



2024:DHC:5811



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

% **Date of decision: 5th August, 2024**

+ **CONT.CAS(C) 1209/2024**

CFM ASSET RECONSTRUCTION PRIVATE LIMITED

.....Petitioner

Through: Mr. Arun Kathpalia, Sr.
Advocate with Mr. Manmeet
Singh, Mr. Alok Shankar, Ms.
Anajli Dwivedi and Ms. Sadhvi
Kumar, Advs.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA & ORS.

.....Respondents

Through: Mr. Sanjay Jain, Sr. Advocate,
Mr. Nishant Awana, Ms. Rini
Badoni, Ms. Rebecca Mishra,
Mr. Nishank Tripathi, Ms.
Harshita Sakhija and Ms. Palak
Jain, Advs.

+ **CONT.CAS(C) 1210/2024**

CFM ASSET RECONSTRUCTION PRIVATE LIMITED

.....Petitioner

Through: Mr. Arun Kathpalia, Sr.
Advocate with Mr. Manmeet
Singh, Mr. Alok Shankar, Ms.
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Through: Mr. Sanjay Jain, Sr. Advocate,



Mr. Nishant Awana, Ms. Rini Badoni, Ms. Rebecca Mishra, Mr. Nishank Tripathi, Ms. Harshita Sakhija and Ms. Palak Jain, Advs.

**CORAM:
HON'BLE MR. JUSTICE DHARMESH SHARMA**

DHARMESH SHARMA, J. (ORAL)

CM APPL. 44351/2024 & CM APPL. 44352/2024 – EXMP.

1. Allowed, subject to all just exception.
2. The applications stand disposed of.

CONT.CAS(C) 1209/2024 & CONT.CAS(C) 1210/2024

3. The petitioner, in the aforementioned two Contempt Petitions, seeks initiation of contempt proceedings against the respondents and its officials, in terms of Section 2(b) read with Section 12 of the Contempt of Courts Act, 1971 [for short “CC Act”] and Article 215 of the Constitution of India for wilful disobedience of the directions of this Court dated 30.03.2022
4. Mr. Sanjay Jain, learned Senior Counsel for the respondents is present on advance notice.
5. In a nutshell, the respondent No.1/NHAI¹ entered into a Concession Agreement dated 22.03.2005 with the ‘Concessionaire’ for executing the concerned project. It is pertinent to mention that the Concessionaire was a Special Purpose Vehicle (SPV) incorporated by IL&FS Transportation Networks Limited [“ITNL”] for conversion of the Jetpur-Gondal-Rajkot and Rajkot Bypass Section of NH-8B into

¹ National Highways Authority of India



access controlled four-lane highway which was envisaged to be the 'Project'.

6. As per the terms of the agreement, the Concessionaire had agreed to pay a negative grant/premium of Rs. 240 crores to the NHAI for execution of the project thereby conferring the Concessionaire permission to collect the toll revenues. It appears that as per the NHAI, certain breaches occurred on the part of the Concessionaire, and therefore, the NHAI issued a 'cure notice' dated 08.03.2021 to the Concessionaire in terms of the agreement *inter alia* calling upon the Concessionaire to cure the defects. This was followed by a 'preliminary notice' dated 16.07.2021 in terms of Article 32.1.2 of the Concession Agreement by the NHAI thereby communicating its intention to terminate the Concession Agreement dated 22.03.2005.

7. It appears that although a representation was preferred by the Concessionaire, the same was not accepted and the NHAI terminated the Concession Agreement by issuing a Termination Notice dated 21.12.2021. On termination of the Concession Agreement *vide* notice dated 21.12.2021, the parties *viz.*, Concessionaire in OMP (I) (COMM) 94/2022 and the 'lenders' to the Concessionaire also filed OMP(I) (COMM) 100/2022 and 101/2022 *inter alia* challenging the Termination Notice on the ground that such termination was in violation of Article 5.1 of the Substitution Agreement dated 23.04.2005. It is brought on the record that the lenders too were entitled to be served with 'cure notice' so as to facilitate them to rectify the defects and/or to substitute the Concessionaire by another entity.



8. In the aforesaid background Mr. Arun Kathpalia, learned Senior Counsel for the petitioner has argued that the Concession Agreement recognized the critical role of the ‘lenders’, who were stipulated to advance huge loans to the Concessionaire, and therefore, in the case of the project going haywire, the Concession Agreement protected their rights thereby providing that the ‘lenders’ should also be issued relevant notices and may appoint another entity to complete the project in terms of the Substitution Agreement.

