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

+ **FAO(OS) (COMM) 247/2023 & CM APPL. 58273-58276/2023**

NATIONAL HIGHWAYS AUTHORITY OF INDIA Appellant

Through: **Mr. Ankur Mittal, Mr. Abhay Gupta
and Mr. Ankur Saboo, Advocates.**

versus

M/S JAS TOLL ROAD COMPANY LIMITED Respondent

Through: **Mr. Soayib Qureshi, Mr. Sandeep
Bajaj, Mr. Devansh Jain and Mr.
Harikesh Anirudhan, Advocates.**

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Date of Decision: 08th November, 2023

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE MINI PUSHKARNA

J U D G M E N T

MINI PUSHKARNA, J: (ORAL)

1. The present appeal has been filed under Section 37 (1) (c) of the Arbitration and Conciliation Act, 1996 ("Arbitration Act") assailing the judgment dated 31st July, 2023 passed by the learned Single Judge in *OMP (COMM) 185/2021*. The present appeal challenges the impugned judgment to the extent that the learned Single Judge has held that the claims raised on behalf of respondent are within limitation and has further upheld the findings of the Arbitral Tribunal in respect of claim no. 2 pertaining to extension of concession period due to transport strike from 13th April, 2003 to 24th April, 2003 and heavy rain in October, 2003.



2. The appellant/ National Highways Authority of India (“NHAI”) issued letter of Award dated 2nd May, 2001 to the consortium of the respondent requiring it to execute Concession Agreement for designing, engineering, financing, procurement, construction, operation and maintenance on BOT basis (“Build, Operate & Transfer”) for widening and rehabilitation of existing two lane to four lane divided carriageway on the Nelamangala - Tumkur Section of NH-4 in the state of Karnataka.
3. The consortium incorporated respondent for entering into the Concession Agreement, which was executed on 28th June, 2001 between the respondent and the NHAI. The construction period was stipulated as 24 months from the Appointed Date in terms of Clause 15.3 of the Concession Agreement. The total concession period was 19 years from the Appointed Date in terms of Clause 3.1 of the Concession Agreement.
4. Since 23rd June, 2002 was fixed as the Appointed Date, as such 24 months of construction period was to be counted from the said date. Thus, the scheduled completion date of the project was 24th June, 2004. However, the respondent completed the project before time on 10th February, 2004 which was declared as the Provisional Commercial Operation Date and the respondent started collecting toll from the project from the said date onwards. The completion certificate was issued subsequently on 25th November, 2004.
5. Various disputes arose between the parties. Demand Letter dated 2nd January, 2007 was issued by the respondent to the appellant. Subsequently, the respondent invoked Dispute Resolution Clause under Clause 39 of the Concession Agreement on 10th October, 2007 seeking amicable settlement. The claims as raised by the respondent were under consideration by the



appellant from time to time. By letter dated 10th April, 2017, the Project Director of the appellant recommended to settle the claims of the respondent herein. Since no settlement was reached, the respondent invoked arbitration on 15th May, 2017 in respect of various claims.

6. By Award dated 31st December, 2020, the learned Arbitral Tribunal allowed various claims of the respondent. The said Award was challenged by the appellant in respect of all the claims allowed by the learned Arbitral Tribunal by filing petition under Section 34 of the Arbitration Act being *OMP (COMM) 185/2021*. However, at joint request of the parties, only claim nos. 2, 4 & 5 related to extension of concession period were adjudicated by the learned Single Judge.

7. By impugned judgment dated 31st July, 2023, the learned Single Judge partly allowed the petition under Section 34 of the Arbitration Act filed on behalf of the appellant. Thus, the learned Single Judge upheld the Award for claim no. 2 and set aside the Award so far as claim nos. 4 & 5 are concerned. The present appeal has been filed assailing the findings of the learned Single Judge regarding limitation and claim no. 2.

8. On behalf of the appellant, the following contentions have been raised:

8.1 Claim no. 2 relating to extension of concession period for 45 days owing to transport strike and heavy rain did not constitute *force majeure*. Therefore, the respondent was not entitled for extension of concession period. The respondent achieved commercial operation date on 10th February, 2004 and started collecting toll from the said date much before the schedule stipulated date under the Concession Agreement i.e. 22nd June, 2004.



8.2 The respondent invoked Dispute Resolution Clause under Clause 39 of the Concession Agreement seeking for amicable settlement on 10th October, 2007. As per Clause 39.1 (c) of the Concession Agreement, if in a period of 30 days no settlement is arrived, then a party can invoke arbitration. As such, after expiry of 30 days from invocation of Clause 39.1 of the Concession Agreement, no settlement was arrived at. The respondent had invoked arbitration on 15th May, 2017 after more than 10 years in respect of its various claims, including claim no. 2 seeking extension of concession period in relation to events that have occurred in the year 2003. The cause of action crystallised when the demand dated 2nd January, 2007 was made by the respondent against the NHAI. Therefore, invocation of arbitration by the respondent was inordinately time barred.

