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

+ **LPA 664/2022 & CM APPLs. 49591/2022& 49592/2022**

RELIANCE INFRASTRUCTURE LIMITED & ANR..... Appellants

Through: Mr. Jaideep Gupta, Senior Advocate
with Mr. Mahesh Agarwal,
Ms. Megha Mehta, Mr. Pranjit
Bhattacharya and Ms. Rachita,
Advocates.

versus

**NATIONAL HIGHWAYS AUTHORITY OF INDIA &
ORS. Respondents**

Through: Ms. Maninder Acharya, Senior
Advocate with Ms. Madhu Sweta,
Ms. Shivangi, Ms. Astha Dhawan and
Ms. Niharika Singh, Advocates for
respondent no. 1.
Mr. Asheesh Jain, CGSC with
Mr. Gaurav Kumar, Ms. Ankita
Kedia, Advocates with Mr. Sravan
Kumar, GP for respondent no. 2.
Mr. Ashim Sood with Mr. Abhijram
Jha, Ms. Sayobani Basu, Mr. Akash
Raj and Mr. Kuber Bajaj, Advocates
for respondent no. 3.

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Reserved on: 23rd August, 2023
Date of Decision: 13th September, 2023

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE MINI PUSHKARNA

J U D G M E N T

MINI PUSHKARNA, J:

1. The present appeal has been preferred against the impugned order dated 07th September, 2022 passed by the learned Single Judge in *W.P. (C)*

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No. 11966/2021. By way of the impugned order, the writ petition filed on behalf of appellants herein was dismissed as non-maintainable on the basis that since appellant no. 1 herein had already divested its share holding in the respondent no. 3, any claims arising out of the Concession Agreement dated 16th July, 2010 ought to be pursued by respondent no. 3 and not by the appellant no. 1, as it no longer had any right as a share holder to pursue such claims.

2. Facts in brief leading to the present appeal are as follows: Respondent no. 1/ National Highways Authority of India (NHAI) invited proposals vide its Request for Qualification (“RFQ”) dated 11th March, 2008 for selection of bidders to undertake the Design, Construction, Development, Finance, Operation and Maintenance of six laning of Delhi-Agra Section of National Highway (NH-2).

3. Appellant no. 1 submitted its bid in response to RFQ, which was accepted by respondent no. 1 vide Letter of Acceptance (LOA) dated 19th May, 2010. Subsequent to the LOA dated 19th May, 2010, appellant no. 1 incorporated a Special Purpose Vehicle (SPV) i.e., DA Toll Road Pvt. Ltd. (“DATR”)/respondent no. 3, as limited liability company for the project, and requested the respondent no. 1 to accept respondent no. 3 as the Concessionaire entity which shall undertake and perform the obligations and exercise the rights of the selected bidder under the LOA for executing the project. Accordingly, on 16th July, 2010 the respondent no. 1 and respondent no. 3 entered into a Concession Agreement with respect to the project.

4. Respondent no. 1/NHAI issued a Circular dated 29th January 2014 permitting substitution of existing Concessionaire/Consortium Member of SPV in a harmonious manner in ongoing and completed national highway projects subject to the condition that NHAI shall stand fully discharged of



any claims whatsoever by the existing concessionaire, amongst other conditions.

5. Respondent no. 1 also issued a policy Circular dated 02nd June, 2017 to constitute a panel of independent experts and setting up of Conciliation and Settlement Committees as a Conciliation and Settlement Mechanism for Contractual Disputes in Contract Agreements with the Contractors/Concessioners/Consultants in respect of respondent no. 1's projects.

6. In view of the Circular dated 29th January, 2014 of NHAI permitting substitution of existing concessionaire, appellant no. 1, respondent no. 3 and Cube Highways and Infrastructure Pvt. Ltd. ("Cube Highways") entered into Share Purchase Agreement on 14th March, 2019 to replace the shareholders of DATR/respondent no. 3 Concessionaire with Cube Highways, subject to necessary harmonious substitution approval from NHAI/respondent no. 1. By its letter dated 05th September, 2019, respondent no. 3 requested its lenders for harmonious substitution of appellant's shareholding in DATR in terms of Circular dated 29th January, 2014 of respondent no. 1. Subsequently, by its letter dated 26th December, 2019, Ministry of Road Transport and Highways, Government of India informed respondent no. 1 herein that it would have no objection to the proposed harmonious substitution, subject to compliance of the conditions as contained in its letter, which inter-alia stipulated settling all financial liabilities in advance.

