



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

Date of decision: 01st DECEMBER, 2023

IN THE MATTER OF:

+ **W.P.(C) 12662/2023 & CM APPL. 49915/2023**

NATIONAL HIGHWAY AUTHORITY OF INDIA Petitioner

Through: Mr. Arun Kumar, Sr. Advocate with
Mr. Ashish Rana, Mr. Anurag Singh,
Mr. Gaurav Raj, Mr. Ritik and Mr.
Nilesh Mudgil, Advocates.

versus

M/S AE TOLLWAY LTD.

..... Respondent

Through: Mr. Vikram Nankani, Sr. Advocate
with Mr. Saket T. Sikri, Mr. Anirudh
Bakhru, Ms. Charu, Ms. Pragya
Gautam, Mr. Yash, Ms. Terresa R.
Daulat, Mr. Sarthak and Mr.
Mohnish, Advocates.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. Vide the present Writ Petition, the Petitioner seeks to challenge the order dated 03.09.2023, passed by the Arbitral Tribunal in the arbitration case titled as "M/s AE Tollway Ltd. v. National Highway Authority of India".
2. The facts, in brief, leading to the present Writ Petition, are as under:
 - a. It is stated that the Petitioner and the Respondent entered into a Concession Agreement for development, maintenance and management of National Highway No.2, including the section of Agra Etawah from Km. 199.660 to Km.323.525. It is stated that during the execution of the agreement certain disputes



arose between the parties which were brought before the conciliation Committee. It is stated that the meetings took place between the parties and settlement agreement dated 12.11.2020 was executed between the parties under Section 73 of the Arbitration and Conciliation Act, 1996. It is stated that after the settlement agreement was entered into between the parties, the Respondent herein requested for two more disputes. However, the request of the Respondent herein was rejected by the Petitioner herein on the ground that the issues raised under the Concession Agreement had already been settled under the settlement agreement dated 12.11.2020 entered into between the parties. Dis-satisfied by the rejection of the request of the Respondent by the Petitioner herein, the Respondent sent a notice dated 14.03.2022 invoking arbitration clause under Article 44.3 of the Concession Agreement.

- b. The Petitioner filed an application under Section 16 of the Arbitration Act was filed before the Arbitrator stating that the claims raised by the Respondent herein had already been amicably resolved between the parties vide settlement agreement dated 12.11.2020. It was stated that under Section 74 of the Arbitration Act, a settlement agreement holds the same weight as an arbitration award and that the Tribunal does not have the jurisdiction to entertain the claims as outlined in the statement of claims since the claims are covered under the settlement agreement.



- c. It was also contended by the Respondent that the Settlement Agreement was entered into under grave economic duress & coercion, and even the procedure adopted for arriving at the settlement was unfair and, therefore, the Claimant has approached the Tribunal for settlement of its claim.
- d. The Arbitral Tribunal by the Order impugned herein has held that it possesses the jurisdiction to adjudicate every claim arising from the Concession Agreement. It further held that the Tribunal's jurisdiction extends to addressing the procedural concerns, ensuring the integrity of the dispute resolution process. The Arbitral Tribunal further held that Section 34 of the Arbitration Act may not adequately cater to the complex claims raised in this case and the multifaceted nature of the dispute, encompassing coercion, procedural deviations, and the validity of the Settlement Agreement which necessitates a forum capable of conducting a comprehensive and equitable adjudication and, therefore, the Tribunal is better suited to accommodate such an examination within the framework of arbitration. The Tribunal held that the Settlement Agreement is susceptible to challenge on the same grounds as any other contractual arrangement. The Tribunal also held that the challenge to the Settlement Agreement is well within the purview of the Arbitration Agreement and the Tribunal's jurisdiction encompasses examining and adjudicating the challenges raised against the Settlement Agreement, which extend to matters of coercion, procedural deviations, and the



broader enforceability of the agreement within the scope of the Contract Act. The Tribunal held that it has the jurisdiction to try and determine every claim arising from the Contract Agreement. It held that the intricate interplay of coercion, procedural irregularities, and the adequacy of available remedies underscores the need for a forum that can thoroughly address the nuances of the dispute and that it is the Tribunal's responsibility to ensure a fair, comprehensive and effective resolution process that upholds the rights and interests of both parties in accordance with the law and principles of justice. The Tribunal also held that the dispute resolution clause indicates that all the disputes, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement between the Parties, and so notified in writing by either Party to the other Party shall, in the first instance be attempted to be resolved amicably in accordance with the conciliation procedure set forth in the Disputes resolution clause and, therefore, the Tribunal is within its jurisdiction to adjudicate the disputes despite the claims not having been raised in the Notice Invoking Arbitration. The Tribunal, after analysing the dispute resolution clause, observed as under:

“43. The Tribunal, in light of the extensive legal analysis and contractual framework presented, unequivocally finds that the assertion of raising new claims in the Statement of Claim without their prior notification under the Notice invoking arbitration does not, in and of itself, foreclose the admissibility or consideration of those claims. Several compelling factors support this determination, rooted in



the principles of contractual interpretation, jurisdiction, and the Tribunal's mandate:

i. Comprehensive Scope of Arbitration Agreement: The Tribunal acknowledges the expansive language of the Arbitration Agreement contained within Article 44. This Clause encompasses all disputes, differences, or controversies arising under, out of, or in relation to the Concession Agreement. The absence of excluded matters underscores the intention to establish a forum capable of addressing the entire spectrum of issues that might arise within the context of the Agreement. As such, the Tribunal's jurisdiction extends to any Claims falling within the scope of this comprehensive Arbitration Agreement.

ii. Adjudicative Authority of the Tribunal: The Tribunal recognizes that its authority to determine matters stems from the parameters outlined in the Arbitration Agreement itself. The wide-ranging language, devoid of any exclusions, signifies an intention to vest the Tribunal with the competence to adjudicate a broad array of disputes. This extends to claims that might not have been explicitly listed in the Notice Invoking Arbitration. The Tribunal's authority is intrinsically linked to the Arbitration Agreement's inclusivity and the overarching purpose of facilitating comprehensive Dispute Resolution.

iii. Impact of Notice Limitation: While the Notice invoking arbitration serves as a mechanism to outline the initial contours of the dispute, it does not restrict the Tribunal's jurisdiction to the specific claims mentioned therein. The Tribunal recognizes that the absence of certain claims in the Notice does not necessarily preclude their consideration. The comprehensive language of the Arbitration Agreement prevails and empowers the Tribunal to delve into any claim that falls within its ambit,



regardless of whether it was explicitly notified in the Notice.

iv. Ensuring Justice and Equitable Resolution: The Tribunal's ultimate goal is to ensure a just, proper and equitable resolution of all the disputes arising from the Concession Agreement. The assertion of new claims, even if not initially stated in the Notice, stems from the parties' inherent right to present their case fully. The Tribunal's jurisdiction, as established by the Arbitration Agreement, upholds this principle by allowing for a thorough examination of all claims within its scope, in accordance with law and not to throw some of the claims at this stage, as argued by Respondent. All this is premature.

44. Considering these factors collectively, the Tribunal concludes that, the fact that new claims have been introduced in the Statement of Claim, without prior notification under the Notice invoking arbitration, does not automatically render those claims inadmissible. The Tribunal's jurisdiction is firmly rooted in the inclusive language of the arbitration agreement and its mandate to comprehensively address disputes arising from the Concession Agreement. The overarching objective of justice and equitable resolution necessitates that the Tribunal's authority is not restricted solely to the content of the initial Notice, but extends to the broader scope defined by the Arbitration Agreement itself and as reflected in the Statement of Claim.”

e) It is this Order which is under challenge in the present Writ Petition.

