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

% *Date of Decision: 15<sup>th</sup> June, 2022*

+ **FAO(OS) (COMM) 158/2022**

**PINK CITY EXPRESSWAY PRIVATE LIMITED ..... Appellant**

Through: Mr. Manoj Swarup, Senior Advocate with Mr. Suryadeep Singh, Ms. Radha R. Tarkar, Ms. Vidisha Swarup, Ms. Kriti Dang, Mr. Aaron Shaw and Mr. Kaustabh, Advocates

versus

**NATIONAL HIGHWAYS AUTHORITY OF INDIA & ANR.**

..... Respondents

Through: Mr. Parag P. Tripathi, Senior Advocate with Mr. Ankur Mittal, Mr. Abhay Gupta and Mr. Debojyoti Sengupta, Advocates for R-1.

Mr. Raunak Dhillon and Ms. Ananya Dhar Choudhury, Advocates for R-2.

**CORAM:**

**HON'BLE MS. JUSTICE JYOTI SINGH**

**HON'BLE MR. JUSTICE ANOOP KUMAR MENDIRATTA**

**JUDGEMENT**

**JYOTI SINGH, J. (ORAL)**

**CM APPL. 28396/2022 (Exemption)**

1. Allowed, subject to all just exceptions.
2. Application stands disposed of.

**FAO(OS) (COMM) 158/2022 & CM APPL. 28395/2022 (Interim relief)**

3. Present appeal arises from the impugned judgment dated 03.06.2022, passed by the learned Single Judge in O.M.P.(I)(COMM.) 166/2022 filed by the Appellant under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act').

4. A brief narrative of the facts, to the extent necessary and relevant for disposal of the present appeal, is that the Appellant is a Special Purpose Vehicle promoted and incorporated specifically for the purpose of executing the work of Six-Laning of Gurgaon-Kotputli-Jaipur Section of NH-8 from KM 42.70 to KM 273.00 on Build, Operate and Transfer ('BOT') basis awarded by National Highways Authority of India (hereinafter referred to as the 'Respondent'), in terms of Concession Agreement ('CA') dated 06.06.2008.

5. As per the case set up by the Appellant, on 25.07.2018 Respondent conducted a Traffic Sample Survey in accordance with Article 29.1.1 of the CA, for the years 2016, 2017 and 2018, whereby it was established that as on the Target Date, the Actual Traffic had fallen short by 14.86% of the Target Traffic and accordingly, Respondent wrote to the Independent Engineer ('IE') for factual determination *qua* modification in the CA.

6. Pursuant to a determination by the IE on 01.08.2018, the Concession Period was deemed extended by 28 months and 24 days, i.e., upto 26.08.2023. Even though the factual determination was made by the IE, the Senior Lenders/Respondent No.2 herein, wanted a formal letter from the Respondent acknowledging the extension upto 26.08.2023, before considering the Resolution Plan of the Appellant. Accordingly, the Senior Lenders and the Appellant requested the Respondent to issue a formal letter according administrative approval. However, despite assurances, a formal letter was not issued and in absence thereof, the Senior Lenders started considering initiation of debt recovery proceedings against the Appellant.

7. In light thereof, the Appellant approached this Court in W.P.(C) 6693/2020 seeking a direction to the Respondent to give its

administrative approval in accordance with the determination made by the IE. *Vide* order dated 21.09.2020, Court directed the Respondent to communicate its stand within 4 weeks to the Appellant. On 10.12.2020, Respondent communicated its acknowledgement for an interim extension of 14 months out of the total 28 months and 24 days.

8. Between January 2021 to February 2022, Senior Lenders also wrote to the Respondent to communicate its approval for the entire period of 28 months and 24 days as per Article 29 of the CA, however, due to the rigid stand of the Respondent, they refused to consider the Resolution Plan and on 10.12.2021, initiated debt recovery proceedings against the Appellant and its promoter companies before the DRT in O.A. No.926/2021.

9. Constrained by the said proceedings, Appellant approached this Court on 10.03.2022 in W.P.(C) 4151/2022, seeking a direction to the Respondent to grant the administrative approval, in accordance with Article 29 of the CA. *Vide* order dated 25.03.2022, this Court directed the Respondent to duly evaluate the prayer and communicate a decision in respect thereof to the Appellant. Letter dated 29.04.2022, was sent by the Respondent to the Appellant communicating its stand that the interim extension granted upto 02.06.2022 was full and final and also threatened to forcibly takeover the toll plazas on 02.06.2022. Respondent also issued Notice Inviting Tenders ('NITs') on 14.05.2022, calling for bids from third-parties to collect the toll for the period post 02.06.2022.

