



2024:DHC:1450



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IN THE HIGH COURT OF DELHI AT NEW DELHI***Decided on 21st February, 2024***

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O.M.P. (COMM) 399/2020 & I.A. 3004/2020

NATIONAL HIGHWAYS AUTHORITY OF INDIA..... Petitioner

Through: Mr. Yash Kapoor & Ms. Madhu
Sweta, Advocates.

versus

T. SURYANARAYANA REDDY

..... Respondent

Through: Mr. S. Ram Babu & Mr. Angad
Mehta, Advocates.

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CORAM:**HON'BLE MR. JUSTICE PRATEEK JALAN****PRATEEK JALAN, J. (ORAL)**

1. By way of this petition, under Section 34 of the Arbitration and Conciliation Act, 1996 [“the Act”], the petitioner-National Highway Authority of India [“NHAI”] assails an arbitral award dated 31.10.2019 in respect of disputes between the parties under a Contract Agreement dated 01.11.2016 [“the Contract”] for collection of user fee for Laxmipuram Toll Plaza on National Highway No. 5 in the State of Andhra Pradesh.

2. The respondent was responsible for collection of toll fee, and payment of sums as specified in the Contract to the petitioner. It claimed relief from its payment obligations, on the ground that the Central Government’s demonetisation of ₹500 and ₹1000 notes on 08.11.2016 constituted a *force majeure* event. Three disputes were adjudicated by the learned sole arbitrator:

i. Application of *force majeure* clause;



- ii. waiver of toll fee payment and refund of penalty with interest; and
 - iii. refund of expenses for the toll suspension period from 08.11.2016 to 02.03.2017 on account of demonetisation.
3. Mr. Angad Mehta, learned counsel for the respondent contends that all three issues have been decided against NHAI in a judgment of a coordinate Bench dated 17.02.2022 in *NHAI vs. M/s C.P Rama Rao (Proprietor)*¹ [“CPR judgment”].
4. On the last date of hearing i.e., 01.02.2024, Mr. Yash Kapoor, learned counsel for NHAI submitted that the aforesaid judgment is pending appeal before the Division Bench. Mr. Mehta was, therefore, directed to place the orders of the Division Bench on record, so that the Court can determine as to whether the adjudication of this petition ought to await the result of the appeal.
5. Mr. Mehta has placed on record the orders in FAO(OS)(COMM) 215/2022, which is directed against the judgment dated 17.02.2022. The order of the Division Bench dated 22.01.2024, records as follows:

“1. The only ground alleged by the learned counsel appearing for the appellant for assailing the Arbitral Award dated 14.02.2019 and the impugned order is that the Arbitral Award has not considered the appellant’s counter-claim in respect to the period after 28.02.2017.

2. It is contended that the period covered by the Force Majeure event ended on 28.02.2017, however, the appellant’s claim was also for a period till 04.08.2017. There is no breakup of the appellant’s counter-claim for the period prior to 28.02.2017 and thereafter.”²

6. In the present case, it is undisputed that the petitioner’s claims

¹ Judgment dated 17.02.2022 in O.M.P.(COMM) 215/2019.



pertain only to the period of operation of the *force majeure* clause, as evident from the enumeration of the disputes reproduced above. The contention of the respondent in claim Nos. 1 and 3 is that it was not liable to make payment of toll fee to NHAI during the period immediately following the demonetisation. In addition to waiver of toll fee during the aforesaid period [Claim No.1], the respondent sought refund of expenses incurred [Claim No.3] and refund of penalty imposed by NHAI [Claim No.2].

7. The *CPR* judgment is admittedly in respect of a similar claim, with the difference that NHAI, in that case, had a counter-claim in respect of toll fee for the post *force majeure* period. It is that aspect which is pending before the Division Bench, as recorded in the order dated 22.01.2024. I am, therefore, satisfied that the hearing of this petition need not await the result of the appeal against the *CPR* judgment.

Re: Claims No.1 and 3:

8. The respondent's case is based upon Clause 25(b) of the Contract, which defines a *force majeure* event in the following terms:

"25(b) FORCE MAJEURE EVENT:

Except as stated in Clause (a) above, Force Majeure event means an event or circumstances or a combination of events and circumstances referred to in this clause which are beyond the reasonable control of the Party or Parties to this Contract and which party could not have prevented or reasonably overcome with the exercise of its reasonable skill and care in relation to performance of its obligations pursuant to this Contract and which are in the nature, without limitation of those described below:

- (i) xx.xxx...xx***
- (ii) xx.xxx...xx***
- (iii) xx.xxx...xx***

² Emphasis supplied.



(iv) xx...xxx...xx

(v) Any change in law which has a material adverse effect on the obligation of the parties hereto.

(vi) xx...xxx...xx

(vii) xx...xxx...xx

(viii) Any event or circumstances of a nature analogous to the foregoing.

Either party to this contract shall be entitled to suspend or excuse performance of his obligations, including remittance of instalments by the Contractor to the Authority for the period of continuance of the Force Majeure event, under this Contract to the extent that such performance is impeded by an event of Force Majeure prevailing continuously for more than 7 (Seven) days at a time for continuously for more than 3 (Three) days at a time in case of no user fee collection at all at the toll plaza) for reasons not attributable to the Contractor.³

9. In the present case, the learned Arbitrator has rendered the finding that demonetisation constitutes a “change in law”⁴. He has also come to the conclusion that the respondent duly served notice of the *force majeure* event to NHAI⁵. The respondent’s claims have been worked out on this basis.

10. I am of the view that these issues are fully covered by the findings of this Court in the *CPR* judgment. The terms of the contract in both contracts are admittedly identical. The following reliefs were sought by the respondent therein in arbitration:

“AT ARBITRATION

5. At Arbitration, the Respondents sought reliefs as follows:

“i) Waiver of the payment of Rs.6,76,71,317/- out of the liability of Rs. 8,09,02,416/- considering the period 09.11.2016 to 28.02.2017 as period falling under Force Majeure period and;

ii) Refund for a sum of Rs.1,32,31,099/- (already paid under duress) out of the liability of Rs.8,09,02,416/- considering the period

³ Emphasis supplied.

⁴ Paragraph 6.12 of the Award dated 31.10.2019.

⁵ Paragraph 6.16 of the Award dated 31.10.2019.



09.11.2016 to 28.02.2017 as period falling under Force Majeure period and;

iii) Interest @ 18% per annum compounded quarterly on the amount of refund of Rs. 1,32,31,099/-.””

11. As in the present case, in the *CPR* case also, the learned Arbitrator had come to the conclusion that demonetisation constituted a *force majeure* event and granted relief to the toll collector. This Court held that the demonetisation decision was correctly characterised as a change in law, and that it had a material adverse effect on the obligation of the parties. The view taken by the learned Arbitrator was, therefore, sustained. The question of whether demonetisation constituted a *force majeure* event, entitling the respondent to waiver of liability, has thus been answered in the *CPR* judgment. As stated above, the order of the Division Bench dated 22.01.2024 also makes it clear that this aspect is not under challenge.

12. Consequently, the decision of the learned Arbitrator impugned in this petition, also does not admit of a challenge under Section 34 of the Act. The view taken on an interpretation of Clause 25(b) of the Contract cannot be characterised as patently illegal, arbitrary or perverse, as held by this Court in the decision dated 17.02.2022.

13. As far as claim Nos. 1 and 3 are concerned, Mr. Kapoor does not assail the award on any other ground.

Re: Claim No.2:

14. As far as claim No. 2 is concerned, Mr. Kapoor submits that the claim for refund of penalty was not an arbitrable claim. He draws my attention to clauses 19, 26 and 27(a) of the Contract in this connection,



which read as follows:

“19. PENALTY FOR FAILURE TO PAY INSTALMENTS:

(i) **In case of delay in remittance of the agreed amount of any installment due under this Contract to the Authority beyond the fixed day (as per clause 8, of SECTION - II), the Authority shall levy penalty @0.2% per day for initial one month delay and @ 0.5% per day for further delay beyond one month.** Such right would, inter-alia, include unconditional right of the Authority to terminate the contract forthwith, without assigning any reasons whatsoever and take over possession of the User Fee Plaza(s) for User Fee collection in any manner the Authority may deem fit. The penalty so levied shall be recovered from the performance guarantee which shall be replenished by the contractor within 10 days from, the date of such recovery failing which the contract is liable to be terminated.

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26. MATTERS NON-ARBITRABLE:

Any disputes or differences between the parties in regard to the matters covered under Clauses 3, 7, 8, 10, 14, 18 and 19 shall be referred to the Authority, Project Implementation Unit / Corridor Management Unit Visakhapatnam whose decision shall be final.

27. ARBITRATION

(a) All disputes and/or difference **except those which are mentioned in the matters non-arbitral under Clause 26** above arising between the parties out of this Contract shall be settled by Arbitration under and in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The Chairman of the Authority or his nominee shall be the sole Arbitrator. The award made and published in pursuance of such Arbitration proceedings shall be final and binding on both the parties.”⁶

15. Learned counsel submits that penalty was levied upon the respondent under Clause 19. According to him, Clause 27(a) read with Clause 26, make it clear that disputes and differences with regard to matters covered under various clauses, including Clause 19, were not susceptible to resolution by arbitration, but were to be referred to NHA

⁶ Emphasis supplied.



itself for a final decision.

16. At the very outset, the nature of the respondent's claim in this regard requires consideration. Clause 19 provides for levy of penalty by NHAI at the rate of 0.2% per day for the first month and 0.5% per day for further delay in the event of delay in remittance of the agreed amount of any instalment "*due under this contract*" to it. It entitles NHAI to recover this amount from the performance guarantee placed by the respondent. This is what the NHAI has done, based upon non-remittance of instalments by the respondent during the *force majeure* period. The position, as noted above, is that by operation of the *force majeure* clause, the respondent was not liable to make payment of those instalments at all. In such a situation, it can hardly be said that the respondent delayed in remittance of any instalment "*due under this contract*". The respondent was, thus, not seeking adjudication of any dispute under Clause 19, but seeking restitution of amounts wrongly appropriated by NHAI under the said clause. The effect of NHAI's submission would be that, even if an amount is not due under the contract, it may levy penalty under Clause 19, and its decision to do so would be final. As in this case, this would lead to an absurd situation that the learned Arbitrator would determine the contractual claims with regard to liability of the party, but would not have the authority to reconstitute the contractor in the event of an unlawful levy of alleged penalty.

17. I am fortified in this conclusion by reference to a decision of the



Supreme Court in *J.G. Engineers (P) Ltd. v. Union of India and Anr.*⁷ [“JG Engineers”], as also the CPR judgment.

18. The Supreme Court, in *JG Engineers*, was interpreting a contractual clause which placed the matter of levy of liquidated damages outside the purview of arbitration. The Court held that such a clause does not render a decision as to liability under the said clause non-arbitrable, but only applies to the rate or quantum of liquidated damages. Paragraphs 22 and 23 of the judgment make this position clear:

“22. In view of the above, the question whether the appellant was responsible or the respondents were responsible for the delay in execution of the work, was arbitrable. The arbitrator has examined the said issue and has recorded a categorical finding that the respondents were responsible for the delay in execution of the work and the contractor was not responsible. The arbitrator also found that the respondents were in breach and the termination of contract was illegal. Therefore, the respondents were not entitled to levy liquidated damages nor entitled to claim from the contractor the extra cost (including any escalation in regard to such extra cost) in getting the work completed through an alternative agency. Therefore, even though the decision as to the rate of liquidated damages and the decision as to what was the actual excess cost in getting the work completed through an alternative agency were excepted matters, they were not relevant for deciding Claims 1, 3 and 11, as the right to levy liquidated damages or claim excess costs would arise only if the contractor was responsible for the delay and was in breach.”

23. In view of the finding of the arbitrator that the appellant was not responsible for the delay and that the respondents were responsible for the delay, the question of the respondents levying liquidated damages or claiming the excess cost in getting the work completed as damages, does not arise. Once it is held that the contractor was not responsible for the delay and the delay occurred only on account of the omissions and commissions on the part of the respondents, it follows that the provisions which make the decision”

⁷ (2011) 5 SCC 758.



of the Superintending Engineer or the Engineer-in-charge final and conclusive, will be irrelevant. Therefore, the arbitrator would have jurisdiction to try and decide all the claims of the contractor as also the claims of the respondents. Consequently, the award of the arbitrator on Items 1, 3 and 11 has to be upheld and the conclusion of the High Court that award in respect of those claims had to be set aside as they related to excepted matters, cannot be sustained.”⁸

19. The CPR judgment, also deals with this issue. The Court has noticed the issues identified by the learned Arbitrator for adjudication in that case, including the following:

“7. The learned Arbitrator identified seven issues for adjudication, as noted under paragraph no. 16 of the impugned Award, which are as follows:

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iv) Whether the respondent-NHAI is entitled to recover a sum of Rs.15,72,52,173/- from the claimant in terms of Clause-H and Clause- 19 of the Contract Agreement?”⁹

20. The learned Arbitrator, in that case, decided in favour of the respondent, and the award was not interfered with by this Court. As noted above, the appeal against the CPR judgment is also limited to grounds which do not effect this part of the decision.

21. The objections of NHAI on claim No. 2 are also, therefore, rejected.

Re: Award for refund of security deposit:

22. Mr. Kapoor lastly contends that the claim for refund of security deposit was not specifically pleaded by the respondent in its statement of claim. I find that, to the contrary, the respondent had specifically pleaded that it claimed refund of the security deposit and additionally claimed

⁸ Emphasis supplied.

⁹ Emphasis supplied.



₹3,43,45,256/- towards the *force majeure* claims. These pleadings are to be found, *inter alia*, in paragraphs 24, 26, 27 & 31 of the statement of claims, which read as follows:

“24. In response to the aforementioned Circular dated 14.03.2017 and letter dated 15.03.2017, the Claimant wrote letter dated 18.03.2017, wherein the Claimant specifically disputed the contention of the Respondent and **claimed the refund of his security deposit amount of Rs.1,56,99,000/-** as well as Rs.3,43,45,256/- towards Force Majeure claim under Clause 25(b) of the Agreement.

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26. It is pertinent to mention that the Agreement period expired on 02.03.2017 and the Claimant handed over the toll to the Respondent. As a matter of fact on the date of expiry of the contract period, the **Respondent was holding the Claimant's security deposit of Rs.1,56,99,000/-**. The main intent and purpose of the security deposit is to adjust any outstanding amounts payable by the Claimant/toll Contractor. In the subject case the alleged outstanding amount payable by the Claimant as on 02.03.2017 is Rs.1,56,85,234/- i.e, the difference of agreed weekly remittance and actual remittance (letter dated 06.04.2017 of Respondent may be referred to). It is reiterated that the Respondent vide Circular dated 14.03.2017 gave concession to all the toll Contractors to deposit the agreed weekly remittance by waiving interest/penalty and further permitted all the contractors to deposit the said outstanding amount on or before 24.03.2017.

27. On 06.04.2017 the Respondent wrote letter to the Claimant and represented that the Claimant failed to avail the concession extended by the Respondent despite repeated requests. Under the said pretext the Respondent levied penalty as contemplated under the Agreement. The Respondent further stated that the outstanding amount payable by the Claimant is Rs.1,56,85,234/- (please refer Respondent's letter dated 07.04.2017)i.e. the alleged short fall of agreed remittance. It is pertinent to mention by the date of termination of the Agreement the Respondent was holding the Claimant's security deposit amount of Rs.1,56,99,000/-. Thereby, it is clear the Respondent was holding the Claimant's money of Rs.13,766/- in excess. But the Respondent imposed interest and penalty of Rs.60,48,611/- and from the said amount. The said actions of the Respondent are completely wrong and contrary to the terms and conditions of the Commercial Contract.

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31. The Respondent wrote letter dated 12.10.2017 to the Claimant whereby it furnished the details of imposition of penalty etc. It is pertinent to mention the Respondent wrongly and in contrary to its own circular imposed interest/penalty. As per the Respondent's representation the Claimant allegedly liable to pay Rs.1,54,60,202/- (Rs.1,25,38,602 + Rs.28,21,600) and on the said amount the Respondent levied 2% of TCS i.e. Rs.3,09,204/-. But whereas the Respondent earlier notified the alleged outstanding amount is Rs.1,56,85,234/- (Respondent's letter dated 06.04.2017 may be referred to). Hence, the total amount due and payable is Rs1,57,69,406/-. But not Rs.1,56,99,000/- as contended by the Respondent. **It is reiterated by that date the Respondent is holding the Claimant's Security Deposit amount of Rs.1,56,99,000/-** hence the balance amount if at all payable by the Claimant would be Rs.70,406/-. But as contended above the Respondent wrongly claimed the total outstanding amount payable by the Claimant is Rs.2,17,47,611/-. The Respondent's may be put to strict proof of the same. The Respondent adjusted the security deposit amount of Rs.1,56,99,000/- and claimed the alleged balance amount of Rs.60,48,611 from the Claimant's other toll contract which is situated at Agnampudi Toll Plaza, Visakhapatnam vide letter dated 14.10.2017.”¹⁰

23. The respondent-claimant has thereafter aggregated its claim alongwith interest until the date of filing of the statement of claim to a sum of approximately ₹9.42 crores. The award is for a lesser sum of Rs. 2,71,95,594/-, and, in my view, cannot be stated to have exceeded the claims of the respondent.

Conclusion:

24. For the aforesaid reasons, I am of the view that the impugned award does not call for interference under Section 34 of the Act.

25. The petition is, therefore, dismissed.

26. There will be no order as to costs.

PRATEEK JALAN, J

FEBRUARY 21, 2024 ‘pv/Adhiraj’/

¹⁰ Emphasis supplied.