

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

% **Date of order : 22nd February, 2023**

+ **O.M.P.(I) (COMM.) 27/2023**

ALLAHABAD BYPASS PATHWAYS PVT. LTD. Petitioner

Through: Mr.Akhil Sibbal, Senior
Advocate with Mr.Monish
Panda, Mr.Anmol Jassal,
Ms.Bahuli Sharma and
Ms.Deboshree Mukherjee,
Advocates

Versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA & ANR.
..... Respondents

Through: Mr.Manish K. Bishnoi and
Mr.Nirmal Prasad,
Advocates

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

I.A. No. 1997/2023 and 1998/2023

Allowed, subject to just exceptions.

Accordingly, the applications are disposed of.

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1. The present petition has been filed by the petitioner under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act, 1996”) seeking urgent interim relief to restrain respondent No.

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1 from taking any coercive action in view of its final notice dated 10th January, 2023 or claiming any sums of money from the petitioner herein towards alleged Concession Fee, without first adjudicating upon/ considering the approved set-off claims made by the petitioner with respondent No. 1 in respect of the construction / development of the Competing Road claims, which have been pending as undecided for three years.

2. Mr. Akhil Sibbal, learned senior counsel appearing on behalf of the petitioner submitted that the petitioner herein is a Company incorporated under the provisions of the Companies Act, 1956 having its registered office at 76, Mall Road, Mhow - 453441, Madhya Pradesh, India.

3. It is submitted that respondent No. 1 is a statutory body established under the National Highways Authority Act, 1988 and respondent No. 2 is the Independent Engineer appointed by respondent No. 1, in terms of the Concession Agreement.

4. It has been submitted on behalf of the petitioner that a Concession Agreement dated 17th December, 2013 was executed between the petitioner and the respondent No. 1 with respect to operation and maintenance of Allahabad Bypass (inclusive of the Ganga Bridge Package ABP-1) from Km. 158.00 to Km. 242.708 of NH-2 on OMT basis in State of Uttar Pradesh. It is further submitted that the commercial operation date of the said project was achieved on 25th April, 2014.

5. It is submitted on behalf of the petitioner that in accordance with Article 21 of the said agreement the petitioner was liable to pay to respondent No. 1 a concession fee. It is further submitted that for the initial year of the Concession Period, the said fee was fixed at Rs. 123.45

Cr. and as further stipulated in the Concession Agreement, for each subsequent year of the Concession Period, the Concession Fees was liable to be increased by 10%.

6. It is submitted on behalf of the petitioner that from January 2019 onwards, the petitioner observed a sharp and sudden decline in its User Fee collections. It is further submitted that the same was due to the diversion of commercial and non-commercial traffic through other cities / link roads on the occasion of *Kumbh Mela*, which is a large religious congregation. In order to accommodate to the needs of the large number of devotees attending the said event, the traffic was diverted by constructing new roads, bridges and also rehabilitation of the existing infrastructure by NHAI. The said developments resulted in the creation of "Competing Road" as per the Concession Agreement. In light of the same, the petitioner requested the respondent for adjustment and reduction of the Concession Fees.

7. It is submitted on behalf of the petitioner that respondent No. 1 vide its letter dated 16th December, 2022 raised a demand of Rs. 180.63 Cr. from the petitioner, while ignoring the Competing Road claim and in absolute violation of the provisions of the Concession Agreement. It is further submitted on behalf of the petitioner that by way of its letter dated 10th January, 2023 titled as 'Final Notice', respondent No. 1 once again raised a demand upon the petitioner to the tune of Rs. 219.53 Cr., in complete derogation of the Competing Road claims of the petitioner, which have been duly approved by respondent No. 2 and recommended by the internal teams of respondent No. 1.

8. Learned senior counsel appearing on behalf of the petitioner submitted that the petitioner has a strong apprehension that respondent No. 1 may initiate coercive actions against the interests of the petitioner, which could result in grave and irreparable loss to the petitioner. It is further submitted that there is a high possibility that the business of the petitioner may come to a complete standstill.

9. It is submitted on behalf of the petitioner that respondent No. 1 may take coercive steps to encash the sums lying in the form of Bank Guarantee, though admittedly there is no default of performance on the part of the petitioner. It is submitted that no loss or prejudice is being caused to respondent No. 1. Despite the same, the respondent no. 1 for reasons best known to it, is acting in a highly arbitrary manner by not considering and deciding upon the set-off claims of the petitioner.

10. During the course of arguments, the learned counsel appearing for the parties submitted that both the parties have already agreed to appoint their respective nominee arbitrators and the third arbitrator would be appointed with the consent of both the nominee arbitrators.

11. Heard the learned counsel for the parties and perused the record.

12. The application under Section 17 of the Act, 1996 sought to be filed by the petitioner, be filed within a period of 15 days from the constitution of the Arbitral Tribunal. This Court is of view that if the abovementioned bank guarantees are invoked by the respondent the very purpose of the said application would be defeated. Thus, it is imperative that the parties shall maintain *status quo* till the adjudication of the application under Section 17 of the Act, 1996, before the Arbitral Tribunal. In case, the respondent fails to file the said application within

the time frame as prescribed by this Court, the stay on the same shall be vacated.

13. In view of the above terms, the petition is disposed of.

14. Nothing stated hereinabove shall however amount to any expression on the merits of the case.

15. The order be uploaded on the website forthwith.

FEBRUARY 22, 2023
SV/UG

CHANDRA DHARI SINGH, J

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