7. Respondent no. 1 by its letter dated 07th January, 2020 conveyed its in-principle approval for harmonious substitution of appellant no. 1 with Cube Highways, subject to fulfilment of the conditions, that inter-alia DATR pays the entire dues of NHAI prior to grant of final approval for harmonious substitution and that the claims of DATR and counter-claims of



NHAI are settled by way of the conciliation mechanism. In due course, respondent no. 1 issued circular dated 24th February, 2020 modifying the policy guidelines for harmonious substitution in terms of the letter dated 26th December, 2019 issued by the Ministry of Road Transport and Highways, Government of India.

8. On 02nd December, 2019, respondent no. 3 wrote a letter to respondent no. 1 that all claims qua the project would be raised under Conciliation Mechanism as per NHAI Policy. Pursuant thereto, respondent no. 1 issued letter dated 26th December, 2019 requesting for certain documents for initiating the conciliation process, including a letter consenting to Conciliation and a brief statement of the issues/disputes. By its letter dated 27th December, 2019, respondent no. 3 reiterated its consent to respondent no. 1 to resolve the disputes in terms of NHAI Policy Circular dated 02nd June, 2017, and agreed to refer the matter to Conciliation and Settlement Committee-2. Thereafter, on 30th December, 2019, respondent no. 3 submitted its claim to respondent no. 1.

9. On 3rd March, 2020, respondent no. 3 conveyed that the Concessionaire had taken all necessary steps/compliances to initiate the conciliation process for amicable settlement, and requested respondent no. 1 to schedule the conciliation meeting at the earliest. By its letter dated 09th March, 2020, respondent no. 3 sought final approval of respondent no. 1 for harmonious substitution and attached the technical capacity of Cube Highways. On 16th March, 2020, respondent no. 1 submitted all the claims before the Conciliation and Settlement Committee. Subsequently, Settlement Agreement dated 03rd November, 2020 was executed between respondent no. 1, respondent no. 3 and Cube Highways.

10. Eventually, by its letter dated 17th November, 2020, respondent no. 1



granted final approval for substitution of appellant no. 1 with Cube Highways. Following this, the Share Purchase Agreement dated 14th March, 2019 was amended by the parties vide Amended Share Purchase Agreement dated 17th December, 2020.

11. Aggrieved by the policy pertaining to harmonious substitution of existing concessionaire as contained in the letter dated 26th December, 2019 issued by respondent no. 2 and the circular dated 24th February, 2020 issued by respondent no. 1 in pursuance of respondent no. 2's letter dated 26th December, 2019, appellants herein filed writ petition, *W.P. (C) No. 11966/2021* before this Court. The said writ petition was filed on the ground that respondent no. 1 had coerced the concessionaire to settle its outstanding claims on the basis of its unreasonable and arbitrary conditions of waiving of all claims against respondent no. 1 for harmonious substitution of existing concessionaire. By the impugned order dated 07th September, 2022, learned Single Judge dismissed the writ petition of the appellants herein holding that they had no locus to file the said writ petition. Thus, the present appeal has been filed.

12. On behalf of the appellants, it is contended that appellant no. 1 was the original successful bidder which incorporated the respondent no. 3 and held 100% of the share holding of respondent no. 3. Thus, appellant no. 1 was an "aggrieved person" in terms of the dictum laid down by Supreme Court in the case of *Jasbhai Motibhai Desai Vs Roshan Kumar, Haji Bashid Ahmed and Others*, (1976) 1 SCC 671.

13. It is further contended that appellants promoted and incorporated respondent no. 3. The impugned letter and circular affect the legal rights of the appellant in respect of its SPV i.e. respondent no. 3, wherein the appellant was the promoter and major shareholder till 30th December, 2020.



Since appellant has suffered a legal injury, it has *locus standi* to file the writ petition challenging the impugned circular.

14. It is the case on behalf of appellants that appellant no.1, being a shareholder of respondent no. 3, is directly prejudiced and affected by the impugned circular, as by virtue of the said circular neither respondent no. 3 nor the appellant can invoke arbitration for adjudication of claims against respondent no. 1, arising from the defaults attributable to respondent no. 1. Merely because the appellant has been substituted, does not mean that it did not suffer a legal injury. It is submitted that a shareholder of a company can be an aggrieved party and can file the writ petition challenging the action of the state if the legal rights of the shareholder are affected along with those of the company by the said action of the state. Legal injury was suffered by the appellant in its capacity as shareholder of respondent no. 3. Legal injury of appellant is not extinguished merely because it has been substituted.

