

Delhi High Court

National Highways Authority Of ... vs Vijayawada Tollways Pvt. Ltd. on 13 May, 2022

NEUTRAL CITATION NO: 2022/DHC/001972

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\* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 13th May, 2022

+ O.M.P. (COMM) 81/2022 & I.A. 1927/2022 (seeking stay of award)

NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Petitioner

Through: Ms. Neetika Sharma, Advocate.

versus

VIJAYAWADA TOLLWAYS PVT. LTD.

Through: Ms. Gunjan Chhabra and Mr. Aayushmaan Gauba, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J. (Oral):

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 [hereinafter "the Act"] impugns the arbitral Award dated 14th August, 2021 passed by a three-member Arbitral Tribunal comprising of - Hon'ble Mr. Justice A.K. Patnaik (Retd.) (Presiding Arbitrator), Hon'ble Mr. Justice B. Sudershan Reddy (Retd.), and Mr. Raghav Chandra, IAS (Retd.) (Arbitrators) [hereinafter "impugned Award"].

BRIEF FACTS The Contract

2. The Respondent/ Vijaywada Tollways Pvt. Ltd. [hereinafter "VTPL"] This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/001972 being the L-1 bidder, was awarded the work of - "Six Laning of Chilkaluripet-Vijaywada Section of NH-5 from KM 355.000 to KM 434.15 (82.5 KM) in State of Andhra Pradesh to be executed as BOT (Toll) on DBFO Pattern under NHDP Phase-V" [hereinafter "Project"], vide letter of acceptance dated 21st February, 2008 issued by the Petitioner/ National Highway Authority of India [hereinafter "NHAI"].

3. Parties entered into a Concession Agreement dated 04th June, 2008 [hereinafter "CA"]. The original Project length under the CA was 82.5 KM [hereinafter "Total Project Length"]. However, owing to various hinderances in a stretch of 14.5 KM (out of the Total Project Length), the Independent Engineer ["IE"] vide letter dated 18th December, 2009, directed VTPL to suspend the work qua the said stretch.

4. For afore-mentioned 14.5 KM stretch - parties entered into a Supplementary Agreement dated 09th September, 2013 [hereinafter "Supplementary Agreement"]. Therein, it was recorded that: (a) VTPL/ Claimant proposed to exclude 14.5 KM stretch from the Project and the impediments arising thereunder. (b) In the event, NHAI was unable to fulfil its commitments qua the aforesaid stretch within three months or any further period as may be mutually agreed between the parties or any other further period w.e.f. signing of the Supplementary Agreement for handing over 14.5 KM stretch, the said stretch would be de-linked from the 'scope of work'.

5. In the event of deletion of 14.5 KM of Chilakuripet Town stretch, it was further agreed that: (a) toll revenue for the stretch of 14.5 KM being This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/001972 collected by VTPL would be passed to NHAI from the date of collection of toll/ appointed date i.e., 01st May, 2009; (b) maintenance expenditure on 14.5 KM stretch incurred so far and borne by VTPL would be reimbursed by NHAI (based on the recommendation of IE); (c) future maintenance expenses on the stretch of 14.5 KM would be borne by NHAI and maintenance could be done through VTPL or third-party (and payment thereon would be subject to certification by IE); and (d) VTPL would pay revenue sharing premium to NHAI as per Article 25 and 26 of CA for stretch of 68 KMs.

### The Dispute

6. Disputes between the parties emanates from de-linking of 14.5 KM stretch from the Total Project Length. Since NHAI was not able to remove hinderances/ impediments from the said stretch within three months from the date of the Supplementary Agreement, VTPL issued letters to NHAI to de-link the stretch of 14.5 KM from the 'scope of work' and after nearly one and a half years from the date of the Supplementary Agreement (i.e., 09th September, 2012), conveyed the decision of the Executive Committee to de- link the aforesaid stretch from the 'scope of work'.

7. Vide communication dated 01st November, 2018, NHAI sought recovery of Rs. 16,76,66,383/- relying on the following clause of the Supplementary Agreement: (a) Clause B (iii) (i.e., toll revenue collection for the 14.5 KM stretch was to be transferred by VTPL to NHAI); and (b) Clause C (i), which included claim towards loss of interest (Rs. 9.69 Crores) accrued on account of delayed payment of toll revenue for the 14.5 KM This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/001972 stretch. VTPL invoked arbitration vide notice dated 09th November, 2018 and by consent, an Arbitral Tribunal was constituted which culminated into the impugned Award [which was corrected vide Order dated 17th September, 2021].

