



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

+ **FAO 179/2019, CM APPL. 18730/2019, CM APPL. 39752/2022**

Reserved on : 14.03.2023

Pronounced on : 02.06.2023

IN THE MATTER OF:

NATIONAL HIGHWAY AUTHORITY OF INDIA Appellant

Through: Mr. Sudhir Nandrajog, Sr.
Advocate with Mr. Balendu
Shekhar, Mr. Krishna Chaitanya,
Mr. Sriansh Prakarsh and Mr.
Rajkumar Maurya, Advocates.

versus

M/S SURESH CHANDRA Respondent

Through: Mr. Swastik Singh and Mr.
Himanshu Dagar, Advocates.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J.

1. By way of present appeal filed under Section 37(1)(c) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Act'), the appellant impugns the order dated 15.12.2018 passed in Arbitration Case No. 68/2017 whereby its objections filed under Section 34 of the Act against the Award dated 27.07.2018 were dismissed.

2. The parties are related to each other through a Contract Agreement dated 21.03.2014, whereby the Appellant had engaged the respondent as a Contractor for collection of User Fee at *Kharik* Toll Plaza at km



333.150 (for length of 69.961 km at *Khagaria-Purnia* Section of NH-31 in the State of Bihar). The respondent was appointed pursuant to an e-tender issued by the appellant. The contract period was for one year i.e., from 25.03.2014 to 24.03.2015.

3. The respondent alleged loss of revenue and lodged a claim for damages to the tune of Rs.1,35,26,024/- on account of reduction in the collection of User Fee in the period from 03.07.2014 to 24.11.2014. The respondent also sought return of penalty amount of Rs. 88,93,346.00 levied on it by the appellant. Additionally, interest @ 18% p.a. was claimed on the principal sum awarded alongwith cost of litigation.

4. Vide Award dated 27.07.2016, the Arbitral Tribunal (hereafter, referred to as 'AT') awarded the following claims.

“7.5 SUMMARY OF AWARD:

Following amounts are awarded against respective Claim:

Claim Nos.	Amount Claimed (in Rs.)	Amount Awarded (in Rs.)	Remarks
1.	1,35,26,024.00	68,12,000.00	
2.	88,93,346.00	27,08,700.00	
Total	2,24,19,370.00	95,20,700.00	
3.	Interest @ 18%	@10 on amounts of Rs.68,12,000.00 w.e.f. 17.05.2015	If payment not paid within 3 months of award then 12 % on amount of Rs.95,20,700.00 till



			date of payment
4.	5,00,000.00	Nil	
5.	Respondent's Claim		
6.	15,00,000	Nil.	

5. The Appellant felt aggrieved by the award and filed objections under Section 34 of the Act, *inter-alia* including the ground that AT has travelled beyond the agreed terms of the Contract Agreement and erred in the interpretation of clause 25. The Objections were dismissed by the Court vide the impugned order.

6. Mr. Sudhir Nandrajog, learned Senior Counsel for the appellant has premised the appellant's challenge on Clause 9 of the Contract Agreement to contend that the Award suffered from patent illegality as the claim was barred under the aforesaid clause. It was also contended that though the respondent had relied on Clause 25 i.e., *Force Majeure* Clause in the Contract Agreement to justify its claims however, it did not follow the procedure provided in the said clause, inasmuch as, no prior notice was given to the appellant. Lastly, it was contended that to justify its claims, respondent had to necessarily show losses suffered by it but the material placed on record would rather reveal that against the bid of Rs.14.33 crores, respondent had earned a sum of Rs.17.74 crores. Learned Senior Counsel has placed reliance on the decision of Steel Authority of India Ltd. v. J.C. Budharaja, Government & Mining Contractor reported as **(1999) 8 SCC 122** and State of Chhattisgarh & Anr. v. Sal Udyog Private Limited reported as **(2022) 2 SCC 275**.



7. *Per contra*, learned counsel for the respondent disputed the contentions raised on behalf of the appellant. It was submitted that the appellant's reliance on Clause 9 of the Contract Agreement is misplaced as the respondent had filed its claim solely on the basis of Clause 25. Insofar as contention raised with respect to process under *Force Majeure* Clause not being followed, it was submitted that no such contention was even raised either before the learned Arbitrator or filed under Section 34 of the Act. It was contended that the relevant data for the months from July to November, 2014 would show that the respondent suffered reduced earnings, and it can't be said that since the User Fee collection exceeded the bid price, the Respondent did not suffer a loss. In support of his contentions, learned counsel has placed reliance on Haryana Tourism Limited v. Kandhari Beverages Limited reported as **(2022) S SCC 237**.

