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

% ***Date of Decision: 01.10.2024***

\+ **ARB. A. (COMM.) 50/2024** and **IA No.40486/2024**

SHAMLAJI EXPRESSWAY PRIVATE LIMITED .....Petitioner

Through: Mr. Tejas Karia, Dr. Amit George, Mr. Abhishek Gupta, Mr. Suyuash Gupta, Mr. Prakhar Deep, Mr. Nishant Doshi, Mr. Anirveda Sharma, Mr. Mukesh Kumar, Ms. Meenakshi Sood, Mr. Arvind Singh and Ms. Nitya Nath, Advs.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA .....Respondent

Through: Mr. Manish Bishnoi, Ms. Gunjan Sinha Jain, Ms. Muskaan Gopal, Mr. Khubaib Shakeel, Advs.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

SACHIN DATTA, J. (*Oral*)

1. The present appeal under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 *(*hereinafter ***'the A&C Act')*** assails an order dated 02.09.2024 passed by the Arbitral Tribunal while disposing of an application under Section 17 of the A&C Act.

FACTUAL MATRIX

2. The ongoing arbitral proceedings are in the context of a Concession Agreement dated 02.05.2018 (*hereinafter* ***'CA'***) entered into between the

parties for the work of "six laning Shamlaji to Motachilodha (93.210 km section) of the NH-8" in the State of Gujarat (hereinafter ***'The Project'***). In terms of Article 3.1 of the CA, the respondent granted to the petitioner the concession set-forth in the contract agreement including exclusive right over the license and authority to construct, operate and maintain the project during the construction period of 730 days from the Provisional Commercial Operation Date (*hereinafter* ***'PCOD'***).

3. Clause 4.4 of the CA provides that the date on which the financial close is achieved and all conditions precedents, specified in Clause 4.1 of the CA are satisfied, shall be the appointed date of the commencement of the Concession period.

4. The appointed date was 02.01.2019, and the scheduled completion date was 01.01.2021. However, the project was not completed by 01.01.2021, and the scheduled completion date had to be extended to 04.09.2023 by granting a time extension to the appellant.

5. Admittedly, the entire project could not be completed till the extended time period. Admittedly, also, the appellant sought to delink the unexecuted portion of the highway where no work could be executed on account of non-availability of land. However, since according to the appellant, it had completed the construction of site made available to it, a formal request was made to the Independent Engineer (hereinafter ***'IE'***) seeking issuance of a provisional completion certificate as contemplated in clause 14.3.2 of the contract agreement. The said provision reads as under :

> *"14.3.2 The parties hereto expressly agree that a Provisional Certificate under this Clause 14.3 may, upon request of the Concessionaire to this effect, be issued for operating part of the*

> *Project, if the Concessionaire has completed construction of 100% (Hundred per cent) of the Site made available to the Concessionaire upto 146 days from the Appointed Date. Upon issue of such Provisional certificate, the provisions of Article 15 shall apply to such completed part, and the rights and obligations of the Concessionaire for and in respect of such completed part of the Project shall be construed accordingly."*

6. This request was dealt with by the IE in its communication dated 25.10.2023. The factual matrix leading up to the said communication has been elaborated in the impugned order. Suffice it to note that the IE took note of the portion of the project where no work could be executed and also took note of the remaining work that was yet to be carried out even in the balance area. The IE accordingly drew up two lists "Balance Work List-A (Punch List-A)" & "Balance Work List-B (Punch List-B)" that remains to be executed.

7. Importantly, while recommending that the concessionaire be granted provisional completion certificate of the project in part length, the same was made contingent upon execution of a large number of punch list items and requiring the concessionaire to give the requisite undertaking in this regard, and also execution of a supplementary agreement.

8. Further correspondence ensued between the parties in view of the apparent difficulties in issuance of a provisional completion certificate. Finally, on 11.03.2024, the respondent/NHAI issued a suspension notice under Clause 30.1 of the CA citing defaults on the part of the appellant. Immediately upon issuance of the suspension notice, the appellant approached this Court under Section 9 of the A&C Act seeking stay of suspension notice and also praying for grant of PCOD with effect from 25.10.2023.

9. A learned Single Judge of this Court by the order dated 20.03.2024, stayed the effect in operation of the suspension notice dated 11.03.2024 till the next date of hearing. Being dissatisfied with the said order dated 20.03.2024, the respondent filed an appeal under Section 37(1)(b) of the A&C before the Division Bench of this Court. By judgment/order dated 14.05.2024, the Division Bench disposed of the said appeal with the following directions :

> *"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."