10. The aforesaid action of the Respondent triggered filing of a writ petition being W.P.(C) 7806/2022 by the Senior Lenders, seeking a direction for extension of the Concession Period. Appellant, on the other hand, filed a petition under Section 9 of the Act on 20.05.2022, seeking

interim protection of its rights as a Concessionaire, pending arbitral proceedings.

11. On 24.05.2022, Respondent issued Letters of Awards ('LOAs') whereby selected entities were to pay a fixed lump-sum amount to the Respondent, irrespective of the actual toll collection. As per the Appellant, under the LOAs, the amounts quoted by the highest bidders are substantially lower than what was being collected/undertaken as minimum guarantee by the Appellant. Being aggrieved, Appellant filed W.P.(C) 8321/2022 challenging the tendering process, which was, however, dismissed as withdrawn on 25.05.2022, on account of pendency of the Section 9 petition.

12. The learned Single Judge *vide* judgment dated 03.06.2022 dismissed the Section 9 petition and the Respondent forcibly took possession of the toll plazas on 03.06.2022 itself, ousting the Appellant and compelling the Appellant to file the present appeal, assailing the said judgment.

13. The arguments made on behalf of the Appellant by the learned Senior Counsel can be encapsulated as follows:-

- a. As per Article 29 of the CA, concession is deemed to have been extended if the Actual Traffic at Project Highway falls short of the specific target traffic per day on the Target Date. Respective traffic surveys conducted by the Appellant and the Respondent reveal that the Actual Traffic had fallen short of the target by more than 2.5% on the Target Date, leading to deemed extension under Article 29.1.2 of the CA. After thorough examination of the surveys, the IE on 01.08.2018 determined and recommended extension of the Concession period upto 26.08.2023, which was reaffirmed by the Project Director, Jaipur. Even the Regional

Office of the Respondent wrote to its Headquarters on 14.06.2019 and recommended extension of the Concession Period. The rigid stand of the Respondent in refusing to extend the period for 28 months and 24 days is contrary to Article 29 of the CA and overlooks the fact that the Appellant has not faulted in executing the work and had completed approximately 96 per cent of the work of widening of the Project Highway.

- b. A combined reading of Articles 29.1.2 and 29.2.1 would show that the extension of Concession Period is automatic on a mere determination that the Actual Traffic is less than the Target Traffic during the Concession Period. Once the IE has factually determined the extension, there was no scope for further approval from the Respondent.
- c. Article 37 of the CA provides for termination of the Agreement and Article 37.1.1 provides the various defaults on which the CA can be terminated by the Respondent. All the three grounds mentioned in Respondent's letter dated 29.04.2022 are covered under sub-clauses (c), (g) and (h). A cure period notice of 60 days is required to be issued and if the defaults are not cured, Respondent has a right to issue Notice of Termination granting time to the Appellant to make a representation as well as time to the lenders to exercise their rights to substitute the Concessionaire. However, the said procedure has been circumvented by indirectly terminating the CA as the Respondent is fully aware that its termination on the alleged default of the Appellant would be unsustainable in law and secondly, on termination, Respondent

would have not pay 90% of the debt due to the lenders under Article 37.1 of the CA.

- d. Parties are *ad idem* that the project was prolonged due to defaults of the Respondent and financial difficulties and, therefore, it was agreed that Respondent would infuse OTFIS of Rs.347 crores and thus, a TPA was entered into for disbursing the toll collected in a waterfall mechanism enshrined under Article 6(h).
- e. Respondent has called bids from third-parties to collect the toll post 02.06.2022, which is illegal and Appellant cannot be ousted in wake of the fact that the CA is continuing and has not been terminated. Appellant has admittedly completed 96% of the work and its promoters have invested Rs.735 crores without any returns. Appellant has paid Rs.3810 crores to the Respondent from toll collections as revenue share and is strictly following the waterfall mechanism. It has also paid interest on OTFIS and the balance of convenience lies in the favour of the Appellant, as further collection of the toll is the only way for the Appellant to recoup its investment and service the debt of Senior Lenders.
- f. Learned Single Judge erred in holding that the extension was not automatic as the Appellant has not challenged the communication dated 10.12.2020, whereby Respondent communicated its extension for 14 months. In view of Article 29, Appellant was not required to challenge the said communication and was only required to protect its rights till 26.08.2023, once a threat was extended for taking over the Project Highway *vide* letter dated 29.04.2022, which was done by filing the section 9 petition.