8. In rejoinder, learned Senior Counsel for the appellant submitted that the *Force Majeure* Clause does not provide for filing of claim of damages and the claim, if any, has to be premised on the basis of Clause 9 of the Contract Agreement.

9. Before proceeding to discuss the rival contentions and analyzing the same, I deem it apposite to reproduce the relevant clauses of the Contract Agreement which are as under :-

“9. *DIVERSIONS:*

(a) The Contractor has surveyed the said Section to the National Highway or the said Bridge and surrounding area including any access or diversion(s) and the Contractor has submitted its bid taking into consideration all such access or diversion(s) or any diversion of traffic due to deterioration in road conditions or closure of road for maintenance work,



whether existing or likely to come in the future which any road user may opt, inter-alia, to avoid payment of the USER Fee bypassing the USER Fee collection booths.

(b) The Contractor undertakes that, he shall not make any claim for any decrease in traffic on the ground of diversion of the traffic as per clause 9(a) above, even if such diversion did not exist at the time of submission of the bid by the Contractor.

(c) The Contractor will not be entitled to (a) close; and (b) demand closure by any authority whatsoever, of any lateral entry to the said section of the Highway for which USER Fee is to be collected. The Contractor recognizes that all tollable traffic on the said section may not pass through the USER Fee collection booth or USER fee plaza.

xxx

25. FORCE MAJEURE:

NON-FORCE MAJEURE EVENT :

An event (i) which involves diversion of traffic of any kind, including but not limited to any diversion ordered/implemented by local authority or any State/Central Government for a period not exceeding 15 days in continuation; or (ii) where the road users opt to access/travel through the existing alternate free User Fee (toll) roads due to deteriorated road conditions/maintenance of road section. This may result into bypassing of User Fee Plaza/User Fee Collection Booths and use of any part of the said Section of the National Highway/said bridge by the user.

FORCE MAJEURE EVENT :

Except as stated in Clause (a) above, Force Majeure event means an event or circumstances or a combination of events and circumstances referred to in this clause which are



beyond the reasonable control of the Party or Parties to this Contract and which party could not have prevented or reasonably overcome with the exercise of its reasonable skill and care in relation to performance of its obligations pursuant to this Contract and which are of the nature, without limitation of those described below :

(i) Publicly declared strike by registered and recognized association of Transporters exceeding 7 days. The date of going on strike and withdrawal or start of movement of traffic will be inclusive for the purpose of calculation of 7 days under this clause.

(ii) Floods/Earthquake having materially adverse impact i.e. complete blockade of road.

(iii) Act of war, invasion, armed conflict or act of foreign enemy, unexpected call up of armed forces, blockade, embargo, revolution, riot, sabotage, terrorism or act of such threat, or any other political or social event having material adverse impact on the performance of obligations of the parties-thereof.

(iv) Expropriation, acquisition, confiscation or nationalisation of the User Fee collection.

(v) Any change in law which has a material adverse effect on the obligation of the parties hereto.

(vi) Any decision or order of a court or tribunal, which has a material adverse effect on the performance of obligations of the parties to this Contract.

(vii) Suspension of traffic on the said section of National Highway/said bridge or any part thereof, exceeding 15 (fifteen) days at a stretch.

(viii) Any event or circumstances of a nature analogous to the foregoing.