15. Learned senior counsel for appellants has strenuously argued that respondent no. 3 is nothing more than an alter ego of appellant no. 1. Despite suffering a legal wrong/injury, appellant no. 1 has been left remediless.

16. *Per contra*, on behalf of respondent no. 1, it is submitted that appellants have no *locus standi* to file the writ petition. The Concession Agreement dated 16th July, 2010 was executed between respondent no. 1 and respondent no. 3. Respondent no. 1/NHAI has privity of contract with DATR and not with appellant no. 1. Appellant no. 1 is an erstwhile shareholder and not a present shareholder. Thus, appellant no. 1 is a total stranger to the Concessionaire Agreement between respondent no. 1 and respondent no. 3/DATR.

17. Learned senior counsel for respondent no. 1 has drawn the attention of



this Court to the Settlement Agreement dated 03rd November, 2020 which has been entered between respondent no. 1/NHAI, respondent no. 3/DATR/ the Concessionaire and Cube Highways. It is submitted that it was at the request of appellant no. 1 that substitution happened and Cube Highways became 100% shareholder in DATR. Further, respondent no. 3/Concessionaire gave its consent for conciliation, therefore, appellant no. 1 is not an “aggrieved person” qua the Settlement Agreement dated 3rd November, 2020 or the Circular dated 24th February, 2020 of respondent no. 1.

18. Likewise, learned counsel appearing for respondent no. 3 has submitted that it was a voluntary exit by appellant no. 1 from the Concessionaire Agreement. The entire procedure of substitution was initiated by appellant no. 1 itself. It is submitted that contractual claims under a Commercial Contract cannot vest *locus standi* to a third party. The settlement agreement is a binding contract under which DATR’s cause of action for agitating any pending claims against NHAI stands extinguished. It is submitted that the impugned order of the learned Single Judge rightly holds that the appellants herein had no *locus standi* to file the writ petition.

19. We have heard learned counsel for the parties and perused the record.

20. This Court notes that Concession Agreement dated 16th July, 2010 was executed between respondent no. 1 and respondent no. 3. At the time of execution of the Concession Agreement, respondent no. 3 was a 100% owned subsidiary of appellant no. 1. Subsequently, a Share Purchase Agreement was entered between appellant no. 1, respondent no. 3 and Cube Highways on 14th March, 2019, by which Cube Highways purchased 100% shares of appellant no. 1 in the respondent no. 3. Thus, as on date, respondent no. 3 is a 100% owned subsidiary of Cube Highways.



21. The respondent no. 3/Concessionaire availed the benefit of harmonious substitution of its existing shareholders as per NHAI Circular dated 24th February, 2020. In accordance with the terms of the NHAI Circular, a Settlement Agreement dated 03rd November, 2020 was executed between respondent no. 1, respondent no. 3 and Cube Highways. Both respondents, i.e. respondent no. 1/NHAI and respondent no. 3/DATR have acted on the Settlement Agreement, and the process of “Harmonious Substitution” of the new shareholder stands completed.

22. This Court notes that the respondent no. 3/DATR in its reply to the writ petition had specifically admitted and stated that the Settlement Agreement is a binding contract and it undertakes to abide by the terms of the Settlement Agreement.

23. The issues raised in the present proceedings by appellants are matters relating to contractual rights and obligations arising out of the Concessionaire Agreement entered between respondent no. 1 and respondent no. 3. The appellant no. 1 being a stranger to the Concessionaire Agreement, had no locus to file the writ petition raising issues which are essentially emanating from the contract between respondent no. 1 and respondent no. 3. Once appellant no. 1 has exited from the respondent no. 3 and 100% shareholding of respondent no. 3 is with Cube Highways at present, appellant no. 1 is a total stranger to the transactions and agreements between respondent no. 1 and respondent no. 3.