9. Pointing out that the present petitioner is the ‘assignee’ of the original lenders w.e.f. 30.09.2022, learned Senior Counsel for the petitioner alluded to the order dated 30.03.2022 passed by this Court to buttress his submissions regarding the alleged wilful disobedience committed by the respondents.

10. At this juncture, it would be expedient to reproduce the operative portion of the order dated 30.03.2022, which read as under:-

“8. After some arguments, the parties have arrived at a limited consensus. It is agreed that the parties shall at the first instance attempt to resolve the disputes amicably through conciliation proceedings within a period of twelve weeks from today. It is also agreed that in the event the parties are unable to resolve their disputes amicably within the said period, the same would be referred to an Arbitral Tribunal comprising of three Arbitrators.

9. Both the Concessionaire and the Lenders have nominated Justice (Retd.) Deepak Gupta, (Mob. 9816533333), a former Judge of the Supreme Court as their nominee Arbitrator.

10. Ms. Sinha, learned counsel appearing for NHAI states on instructions that NHAI nominates Justice (Retd.) Dr. Siva Sankara Rao (Mob.9440406301), a former Judge of the State of Telangana as their nominee Arbitrator, for constitution of the Arbitral Tribunal, with respect to disputes with the Concessionaire as well as the Lenders.

11. It is agreed that both the nominated Arbitrators shall jointly appoint the Presiding Arbitrator.



12. It is clarified that this is subject to the learned Arbitrators making the necessary disclosure as required under Section 12(1) of the A&C Act and not being ineligible under Section 12(5) of the A&C Act.

13. The said Arbitral Tribunal shall consider both the references: one in respect of the disputes between the Concessionaire and NHAI in respect of the Concession Agreement; and, the second reference in respect of disputes in connection with the Substitution Agreement.

14. It is also agreed that NHAI shall immediately deposit a sum of ₹75 crores in an earmarked no lien interest bearing account with a scheduled bank within a period of one week from today. The disbursal of the said amount or a part thereof, shall abide by the orders that may be passed by the Arbitral Tribunal in respect of the reference relating to disputes arising out of the Substitution Agreement.

15. It is clarified that all rights and contentions of the parties are reserved and nothing stated in this order shall preclude the parties from seeking such reliefs as may be advised.

16. It is clarified that NHAI is not interdicted in proceeding further with the six laning of the highways in question. NHAI and the Concessionaire shall determine the time and modalities for handover of the tolling of the Project Highway in question to NHAI or its nominee.

17. The petitions are disposed of in the aforesaid terms.

18. Order *dasti* under signature of Court Master.”

11. Learned Senior Counsel for the petitioner has canvassed that the aforesaid order categorically provided that NHAI may go ahead with the termination of the Concession Agreement and take control of the project but subject to depositing Rs. 75 crores in terms of the directions contained in paragraph (14) of the aforesaid order, which were passed to safeguard the ‘lenders’. It was vehemently urged that the ‘lenders’ gave up their rights to challenge the termination based on the fact that eventually their right to seek recovery of their legitimate dues shall be protected by a separate deposit being made by the NHAI.

12. On a pointed query by this Court as to how the present



contempt petition is maintainable, having been filed beyond the period of one year, learned Senior Counsel for the petitioner relied on the decisions in **Santosh Kapoor v. Apex computers P. Ltd.**² and **Anil Singhvi v. Sudarshan Sethi**³.

13. *Per contra*, Mr. Sanjay Jain, learned Senior Counsel appearing for the respondents has vehemently challenged the maintainability of the present contempt petitions pointing out that the original Concessionaire viz., West Gujarat Expressway Limited was a company controlled by IL&FS group, in respect of which CIRP proceedings are sub judice before the National Company Law Tribunal [“NCLT”]. Further, he alluded to the Substitution Agreement dated 23.04.2005 executed between NHAI, West Gujarat Expressway Limited and IDBI Trusteeship Services Limited, and referring to Article 1.1.6, it was pointed out that “IDBI Trusteeship Services Limited” is described as a ‘senior lender’ to the companies listed in Schedule-I, which are none other than L&T Infra Debt Fund Limited to the tune of Rs. 52.50 crores and L&T Infrastructure Finance Company Limited to the tune of Rs. 9.76 crores, totalling Rs. 52.50 crores.

14. Mr. Jain, learned Senior Counsel for the respondents further invited reference to Article 5.1 of the Substitution Agreement dated 25.04.2015 and pointed out that NHAI was only obligated to keep the ‘senior lenders’ informed, which was by all means done but they failed to appoint a new party to take over and complete the project. It

² MANU/DE/0115/2009

³ 2015 SCC OnLine Raj 3555



was vehemently urged that in terms of Article 5.1 of the Substitution Agreement dated 25.04.2015, no ‘termination payment’ was due to the ‘senior lenders’, and therefore, it was urged that the petitioner has no *locus standi* as there was no agreement executed between NHAI and the petitioner. It was also urged that the petitioner has no *locus standi* and only the Concessionaires have a right to challenge any inaction or breach on the part of the respondents.