(i) *The party to this Contract shall be entitled to suspend or excuse performance of his obligations, including remittance of installments by the Contractor to the Authority for the period of continuance of the Force Majeure event; under this Contract to the extent that such performance is impeded by an event of Force-Majeure prevailing continuously for more than 7 (seven) days at a time (or continuously for more than 3 (three) days at a time in case of no user fee collection at all at the toll plaza) for reasons not attributable to the Contractor.*

(a) *PROCEDURE FOR FORCE MAJEURE:*

(i) *NOTICE:*

(1) *If a party claims relief on account of a Force Majeure event, then the Party claiming to be affected by the Force Majeure event shall, as soon as reasonably practicable and in any event within 7 days of becoming aware of the Force Majeure event, give notice giving details of the effects of such Force Majeure on the Party's obligations under this Contract to the other Party in writing, including the dates of commencement and actual/likely date of cessation of such Force Majeure and its effect, with necessary supporting documents and data.*

(2) *The Party receiving the claim for relief under Force Majeure shall, if wishes to dispute the claim, give a written notice of the dispute to the Party making the claim within 30 days of receiving the notice of claim.*

(ii) *CONSULTATION AND DUTY TO MITIGATE*

(1) *The Party claiming relief under Force Majeure shall, at its own cost, take reasonable steps to remedy and mitigate the effects of the Force Majeure event and restore its ability to perform its obligations under this Contract as soon as reasonably possible. The Parties shall consult with each*



other to determine the measures to be implemented to minimize the losses of either Party as a result of the Force Majeure.

(2) The Party affected by Force Majeure shall keep the other Party informed of such efforts to remedy and make reasonable efforts to mitigate on a continuous basis and shall provide written notice of the resumption of performance hereunder.

(3) Notwithstanding anything contrary to the specifically stated in this Contract no party shall be relieved of its obligations under this Contract by reason of impossibility of performance or any other circumstances whatsoever not beyond its control.

(4) Any Party claiming cessation of the event of Force Majeure may, if the other party has not served a notice of resumption of performance, give notice to the other party, of cessation of such event, notifying the date of alleged cessation and unless the party to whom such notice is given does not dispute the same within 30 days of the receipt of such notice the Force Majeure event shall be deemed to have ceased to consequences thereof and shall be deemed to have come to an end on the date so notified.

(5) The relief under force Majeure will be calculated on the basis of average collection per day, arrived based on the agreed weekly remittance. The difference in collection per day during force majeure and average amount of collection per day, arrived based on the agreed weekly remittance multiplied by number of days of force majeure will be payable to the contractor.

(iii) TERMINATION DUE TO FORCE MAJEURE:

If any event of Force Majeure shall continuously impede or prevent a Party's performance for longer than 60 days from the date of commencement of such Force Majeure event, the



parties shall decide through mutual consultation, either the terms upon which to continue the performance of this Contract or to terminate this Contract by mutual consent. If the parties are unable to agree on such terms or to terminate the Contract by mutual consent within 90 days from the date of commencement of such Force Majeure event, either Party may issue a Notice to terminate this Contract.

...”

10. As per the Contract Agreement, the contract period was from 25.03.2014 to 24.03.2015 however, the claim pertains to the period from 03.07.2014 to 24.11.2014. In the claim petition, the Contractor claimed that due to heavy rains and floods, there was restriction/partial closure of *Bhaina* river bridge for heavy vehicles at Km 155.00 on NH- 80 (*Bhagalpur-Kahalgaon* Section) with effect from 03.07.2014. Cracks were found in *Baijini* bridge near *Bhaijini Fulwaria* village at Km 7.00 on SH 19 (*Bhaijini-Fulwaria* Section) with effect from 26.07.2014, where vehicles of all kinds were stopped. Around 07.08.2014, the *Paras Banni* bridge on SH 25 also got damaged due to rains and floods thereby adversely affecting the use of toll plaza by vehicles.

11. It was claimed that due to the damages to the *Bhaina* river bridge, the passage of traffic at the toll plaza reduced significantly resulting in loss to the tune of Rs.1.25 lacs per day. Vide letter dated 22.07.2014, the Contractor sought reduction of weekly collection remittances that it was supposed to make to the Appellant. A similar request was made for additional rebate of Rs.1 lac per day with respect to *Bhaijini-Fulwaria* bridge as well as for the *Paras Banni* bridge. The Contractor sent request letters to NHA I on 22.07.2014, 30.07.2014, 02.08.2014, 07.08.2014, 15.09.2014, 19.11.2014 and 01.12.2014.



