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

Date of decision: 03rd November, 2023

IN THE MATTER OF:

+ **W.P.(C) 14234/2023**

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner
Through: Mr. Ankur Mittal and Ms. Priya
Gupta, Advocates.

versus

**M/S IRB AHMEDABAD AHMEDABAD VADODARA SUPER
EXPRESS TOLLWAYS PRIVATE LIMITED** Respondent

Through: Mr. Atul Nanda, Sr. Advocate with
Ms. Rameeza Hakeem, Ms. Charu
Shriyam Singh, Ms. Pragya Gautam,
Ms. Teresa R. Daulat, Mr. Sarthak
Sachdev and Mr. Mohnish Patkar,
Advocates.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT (ORAL)

CM APPL. 56319/2023 (Exemption)

Allowed, subject to all just exceptions.

W.P.(C) 14234/2023 & CM APPLs. 56318/2023, 56320/2023

1. Petitioner has approached this Court challenging the Order dated 17.07.2023, passed by the Arbitral Tribunal constituted to adjudicate upon the disputes between the Petitioner and the Respondent herein. By the Order impugned herein the learned Arbitrator has disposed of the application dated 26.06.2023 filed by the Petitioner herein for constitution of a Commission to



conduct O-D Survey of Savli Road through ANPR Method in presence of representatives of the parties.

2. Material on record discloses that the Petitioner and the Respondent entered into a Concession Agreement dated 25.07.2011 under which the Respondent herein had to augment the existing road from Km. 6.400 to Km 108.700 of the National Highway No.8 by doing six laning and improving the Ahmedabad Vadodara Expressway from Km. 0.000 to Km. 93.302 in the State of Gujarat on a Design, Build, Finance, Operate and Transfer (DBFOT) basis. It is stated that disputes arose between the parties. Arbitral Tribunal was constituted. During the pendency of the arbitration proceedings, an application was filed by the Petitioner herein seeking joint origin-destination survey on Savli Road. It is stated in the application that the Respondent herein has setup a claim that Savli Road qualifies to be competing road to NH-8 and, therefore, as per the Respondent traffic from Ahmedabad to Vadodara or vice versa are using the Savli Road instead of NH-8 as the same is not a toll-able road resulting into alleged loss of toll to the Respondent herein. The application was, therefore, filed by the Petitioner herein for constitution of a Commission to conduct O-D Survey of Savli Road through ANPR Method in presence of representatives of the parties. The said application was opposed by the Respondent on the ground that the expression '*Serves as an alternative route*' in the definition of '*Competing road*' has to be considered only in the final arguments. The learned Arbitral Tribunal noted that the Petitioner herein has filed an O-D Survey Report and has filed an Affidavit by way of examination in chief of a witness to prove the O-D survey report concerning Savli Road and since the Petitioner has conducted an O-D survey, the report generated from the data collected at the



survey has been filed by the Respondent and a witness has been cited to prove the same and, therefore, the Tribunal felt that the application filed by the Petitioner herein does not merit acceptance.

3. It is this Order which has been challenged in the present Writ Petition by invoking Article 227 of the Constitution of India on the ground that the learned Arbitrator ought to have constituted a Commission for conducting O-D Survey because the material collected by the Commission would be evidence and would be necessary for adjudication of the case.

4. It is well settled that the Arbitral Tribunal is not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872 and the Arbitral Tribunal may conduct the proceedings in the manner it considers appropriate. Section 19(4) of the Civil Procedure Code, 1908 provides that the power of the Arbitral Tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence and it is up to the Arbitral Tribunal to take any further evidence if necessary. The findings of the Arbitral Tribunal wherein the Tribunal has accepted the contention of the Respondent herein that a party has to lead evidence to support its own case and a court would not assist the party to gather evidence on behalf of any party to the lis. The decision of the learned Arbitral Tribunal in dismissing the application of the Petitioner herein to conduct an O-D Survey to collect evidence cannot be said to be perverse. It is well settled that the scope of interference under Article 227 of the Constitution of India while challenging an Order of the Arbitral Tribunal is extremely limited and can be turned only in exceptional circumstances and interference is permissible only if the Order is perversely and patently lacking inherent jurisdiction. The Courts have gone to the extent of saying



that perversity should be of such a nature that it must stare on its face. A learned Single Judge of this Court in **CM(M) 1272/2019**, titled as Surender Kumar Singhal & Ors. v. Arun Kumar Bhalotia & Ors., while dealing with the scope of Article 227 of the Constitution of India while entertaining petitions under the Arbitration Act has held as under:

"24. A perusal of the above-mentioned decisions, shows that the following principles are well settled, in respect of the scope of interference under Article 226/227 in challenges to orders by an arbitral tribunal including orders passed under Section 16 of the Act.

(i) An arbitral tribunal is a tribunal against which a petition under Article 226/227 would be maintainable;

(ii) The non-obstante clause in section 5 of the Act does not apply in respect of exercise of powers under Article 227 which is a Constitutional provision;

(iii) For interference under Article 226/227, there have to be 'exceptional circumstances';

(iv) Though interference is permissible, unless and until the order is so perverse that it is patently lacking in inherent jurisdiction, the writ court would not interfere;

(v) Interference is permissible only if the order is completely perverse i.e., that the perversity must stare in the face;

(vi) High Courts ought to discourage litigation which necessarily interfere with the arbitral process;



(vii) Excessive judicial interference in the arbitral process is not encouraged;

(viii) It is prudent not to exercise jurisdiction under Article 226/227;

(ix) The power should be exercised in 'exceptional rarity' or if there is 'bad faith' which is shown;

(x) Efficiency of the arbitral process ought not to be allowed to diminish and hence interdicting the arbitral process should be completely avoided."

5. None of the principles laid down by the learned Single Judge which would warrant interference by this Court is present in the Order impugned herein which would persuade this Court to entertain the Writ Petition.

6. 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)

7. In view of the fact that the view taken by the learned Arbitrator that since the Petitioner herein has already filed an O-D Survey Report and has filed an Affidavit by way of examination in chief of a witness to prove the O-D survey report concerning Savli Road and since it is not so perverse and is a plausible view this Court is not inclined to substitute its own conclusion to the one arrived at by the learned Arbitral Tribunal.

8. Accordingly, the Writ Petition is dismissed along with the pending applications, if any.

SUBRAMONIUM PRASAD, J

NOVEMBER 03, 2023

Rahul