24. In view of the aforesaid, it is apparent that appellant no.1 cannot agitate its rights as shareholder of respondent no. 3. It is to be noted that it was at the request of appellant no. 1 that substitution was effected which led to Cube Highways becoming 100% shareholder in the respondent no. 3. That being so, appellant no. 1 is a complete stranger as the respondent no. 1



had entered into Concessionaire Agreement with respondent no. 3/DATR and not appellant no. 1 *per se*. The respondent no. 3/DATR gave its categorical consent for conciliation for project issues/claims under the policy of respondent no. 1/NHAI, which culminated in the Settlement Agreement dated 03rd November, 2020, to which appellant no. 1 is not even a party. Thus, the judgment in the case of ***Rustam Cavasjee Cooper Vs Union of India, 1970 (1) SCC 248*** dealing with the rights of shareholders of a company, as relied upon by appellants, does not apply to the facts of the present case.

25. Learned Single Judge has rightly held that once the appellant had completely divested its shareholding to a third party in terms of the Circular of respondent no. 1 which granted harmonious substitution, the claims which may arise from or out of the Concession Agreement, must necessarily be recognised as being permissible to be pursued by the Concessionaire alone i.e. respondent no. 3 herein. Thus, learned Single Judge has held as follows:-

“6. Undisputedly, the petitioners had completely divested its shareholding in the third respondent in terms of the Circular which was issued by the Union Government and permitted a harmonious substitution. The claims which may arise from or out of the Concession Agreement must necessarily be recognized as being permissible to be pursued by the Concessionaire alone. The Court finds itself unable to countenance or recognize any right that may inhere in a shareholder of the Concessionaire to individually or independently assail the said Circular. It becomes pertinent to note that claims, even if they be with respect to a period prior to the harmonious substitution which ensued, would undoubtedly survive to be agitated by the Concessionaire, if otherwise permissible in law. The Court, however, finds itself unable to recognise or countenance a right which may inhere in the petitioner, who was merely a shareholder in that Special Purpose Vehicle, to agitate, pursue or prosecute such claims. This since such claims would necessarily have to be agitated by the Concessionaire alone and not by a shareholder of that entity.”

26. Reliance by appellants on the judgment in the case of ***Jasbhai***



Motibhai Desai Vs Roshan Kumar, Haji Bashid Ahmed and Others, (supra) is also misplaced. The said judgment defines as to who is an “aggrieved person” and holds that “its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of the petitioner’s interest, and the nature and extent of the prejudice or injury suffered by him.” However, considering the definition as laid down by Supreme Court in the said case, appellant no. 1 cannot be considered to be an “aggrieved person” qua respondent no. 1.

27. Perusal of the documents manifests that a Tripartite Share Purchase Agreement dated 14th March, 2019 was entered among appellant no. 1, respondent no. 3 and Cube Highways. The grievances as raised by the appellants in the present proceedings essentially emanate from the said Tripartite Agreement. Appellant has contended that its right to agitate claims against respondent no.1/NHAI is recognized by Clause 5.3 of the said Share Purchase Agreement. As per Clause 5.3 of the said Share Purchase Agreement dated 14th March, 2019, it was stipulated that in the event of receipt of any amounts received from NHAI qua any claims filed by the seller i.e. appellant no. 1 and/or the company prior to substitution, the same shall be paid to the seller i.e. appellant no. 1 herein subject to other conditions of the said Share Purchase Agreement. The said Clause 5.3 was subsequently amended by Amended Agreement dated 17th December, 2020 and the same reads as under:-

“2.1.4 7 Clause 5.3 of the SPA shall be deleted in its entirety and replaced by the following.

In the event: (i) any Claims filed by the Seller and/or the Company prior to the First Closing Date (“Pre-Closing Claims”, and together with the Palwal Structure Claims, the “NHAI Claims”); and/or (ii) any Palwal Structure Claims, are awarded in favor of the Company and/or the Seller, the Company shall within 7 (seven) Business Days from the later of: (i) the



date of actual recovery of such amounts by the Company: or (ii) the expiry of the Filing Limitation Deadline Date, shall firstly transfer an amount, equivalent to proportionate Transaction Charges on such amounts received from NHAI (as adjusted pursuant to the adjustments set out in Clauses 12.14, 12.14A and 15.9 above), to Ambit Private Limited and thereafter pay to the Seller all amounts received from NHAI in relation to such NHAI Claims less aforesaid proportionate Transaction Charges subject to Clause 12.14 and Clause 15.9

In the event NHAI or any court permits release of any amounts underlying the aforementioned Claims on provision of a bank guarantee, the Seller shall be entitled (but not obligated) to provide such bank guarantee to NHAI and/or the court and, upon such bank guarantee being provided by the Seller, the Company shall, within 2 (two) Business Days of receipt by the Company of such amounts from NHAI (provided the Company has received the approval of the Lenders for release of such amounts prior to receipt by the Company of the bank guarantee from the Seller) shall firstly transfer an amount, equivalent to proportionate Transaction Charges on such amounts received from NHAI, to Ambit Private Limited and thereafter make payment to the Seller of such Claim amounts less aforesaid proportionate Transaction Charges subject to Clause 12.14, 12.14A and Clause 15.9.

