$~3 (2020)

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

% *Date of Decision: 16th March, 2022*

\+ **ARB.P. 573/2019**

IRB CHITRADURGA TOLLWAY PRIVATE LIMITED (EARLIER KNOWN AS IRB TUMKUR CHITRADURGA TOLLWAY PRIVATE LIMITED ..... Petitioner

Through Mr. Saurabh Kirpal, Sr. Adv. with Mr. Parthiv Goswami, Mr. H.P. Chaturvedi, Mr. Sarthak Sachdev, Mr. Apoorva Agarwal & Ms. Teresa R. Daulat, Advs.

Versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Respondent

Through Mr. Ankur Mittal, Mr. Abhay Gupta & Mr. Debojyoti Sengupta, Advs.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

VIBHU BAKHRU, J. ***(ORAL)***

1. The petitioner has filed the present petition under Section 11(6) of the Arbitration & Conciliation Act, 1996 (hereafter the 'A&C Act'), *inter alia,* praying that an Arbitrator be appointed to adjudicate the disputes between the parties.

2. The parties had entered into a Concession Agreement dated 16.08.2010 for six-laning of the Tumkur-Chitradurga section from

KM 75 to KM 189 of National Highway-4 in the state of Karnataka and for operation and maintenance of the Project Highway for a period of 26 years on 'Design Build Finance Operate Transfer Basis'.

3. In terms of the aforesaid Concession Agreement, the petitioner was required to pay a premium of ₹140.40 crores to the respondent for each year with an annual increase at the rate of 5%. The petitioner states that there was revenue shortfall from the realization of the project. Similar issues were also faced by other Concessionaires.

4. In this backdrop, the Central Government floated a 'Premium Deferent Scheme' by a Circular dated 04.03.2014. It is stated that in terms of the said Scheme, the premium payment to the extent of shortfall was deferred to a later stage. The petitioner applied to avail benefit of the said Scheme and sought modification of the terms of payment of premium as agreed under the Concession Agreement. The respondent by a letter dated 06.06.2014 approved the same and granted deferment of the premium to the extent of the revenue shortfall as projected.

5. The petitioner states that in terms of Clause 3(b) of the Scheme, interest at the rate of 2% per annum above the bank rate, was payable on the deferred premium amounts.

6. Thereafter on 06.06.2014, the parties entered into a Supplementary Agreement.

7. Certain disputes have arisen between the parties with regard to

the shortfall of revenue. The petitioner claims that shortfall of revenue was required to be re-evaluated and, on such re-evaluation, it was found that the shortfall was higher than the earlier projected shortfall. This is contested by the respondent. The respondent claims that the revenue deficit was lesser by more than 5% of the projected revenue and therefore, has demanded additional premium from the petitioner.

8. In view of the disputes between the parties, the petitioner invoked the Dispute Resolution Mechanism as provided under Article 44.2 of the Concession Agreement and sought resolution of the disputes by conciliation. According to the petitioner, the conciliation proceedings were not successful and by a letter dated 03.05.2019, the petitioner declared that the conciliation proceedings had failed. The petitioner invoked the Arbitration Agreement in terms of Article 44.3. of the Conciliation Agreement and also nominated an Arbitrator. It is stated that certain meetings were held between the parties, however, NHAI has failed to appoint an Arbitrator.

9. In the meanwhile, the petitioner filed a petition under Section 9 of the A&C Act [being OMP(I)(COMM) no.270/2019]. The said petition was allowed and certain interim reliefs were granted to the petitioner.

10. Article 44.3 of the Concession Agreement reads as under:

> **"44.3 Arbitration**
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> 44.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 44.2,

shall be finally decided by reference to arbitration by a Board of Arbitrators appointed in accordance with Clause 44.3.2. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the "Rules"), or such other rules as may be mutually agreed by the parties, and shall be subject to the provisions of the Arbitration Act. The venue of such arbitration shall be Delhi, and the language of arbitration proceedings shall be English.

44.3.2 There shall be a Board of three arbitrators, of whom each Party shall select one and the third arbitrator shall be appointed by the two arbitrators so selected, and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules.

44.3.3 The arbitrators shall made a reasoned award (the "Award"). Any Award made in any arbitration held pursuant to this Article 44 shall be final and binding on the Parties as from the date it is made, and the Concessionaire and the Authority agree and undertake to carry out such Award without delay.