15. Mr. Sanjay Jain, learned Senior Counsel for the respondents also referred to the decision in the case of **S. Tirupathi Rao v. M. Lingamaiah**⁴ and pointed out that the plea raised by the learned Senior Counsel for the petitioner that non-compliance of the order dated 30.03.2022 is a ‘continuous offence’ is misplaced. Lastly, it was pointed out that the matter between the NHAI and the Concessionaire already stands settled in terms of letters dated 10.05.2024 and 31.07.2024, which are placed on the record.

ANALYSIS AND DECISION:

16. Having heard the learned Senior Counsels for the parties and on perusal of the record, this Court finds that the present contempt petitions *per se* are not maintainable. There is a huge question mark on the *locus standi* of the petitioner to approach this Court, since evidently it had no privity of contract with NHAI. Although the directions contained in paragraph (14) of the order dated 30.03.2022 of this Court have not been complied with, it was pointed out that there have been continuous rounds of negotiations between the

⁴ 2024 INSC 544



affected parties, and evidently the matter between NHAI and the Concessionaire already stands settled in terms of letter dated 10.05.2022 by the Concessionaire i.e., West Gujarat Expressway Limited, which fact has also been intimated to the Arbitrators on behalf of the said Concessionaire *vide* letter dated 30.07.2024. There is no gainsaying that once the dispute between the NHAI and the original Concessionaire stands amicably resolved and settled, the 'senior lenders' or for that matter their assignees *viz.*, the present petitioner have no *locus standi* to pursue the matter for compliance of any part of the order dated 30.03.2022, passed by this Court.

17. The bottom line being that even on assuming that there was a wilful breach on the part of the NHAI in complying with directions dated 30.03.2022, inasmuch as the project was taken over by the NHAI pursuant to termination of Concession Agreement, the breach thereof started immediately on expiry of seven days from the date of passing of the order, or otherwise assuming from the time the present petitioner became an assignee from the lenders *viz.*, 30.09.2022, and therefore, the present Contempt Petition, which was instituted beyond the period of one year, by itself is clearly barred.

18. Before parting with these contempt petitions, it is apposite to point out that this Court is not impressed by the case law cited at the Bar by the learned Senior Counsel for the petitioner, which are clearly distinguishable. The relied upon decisions were made in cases where there was partial compliance of the undertaking on the part of the contemnors and thereafter breaches were committed, and as a matter of fact, more time was sought by the Contemnor and it is in the face of



such peculiar circumstances that it was held that the breach of the undertaking was a continuing offence. It is pertinent to mention here that the learned Senior Counsel for the respondents countered such arguments referring to the decision in the case of *S. Tirupathi Rao (supra)* and alluded to the observations of the Supreme Court, which go as under:

“56. A caveat needs to be added here. For a “continuing wrong/breach/offence” to be accepted as a ground for seeking exemption in an action for contempt, the party petitioning the court not only has to comprehend what the phrase actually means but would also be required to show, from his pleadings, the ground resting whereon he seeks exemption from limitation. Should the party fail to satisfy the court, the petition is liable to outright rejection. Also, the court has to be vigilant. Stale claims of contempt, camouflaged as a "continuing wrong/breach/offence" ought not to be entertained, having regard to the legislative intent for introducing section 20 in the Act which has been noticed above. Contempt being a personal action directed against a particular person alleged to be in contempt, much of the efficacy of the proceedings would be lost by passage of time. Even if a contempt is committed and within the stipulated period of one year from such commission no action is brought before the court on the specious ground that the contempt has been continuing, no party should be encouraged to wait indefinitely to choose his own time to approach the court. If the bogey of "continuing wrong/breach/offence" is mechanically accepted whenever it is advanced as a ground for claiming exemption, an applicant may knock the doors of the Court any time suiting his convenience. If an action for contempt is brought belatedly, say any time after the initial period of limitation and years after the date of first breach, it is the prestige of the court that would seem to become a casualty during the period the breach continues. Once the dignity of the court is lowered in the eyes of the public by non-compliance of its order, it would be farcical to suddenly initiate proceedings after long lapse of time. Not only would the delay militate against the legislative intent of inserting section 20 in the Act (a provision not found in the predecessor statutes of the Act) rendering the section a dead letter, the damage caused to the majesty of the court could be rendered irreparable. It is, therefore, the essence of justice that in a case of proved civil contempt, the contemnor is suitably dealt with, including