Notwithstanding the aforesaid, in the event NHAI appeals against any decision following receipt of funds by the Company and subsequent payment of such amounts to the Seller by the Company, the Seller shall be required to deposit such amounts as may be required by any court in such appeal and shall be responsible for any Loss and/or Liability that may arise on account of such appellate decision being made against the Company. It being clarified for removal of doubt that any such right of the Company and/or Purchaser to receive amounts from the Seller would be considered to be an Agreed Claim which has been Finally Resolved and the Company and/or Purchaser would be entitled to Set-Off such amount in accordance with Clause 12.14 In the event the Company does not make payments to the Seller pursuant to this Clause 5.3 for any reason whatsoever, the Seller shall be entitled to exercise any and all rights and remedies available to it under this Agreement or Applicable Law, including as a creditor of the Company under the Insolvency and Bankruptcy Code, 2016”

28. Perusal of the aforesaid clearly shows that the “legal injury” which the appellants contend has been suffered by them, relates to the agreement of appellant no. 1 with respondent no. 3 and Cube Highways. Therefore, if the appellants have suffered any “legal injury” and are “person aggrieved”, the said cause of action may be said to have occurred only against respondent



no. 3 herein. Respondent no. 1 has nothing to do with the Share Purchase Agreement dated 14th March, 2019 as amended on 17th December, 2020 between appellant no. 1, respondent no. 3 and Cube Highways, which owns respondent no. 3 as 100% shareholder as of now. Appellant no. 1 has not suffered any “legal injury” and is not a “person aggrieved” qua respondent no. 1/NHAI. Therefore, appellant no. 1 may have legal remedies against respondent no. 3 on the basis of the aforesaid Share Purchase Agreement. However, appellant no.1 is precluded from challenging the policy of respondent no. 1 dated 24th February, 2020 or the Settlement Agreement dated 03rd November, 2020 executed between respondent no. 1, respondent no. 3 and Cube Highways, when it has already divested its shareholding in the respondent no. 3.

29. This Court notes that contrary to being “aggrieved”, appellant no. 1 has rather benefitted from the Circular dated 24th February, 2020 issued by respondent no.1 as the same enabled the appellant no. 1 to harmoniously substitute itself with Cube Highways for valuable consideration and exit the project.

30. There is another aspect of the matter. The Share Purchase Agreement is a contract between appellant no. 1, respondent no.3/DATR and Cube Highways. The remedies and rights under the Share Purchase Agreement are purely contractual in nature inter-se only the appellant no. 1, respondent no.3 and Cube Highways. Therefore, the Share Purchase Agreement cannot be invoked by way of a writ remedy against respondent no.1/NHAI, which is not a party to the said Share Purchase Agreement. Besides, it is settled law that a writ petition is not maintainable in relation to matters governed by contract. (*See : State of Gujarat and Others Vs. Meghji Pethraj Shah Charitable Trust and Others, (1994) 3 SCC 552*)



31. The contention of appellants that respondent no.3/DATR is only an alter-ego of appellant no. 1 and consequently, appellant no. 1 had a right to maintain a writ petition against NHAI, holds no water. Appellant no. 1 is not currently a shareholder in respondent no.3/DATR, having voluntarily divested its entire shareholding in DATR in favour of Cube Highways. Since appellant no. 1 does not enjoy any shareholding in respondent no.3/DATR and is merely an erstwhile shareholder as on date, the doctrine of alter-ego/piercing the corporate veil is altogether inapplicable to the facts and circumstances of the present case.

32. In view of the detailed discussion hereinabove, this Court finds no merit in the present appeal. The same is accordingly dismissed along with the pending applications.

MINI PUSHKARNA, J

MANMOHAN, J

SEPTEMBER 13th, 2023

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