

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% **Date of order: 1st May, 2023**
+ **O.M.P.(I) (COMM.) 30/2023**
M/S ATHAANG DICHALLY TOLLWAY PRIVATE LIMITED

..... Petitioner
Through: Mr. Sandeep Sethi, Sr. Advocate
with Mr. Saurabh Bindal,
Advocates

versus

**THE 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)

1. The instant petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter "the Act") has been filed on behalf of the petitioner seeking the following reliefs:

*"(a) Stay the operation of the Letter dated 24.01.2023, i.e., DOCUMENT - 13 and to restrain Respondent No. 2 from acting upon the unilateral directions therein specified;
(b) Allow the petition and be further pleased to pass an order for injunction restraining Respondent No. 1 from encashing on or dealing with the Escrow Account number 921020050848762 qua the encashment or imposition of the damages imposed amounting to INR 68,96,81,003/- (Rupees Sixty-Eight Crore Ninety-Six Lakhs Eighty-One Thousand*

and Three Only);

(c) Grant injunction restraining the Respondents, their legal representatives, assigns, administrators, men, servants or employees or any one acting through or under them qua the encashment or debiting or dealing with any amounts towards damages imposed amounting to INR 68,96,81,003/- (Rupees Sixty Eight Crore Ninety-Six Lakhs Eighty-One Thousand and Three Only) from the Escrow Account bearing Account number 921020050848762;

(d) Declare that the damages amounting to INR 68,96,81,003/- (Rupees Sixty-Eight Crore Ninety-Six Lakhs Eighty-One Thousand and Three Only) unliterally imposed upon the Petitioner by the Respondent No. 1 are in breach of the terms of the Concession Agreement;

(e) Pass any other or further order(s) as this Hon'ble Court deem fit in the facts and circumstances of the case.”

2. Learned senior counsel for the petitioner, Mr. Sandeep Sethi, submitted that the petitioner, *inter alia*, seeks the interim injunction restraining the respondent no. 1 from encashing the alleged damages to the tune of Rs. 68,96,81,003/- imposed upon the petitioner. It is also prayed that the respondent no.1 shall also be restrained from dealing with the ESCROW Account No. 921020050848762 *qua* the encashment or imposition of the said damages.

3. It is stated that the petitioner is a company incorporated under the Companies Act, 1956 and the respondent No.1 is a Government of India Undertaking established under the National Highways Authority Act, 1988. The respondent no.2 is the lenders' representative and the ESCROW Bank.

4. It is submitted that the respondent no.1 had been entrusted with the development, maintenance and management of National Highway No. 7

(hereinafter referred to as 'NH-7'), including the section from km 308 to km 367. In this regard the respondent no.1 resolved to augment the existing road from km 308 to km 367 on the Nagpur-Hyderabad Section of NH-7 (hereinafter referred to as 'the Project').

5. For the said Project, respondent no.1 invited proposals, by its Notice No. NHAI/Tech/NS-2/BOT/AP-1/RFQ/2008/2367 dated 24th February, 2009, for short listing of bidders for the construction, operation and maintenance of the section of NH-7 on DBFOT basis and short listed certain bidders, including the petitioner, which was part of a consortium at the relevant time. Respondent no.1 accepted the bid of the petitioner and issued a Letter of Acceptance bearing No. HAI/Tech/NS2/ BOT/AP-1/RFQ/2008/2475 dated 27th May, 2009 (hereinafter referred to as 'the LoA') to the petitioner consortium requiring, inter alia, the execution of the Concessionaire Agreement within 45 days of the date of issue.

6. The learned senior counsel submitted that subsequent to the LoA, petitioner and respondent no.1 entered into the Concession Agreement dated 5th August, 2009 and thus, respondent no.1 granted the petitioner the exclusive right, license and authority to construct, operate and maintain the Project for a total period of 20 years from the appointed date.

7. During the course of operation of the project, certain disputes arose between the respondent no. 1 and M/s Essel Dichpally Tollway Private Limited, Concessionaire No. 2, whereupon a Settlement Agreement was executed between them on December 2020. The learned senior counsel while referring to certain clauses of the said Agreement submitted that as per the Agreement, all disputes between the parties stand settled.

However, despite the settlement of disputes, the respondent issued the impugned letter dated 24th January, 2023, whereby the respondent no. 1 sought to recover alleged damages of Rs. 68,96,81,003/- from the petitioner's ESCROW Account, on the grounds that the Concessionaire, petitioner herein, was in breach of Maintenance Requirements and in default of payment to be made to the respondent no. 1 within the stipulated time.