3. It is contended by the learned Counsel for the Petitioner that the settlement agreement was entered into between the parties on 12.11.2020 and the present claim had been raised only on 14.03.2022, i.e. only after more than three years and it amounts to re-opening of the issues which had



been sought under the Settlement Agreement. He states that the Concession Agreement under Section 74 of the Arbitration Act is like an award and binds the parties. He further states that nothing stopped the Respondent to raise these issues before the Conciliation Proceedings. He also states that by invoking Arbitration, Respondent has attempted to go behind the settlement agreement which is not permissible. He states that since the Concession Agreement takes the shape of an award under Section 74 of the Arbitration Act, it cannot re-agitated subsequently in Arbitration and if such procedure is accepted it will nullify all settlement agreements entered into by the parties throwing open all settlement agreements to be adjudicated by Arbitration. He states that the Arbitral Tribunal has usurped and asserted itself the jurisdiction to sit in appeal and preside over another Award which is like an arbitral award passed under Section 74 read with Section 30 of the Arbitration Act between the same parties which is not envisaged under the Scheme of the Arbitration and Conciliation Act. He states that the fact that the Settlement Agreement was entered into between the parties on 12.11.2020 with respect to all the disputes existing between the parties at that time and for two years the Respondent did not raise any issue that the settlement agreement was signed by them under coercion and after remaining silent for over two years it is now not open for the Respondent to challenge the Settlement Agreement on the ground of coercion.

4. Per contra, it is contended by the learned Counsel for the Respondent that the present writ petition under Article 227 of the Constitution of India is not maintainable. He states that it is well settled that that the High Courts ought not to interfere in arbitral proceedings in exercise of power under Article 226 and 227 of the Constitution of India and the interference, if any,



must be restricted only to orders that are passed lacking inherent jurisdiction. To buttress his arguments he places reliance on the Judgments passed by the Apex Court in Deep Industries Limited v. Oil & Natural Gas Corporation Limited & Anr., **2020 (15) SCC 706** and Punjab State Power Corporation Limited v. Emta Coal Limited, **(2020) 17 SCC 93**. Learned Counsel for the Respondent contends that all the contentions raised by the Petitioner in the present Writ Petition can be raised after the award is passed under Section 34 of the Act and it cannot be said that the Arbitral Tribunal lacked jurisdiction to entertain the disputes raised before it, especially the ground that the Settlement Agreement was entered into under duress and coercion. He states that Article 44.3 of the Concession Agreement states that any dispute which is not resolved by way of settlement can be finally settled by arbitration. He states that the Arbitral Tribunal was well within its jurisdiction to reject the application filed by the Petitioner and to entertain the disputes between the parties.

5. Heard the Counsels for the Petitioner and the Respondent and perused the material on record.

6. Section 16 of the Arbitration Act gives the Arbitral Tribunal the power to rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement. Article 44 of the Concession Agreement deals with the dispute resolution mechanism and the same reads as under:

“44.1 Dispute resolution

44.1.1 Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in



writing by either Party to the other Party (the "Dispute") shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 44.2.

44.1.2 The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non- privileged records, information and data pertaining to any Dispute.

44.2 Conciliation

In the event of any Dispute between the Parties, either Party may call upon the Independent Engineer to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Independent Engineer or without the intervention of the Independent Engineer, either Party may require such Dispute to be referred to the Chairman of the Authority and the Chairman of the Board of Directors of the Concessionaire for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 44.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 44.3.

44.3 Arbitration



44.3.1 "Any dispute, which is not resolved amicably as provided in clause 44.2 shall be finally settled by arbitration as set forth below:

i) The Dispute shall be finally settled by arbitration in accordance with the Arbitration and Conciliation Act, 1996, or any statutory amendment thereof. The Arbitral tribunal shall consist of 3 Arbitrators, one each to be appointed by NHAI and the concessionaire. The third arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding Arbitrator. In case of failure of the two Arbitrators, appointed by the parties to reach upon a consensus within period of 30 days from the appointment of the Arbitrator appointed subsequently, the Presiding arbitrator shall be appointed by the Chairman of the Executive Committee of the Indian Roads Congress.

ii) Neither party shall be limited in the proceedings before such Tribunal to the evidence or arguments before the other party/Independent consultant.

iii) Arbitration may be commenced during or after the Concession Period, provided that the obligations of and Concessionaire shall not be altered by the reason of the arbitration being conducted during the Concession Period.

iv) If one of the parties fail to appoint its Arbitrator in pursuance of Sub-Clause (i) above, within 30 days after receipt of the notice of the appointment of its Arbitrator by the other party, then the Chairman of the Executive Committee of the Indian Roads Congress, shall appoint the Arbitrator. A certified copy of the order of the Chairman of the Executive Committee of the Indian Roads Congress making such an appointment shall be furnished to each of the parties.