10. Pursuant to the aforesaid order of the Division Bench of this Court, the appellant filed an application under Section 17 of the A&C Act for interim measures of protection. The prayers made by the appellant in its application filed under Section 17 of the A&C Act read as under:-

> *"(i) Pass an interim direction to the effect that PCOD stands achieved on 25.10.2023 i.e. the date on which the Independent Engineer had recommended that the indicated length can be safely and reliably placed into commercial operation and direct the Respondent to take consequential actions pursuant thereto in terms of the Concession Agreement till the final disposal of the arbitration proceedings; and*
>
> *(ii) Grant ad-interim ex-parte relief in terms of the above prayer(s) till the final disposal of the arbitration proceedings; and*
>
> *(iii) Grant any other or further relief that this Hon'ble Tribunal deems fit and proper in the facts and circumstances of the case in favour of the Respondent and against the Claimant."*

11. The aforesaid application under Section 17 of the A&C Act has been disposed of by the Arbitral Tribunal *vide* the impugned order dated 02.09.2024. The operative portion of the impugned order reads as under:-

> *"5.13 For the aforesaid reasons, the application of the Respondent under Section 17 of the Arbitration and Conciliation Act, 1996 is dismissed and the interim order dated 20.03.2024 of the Learned Single Judge of the Hon'ble High Court of Delhi staying the effect and operation of the Suspension Notice dated 11.03.2024 is vacated. It is, however, made clear that none of our findings in this Order would influence the arbitral Tribunal while deciding the disputes between the parties and making the award. The Application of the Respondent and the reply of the Claimant stand disposed of."*

SUBMISSIONS ON BEHALF OF THE APPELLANT

12. Learned counsel for the appellant has sought to assail the impugned

order on two counts. First, it is submitted that while dealing with the appellant's application under Section 17 of the A&C Act, there was no occasion for the Arbitral Tribunal to vacate the stay operating on the suspension notice dated 11.03.2024. It is submitted that the order passed by the Division Bench expressly stated that the order/s staying the suspension would remain in place, and in the absence of any application being moved by the respondent seeking vacation of the said order, the Arbitral Tribunal could not have proceeded to modify the subsisting interim directions issued by the Division Bench. Secondly, it is contended that the impugned order is unreasoned and does not give any reason as to why the stay operating against the suspension notice was vacated.

13. Learned counsel for the appellant does not seriously controvert that the Arbitral Tribunal could not have granted a mandatory injunction directing grant of PCOD.

SUBMISSION ON BEHALF OF THE RESPONDENT

14. Learned counsel for respondent has submitted that submissions canvassed on behalf of the appellant do not satisfy the principles governing interference with the appeals of the present nature. Neither the Arbitral Tribunal has exercised its discretion arbitrarily or perversely or acted in ignorance of settled principles of law regulating grant or refusal interlocutory injunction.

15. Learned counsel of the respondent also seriously controverts that the issue of suspension of the appellant was not in issue before the Arbitral Tribunal. It is submitted that this aspect was not only raised by the respondent in its pleadings, extensive arguments were also advanced by the parties on this aspect. Learned counsel for the respondent also controverts

that the impugned order is unreasoned. In this regard reference has been made to various portions of the impugned order, particularly, para 5.12 thereof. The same reads as under:-

> *"The Respondent is also not right in its submission that the balance of convenience is in the favour of granting the interim directions as prayed for. The main contention of the Respondent is that the Claimant is realising a toll @75% of the rates and if PCOD is granted with effect 25.10.2023 as prayed for by the Respondent, the Claimant will realise toll @100% of the rates. Safety of the users using the National Highway is much more important than the revenue collection of the National Highway Project. A major reason for the Claimant to invoke Clause 30.1 of the CA and suspend the rights of the Respondent under the CA is that some parts of the Project Highway constructed by the Respondent are not safe for the users of the highway. The balance of convenience is, therefore, against the grant of interim directions as prayed by the Respondent. The balance of convenience, on the other hand, is in favour of vacating the interim order dated 20.03.2024 of the Learned Single Judge of the Hon'ble High Court of Delhi staying the effect and operation of the Suspension Notice dated 11.03.2024."*

REASONS AND CONCLUSION

16. At the outset, it is noticed that the Arbitral Tribunal has examined the factual matrix leading up to the date of issuance of IE letter/communication dated 25.10.2023 and the suspension notice dated 11.03.2024 in considerable detail.

