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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 3rd February, 2023

+ W.P.(C) 9796/2021 & CM APPL. 30215/2021

PSL INFRATECH PRIVATE LIMITED

..... Petitioner

Through: Mr. Ravikiran Singh & Surabhi
Maheshwari, Advs. (M: 9643716677)

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA
& ANR.

..... Respondents

Through: Mr. Manish K. Bishnoi and Mr.
Nirmal Prasad, Advocates for R-1
(M: 9811548007).
Mr. Anil Soni, CGSC with Mr.
Devvrat Yadav, Advocate for R-2 (M:
8285815626).

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. The present writ petition has been filed by the Petitioner who was awarded the contract for “*User Fee Collection at the Banajodi Fee Plaza*” in the State of Odisha. The said contract was entered into on 13th October, 2020 for a period of one year from 15th October, 2020 to 15th October, 2021. The said period was post the first wave of the Covid-19 pandemic.
3. The Petitioner invoked the *force majeure* clause in the contract and raised various claims by issuing notices to the National Highways Authority of India (NHAI) (MoRTH). The said claims of the Petitioner were initially not replied to by the NHAI. A writ petition was filed by the Petitioner herein, being *W.P.(C) 9000/2021* titled ‘*PSL Infratech Private Limited v. National Highway Authority of India & Anr.*’ in which the Court records

the stand of NHAI that the claim is still pending consideration and permitted it to decide the same. The order dated 26th August, 2021 reads as under:

“CM APPL. 27976/2021

1. *Exemption allowed, subject to all just exceptions.*
2. *The application is disposed of.*

W.P.(C) 9000/2021

3. *Vide the present petition, the petitioner which has been awarded the right to collect toll at the toll plaza located at Banajodi, Odisha on NH 215 has approached this Court being aggrieved by the respondents' initiation of coercive action against the petitioner without deciding its pending representation invoking force majeure in terms of the agreement between the parties.*
4. *After the matter was heard at some length yesterday, learned counsel for the respondent was granted time to obtain instructions. Today, he submits that keeping in view the fact that the petitioner's representation invoking force majeure is still pending consideration, the respondents will withhold any coercive action against the petitioner till a decision is taken on the petitioner's aforesaid representation.*
5. *In the light of the aforesaid stand taken by the respondent, nothing further survives for adjudication. It is, however, directed that, no coercive action will be taken against the petitioner for a period of one week from the date a decision is taken on the petitioner's pending representation.*
6. *The petition alongwith the pending application is, accordingly, disposed of in the aforesaid terms.”*

4. Subsequent to the said order, the NHAI communicated its approval vide letter dated 8th February, 2022, for the force majeure claim of the Petitioner for the following two periods:

- | | | | |
|-----|--|---|------------------|
| i. | 5 th May, 2021 to 31 st July, 2021 | - | Rs.4,96,22,584/- |
| ii. | 1st August, 2021 to 24th September, 2021 | - | Rs.7,64,20,245/- |

5. As per Clause 17(a) of the contract dated 13th October 2020 signed between the Petitioner and the NHAI which deals with performance security, the user fee collecting agency had furnished a security deposit towards performance security consisting of 2 components. The said clause of the contract reads as under:

*“The user fee collecting agency has furnished a security deposit towards Performance Security consisting of (a) a crossed account payee demand draft/pay order, amounting to **Rs. 6,61,56,250/- (Rupees Six Crore Sixty One Lakh Fifty Six Thousand Two Hundred and Fifty Only)** (an amount equal to one (1) month’s agreed remittance) has been deposited by the bidder through RTGS/NEFT vide UTR No. BARBR52020101200906036 dated 12.10.2020 in favour of National Highways Authority of India). (an amount equal to one (1) month’s agreed remittance) issued by a Scheduled Bank in India, drawn in favour of the Authority and payable at New Delhi and (b) a bank guarantee as per the format prescribed by National Highway Authority of India from any Nationalised Indian Bank/State Bank of India or its subsidiaries /IDBI/ICICI/Export Import Bank/Foreign Bank with counter guarantee from any Nationalized Indian Bank or State Bank of India or its subsidiaries/ any RBI approved Scheduled Commercial Bank having net worth of more than Rs. 500 crore (Rupees Five Hundred Crores) from its Indian Operations for **Rs. 6,61,56,250/- (Rupees Six Crore Sixty One Lakh Fifty Six Thousand Two Hundred and Fifty Only)** (an amount equal to one (1) month agreed remittance), Bank of Baroda, Surya Kiran Building, 19, K.G. Marg, New Delhi-110001, Bank Guarantee no.0623IGP000866920 amounting to **Rs. 6,61,56,250/- (Rupees Six Crore Sixty One Lakh Fifty Six Thousand Two Hundred and Fifty Only)** dated 08.10.2020 valid upto 04.12.2021 for a*

period of 14 (Fourteen) months (an amount equal to one (1) month agreed remittance), valid for a period of 14 (Fourteen) months from the Date of LOA for due observance of the terms and conditions contained herein and the performance of its obligation as per the Contract to be entered into for 1 (one) year. ”