- g. Even assuming otherwise *in arguendo*, the letter dated 10.12.2020, was only an interim stand of the Respondent and it was never the case of the Respondent that this was its final position.
  - h. Learned Single Judge erred in holding that because the writ petition challenging the issue of LOAs dated 24.05.2022, awarded in favour of third-parties, was withdrawn by the Appellant, the tendering process has attained finality. The petition was clearly withdrawn on account of pendency of the Section 9 petition and in any case, calling tenders from third-parties cannot curtail the rights of the Appellant under the CA.
  - i. It cannot be overlooked that the Appellant was collecting over Rs.2.06 crores per day till 19.05.2022 and had assured a Minimum Guarantee of Rs.1.87 crore per day. However, third-parties have been engaged on a fixed/lump-sum remittance system at a rate of Rs.1.75 crore per day and thus there is a direct loss of Rs.112 crore annually to the public exchequer which is against public interest.
  - j. Learned Single Judge erred in holding that grant of the relief sought by the Appellant would amount to extending the CA, overlooking that the Appellant was only seeking *status quo* pending further orders by the Arbitral Tribunal.
14. Learned Senior Counsel appearing on behalf of the Respondent raised the following objections:-
- a. *Vide* letter dated 29.04.2022, Respondent had conveyed its decision to the Appellant not to grant any further extension in the

Concession Period and that the same shall come to an end on 02.06.2022. Appellant, however, chose not to challenge the said decision and thus, no extension for a further period of 15 months can even be sought.

- b. Appellant had earlier filed W.P.(C) 6693/2020, seeking directions to the Respondent to decide the extension of the Concession Period under Article 29 of the CA, as recommended by the IE and the same was disposed of on 21.09.2020 directing the Respondent to take a decision with respect to the extension, thus leaving the discretion to extend with the Respondent. The second writ petition being W.P.(C) 4151/2022, where the contention of deemed extension was raised by the Appellant, was also disposed of, leaving it to the Respondent to take a decision thereon. Pursuant to the directions of the Court, Respondent decided not to extend the Concession Period. Pertinently, there is no challenge to the aforesaid two orders and it is not open, therefore, to the Appellant to plead automatic extension.
- c. Appellant has failed to challenge the communication dated 10.12.2020, whereby a limited extension was granted with a caveat that the OTFIS infused by the Respondent would be refunded. Acceptance of the communication is evidence to the fact that the Appellant understood that there was no automatic extension and in fact, even the said amount has not been refunded by the Appellant.
- d. Insofar as the award of LOAs to the third-parties is concerned, Appellant filed a writ petition being W.P.(C) 8321/2022

challenging the award of the LOAs but chose to withdraw the same on account of pendency of the Section 9 petition. Significantly, neither was there a challenge to the LOAs in the Section 9 petition already pending nor was the same amended subsequently to incorporate a challenge and therefore, no arguments can be addressed on this issue by the Appellant.

- e. The plea regarding 96% completion of work is misplaced. In any case, no specific performance can be granted in a Section 9 petition on account of the provisions of sections 14(b), 16(c), 41(e) and 41(h) of the Specific Relief Act, 1963. In case the Appellant succeeds before the Arbitral Tribunal, it can be compensated by way of damages.

15. After hearing the parties at length, the learned Single Judge framed the only question arising for consideration as to whether the Appellant should be allowed to operate the toll plaza on the Project Highway, on the ground that Article 29.1.2 of the CA contemplated automatic extension of the Concession Period. Learned Single Judge was of the *prima facie* view that there is no automatic extension of the Concession Period, more so, as the Appellant had itself filed two writ petitions for a direction to the Respondent to accord approval for extension in terms of Article 29 of the CA and the Court had directed the Respondent to take a decision thereon. The plea raised by the Appellant of automatic extension did not find favour with the learned Single Judge also on the ground that the Appellant did not challenge the communication dated 10.12.2020, whereby extension was granted only for 14 months and even the subsequent communication dated

29.04.2022 categorically informing the Appellant that the Concession Period shall come to an end on 02.06.2022, was unchallenged.

16. The learned Single Judge took note of the fact that three LOAs had been awarded to toll collecting agencies for three toll plazas and two LOAs for maintenance and balance work in Rajasthan and Haryana and the writ petition challenging the award of the LOAs, filed by the Appellant was withdrawn. Moreover, the third-parties were not impleaded in the Section 9 petition and therefore, the issuance of tenders has attained finality. The relief sought by the Appellant was also denied on the ground that grant of the said relief in a Section 9 petition shall amount to extending the contract contrary to the decision dated 29.04.2022 as well as provisions of the Specific Relief Act. Reliance was placed by the learned Single Judge on the judgments of the Division Benches of this Court in *C.V. Rao v. Strategic Port Investments KPC Ltd., 2014 SCC OnLine Del 4441*; *DLF Ltd. v. Leighton India Contractors Private Ltd. & Anr., 2021 SCC OnLine Del 3772* and on the judgment of the learned Single Judge passed in *O.M.P.(I) (COMM.) 144/2020* titled as *West Haryana Highway Projects Private Limited v. National Highways Authority of India & Ors.*

