coercive action pursuant to its communication dated 17.11.2021. It is made clear that vide order dated 23.11.2021, this Court has not stayed the termination of the contract, as has been mentioned in Para-16 of communication dated 17.11.2021, however, stayed the consequence, which are mentioned in Para-17 thereof.

6. The arbitral tribunal has already been constituted and nothing survives for consideration in the present petition. Accordingly, parties are directed to appear before arbitral tribunal for redressal of their disputes. At the request of learned counsel for the petitioner, the present petition be listed before the arbitral tribunal as an application filed under Section 17 of the Act, which shall be considered in accordance with the law. Till the time the application under Section 17 of the Act is decided by the Tribunal, the directions given in Para-8



of the order dated 23.11.2021 shall remain in force. However, once the tribunal commences the hearing on the said application and proceed to decide the same, it shall be at liberty to modify or alter the order dated 23.11.2021 passed by this Court, if so required.

7. Needless to say, all the issues have been kept open for parties to be agitated before the tribunal and the arbitral tribunal is free to consider and decide the same under appropriate provisions of law, uninfluenced by any observations made in any order in this petition.”

4. Mr Parag P Tripathi, learned senior counsel, who appears on behalf of the appellant, says that the appellant is aggrieved by that portion of the impugned order, whereby the learned single judge has observed that it has “stayed the consequence” which are mentioned in paragraph 17 of the termination notice dated 17.11.2021.

5. We may note that this appeal, for the first time, came up for hearing before a co-ordinate bench of this Court on 28.02.2022. On that date, an interim order was issued, whereby the “operation, implementation and execution” of the impugned order dated 8.02.2022 was stayed.

5.1. The matter was, thereafter, fixed on 15.03.2022, albeit before another coordinate bench. On that date, one of the judges recused from the bench, which resulted in the matter being listed before the present bench.

6. It is not in dispute that the arbitral tribunal has been constituted, and that the matter is listed before it on 01.09.2022.

6.1. It is also not disputed that the Section 9 petition filed on behalf of the respondent, pursuant to the order of the learned single judge has been converted into a petition under Section 17 of the Act.

6.2. We are also informed by Mr Tripathi that, in the interregnum, fresh tenders have been floated and bids have been invited.

6.3. We may also indicate that the record shows that the respondent had instituted a contempt petition i.e., CCP(O) No.2/2022 for bringing to fore, inter alia, the violation of the above-mentioned order dated 23.11.2021. Since, according to the respondent, ameliorative steps had been taken, the contempt petition was withdrawn on 20.01.2022.

7. It is relevant to note that both Mr Tripathi as well as Dr Amit George, who appears on behalf of the respondent, on instructions, say that they are in possession of subject site.



7.1. Mr Tripathi says that the appellant has invested in the subject project (approximately) Rs.540 crores, in the form of One Time Financial Infusion (OTFI).

7.2. On the other hand, Dr George says that the respondent has invested in excess of Rs.1250 crores.

7.3. It is also contended by Mr George that the respondent has completed 88.08% of the project. For this purpose, Mr George has drawn our attention to the report drawn by an independent engineer, of October 2021, which is the Monthly Progress Report bearing number 117. In particular, our attention has been drawn to the „executive summary“, set forth in the said report.

7.4. Dr George also submits that in terms of Clause 14.3 of the CA, the respondent is entitled to seek issuance of a provisional certificate of completion, having completed more than 75% of the subject project.

7.5. Thus, as per Dr George, since more than 75% project has been completed, the respondent is entitled to operate the highway as well and thus collect the toll.

7.6. We may note that Mr Tripathi has vigorously contested this position.

8. Since the arbitral tribunal has been constituted, and given the fact that the learned single judge has directed the conversion of Section 9 petition into a Section 17 action under the Act, we have put to the learned counsel for the parties that, as a protem measure, till such time the arbitral tribunal takes a view on the Section 17 petition, the process involving new tenders could proceed, which includes the invitation of bids, subject to the caveat that no work order will be awarded to the successful bidder, till such time the arbitral tribunal renders a decision in the Section 17 petition.

8.1. Therefore, the suggestion is that the order of the coordinate bench dated 28.02.2022 whereby interim relief was granted, would be modified to that extent.

8.2. Counsels for the parties say that they will revert with instructions.

9. In the meanwhile, Mr Tripathi and Dr George say that the parties will explore the possibility of the arbitral tribunal advancing the date of hearing.”

3. Both Mr Parag P Tripathi, learned senior counsel, who appears on behalf of the appellant, as well as Dr Amit George, who appears on behalf of



the respondent, have reverted with instructions.

3.1 According to the counsel for the parties, suggestions made by us in paragraph 8 of the order dated 16.03.2022 with regard to *protem* measures are acceptable to the parties.

3.2 It is ordered accordingly.

4. Besides this, Mr Tripathi submits that this Court should add the following directions:

(i) First, the observations made by us in the matter will not impact the merits of the case.

(ii) Second, the parties will be at liberty to move applications before the arbitral tribunal.

4.1 Mr George says that he has no objection to such directions, being issued by this Court.

4.2 According to us, these directions are quite unnecessary. However, for the comfort of the parties, we reiterate that the observations made by us will not impact the merits of the case, and that the arbitral tribunal will decide the matter after hearing both sides.

4.3 Furthermore, the parties will also be at liberty to move applications before the arbitral tribunal.

5. Besides this, it goes without saying that the tenders floated and bids received against them by the appellant will be subject to the decision rendered by the arbitral tribunal in the petition preferred before it under Section 17 of the Arbitration and Conciliation Act, 1996.. This aspect of the matter would be made known by the appellant to the prospective bidders.

6. At this stage, Mr Tripathi says that a further direction should be issued, which is, that the arbitral tribunal will take up the matter and dispose



of the pending Section 17 petition, as early as possible.

6.1 To our minds, such a direction to the arbitral tribunal, which is presided by Hon'ble Mr Justice A.K. Sikri (Retd.) and comprises other eminent members, is not merited. However, since Mr Tripathi insists- we request the arbitral tribunal to dispose of the pending Section 17 petition at the earliest, as it will resolve many issues obtaining between the parties.

7. The appeal is disposed of in the aforementioned terms. Consequently, pending application shall stand closed.

RAJIV SHAKDHER, J

JASMEET SINGH, J

MARCH 21, 2022/pmc

[Click here to check corrigendum, if any](#)