6. As per the letter of NHAI dated 26th July, 2021, it was communicated to the Petitioner that the amount of Rs.6,61,56,250/- (i.e. including interest, TCS and toll amount due) has been adjusted from the first component, i.e., cash performance security and the balance amount of Rs.97,62,842/- would be adjusted by the NHAI by encashing the second component i.e., performance bank guarantee as the Petitioner had not remitted the daily toll amount timely.
7. Subsequently however, the NHAI released the bank guarantee for a sum Rs.6,61,56,250/- to the Petitioner. Ld. counsel for the Petitioner submits that performance security is still lying with the Respondents.
8. In the above backdrop, Id. Counsel for the Petitioner submits that the only claim that is outstanding is a *force majeure* claim for the period from 1st February, 2021 to 4th May, 2021. It is his submission that, the second wave of the pandemic was ongoing during this period and, accordingly, the Petitioner is entitled to reliefs. On behalf of the Respondents it is submitted that all the claims of the Petitioner have been considered and the best possible relief has already been granted to the Petitioner.
9. A perusal of the notice issued by the Petitioner dated 23rd July, 2021 would show that the force majeure claim of the Petitioner was for the period from 1st April, 2021 to 18th July, 2021. The said claim is set out below:

“IX) The ongoing strike has far reaching ramifications on all the affected parties including Toll Operators, Govt and Transporters. We enclose certain clipping gathered from Media Reports published and publicly declared in various newspapers/print media/electronic media.

X) Unearthing of Mining Scam and thereby imposing heavy penalty of Rs. 2056 Crores on Sharda Mines, a merchant miner for excess and illegal mining in the previous years and consequently stoppage of mining activity at the Sharda Mines which accounted for around 15% of the traffic.

XI) Multiple Litigations arising out of challenging the order of State Mining Department in the Hon'ble High Court which are as under

f) Cancellation of leases of Iron Ores Mines that did not start/production/operations even after 8 months of auction and execution of mining leases in their favour,

g) Dispute between old lessee and new lessee for wrong stacking of Iron Ores and non removal of stock of Iron Ores within stipulated time

h) Dispute regarding payment of royalty to State.

i) Extracting excess quantity of Iron Ores in violation of environmental clearances granted by the Ministry of Environment and Forests.

j) Dispute between Ex-lessee and Odisha Mines Department with regard to not granting extension of time for removal of legally excavated material during currency of lease, as well as taking away plant and machinery and equipment's and other structure etc. due to force majeure event arising out of Covid-19 which however was not permitted and hence there was no movement of traffic from mines.

XII) Dispute with regard to hike in freight rates between lease owners and transporters.

XIII) Iron and mining had been badly hit by ongoing strike by a section of local villagers in front of the main gate of the mines, throwing a spanner into the Odisha Govt. efforts to boost steel production in the state. Strike has impacted loss of revenue for the Govt. as well. The

Local administrations could not succeed in sorting out the issues between the mine owners and the agitators.

XIV) The Area is a strong hold of Mining Mafia who are believed to have sponsored a group of local villagers to go on strike.

XV) Raid conducted by authorities on the premises of Lessees resulted in suspension of Iron ore dispatches from SMPL's and Thakurani B Mine who are the major mines owners.

XVI) Second wave of Covid -19 Pandemic

Due to aforesaid disputes between demand of ex-lessee, the new lessee, Transporters, state Mining Department, results in the non-commencement of operations of the Mines or operations at mines came to grinding halt with no traffic emanating from mines.

This unusual event has occurred due to circumstances beyond reasonable control of ours which has a detrimental impact in relation to performance of our obligation pursuant to the contract entered into by our company with NHAI on 15.10.2020.

In the prevailing circumstances it is difficult to ascertain how long the unexpected event will continue.

In accordance with clause 25(b) of above referred agreement, we are hereby declaring the occurrence of aforesaid event as a Force Majeure Event which excuses us of our performance while the effects of this event are continuing.

We hereby sending 4th notice of Force Majeure regarding the occurrence of this event along with the following claim

(i) Rs. 10,92,31,006/- (Rupees Ten Cores Ninety Two Lacs Thirty One Thousand Six Only) from 01.04.2021 to 18th July 2021 (computation of the claim is attached as per Avg Collections)

(ii) Rs. 5,35,86,183/- (Rupees Five Crores Thirty Five Lacs Eighty Six Lacs One Hundred Eighty Three Only)

Please note that as a result of occurrence of this unplanned event which is beyond our control it may not be possible for us to perform our obligation as required under the contract.

Please note that, we have made weekly remittance on the basis of collection received from 01.04.2021 to 18.07.2021."

10. Thus, it is these claims *qua* the period 1st April 2021 to 18th July 2021, which have been considered and processed by the Respondents. The Petitioner now seeks to increase the claim period by changing the initial date of the claim from 1st April, 2021 to 1st February, 2021. This, in the considered opinion of the Court, cannot be permitted. The claim filed by the Petitioner itself is for the period beginning from 1st April, 2021 and the Respondents have accepted the claim from 5th May, 2021.

11. In these circumstances, since the Petitioner is now seeking to extend the claim period, the *force majeure* claim which is now sought to be raised for the period 1st February, 2021 to 4th May, 2021 would not be liable to be considered in a writ petition.

12. If the Petitioner has any other claims under the contract, it is free to avail of the remedies in accordance with law.

13. With these observations, the present petition, along with all pending applications, is disposed of.

**PRATHIBA M. SINGH
JUDGE**

FEBRUARY 3, 2023

dj/rp