v) *Arbitration proceedings shall be held at Delhi, India, and the language of the Arbitration Proceedings and that of all documents and communications between the parties shall be English.*

vi) *The expenses incurred by each party in connection with the preparation, presentation, etc., of its proceedings shall be borne by each party itself.....”*

7. The facts of the case reveals that certain disputes arose between the Petitioner and the Respondent which were referred to conciliation and a settlement agreement was entered into on 12.11.2020. After virtually one-and-a-half years, Respondent invoked Arbitration Clause in respect of two disputes and after two years of the agreement, and after the time for challenging the conciliation agreement lapsed, the Respondent challenged the settlement agreement on the ground of duress and coercion. The short issue which, therefore, arises for consideration is as to whether the decision of the Tribunal to dismiss the application under Section 16 of the Act should be interfered with by this Court under Article 227 of the Constitution of India or not.

8. A perusal of the judgments and order of the Arbitral Tribunal shows that the Arbitral Tribunal has, in great detail, gone into the scope of the dispute to come to the conclusion that the Respondent/Claimant has raised profound allegations of coercion and duress surrounding the execution of the Settlement Agreement. Such claims go to the heart of the voluntary nature of the agreement and potentially render it voidable if proven to be true. The Tribunal was of the opinion that the allegations raised by the Claimant demanded careful examination and a comprehensive assessment, which can only be effectively conducted within the scope of an arbitration proceeding.



The Tribunal was of the opinion that there are deviations from Agreed Conciliation Procedure and Statutory Provisions and deviation from such procedures raises issues of fairness and due process, which require a thorough investigation and that the Tribunal's jurisdiction extends to addressing these procedural concerns, ensuring the integrity of the dispute resolution process. The Tribunal also opined that Section 34 being summary in nature may not adequately cater to the complex claims raised in the present case. The Tribunal held that the multifaceted nature of the dispute, encompassing coercion, procedural deviations, and the validity of the Settlement Agreement, necessitates a forum capable of conducting a comprehensive and equitable adjudication and that the Tribunal is better suited to accommodate such an examination within the framework of arbitration.

9. This view taken by the Arbitral Tribunal cannot be said to be so perverse which requires interference by this Court under Article 226 & 227 of the Constitution of India.

10. The scope of interference while exercising jurisdiction under Article 227 of the Constitution of India under the Arbitration and Conciliation Act is well settled. The power of the High Court for exercising its jurisdiction under Article 227 of the Constitution of India has been succinctly explained by the Apex Court in Estralla Rubber v. Dass Estate Private Limited, **2001 (8) SCC 97**, has observed as under:-

"6. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the



bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or tribunal has come to.

7. This Court in Ahmedabad Mfg. & Calico Ptg. Co. Ltd. v. Ram Tahel Ramnand [(1972) 1 SCC 898 : AIR 1972 SC 1598] in AIR para 12 has stated that the power under Article 227 of the Constitution is intended to be used sparingly and only in appropriate cases, for the purpose of keeping the subordinate courts and tribunals within the bounds of their authority and, not for correcting mere errors. Reference also has been made in this regard to the case Waryam Singh v. Amarnath [AIR 1954 SC 215 : 1954 SCR 565] . This Court in Bathutmal Raichand Oswal v. Laxmibai R. Tarte [(1975) 1 SCC 858 : AIR 1975 SC 1297] has observed that the power of superintendence under Article 227 cannot be invoked to correct an error of fact which only a superior court can do in exercise of its statutory power as a court of appeal and that the High Court in exercising its jurisdiction under Article



227 cannot convert itself into a court of appeal when the legislature has not conferred a right of appeal. Judged by these pronounced principles, the High Court clearly exceeded its jurisdiction under Article 227 in passing the impugned order."