17. After taking note of the same and also taking into account the relevant contractual provisions, the following findings have been rendered:

(i) It was noticed that even at the time of consideration of the appellant's request for grant of provisional completion certificate, there were several deficiencies/shortcomings in various item of work such as box/slab culverts, minor bridges, ROBs, RE wall in main carriageway etc. These items were included in the Punch List A & B,

even though, they were not strictly punch list item as contemplated as per Clause 42.1 of the CA which reads as under:-

> *"42 DEFINITIONS*
>
> *42.1 Definitions*
> *In this Agreement, the following words and expressions shall, unless repugnant to the context or meaning thereof, have the meaning hereinafter respectively assigned to them: "Project" means the construction, operation and maintenance of the Project in accordance with the provisions of this Agreement, and includes all works, services and equipment relating to or in respect of the Scope of the Project in Site comprising the existing road comprising NH-8 from km 401.200 to km 494.910 and all Project Assets, and its subsequent development and augmentation in accordance with this Agreement;*
>
> *"Punch List" shall have the meaning ascribed to it in Clause 14.3.1 and, if applicable, shall only include any or all of the below:*
>
> *(i) Plantation of avenue trees along the edge of the RoW and other landscaping works within RoW*
>
> *(ii) Completion of work on Provision of Unlined Roadside Drains*
>
> *(iii) Lining of roadside drains in identified stretches*
>
> *(iv) Construction of rest areas, as approved*
>
> *(v) Completion of Fencing Works of RoW*
>
> *(vi) Turfing on embankment slopes in identified sections*
>
> *(vii) Pointing to Stone Masonry works in identified Cross Drainage Structures*
>
> *(viii) Stone Pitching at identified locations."*

(ii) The Arbitral Tribunal also took note of the conditional recommendation of the IE for grant of provisional completion certificate; one pre-condition stipulated by the IE was execution of the supplementary agreement.

(iii) The Arbitral Tribunal taking note of the provisions of the contract in particular 14.3.1 and 14.3.2 thereof reach the conclusion that IE did not have exclusive power to issue a provisional certificate for operating part of the project.

(iv) The Arbitral Tribunal reached the conclusion that IE had wrongly applied provisions of Clause 14.3.1 and 14.4.1 of the CA to a recommendation made under Clause 14.3.2 of the CA.

(v) The Arbitral Tribunal distinguished the judgment of this Court in ***Soma Isolux Kishangarh Beawar Tollway Pvt. Ltd. v. National Highways Authority of India***, as reported in 2015 SCC OnLine Del 7678 by taking note of the fact that in the said case the Court was not concerned with the issuance of the provisional completion certificate only for a part of the project.

(vi) The Arbitral Tribunal noted that the parent company of the respondent i.e. Chetak Enterprises Pvt. Ltd. has sponsored the appellant and the project to the lenders and had executed an undertaking that in the event of the appellant failing to meets its financial commitments to its lender, the parent company will infuse funds into escrow account of the project to repay the debts.

18. Para 5.9 of the impugned order notes as under:-

> *"5.9. ..... Therefore, an interim direction is not issued to the effect that the project of the respondent has not achieved PCOD, the Respondent can request its Parent Company to infuse funds in the escrow account for repaying the debts becoming due beginning from 31.08.2024. The respondent will, therefore, not suffer irreparable injury, or loss, if the interim directions as prayed for by the Respondent is not granted by the arbitral Tribunal."*

19. Having rendered the above findings, the Tribunal proceeded to further

examine factual aspects which led to the issuance of the suspension notice dated 11.03.2024. In particular, it was noticed that despite cure period notices having been issued to the appellant in terms of Clause 31.1 of the CA, the appellant had failed to rectify the defects indicated therein, thus, resulting in a 'concessionaire default' in terms of Clause 31.1 of the CA.

20. Para 4.4 of the impugned order notes the factual position that the appellant was given several opportunities to cure its defaults prior to invocation of the Clause 30.1 of the CA, to suspend the rights of the appellant, and take steps to employ third party agencies to complete the balance works of the project.

21. Again, para 5.12 of the impugned order notices that the safety of the users using the National Highways is much more important than the revenue collection of the National Highway Project. It is observed as under:-

> *"A major reason for the Claimant to invoke Clause 30.1 of the CA and suspend the rights of the Respondent under the CA is that some parts of the Project Highway constructed by the Respondent are not safe for the users of the highway. The balance of convenience is, therefore, against the grant of interim directions as prayed by the respondent."*

22. It was in the above background that the learned Arbitral Tribunal proceeded to vacate the stay on the operation of the suspension notice dated 11.03.2024.

23. From a perusal of the impugned order in totality, it is evident that the said order cannot be characterised as "unreasoned", including on the aspect of validity/justifiability of the suspension notice dated 11.03.2024.

24. A reading of the impugned order reveals that the Arbitral Tribunal has noted in considerable detail the circumstances which led to, and impelled the respondent to issue the suspension notice dated 11.03.2024. The contention

that the impugned order is "unreasoned", is belied by a perusal thereof.