17. We have heard the learned Senior Counsels for the parties and examined their rival contentions.

18. It is an undisputed fact before us that the Appellant had filed a writ petition being W.P.(C) 6693/2020 seeking directions to the Respondent to decide the issue of extension of the Concession Period, invoking Article 29 of the CA. *Vide* order dated 21.09.2020, Court directed the Respondent to take a decision on the extension and communicate its stand to the Appellant within 4 weeks. *Vide* letter dated 10.12.2020, Respondent communicated its

stand to the Appellant that in terms of the decision of the EC, taken in its 449<sup>th</sup> Meeting, interim extension in the Concession Period was granted only for 14 months from the date of expiry of the original Concession Period. This communication was not challenged by the Appellant. In fact, Appellant filed another writ petition being W.P.(C) 4151/2022 for a direction to the Respondent to accord approval to the prayer of the Appellant for extension, in accordance with the assessment and determination made by the IE. This petition was also disposed on 25.03.2022, leaving the decision to the Respondent after duly evaluating the prayer. *Vide* letter dated 29.04.2022, Appellant was unequivocally informed that no further extension could be granted and the extended Concession Period of the project shall come to an end on 02.06.2022. Even this decision was not challenged by the Appellant. In this view of the matter, there is no infirmity in the *prima facie* view taken by the learned Single Judge that there is no automatic extension of the Concession Period and the extension pre-supposes approval of the Competent Authority. It is also rightly observed that in absence of challenge to the communication dated 29.04.2022, it was not open to the Appellant to seek extension of the Concession Period beyond the 14 months granted *vide* the said letter.

19. Law on the scope of interference in a Section 9 petition is no longer *res integra*. The learned Single Judge has held that the prayer made by the Appellant in the Section 9 petition cannot be granted as that would amount to extending the contract contrary to the decision dated 29.04.2022. It is well-settled that powers under Section 9 can only be exercised for preservation of the subject matter of the dispute till the decision of the Arbitral Tribunal and cannot be extended to directing specific performance

of the contract itself. The learned Single Judge has in this context relied on the judgment of the Division Bench in *C.V. Rao (supra)* and in our view rightly so. Reliance was also placed on the judgment of another Division Bench in *DLF Ltd. (supra)*. We find no infirmity in the *prima facie* view that directing the Respondent to extend the contract for a further period, beyond 14 months extension granted, would amount to granting specific relief of the contract and is beyond the scope of the powers of the Court under Section 9 of the Act. For a ready reference, we may allude to para 40 of the judgment in *DLF Ltd. (supra)*, as follows:-

*“40. In C.V. Rao & Ors. v. Strategic Port Investments KPC Ltd. & Ors. 2014 SCC OnLine Del 4441, this Court had held that while exercising jurisdiction under Section 9 of the A&C Act, the Court cannot ignore the underlying principles which govern the analogous powers conferred under Order XXXIX Rules 1 & 2 CPC and Order XXXVIII Rule 5 CPC. Not only is the court required to be satisfied that a valid arbitration agreement existed between the parties, but the powers under Section 9 of the A&C Act could be exercised only for orders of an interim measure of protection in respect of the matters specified in Section 9 (ii)(a) to (e) of the A&C Act. In other words, the orders must relate to preservation of the property, which is the subject matter of the dispute, till the Arbitral Tribunal decides the same. The scope of relief under Section 9 of the A&C Act cannot be extended to directing specific performance of the contract itself.”*

20. Insofar as the issuance of LOAs in favour of third-parties is concerned, in our view, Appellant is disentitled from raising the said issue on two-fold grounds. Firstly, Appellant had filed a writ petition being W.P.(C) 8321/2022 seeking a writ of certiorari quashing the Notice Inviting Tenders for collection of user-fee (toll) from third-party toll collection

agencies and a writ of mandamus directing Respondent not to issue LOAs or take any other action pursuant to the said NITs. Admittedly, the writ petition was withdrawn by the Appellant on 25.05.2022, before the Division Bench, on the ground that Section 9 petition was pending. We find merit in the contention of the Respondent that having withdrawn the writ petition, it is not open to the Appellant to raise a challenge to the award of LOAs in favour of third-parties. Significantly, Appellant had not challenged the NITs/LOAs in the Section 9 petition and even subsequent to the withdrawal of the writ petition, no amendment was sought.

21. For all the aforesaid reasons, we do not find any merit in the present appeal. The view expressed by the learned Single Judge is clearly a *prima facie* view and Appellant has been granted the liberty to seek such remedies as may be available in law.

22. The appeal is accordingly dismissed along with the pending application.

**JYOTI SINGH, J**  
**(VACATION JUDGE)**

**ANOOP KUMAR MENDIRATTA, J**  
**(VACATION JUDGE)**

**JUNE 15, 2022/rk**