

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

% **Date of order : 18th April, 2023**

+ O.M.P.(I) (COMM.) 59/2023 & I.A. 7212/2023

PS TOLL ROAD PRIVATE LIMITED Petitioner

Through: Mr. Pranjit Bhattacharya, Advocate

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA..... Respondent

Through: Ms. Gunjan Sinha Jain, Advocate

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

1. The instant petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter “the Arbitration Act”) has been filed on behalf of the petitioner seeking the following reliefs:

- “(i) Restrain the Respondent by way of an order and injunction, from suspending the rights of the petitioner as the concessionaire including giving effect to Notice for Suspension issued by the Respondent on 14.02.2023 and any actions consequential or incidental thereto;*
(ii) Pass ad interim and interim ex parte reliefs in terms of prayer above;
(iii) Order costs of the Petition to be borne by the Respondent; and
(iv) Pass such further and other reliefs as a nature and circumstances of the case may require.”

2. Learned counsel appearing on behalf of the petitioner submitted that the petitioner is a company incorporated under the Companies Act, 1956, a Special Purpose Vehicle and is a wholly-owned subsidiary of Reliance Infrastructure Limited. The respondent is the National Highway Authority of India (hereinafter "NHAI"), a Government enterprise involved with maintenance of national highways across the country.

3. It is submitted that the parties entered into a Concession Agreement dated 10th March, 2010 for undertaking the project for Six Laning of Pune - Satara Section of NH-4 from 725.00 kms to 863.350 kms (length - 140.350 kms) in the State of Maharashtra to be executed as EOT (Toll) on DEPOT Pattern- under NHDP Phase V (Package No. NHDP-V/MC-II/14) (hereinafter "the Project").

4. It is submitted that during the course of the work, the petitioner encountered delays in the project timeline from the appointed date, which were not attributable to the petitioner, whereupon it made several representations/applications to NHAI seeking extension of the time period. These reasons include delays on account of handing over of encumbrance free vacant access of ROW by NHAI, delay in issuance of applicable permit relating to environmental protection and conservation of the site, delay in permission for tree cutting, delay in the mobilization of IE, delay in publication of encroachment notices, delay in acquisition of additional land requirement and the occurrence of *Force Majeure* event being the COVID- 19 pandemic.

5. It is submitted that despite the above circumstances, the Notice of

intent to terminate the Concession Agreement was furnished by the respondent on 21st May 2020 granting the petitioner 15 days' time to make a representation. Thereafter, communications were exchanged between the parties whereby the petitioner expressed its readiness and willingness to complete the Project. However, the respondent suspended the rights of the petitioner as a Concessionaire under the Concession Agreement by way of issuance of a Suspension Notice dated 14th February 2023, which came to be withdrawn by the letter dated 17th February 2023.

6. It is submitted that the issuance of Notice of Suspension was in gross violation of Clause 36.1 and Clause 37.1 of the Concessionaire Agreement since the provision stipulates that only in the case of default on the part of the Concessionaire, its rights may be suspended by the respondent. The clauses further stipulate that a default would accrue only in the event of default specified in the said Clause occurs and the Concessionaire fails to cure the default within the cure period set forth in the said clause or where no Cure period is specified, within a Cure period of 60 days, unless default has occurred as a result of any breach of this Concession Agreement by the Authority or due to *Force Majeure*. It is submitted that without giving the Cure period of 60 days, and the expiry thereto, no default can be attributed to the Concessionaire under the Agreement.

7. The learned counsel for the petitioner submitted that there is no occurrence of Concessionaire Default in the instant case and thus, issuance of Notice for Suspension is *mala fide*, illegal and unwarranted.

Moreover, the action on behalf of the respondent is premature and flawed.

8. It is submitted that the petitioner submitted prolongation cost claims as the Project could not be completed within the stipulated times for the reasons not attributable to the petitioner. As the said claims were rejected by respondent, the petitioner invoked disputes resolution mechanism by issuing Dispute Notice dated 14th October 2022 under Clause 44.1.1 of Concession Agreement and requested for resolution of dispute amicably. Since, the respondent failed to reply or take any action within the stipulated timeframe, the petitioner vide its letter dated 23rd December 2022 invoked Arbitration and also nominated an Arbitrator. Since the respondent did not nominate its Arbitrator within the stipulated timelines, the petitioner approached this Court under Section 11 of the Arbitration Act by way of filing ARB. P. NO. 100/2023 for appointment of Arbitrator.