25. I also find no merit in the contention of the learned counsel for the appellant that there was no occasion for the Arbitral Tribunal to rule upon and/or to vacate the interim stay of the suspension notice dated 11.03.2024. The factual aspects which have a bearing on the denial of the appellant's request for grant of provisional completion certificate also have a direct nexus with the issue of suspension of the concessionaire under Clause 30.1 of the CA. The same set of facts which form the basis for denial of the appellant's request for grant of provisional completion certificate, also constitute the factual substratum for taking suspension action against the appellant.

26. Also, a perusal of the order dated 14.05.2024 passed by the Division Bench of this Court, clearly indicates that the order staying the suspension was directed to remain in place "till the Arbitral Tribunal considers the question of interim measures of protection". There was no direction to the effect that the stay of suspension would continue to operate during the pendency of the arbitration. On the contrary, the aspect of suspension was necessarily required to be gone into while considering the request for interim measures.

27. The conclusions drawn up by the Arbitral Tribunal are based on an intricate examination of the factual matrix which was mandated in terms of the order dated 14.05.2024 passed by the Division Bench.

28. Learned counsel for the respondent has also rightly pointed out that in the reply filed by the respondent to the application filed under Section 17 of the A&C Act filed by the appellant, the respondent specifically prayed for vacation of the interim stay on the suspension notice. In this regard reference

may be made to the following extracts from the said reply:

> *"8.144 Instead of fulfilling its obligations, aggrieved by the issuance of the Suspension Notice, on 19.03.2024, the Respondent filed a petition (I) Comm. No.90/2024 before the Hon'ble High Court of Delhi. Which is based on false and misleading facts.*
>
> *8.145 On the very first date of admission hearing, the Ld. Single Judge, Hon'ble Delhi High Court vide order dated 20.03.2024 passed in OMP(I) Comm No. 90 of 2024 granted ad-interim stay on the operation of the suspension notice.*
>
> *8.146 The Ld. Single Judge without even granting any opportunity to the Claimant to place on record its reply as well as relevant documents, which would have nailed the blatant lies of the Respondent, proceeded to pass an order dated 20.03.2024 staying the operation of the Suspension Notice, heavily relying upon the internal letter dated 25.10.2023 issued by IE to the Claimant, causing grave prejudice to the Claimant. The suspension notice ought not have been stayed without awaiting a response from the Claimant since in this case, there was no emergent situation as the toll was being collected by the Claimant only since it was a HAM Project. The injunction passed by the Ld. Single Judge was granted despite the fact that the Claimant had acted in terms of the Concession Agreement and had taken recourse to its rights given under the contract. The Claimant has been left at the mercy of the Respondent, who is a non-performer and has made serious defaults on fulfilment of its contractual obligations. Such order severely affected the project and delay the completion of the work, which has already been delayed by more than 5 years due to Respondent's lackadaisical and negligent approach, while the whole case of the Respondent was financial annihilation due to operation of Suspension Notice. Thus, the Respondent pitted commercial interest against public interest. Ld. Single Judge failed to appreciate that the public interest far outweighs commercial/fiscal interest of the Respondent, for completion of balance works were immediate requirement and the Claimant could not be put under duress by the Respondent and its Lender Bank without further release of funds which were assured at the time of financial close.*
>
> *9.40 The contents of 68-80 are denied in view of the submissions made above and that in the Statement of Claim. It is stated that the*

> *Claimant never painted the IE's Letter No. 2120 as internal document, but stated that same was part of internal discussions for assessing whether the Project qualifies for PCOD. The request of the Respondent for extension of time made vide Letter No. 2217 A dated 28.03.2024 was denied and rejected by the IE as stated earlier and also explained in the Statement of Claim. The Respondent is not entitled to stay of the Suspension Notice, and the said order dated 20.03.2024 needs to vacated by this Hon'ble Tribunal in view of the subsequent events mentioned in the Statement of Claim and present reply. Further, it is ironical that the Claimant is executing the balance works under the directions of the Division Bench of the Hon'ble High Court which passed by the Court releasing the emergent need of completion of works and frequent accidents at Site. That being the position the Respondent demand for Annuity is completely unwarranted and has been rightly rejected by the IE and the Claimant by detailed letters"*

29. It is further pointed out that elaborate arguments were addressed by the parties on the aspect of vacation of the stay of the suspension order and this aspect was also taken note of in proceedings dated 20.08.2024 issued by the Arbitral Tribunal. The relevant portion of the said proceedings dated 20.08.2024 reads as under:-

