IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

954 CIVIL APPLICATION NO.14942 OF 2022
IN CARBA/1/2022

M/S KALYAN TOLL INFRASTRUCTURE LTD., INDORE
VERSUS
STATE OF MAHARASHTRA THR CHIEF ENGINEER PUBLIC WORKS DEPARTMENT AURNAGABAD AND ORS
...
Mr. A. B. Gatne h/for Mr. Patil Swapnil S., Advocate for the applicant
Mr. G. K. Naik-Thigale, Special Counsel for the respondents-State.

CORAM	:	RAVINDRA V. GHUGE, & Y. G. KHOBRAGADE, JJ.
DATE	:	16th June, 2023

ORDER:

1. The applicant has put forth Prayer clause (B) which reads as under:

> (B) The Applicant- KTIL may kindly be allowed to unconditionally withdraw the entire amount of Rs.15 crores deposited by the respondent- PWD in this Hon'ble Court alongwith the accrued interest."

2. We have considered the strenuous submissions of the learned Advocates for the respective sides.

3. This application has been filed on 19.10.2022. The applicant is armed with an arbitration award which grants it Rs.25

crores as compensation towards prematurely taking over the toll facility, by almost eight years prior to the expiry of the contract.

4. The applicant/respondent is a toll booth operator. It had a contract for the improvement work of the road at Shirur-Mukhed-Narsi-Biloli to State Border, Km 72/500 to 105/200 under Build, Operate and Transfer scheme, with the appellant-PWD. The applicant spent it's own money for the project with the right of BOT to collect toll for a concessional period of 17 years and 7 months which was to end on 02.01.2022.

5. The applicant contends that it had commenced collection of toll from 15.04.2005. In the middle of the contract period, on 08.06.2014, the Government of Maharashtra took over the toll facility and the contract was terminated prematurely. Clauses 3 and 9 of the contract oblige the Government of Maharashtra to pay compensation towards unrecovered amounts to the applicant.

6. The above aspects are undisputed. However, the learned Special Counsel for the State/PWD submits that an amount of Rs.10.54 cores was paid to the applicant in addition to the toll that it had collected. The only dispute is, as to whether the panel of three

arbitrators have rightly set off this amount and whether the applicant was unduly held entitled in terms of the arbitral award.

7. The learned Advocates for the respective sides submit that a coordinate bench of this Court, as per the roster of assignment, had heard this matter for a longtime and it was closed for orders. However, recently, the bench has ordered that this matter should be treated as de-part heard.

8. Considering the above, in terms of the record before us, the applicant is entitled to receive Rs.25 crores as compensation alongwith an additional award that was delivered by the arbitrators granting Rs.4.56 crores approximately, to the applicant. About Rs.29 crores and odd would be payable to the applicant.

9. On 10th March, 2022, this Court passed an order in Civil Application No. 3389 of 2021 in Commercial Arbitration Appeal No. 01 of 2022, which reads thus:

> "1. The applicant-appellant seeks stay to the award. The order of attachment is passed against the appellant.
>
> 2. It appears that award has been passed by the arbitrator. The present appellant assailed the said award under Section 34 of the Arbitration and Conciliation Act, 1996. The application of the

present applicant under Section 34 of the Arbitration and conciliation Act, 1996 is rejected/dismissed. Against that present appeal is filed.

3. The award in question tantamount money decree.

4. Mr. Thigale, learned counsel for the applicant relies upon the judgment of the Apex Court in the case of **Kanpur Jal Sansthan and another Versus Bapu Constructions** reported in **(2015)5 SCC 267**.

5. Mr. Thigale, the learned counsel further submits that the Court deciding the application under Section 34 of the Act, did not possess territorial jurisdiction. Reliance is placed on the judgment of the Supreme Court in the case of I**ndus Mobile Distribution Private Limited Versus. Datawind Innovations Private Limited and others** reported in **(2017) 7 SCC 678.**

6. The learned counsel for the non applicant relies on the judgment of the Apex Court in the case of **Pam Developments Private Limited versus State of West Bengal** reported in **(2019) 8 SCC 112**.

7. According to the learned counsel for the applicant, the applicant- State is required to deposit the amount as contemplated under Award.

8. The appeal will have be considered including objection raised by the applicant with regard to the territorial jurisdiction. Today, award which is akin to decree of Civil Court is in force. Amount of Rupees Twenty five Crores is payable by the applicant as per award passed by the Arbitrator and confirmed by the District Court.

9. The Apex Court in the case of Pam Developments Private Limited (Supra) has considered the amendment made to Order 41 Rule 5 of

C.P.C. by Act 104 of 1976 w.e.f. 01-02-1977, and no consequential amendment to Order 27 Rule 8-A of C.P. C.

10. In light of the above, we pass the following interim order:

> The order of attachment is stayed on condition that applicant deposits amount of Rupees Fifteen Crores within a period of eight (08) weeks from today. Failure to deposit the amount shall entail rejection of the application."

10. The learned Special Counsel has vehemently contended that the applicant is not entitled for a single penny as he has been paid compensation under clauses 3 and 9, in addition to the toll that he has collected in between 2005 to 2014. The entire award was unwarranted as the applicant has received more than what it was entitled to.

11. The learned Advocate for the applicant submits that time and again, an attempt was made by this Court to have a final hearing. Considering the extensive load/heavy daily cause list, it was not possible to have a final hearing. The amount deposited by the appellant is 50% of the actual award amount. The Hon'ble Supreme Court, in such commercial matters, has directed deposition of 100% amount. He, therefore, prays for permission to withdraw the amount of Rs.15 crores.

12. Having considered the rival contentions and the record before us to the extent of the prayer of the applicant for withdrawal of the

amount, we are of the view that the applicant can be permitted to withdraw half of the amount which is about Rs.7.5 crores. An affidavit undertaking can be directed with certain additional conditions in order to balance the equities.

13. As such, **this application is partly allowed** with the following directions:-

(A) The applicant is permitted to withdraw an amount of Rs.7.5 cores (Rupees seven crores fifty lakhs).

(B) An affidavit undertaking from the Managing Director or a Director who holds equity shares in the applicant, which would bind the parties without any excuse, shall be tendered to the Court stating therein that the applicant would refund the withdrawal amount with simple interest, if, it is eventually held to be dis-entitled to the said amount. It would also be mentioned in the said affidavit that if the applicant's financial condition is weak, in such situation, it authorizes the Government/concerned department to deduct the said amount from it's bills payable in different projects with the Government so as to recover the amount.

(C) The affidavit undertaking shall be tendered to the Court prior to withdrawing the amount under proper authorization and identification.

(D) The affidavit undertaking may be sworn before the learned Registrar, Indore Bench of the Madhya Pradesh High Court.

14. After this order was passed, the learned Special counsel prays that this order may be stayed for a period of eight weeks. The learned Advocate for the applicant strenuously opposes the said request and says that the applicant is being deprived of it's legitimate money. Taking into account the above factors, our order shall not come into effect until 21st July, 2023.

(Y. G. KHOBRAGADE, J.) **(RAVINDRA V. GHUGE, J.)**

JPChavan