8. NHAI impugns the Award qua six claims - Claims No. 2, 4 and 5-8, which are taken up separately.

CLAIM-WISE CONTENTIONS AND ANALYSIS I. CLAIM NO. 2/ DISPUTE NO. 2 - WHETHER NHAI IS ENTITLED FOR SUM OF RS. 16,76,66,383/- AS PER THE IMPUGNED LETTERS DATED 01ST NOVEMBER, 2018 AND 06TH MARCH, 2019 UNDER THE SUPPLEMENTARY AGREEMENT OR ANY LESSER AMOUNT

9. Ms. Neetika Sharma, counsel for NHAI makes the following submissions: -

(i) The impugned Award, to the extent challenged, is patently illegal, in violation of public policy and settled law. The Tribunal misapplied the legal and contractual provisions and passed the impugned Award which is liable to be set-aside under Section 34 of the Act. 1

(ii) NHAI's claim for interest of Rs. 9.69 Crores has been erroneously refused on the ground that the Supplementary Agreement did not contain any provision for award of interest. NHAI is entitled to Rs. 9.69 Crores towards loss of interest on account of delayed remittance Reliance is placed on: Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705) and IOCL v. M/s Shree Ganesh Petroleum Rajgurunagar, 2022 SCC OnLine SC 131.

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NEUTRAL CITATION NO: 2022/DHC/001972 of toll revenue for 14.5 KM de-linked stretch. Reliance is placed on Article 47.5 of CA ('Detailed Payments'). Further, a bare reading of Clause C (v) of Supplementary Agreement reveals that all the terms and conditions of the said agreement shall be governed by the CA which in turn, contains the interest clause.

(iii) VTPL vide letter dated 22nd December, 2014 acknowledged the de-

linking of 14.5 KM stretch from December, 2013. By way of the said letter, VTPL stated that an additional concession fee is payable from the day falling after 1698th day from 24th December 2013. Despite such acknowledgment, VTPL did not start paying the proportionate toll revenue generated from the same stretch until 2015. Thus, VTPL is liable to pay interest for the period commencing from December, 2013 till the actual date of payment i.e., 12th November, 2015.

(iv) VTPL wrongly deducted Rs. 26.18 Crore towards the routine maintenance, incident management and toll operation charges which was contrary to the evaluation of the IE [i.e., Rs. 20,25,12,661/-]. The amount of Rs. 16.76 Crore claimed by NHAI vide letter dated 01st November, 2018 was towards interest and short payments due to NHAI. Thus, there is no connection between the above-stated amounts.

(v) The reimbursement towards maintenance and other expenditures by NHAI was dependent upon VTPL's submission of details for certification by IE/ Project Director ["PD"]. The Tribunal erred in This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/001972 holding that the agreement to pass on the toll revenue from the de- linked stretch of 14.5 KM by VTPL to NHAI and promise on the part of NHAI to reimburse the maintenance expenditure to VTPL, have to be simultaneously performed. The question of reciprocal promises does not arise in the present case. Pertinently, the Tribunal itself, in paragraph No. 5.2.8 of the Award, has recorded that the dispute is only qua quantum of maintenance of de-linked stretch of 14.5 KM and further, in paragraph No. 5.2.16 has held that the

actual expenses borne by the Concessionaire/ VTPL will have to be taken into consideration by IE/ PD for certification.

(vi) Claim for recovery of Rs. 16,76,66,383/- raised by NHAI vide notices dated 01st November, 2018 and 06th March, 2019, was made after deducting Rs. 18,64,76,216/- payable to VTPL, as certified by IE towards routine maintenance, incident management and toll operation charges for the de-linked portion of 14.5 KM for the disputed period commencing from May, 2009 to August, 2018.

(vii) The Arbitral Tribunal erred in holding that no timeframe was prescribed under CA, for passing on toll revenue by VTPL to NHAI. A meeting between the parties was held on 20th September, 2018, wherein the issue of timelines for deposit of proportionate toll revenue was discussed and VTPL was instructed to remit the amount by seventh day of every month. Reliance is placed on Clause 26.4 of the CA ('Payment of Concession Fee') whereunder VTPL is obliged to pay 'concession fee' within seven days from close of each month.

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NEUTRAL CITATION NO: 2022/DHC/001972 ANALYSIS

10. Claim No. 2/ Dispute No. 2 pertains to the amount that NHAI sought to recover under letters dated 01st November, 2018 and 06th March, 2019. The breakup of the amount NHAI sought to recover (Rs. 16,76,66,383/-) has been given in paragraph No. 5.2.1 of the impugned Award which includes amount due towards: (a) short and delayed payment of toll revenues (from May, 2015 to June, 2016 and July, 2016 to August, 2018); and (b) loss of interest due to delayed remittance of toll revenue arising from de-linking of 14.5 KM stretch.