8.3 There is no iota of evidence that any negotiations were going between the parties from 2007 till 10th April, 2017 to somehow bring claim no. 2 within limitation. Even if negotiations were going on between the period from 2007 to 2017, mere writing correspondences after accrual of cause of action would not extend the period of limitation.

8.4 The recommendation by the Project Director dated 10th April, 2017 was an internal communication and admittedly the said recommendation has not matured till date. As a result, no significance could have been attached to the said communication.

8.5 Under Clause 29.1 (ii) and (iii), an event would fall under *force majeure* category only if the party claiming to be affected by such event has not been able to overcome such act or event and such act or event had material adverse effect on the project. Undisputedly, as per the schedule under the Concession Agreement, respondent had to achieve completion on



22nd June, 2004. However, despite the alleged *force majeure* event, the respondent achieved completion on 10th February, 2004, i.e. 4 months in advance. The learned Single Judge completely ignored Clause 29.1 of the Concession Agreement. Therefore, the finding in respect of claim no. 2 is patently illegal.

8.6 There was no material placed on record by respondent which could have even suggested that respondent had planned to achieve completion/operation of the project earlier, but could not do so due to happening of such event. Any finding based on “no evidence” amounts to patent illegality and is liable to be set aside.

9. Per contra, learned counsel for the respondent justified the impugned judgment passed by the learned Single Judge and the Award passed by the learned Arbitral Tribunal.

10. At the outset, it is to be noted that the present appeal is under Section 37 of the Arbitration Act where the scope of interference by the Appellate Court is extremely limited. The Court while hearing an appeal under Section 37 of the Arbitration Act cannot re-appreciate the evidence as before the learned Arbitral Tribunal. If the learned Arbitral Tribunal has taken a view which is found to be reasonable and plausible, then the Court would certainly not interfere. This Court would be very cautious and reluctant to interfere with the findings given by the Arbitral Tribunal and as confirmed in the proceedings under Section 34 of the Arbitration Act (See: *MMTC Limited Versus Vedanta Limited, 2019 SCC OnLine SC 220 and PSA SICAL Terminals Pvt. Ltd. Versus Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Others, 2021 SCC OnLine SC 508*).



11. Considering the aforesaid position of law, this Court finds no cause for interference with the concurrent findings given by the learned Arbitral Tribunal and the learned Single Judge, which are found to be plausible and reasonable.

12. On the aspect of limitation, it is to be noted that the learned Arbitral Tribunal has held in categorical terms that the claims of the respondent had never been rejected by the appellant and that the same were under consideration from time to time. The learned Arbitral Tribunal also took note of the letter dated 10th April, 2017 written by the Project Director of the respondent wherein he recommended settlement of the claims of the respondent. Since the arbitration has been invoked by the respondent within a period of 3 years from the date on which the aforesaid letter dated 10th April, 2017 was issued on behalf of the appellant, it has been held by the learned Arbitral Tribunal that the cause of action was still continuing. Thus, the learned Arbitral Tribunal has held as follows:

“a) Firstly, the AT considered the rival contentions of the parties with regard to limitation. It is an admitted position of fact that the Claim in question pertains to the years 2002-2004. It is also an admitted position of fact that the Claimant had raised the said claim with NHAI within the period of limitation vide its Letter dated 28.03.2005 (Exhibit C-12) and Letter dated 0201.2007 (Exhibit C-13). The only contention raised by the Respondent is that the Claimant was required to invoke arbitration when the said Claims were not paid within the period of limitation.

b) In this regard, the Respondent has placed reliance upon the judgment of "State of Gujarat Vs. Kothari and Associates". The AT has gone through the said judgment, however, the same is of no avail to the Respondent as in the said matter, as has been rightly pointed out by the Claimant, at the time of each extension in the facts of the said case, the State had repudiated the Claim for compensation thereby giving rise to a separate cause of action. However, in the present case, the Claims of the Claimant have never been rejected by the NHAI which have led to arising of any cause of action. The cause



of action arises when one party asserts and the other denies, as has been noted by the Hon'ble Supreme Court of India in the matter of "Kashtnyalspat Nigam Ltd. Vs. M/s. Prathyusha Resources & Infra Private Limited and Anr."