11. While dealing with the scope of a petition under Article 227 of the Constitution of India filed against an order passed by an Arbitral Tribunal the Apex Court in SBP & Company v. Patel Engineering Limited & Anr., **2005 (8) SCC 618**, has observed as under:-

"45. It is seen that some High Courts have proceeded on the basis that any order passed by an Arbitral Tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution. We see no warrant for such an approach. Section 37 makes certain orders of the Arbitral Tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating its grievances against the award including any in-between orders that might have been passed by the Arbitral Tribunal acting under Section 16 of the Act. The party aggrieved by any order of the Arbitral Tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The Arbitral Tribunal is, after all, a creature of a contract between the parties, the arbitration agreement, even though, if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the Arbitral Tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution. Such an intervention by the High Courts is not permissible.



46. The object of minimising judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 or under Article 226 of the Constitution against every order made by the Arbitral Tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the Arbitral Tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act even at an earlier stage."

12. The said judgment was distinguished by the Apex Court in Punjab Agro Industries Corporation Limited v. Kewal Singh Dhillon, **2008 (10) SCC 128**, wherein the Apex Court has observed as under:-

"9. We have already noticed that though the order under Section 11(4) is a judicial order, having regard to Section 11(7) relating to finality of such orders and the absence of any provision for appeal, the order of the Civil Judge was open to challenge in a writ petition under Article 227 of the Constitution. The decision in SBP [(2005) 8 SCC 618] does not bar such a writ petition. The observations of this Court in SBP [(2005) 8 SCC 618] that against an order under Section 11 of the Act, only an appeal under Article 136 of the Constitution would lie, is with reference to the orders made by the Chief Justice of a High Court or by the designate Judge of that High Court. The said observations do not apply to a subordinate court functioning as designate of the Chief Justice."

13. The Apex Court in Deep Industries Limited v. Oil & Natural Gas Corporation Limited & Anr., **2020 (15) SCC 706**, after adverting the above two judgments in Estralla Rubber (supra) and SBP & Company (supra) has



observed as under:-

"17. This being the case, there is no doubt whatsoever that if petitions were to be filed under Articles 226/227 of the Constitution against orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, we cannot forget that Article 227 is a constitutional provision which remains untouched by the non obstante clause of Section 5 of the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us hereinabove so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction."

(emphasis supplied)

14. The Apex Court in Punjab State Power Corporation Limited v. Emta Coal Limited, (2020) 17 SCC 93, has observed as under:

"4. We are of the view that a foray to the writ court from a Section 16 application being dismissed by the arbitrator can only be if the order passed is so perverse that the only possible conclusion is that there is a patent lack in inherent jurisdiction. A patent lack of inherent jurisdiction requires no argument whatsoever — it must be the perversity of the order that must stare one in the face.

5. Unfortunately, the parties are using this expression which is in our judgment in Deep Industries Ltd. [Deep Industries Ltd. v. ONGC, (2020) 15 SCC 706] , to go to the Article 227 Court in matters which do not suffer from a patent lack of inherent jurisdiction. This is one of them. Instead of dismissing the writ petition on the



ground stated, the High Court would have done well to have referred to our judgment in Deep Industries Ltd. [Deep Industries Ltd. v. ONGC, (2020) 15 SCC 706] and dismiss the Article 227 petition on the ground that there is no such perversity in the order which leads to a patent lack of inherent jurisdiction. The High Court ought to have discouraged similar litigation by imposing heavy costs. The High Court did not choose to do either of these two things.”

15. Applying the law laid down by the Apex Court to the facts of the present case, this Court is of the opinion that the findings of the Tribunal does not require any interference by this Court under Article 227 of the Constitution of India. The contention of the learned Counsel for the Respondent that it is always open for the Petitioner to raise these issues in case the award goes against the Petitioner in proceedings under Section 34 of the Arbitration Act is correct. The question as to whether the settlement agreement suffers from perversity or deviation or from coercion can all be gone into by the Arbitral Tribunal and, therefore, it cannot be said that the Tribunal lacked inherent jurisdiction to examine these issues.

16. In view of the above, this Court is not inclined to interfere with the Order passed by the Tribunal rejecting the application filed by the Petitioner under Section 16 of the Arbitration Act.

17. Accordingly, the Writ Petition is dismissed. Pending applications, if any, also stands dismissed.

SUBRAMONIUM PRASAD, J

DECEMBER 01, 2023

Rahul