8. The learned senior counsel appearing on behalf of the petitioner vehemently submitted that there is no basis for imposing the damages claimed against the petitioner to the tune of Rs.68,96,81,003/-. It is submitted that the petitioner is neither aware of any communication between the independent engineer of the Project and the respondent no. 1, nor the basis, reason or mode of calculation of the damages is in the knowledge of the petitioner.

9. Learned senior counsel has also submitted that if the impugned letter/order dated 24th January, 2023 remains in operation, the petitioner would suffer irreparable loss, since the petitioner has already performed in accordance with the Concession Agreement. It is, however, submitted that this Court may appoint an arbitrator for adjudication of the disputes between the parties and the interim reliefs being prayed herein may be allowed to be raised before the arbitrator.

10. *Per Contra*, the learned counsel for the respondent vehemently opposed the instant petition. It is submitted that there is no relief which accrues to the petitioner and may be granted by this Court, therefore, the instant petition may be dismissed. However, it is submitted that the disputes between the parties are arbitrable in nature and they have no

objection in case, the same is referred by this court to an independent and impartial sole arbitrator.

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

12. The petitioner has approached this Court by way of the instant petition seeking urgent relief against the respondents. Upon perusal of the record as well as the arguments advanced on behalf of the parties, this Court finds that there are disputes between the parties, which may be adjudicated and settled by an arbitrator. In the instant case, there is an Agreement in existence which has given rise to the contractual relationship as well as the disputes between them. There is no challenge to the fact that the disputes between the parties are arbitrable in nature.

13. At this juncture, it is deemed pertinent to reiterate the intent and purpose of enacting the Act which facilitates a mechanism to the public to resolve their disputes in a process which is less rigorous, technical and formal than that of litigation. Arbitration, conciliation and other alternate mechanisms of dispute resolution have proven to be easier, more accessible, efficient and even cost effective for the parties involved, whether at an individual level or at the level of a business or corporation.

14. The alternative dispute mechanism is not only advantageous for the people involved in disputes but has also been aiding the effective disposal and release of burden on the Courts of the Country. It has been time and again reiterated that where in terms of an Agreement or otherwise, the parties to a dispute agree to resolve them amicably, they may be referred to arbitration. Therefore, keeping in view the spirit and purpose of the Arbitration Act, the nature of disputes between the parties, and as agreed on behalf of the parties, it is evident that the parties in the instant matter

intend the Court to refer the disputes to arbitration, by appointing a sole arbitrator.

15. In the instant case, there is already an interim order in operation in favour of the petitioner vide which the operation of the impugned letter/order dated 24th January, 2023 has been kept in abeyance. Therefore, there is no relief that the Petitioner can be granted in the facts and circumstances of the case.

16. The petitioner is directed to file an application under Section 17 of the Act within one month from the date of this order, to raise before the Arbitral Tribunal all issues and grounds that have been raised before this Court by way of the instant petition. The interim order passed by this Court vide which the operation of the impugned letter/order dated 24th January, 2023 was kept in abeyance, shall continue in operation till the first date of hearing before the Arbitrator.

17. In view of the request made by the parties, to resolve the dispute between the parties, the said disputes and differences arising between the parties are referred to arbitration, by appointing an arbitral tribunal. Hence, the following Order:

ORDER

- (i) Justice Dinesh Kumar Singh, former Judge of the Patna High Court is appointed as a sole arbitrator to adjudicate the disputes which have arisen between the parties;
- (ii) The learned sole arbitrator, before entering the arbitration reference, shall ensure the compliance of Section 12(1) of the Arbitration and Conciliation Act, 1996;
- (iii) The learned sole arbitrator shall be paid fees as prescribed

under the Delhi International Arbitration Centre (DIAC) (Administrative Cost and Arbitrators Fees) Rules, 2018 as amended vide notification dated 15th November, 2022;

(iv) At the first instance, the parties shall appear before the learned sole arbitrator within 10 days from today on a date which may be mutually fixed by the learned sole arbitrator; and

(v) All contentions of the parties are expressly kept open.

18. A copy of the order be forwarded to the learned sole arbitrator on the following address:

Justice Dinesh Kumar Singh
Retd. Judge, Patna High Court
I/110, Lajpat Nagar, Part-I, New Delhi.
justicedineshksingh@gmail.com
9431015011

19. Accordingly, the instant petition is disposed of with the aforesaid directions. Pending applications, if any, also stand dismissed.

20. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

MAY 1, 2023
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Click here to check corrigendum, if any