> *"Proceedings of 3rd meeting of the arbitral Tribunal held on 20.08.2024 from 04:00 P.M. to 07:30 P.M. through video conference.*
>
> *1. Mr. Manish Bishnoi, Learned Advocate of the Claimant, commenced and concluded his arguments in reply to the application under Section 17 of the Arbitration and Conciliation Act, 1996 as well as for vacating the stay of the Suspension Notice.*
>
> *2. Dr Amit George, Learned Advocate, commenced and concluded his rejoinder arguments on behalf of the Respondent on the application under Section 17 of the Arbitration and Conciliation Act, 1996.*
>
> *3. The application under Section 17 of the Arbitration and Conciliation Act, 1996 filed by the Respondent are reserved for orders."*

30. In view of the aforesaid, no merit is found in both the submissions

made on behalf of the Appellant.

31. It is also notable that the legal position is well-settled to the effect that while entertaining the appeal from an order passed by the Arbitral Tribunal under Section 17 of the A&C Act, this Court would not supplant the conclusions drawn by the Arbitral Tribunal, which are based on an intricate factual examination of the matter.

32. In ***World Window Infrastructure Pvt. Ltd. v. Central Warehousing Corporation*** 2021: DHC: 3798, it was observed by a Coordinate Bench of this Court as under:

> *"29. The scope of interference, in appeal, against orders passed by arbitrators on applications under Section 17 of the 1996 Act is limited. This court has already opined in Dinesh Gupta v. Anand Gupta MANU/DE/1727/2020, Augmont Gold Pvt. Ltd. v. One 97 Communication Ltd. and Sanjay Arora v. Rajan Chadha MANU/DE/2643/2021 that the restraints which apply on the court while examining a challenge to a final award under Section 34 equally apply to a challenge to an interlocutory order under Section 37(ii)(b). In either case, the court has to be alive to the fact that, by its very nature, the 1996 Act frowns upon interference, by courts, with the arbitral process or decisions taken by the arbitrator. This restraint, if anything, operates more strictly at an interlocutory stage than at the final stage, as interference with interlocutory orders could interference with the arbitral process while it is ongoing, which may frustrate, or impede, the arbitral proceedings.*
>
> *30. Views expressed by arbitrators while deciding applications under Section 17 are interlocutory views. They are not final expressions of opinion on the merits of the case between the parties. They are always subject to modification or review at the stage of final award. They do not, therefore, in most cases, irreparably prejudice either party to the arbitration. Section 17-like Section 9-is intended to be a protective measure, to preserve the sanctity of the arbitral process. The pre-eminent consideration, which should weigh with the arbitrator while examining a Section 17 application, is the necessity to preserve the arbitral process and ensure that the parties before it are placed on an equitable scale. The interlocutory nature of the order passed under Section 17, therefore, must necessarily inform the court seized with an*

> *appeal against such a decision, under Section 37. Additionally, the considerations which apply to Section 34 would also apply to Section 37(ii)(b). Qua impugned order dt. 17th June, 2020 in first Section 17 application."*

33. Again, in ***Dinesh Gupta and Ors. v. Anand Gupta and Ors.*** 2020: DHC: 2786, it was observed as under:-

> *"59.……If anything, therefore, the jurisdiction of the Court, under Section 37(2)(b), is even more limited than the jurisdiction that it exercises under Section 37(2)(a) or, for that matter, under Section 34. The discretionary jurisdiction, as exercised by the arbitrator, merits interference, under Section 37(2)(b), therefore, only where such exercise is palpably arbitrary or unconscionable."*

34. The view taken by the arbitral tribunal in the present case is based on a detailed factual examination, and considers all relevant aspects of the matter, including the adverse financial impact on the Appellant, of the vacation of stay on the suspension. It was found that the same does not outweigh the multiple factors which are set out in the impugned order. The view taken by the arbitral tribunal cannot be said to be perverse or irrational. Moreover, the same is inherently subject to the final outcome of arbitration and without prejudice to the right of the appellant to claim appropriate final relief/s, including damages.

35. It is also notable that in terms of the provisions of the CA, the suspension of the concessionaire under Article 30 thereof can only be for a period not exceeding 180 days from the date of issue of such notice, extendable only by a further period not exceeding 90 days. Thereafter, other contractual consequences as envisaged in the CA have to ensue. Necessarily, all these aspects will be gone into by the Arbitral Tribunal in the due course of arbitral proceedings.

36. In the circumstances, this Court finds no merit in the present appeal; the same is accordingly dismissed.

37. Pending application also stands disposed of.

SACHIN DATTA, J

OCTOBER 1, 2024/*sl, at*