44.3.4 The Concessionaire and the Authority agree that an Award may be enforced against the Concessionaire and / or the Authority, as the case may be, and their respective assets wherever situated.

44.3.5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder."

11. The respondent has opposed the present petition on the ground that the disputes relate to the Supplementary Agreement and there is no agreement to refer such disputes to arbitration; the Supplementary Agreement does not include an arbitration clause.

12. The petitioner contends that the Supplementary Agreement is in addition to and forms a part of the Concession Agreement and therefore, the disputes between the parties arise in connection with the Concession Agreement. He submitted that mere deferment of the premium payable under the Concession Agreement does not constitute a separate agreement disjunct from the Concession Agreement.

13. Mr. Kripal, learned senior counsel appearing for the petitioner, also referred to the decision of a Coordinate Bench of this Court in OMP(I)(COMM) No.270/2019 captioned ***IRB Tumkur Chitradurga Tollway Ltd. v. National Highways Authority of India***. On the strength of the said decision, he submitted that the Coordinate Bench of this Court has taken a *prima facie* view as to the existence of the Arbitration Agreement after considering the rival contentions in this regard. He further submitted that the question whether the disputes are arbitrable is itself required to be considered by the Arbitral Tribunal following the doctrine of *kompetenz-kompetenz*.

14. The learned counsel for the respondent states that the aforesaid decision is a subject matter of appeal before the Division Bench of this

Court in FAO(OS)(COMM) No.24/2020. However, it is conceded that no order of stay is granted in the said appeal.

15. At this stage (referral stage), the Court is required to take a *prima facie* view as to the existence of an Arbitration Agreement. It is only in cases where the Court conclusively finds that an arbitration agreement does not exist, that the reference of the disputes to arbitration is required to be denied.

16. The Law Commission of India in its 246th Report had referred to the decision of the Supreme Court in ***Shin-Etsu Chemical Co. Ltd.* v. *Aksh Optifibre Ltd.:* (2005) 7 SCC 234** and **observed** as under:-

> "32. In relation to the nature of intervention, the exposition of the law is to be found in the decision of the Supreme Court in ***Shin-Etsu Chemical Co. Ltd.* v. *Aksh Optifibre Ltd.* [*Shin-Etsu Chemical Co. Ltd.* v. *Aksh Optifibre Ltd.*, (2005) 7 SCC 234]**, (in the context of Section 45 of the Act), where the Supreme Court has ruled in favour of looking at the issues/controversy only prima facie.
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> 33. It is in this context, the Commission has recommended amendments to sections 8 and 11 of the Arbitration and Conciliation Act, 1996. The scope of the judicial intervention is only restricted to situations where the Court/Judicial Authority finds that the arbitration agreement does not exist or is null and void. In so far as the nature of intervention is concerned, it is recommended that in the event the Court/Judicial Authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case

> may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void. In the event that the judicial authority refers the dispute to arbitration and/or appoints an arbitrator, under sections 8 and 11 respectively, such a decision will be final and non-appealable. An appeal can be maintained under section 37 only in the event of refusal to refer parties to arbitration, or refusal to appoint an arbitrator."

17. The aforesaid view was also accepted by the Supreme Court in ***Vidya Drolia* v. *Durga Trading Corporation: (2021) 2 SCC 1.*** In the present case, *prima facie* existence of the Arbitration Agreement is accepted by the Coordinate Bench of this Court in the proceedings instituted under Section 9 of the A&C Act.

18. In view of the above, this Court considers it apposite to allow the present petition.

19. Accordingly, Justice (Retd.) Balbir Singh Chauhan (Mob.9717393516), a former Judge of the Supreme Court, is appointed as the Arbitrator on behalf of the respondent-NHAI. In terms of Arbitration Clause, the two nominated Arbitrators shall appoint the third Arbitrator for constitution of the Arbitral Tribunal as expeditiously as possible.

20. It is clarified that this is subject to the learned Arbitrators making the necessary disclosure as required under Section 12(1) of the A&C Act and not being ineligible under Section 12(5) of the A&C Act.

21. It is further clarified that all rights and contentions of the parties are reserved including the existence of the Arbitration Agreement and the arbitrability of the disputes.

22. The petition is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

MARCH 16, 2022

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Click here to check corrigendum, if any