9. Learned counsel for the petitioner submitted that the petitioner has filed the instant petition seeking intervention of this Court to restrain the respondent from taking any coercive action with respect to suspension under Clause 36.1 of the Concession Agreement entered into between the parties. The petitioner apprehends that the respondent may revive its Suspension Notice or terminate the Concession Agreement which was earlier withdrawn by it.

10. *Per Contra*, the learned counsel for the respondent vehemently opposed the instant petition. The learned counsel submitted that an

Arbitral Tribunal has already been constituted for adjudication and resolution of disputes between the parties, therefore, the averments made and the grounds raised on behalf of the petitioner before this Court in the instant petition may be raised before the Arbitral Tribunal so constituted.

11. It is submitted that there is no relief which accrues to the petitioner and may be granted by this Court, therefore, the instant petition may be dismissed.

12. Heard the learned counsel for the parties and perused the record.

13. The petitioner has approached this Court by way of the instant petition seeking urgent relief against the respondents. The petitioner apprehends that an action may be taken by the respondent and the Concession Agreement may be terminated or suspended by them. To support the averments, the learned counsel for the petitioner referred to and cited the previous incidents whereby the respondent had issued a Notice of Suspension but which was withdrawn by the respondent.

14. Upon perusal of the record as well as the arguments advanced on behalf of the parties, this Court finds that there are disputes between the parties, which may be adjudicated and settled by an arbitrator. Moreover, it has been informed that an Arbitral Tribunal has already been constituted between the parties to adjudicate and resolve the disputes arising out of the Concession Agreement.

15. At this juncture, it is deemed pertinent to reiterate the intent and purpose of enacting the Arbitration Act which facilitates a mechanism to

the public to resolve their disputes in a process less rigorous, technical and formal than that of a litigation. Arbitration, conciliation and other alternate mechanisms of dispute resolution have proven to be easier, more accessible, efficient and even cost effective for the parties involved, whether at an individual level or at the level of a business or corporation. The alternative dispute mechanism is not only advantageous for the people involved in disputes but has also been aiding the effective disposal and release of burden on the Courts of the Country. It has been time and again reiterated that where in terms of an Agreement or otherwise, the parties to a dispute agree to resolve them amicably, they may be referred to arbitration where the minimum tests, including that of arbitrability of disputes, are satisfied.

16. In the instant case, there is an Agreement in existence which has given rise to the contractual relationship between the parties and which has also given rise to the disputes between them. There is no challenge to the fact that the disputes between the parties are arbitrable in nature. Moreover, there is an arbitration clause, i.e., Article 44, in the Agreement which entitles the parties to invoke arbitration proceedings. In accordance with the provision, the parties have made attempts to have the disputes between them resolved amicably. The petitioner had also sent several notices and communications to the concerned authorities of respondent explaining its circumstances and calling upon the respondent to resolve the issues amicably vide Notice dated 14th October 2022. Hence, the basic requirements of the Arbitration Act are not standing in way of reference of the disputes between the parties to arbitration. Since an Arbitral

Tribunal has already been constituted, it is also found that the disputes between the parties may be considered, adjudicated upon and be finally resolved the arbitrator. The petitioner has the liberty, including filing an application under Section 17 of the Arbitration Act, to raise before the Arbitral Tribunal all issues and grounds that have been raised before this Court by way of the instant petition.

17. Therefore, keeping in view the spirit and purpose of the Arbitration Act, the nature of disputes between the parties, the fact that an Arbitral Tribunal has already been constituted which may consider, appreciate and adjudicate upon the grounds invoked by both the parties, at this stage, this Court is not inclined to pass any order granting the reliefs as sought on behalf of the petitioner.

18. Accordingly, the instant petition is dismissed since the petitioner has failed to show any cogent reason for granting the interim relief prayed for.

19. Pending applications, if any, also stand dismissed.

20. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

APRIL 18, 2023

gs/ms

Click here to check corrigendum, if any