12. The Project Director, NHAI vide letter dated 05.09.2014 recommended reduction of weekly remittance from Rs.28,82,352/- to Rs.22,33,840/- with effect from 26.07.2014. The said recommendation was claimed to be based on a survey conducted by a third party for the period from 09.08.2014 to 16.08.2014. The recommendation was rejected by the Regional Officer of NHAI on the ground that *Force Majeure* clause was not applicable as there was no suspension of traffic under Clause 25 of the Agreement and also for the reason that the bridges affected were not in the same section as the toll plaza. On 02.03.2015, Regional Officer of the NHAI submitted its opinion that Contractor's claim was not tenable. The recommendation of the Project Director was also rejected by the 3 CGM Committee of NHAI.

13. AT, while relying on the map placed on record, opined that to reach toll plaza at NH 31, vehicles coming from NH 80 and SH 19 had no other route but to pass the toll plaza. The road which is the only connecting road between NH 80 and NH 31 turns towards left as well as right side when it joins NH 31 and on the left side, *Kharik* toll plaza is located.

14. The issue that arose for consideration before the AT was whether the aforesaid events would fall under Clause 9 or 25(b) of the Contract Agreement as admittedly, the events do not fall within the purview of Clause 25(a).

Clause 9(b) prohibits the Contractor from making any claim on account of reduction in traffic on the ground of diversion of traffic as per Clause 9(a) which casts an obligation on the Contractor to survey the section of national highway or the said bridge or surrounding area and



taking into consideration all such access or diversion of traffic due to deterioration of road condition or closure of road for maintenance work, whether existing or likely to come in future.

15. AT interpreted the Contract Agreement and concluded that the events highlighted by the Contractor were squarely covered by Clause 25(b) of the Contract Agreement.

16. This Court has to see whether the conclusion so arrived suffers from patent illegality. The supreme Court in *Sal Udyog (Supra)* reiterated its earlier observations in Delhi Airport Metro Express (P) Ltd. v DMRC reported as **(2022) 1 SCC 131** while referring to the facets of patent illegality, held as under:

“29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression “patent illegality”. Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression “patent illegality”. What is prohibited is for courts to reappraise evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under [Section 34\(2-A\)](#) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression “patent illegality.”



17. Indisputably, there was reduction of traffic at the *Kharik* toll plaza in the period from 03.07.2014 to 24.11.2014. However, the moot question is whether reduction in traffic volume qualifies as *Force Majeure*, as contemplated by the parties in Clause 25. In Clause 25(b)(ii), only complete blockade of “the road” due to floods/earthquake was contemplated as a *Force Majeure* event.

18. Pertinently, Clause 25(b) (ii) came to be interpreted by this Court in National Highway Authority of India v. TGV Projects & Investment Pvt. Ltd., **Neutral Citation No. 2018:DHC:3477**, wherein the Court has held that the clause contemplates complete blockade of “the road” affected by floods and not a mere reduction in traffic on account of a remote event of flood occurring, thereby affecting the flow of traffic leading to the contract road. The aforesaid view was upheld by the Division Bench and the SLP bearing No.21830/2019 was also dismissed.

19. Accordingly, the interpretation of Clause 25(b) (ii) adopted by the AT appears to be contrary to the intent of the parties that is reflected in the plain words of Clause 25(b) i.e., complete blockade. The AT erred in misapplying rules of interpretation by abandoning the plain language used in Clause 25(b) to fit in “partial reduction of traffic” in the Clause 25(b), as a *Force Majeure* event. There is no reason cited by the AT, or is otherwise apparent from the facts and records, if the parties had intended to include “partial reduction in traffic” in Clause 25(b).

20. For the reasons stated above, the Award in question is vulnerable to challenge on the ground that the award is contrary to the contractual provisions and thus squarely falls within the scope of Section 34 (2)(b)(ii) of the Act.



21. In terms of Clause 19 of the Contract Agreement, NHAI was well within its right to levy penalty (which to my mind are liquidated damages) @ 0.2% per day for initial one month of delay in depositing remittances and 0.5% for further delay beyond one month. The AT's decision to direct refund to the Contractor is contrary to the Clause 9 and was premised on the misunderstanding that the partial reduction in traffic was a *Force Majeure* event, and hence untenable. As a sequitur, the award of interest also is set aside. Consequently, the appeal is allowed and the

award dated 27.07.2018 is set aside. The parties are left to bear their own costs.

22. Pending applications stand disposed of.

(MANOJ KUMAR OHRI)
JUDGE

JUNE 02, 2023

ga