c) Further, in the present matter, the claims of the Claimant have never been rejected by the Respondent which in turn kept the same open and under consideration from time to time. The documents marked as Exhibit C-14 and Exhibit C-89 show that the claims of the Claimant were under consideration with the Respondent and as such, it cannot be ruled out that negotiations and a dialogue was ongoing between the parties till the time of issuance of the document marked as Exhibit C-89. As such, the judgment in the matter of Fatehji & Company & Ors Vs. L. M. Nagpal & Ors. is also not applicable in the present case.

d) Admittedly, the Arbitration has been invoked within a period of 3 years from the date on which the said Exhibit C-89 was issued. Therefore, the Arbitral Tribunal is of the opinion that the cause of action is still continuing. It is not expected that the Claimant would invoke arbitration when there exists a possibility of an amicable resolution between the parties when the Project Director of the Respondent has itself as late as on 10.04.2017 vide Exhibit C-89 has recommended to settle the Claim of the Claimant.

e) Be that as it may, Exhibit C-14 and Exhibit C-89 amount to an admission and an undertaking on the part of the Respondent to settle the claims of the claimant and the Respondent is bound by it thereby giving rise to a fresh cause of action in favor of the Claimant in terms with Section 25(3) of the Indian Contract Act. As such, the AT finds that the Claims of the Claimant are within the period of limitation."

13. On the aspect of limitation, the learned Single Judge upheld the findings of the learned Arbitral Tribunal in the following manner:

"107. Apropos limitation, the learned Arbitral Tribunal has held that, attempts at an amicable resolution of the dispute being a contractual prerequisite before instituting arbitral proceedings, JTR could not be faulted in not instituting the said proceedings till 10 April 2017, when NHAH made it finally clear that an amicable resolution of the dispute was not possible. Notice under Section 21 of the 1996 Act was issued by JTR practically within a month thereof, on 15 May 2017. If, therefore, the learned Arbitral Tribunal did not deem it appropriate to reject JTR's claims on the ground of limitation, I do not find any reason to interfere with the decision, under Section 34 of the 1996 Act."



14. Similarly, the learned Arbitral Tribunal has rejected the contention of the appellant that the transporter's strike or heavy rainfalls did not constitute *force majeure* event. Thus, the learned Arbitral Tribunal has held as follows:

"a).....

b) Upon merits, it is an admitted position that Transporter's Strike is covered under the definition of a Force Majeure Event under the terms of the Concession Agreement. Even the IE and the NHAI have clearly mentioned the said fact in Exhibit C-17 and Exhibit C-15 respectively.

c) With regard to the heavy rainfalls in the October, 2003, the IE has clearly admitted in Exhibit C-17 that the same were on account of a low pressure area in the Bay of Bengal. As such, the same cannot be said to be an expected event thereby rendering it beyond the scope of a Force Majeure Event as defined under the Concession Agreement.

d) The main contention raised by the Respondent is that the Claimant was able to achieve the COD before the scheduled completion date and as such, the claimant was able to overcome the said force majeure event. Such an argument is unacceptable as the agreement provides for extension of Concession period, which includes the construction period to the extent the force majeure survives."

15. Upholding the Award of the learned Arbitral Tribunal with respect to claim no. 2 regarding *force majeure*, the learned Single Judge has held as follows:

"108. On merits, too, the question of whether heavy rains in October were expected, or unexpected, is a pure question of fact. The IE had, in its letter dated 28 November 2003, acknowledged that the rains were on account of low-pressure area in the Bay of Bengal and could not, therefore, be regarded as usual or expected. The learned Arbitral Tribunal justifiably followed the recommendation of the IE.

109. The submission of NHAI that, as JTR had achieved the PCOD four months prior to the scheduled COD, the progress of the project could not be said to have been affected by force majeure, also fails to impress. The mere fact that the project might have been completed in time does not necessarily imply, ipso facto, that there was no deleterious effect of the force majeure events, in the form of the transporters strike and the unseasonal rains. Though there is substance in NHAI's contention that the reliance, by the learned Arbitral Tribunal, on Clause 14.5(d), to hold that the IE's



recommendations had to be necessarily accepted by NHAI, was misguided, nonetheless, on facts, the finding of the existence of force majeure, and of the force majeure having adversely impacted the progress of the project, do not call for interference under Section 34 of the 1996 Act.

110. NHAI has not independently chosen to challenge the decision of the learned Arbitral Tribunal with respect to Claim 2 on the aspect of the number of days of extension of the Concession Period to which JTR would be entitled.”

16. In view of the aforesaid, no merit is found in the present appeal. The same is accordingly dismissed along with the pending applications.

17. However, it is clarified that the appellant is at liberty to raise the issue of limitation with respect to claims in other matters, wherever such issue of limitation arises.

MINI PUSHKARNA, J

MANMOHAN, J

NOVEMBER 8, 2023

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