11. The challenge in the present petition is confined to the award of the interest component which forms part of Claim No. 2. However, since NHAI has also touched upon the other components to sustain the challenge, a brief mention of the entire gamut of dispute would be necessary. It was undisputed that the quantum of toll revenue collected for the de-linked stretch was to be passed on from VTPL to NHAI. The dispute was limited to the quantum of maintenance expenditure which was to be reimbursed by NHAI under Clause C (i)(b) (maintenance expenditure on 14.5 KM stretch) of the Supplementary Agreement. VTPL contended that it was entitled to expenditure on 'actual basis' and NHAI relied upon the maintenance expenditure, incidental management expenditure and tolling operation charges as per the calculation and certification by IE in Annexure-F to the Affidavit dated 02nd December, 2019 filed by NHAI, in terms of the Supplementary Agreement. On this aspect, the Arbitral Tribunal analyzed terms of the CA and Supplementary Agreement and in particular Clause C This is a digitally signed Judgement.

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(i)(b) and Clause C (i)(c) thereof and held that expenses actually borne by Concessionaire/ VTPL on future maintenance will have to be looked into by IE/ PD and NHAI was not bound to reimburse the

actual future maintenance expenses. Instead, it was liable to be reimbursed only the amount certified by IE/ PD. Thereafter, the Tribunal analyzed the calculations done by the IE in terms of Affidavit dated 02nd December, 2019 and held the same to be in terms of the stipulations in the Supplementary Agreement.

12. Qua recovery of interest amount of Rs. 9.69 Crores sought to be affected from the escrow account, the Arbitral Tribunal held as under: -

"5.2.27. The arbitral Tribunal finds that in the Impugned Notice dated 01.11.2018 of the Respondent (Annexure C-1 Vol. C-2 Pg. 1), the Respondent has not reimbursed the Maintenance Expenditure, Incidental Management Expenditure and Tolling Operations Charges and has also claimed interest of Rs. 9.69 Crores. The Impugned Notices dated 01.11.2018 and 06.03.2019 of the Respondent demanding Rs. 16.77 Crores along with interest from the Claimant are therefore contrary to the Supplementary Agreement dated 09.09.2013 read with the Concession Agreement dated 04.06.2008 and are illegal. The arbitral Tribunal also holds that the Claimant is entitled to an injunction restraining the Respondent from recovering the sum of Rs. 16.77 Crores from the Escrow Account in furtherance of its letter dated 01.11.2018 and 06.03.2019. The Point of Dispute No. 2 is answered accordingly. The Respondent will therefore deduct the amounts reimbursable to the Claimant towards Maintenance Expenditure, Incidental Management Expenditure and Tolling Operation Charges for the period from May 2009 to August 2018 as certified by the IE in Annexure-F to the Affidavit dated 02.12.2019 from the proportionate toll free amount for the said stretch of 14.5 Kms and demand the differential amount that is due from the Claimant to the Respondent in terms of Article 47.5 of the Concession Agreement. In case, the Claimant does not pay the differential amount that is due from the Claimant to the Respondent within 15 days from the date of receipt of the demand, the Respondent is entitled to claim interest in terms of Article 47.5 of the Concession Agreement."

13. From the afore-noted extract it emerges that the Tribunal upheld This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/001972 VTPL's claim on the basis of terms of the Supplementary Agreement. The said agreement does not contain a provision for payment of interest and stipulates that all rights and obligations thereunder shall be governed by CA which is deemed to be part and parcel thereof. Therefore, Article 47.5 of the CA relating to delayed payments is applicable, which reads as under: -

"47.5 Delayed Payments The Parties hereto agree that payments due from one Party to the other Party under the provisions of this Agreement shall be made within the period set forth therein, and if no such period is specified, within 15 (fifteen) days of receiving a demand along with the necessary particulars. In the event of delay beyond such period, the defaulting Party shall pay interest for the period of delay calculated

at a rate equal to 5% (five per cent) above the Bank Rate, and recovery thereof shall be without prejudice to the rights of the Parties under this Agreement including Termination thereof."

14. It should be noted that NHAI's demanded interest for delayed payment of toll revenue vide notice dated 01st November, 2018. While making the demand, NHAI had not reimbursed or adjusted the maintenance expenditure, incidental management expenditure and tolling operations charges. