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

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Date of Decision: 14.05.2024

+ **FAO(OS) (COMM) 82/2024 and CM APPL. 24240/2024**

NATIONAL HIGHWAYS AUTHORITY
OF INDIA

..... Appellant

Through: Mr Manish K. Bishnoi, Mr Twinkle
Kataria and Mr Khubaib Shakeel,
Advocates.

versus

SHAMLAJI EXPRESSWAY PVT LTD

..... Respondent

Through: Dr Amit George, Mr Abhishek Gupta,
Mr Suyash Gupta, Mr Mukesh
Kumar, Ms Meenakshi Sood, Mr
Satpal Yadav and Mr Adhishwar Suri,
Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MS. JUSTICE TARA VITASTA GANJU

VIBHU BAKHRU, J. (Oral)

1. National Highways Authority of India (hereafter *NHAI*) has filed the present appeal under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 (hereafter *the A&C Act*) assailing an order dated 20.03.2024 (hereafter *the impugned order*) passed by the learned Single Judge in OMP(I)(COMM)90/2024 captioned *Shamlaji Expressway Private Limited v. National Highway Authority of India*.

2. The respondent had filed the said application [OMP(I)(COMM) 90/2024] under Section 9 of the A&C Act seeking interim measures of



protection for staying the Suspension Notice dated 11.03.2024 issued by NHAI in terms of the Concession Agreement dated 02.05.2018 (hereafter *the Concession Agreement*). This Court had briefly heard the submissions on behalf of the parties on 26.04.2024.

3. The principal issue flagged by NHAI was that the structures on highway (bridges and flyovers) in question are incomplete and the same is causing problems for the persons using the said road. It was stated that NHAI requires as a matter of urgent measure to complete the said structures on the highway. The temporary diversions made to carry on the construction are stated to be in complete disrepair and require immediate attention to ensure free flow of traffic.

4. There are allegations and counter allegations by the parties.

5. NHAI claims that the respondent has been unable to complete the construction of the highway. NHAI claims that it has already contributed ₹543.12 crores against the total contribution of ₹544.4 crores and yet, the highway and structures are incomplete. In addition, NHAI alleges that the Central Road Research Institute (CRRI) has reported that there are defects in the highway constructed by the respondent and it estimates that about ₹97 crores would be required to address the defects.

6. It is the respondent's case that if NHAI suspends the contracts, lenders would have a right to substitute the respondent and it being a Special Purpose Vehicle (SPV) would have no recourse to recover any amount. It was contended that, such an event would render the respondent insolvent



and without any recourse. This Court had briefly considered the rival contentions. In the aforesaid circumstances, this Court had, on 26.04.2024 suggested an interim arrangement whereby, NHAI would be at liberty to take over the entire site and execute the works either on its own or through another contractor. The same would be without prejudice to all rights and contentions of the parties.

7. The learned counsel had sought time to take instructions in this regard. The order passed on 26.04.2024 reads as under:

“CAV 202/2024

1. In view of appearance on behalf of the respondent/caveator, the caveat stands discharged.

CM APPL. 24241/2024(Exemption) CM APPL. 24242/2024(Exemption)

2. Exemptions are allowed, subject to just exceptions.

3. The applications stand disposed of.

FAO(OS) (COMM) 82/2024 & CM APPL. 24240/2024(Stay)

4. The appellant – National Highways Authority of India (hereafter *NHAI*) has filed the present appeal under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 (hereafter *the A&C Act*) impugning an order dated 20.03.2024 (hereafter *the impugned order*) passed by the learned Single Judge in OMP (I)(COMM) No. 90/2024 captioned *Shamlaji Expressway Pvt. Ltd. v. National Highway Authority of India*.

5. The respondent (hereafter also referred to as *Concessionaire*) had filed the aforementioned application under Section 9 of the A&C Act, *inter alia*, seeking to challenge the suspension notice dated 11.03.2024 issued by NHAI in terms of the Concession Agreement dated 02.05.2018



(hereafter *the Concession Agreement*).

6. The Concession Agreement, is fashioned on a Hybrid Annuity Mode of public-private participation. In terms of the Concession Agreement, the respondent was engaged for 'Six Lanning of Shamla Ji to Motachilodha from KM 401.200 to KM 494.410 (Length 93.210 KM) section of NH-8 in the State of Gujarat'. The concession was for a period of 17 years which included the construction period of 730 (seven hundred and thirty) days. The investment for execution of the work was required to be funded partially by the concessionaire and partly by NHAI in a specified ratio. The concessionaire was required to be remunerated by annuity for the remaining concession period after the Provisional Commercial Operation Date (PCOD). The toll collected on the highway would be appropriated by NHAI.

7. It is NHAI's case that the concessionaire had defaulted in performing its obligation in a timely manner and the execution of the works was delayed. NHAI further contends that additional work was also awarded to the concessionaire but only a fraction of that work was completed.

8. The concessionaire on the other hand, disputes the said allegations. It claims that approximately 84% of the highway is completed and the concessionaire was unable to complete the same as the land has not been provided by NHAI. Thus, according to the concessionaire, the delay is attributable to NHAI or for reasons beyond its control. The concessionaire relies heavily on the communication issued by the Independent Engineer (IE) recommending that a Provisional Certificate be issued. NHAI, on the other hand, claims that the highway constructed is not upto standards as reported by the committee constituted to examine the defects in the said highway.

9. It is pointed out that the suspension of the Concession Agreement would entitle the lenders to substitute the concessionaire for completing the remaining part of the project. According to the concessionaire the same would effectively extinguish its existence since it is a Special Purpose



Vehicle. It is also submitted that the concessionaire would have no means to fund the claims of the lenders in this regard.

10. NHAI's immediate concern is for the construction of the remaining stretch of the highway. It is submitted that temporary diversions have been made which are in a state of dis-repair and causing inconvenience to the users of those stretches of the road.

11. We have briefly heard the submissions made by the learned counsel for the parties. Undeniably, the concerns of both the parties require to be balanced at an interim stage.

12. During the course of the arguments, it is suggested that the interim order regarding stay of suspension notice dated 11.03.2024 would continue, but NHAI would be permitted to award the work of pending stretches of road for its completion in an expeditious manner. The question whether the same would be at the risk and cost of the concessionaire would be the subject matter of the dispute to be finally adjudicated.

13. The learned counsel appearing on behalf of NHAI seeks time to take instructions in this regard. The learned counsel shall also take formal instructions as to the further process for resolution of disputes (either by proceeding directly to arbitration, or by attempting pre-reference conciliation, or any other mode).

14. List on 14.05.2024."

8. Mr Bishnoi, learned counsel appearing for NHAI submits that NHAI is agreeable to proceed with the arbitration proceedings straight away and has already nominated its Arbitrator.

9. Dr George, learned counsel appearing on behalf of the respondent states that the letter nominating the Arbitrator was received yesterday and that the respondent will nominate its Arbitrator within a period of one week



from date. The respondent is also agreeable to the interim arrangement as suggested by this Court.

10. Both the parties have agreed that it is not necessary to avail of the pre-institution of arbitration remedies for amicable resolution of the dispute.

11. In view of the above, with the consent of the parties, the following directions are issued:

(1) NHAI would be at liberty to take over the complete site and structures and execute the balance remaining works in the manner as it considers apposite. The respondent will not impede NHAI from doing so in any manner.

(2) The parties will take steps to ensure that the Arbitral Tribunal is constituted as expeditiously as possible.

(3) The orders staying the suspension would remain in place till the Arbitral Tribunal considers the question of interim measures of protection.

(4) The parties would be at liberty to approach the Arbitral Tribunal under Section 17 of the A&C Act to vacate or modify the impugned order passed by the learned Single Judge and/or seek any further measures of protection. The Arbitral Tribunal, if approached by the parties, shall consider the question of interim measures of protection uninfluenced by any of the observations made by the learned Single Judge in the impugned order or this Court in the present order.



(5) Any order passed by the Arbitral Tribunal would substitute the orders passed by the learned Single Judge and be construed as substantive orders under Section 17 of the A&C Act.

12. All rights and contentions of the parties are reserved.

13. The present appeal is disposed of in the aforesaid terms. The pending application is also disposed of.

14. The pending petition under Section 9 of the A&C Act [OMP(I)(COMM) 90/2024] shall also stand disposed of in terms of this order.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

MAY 14, 2024
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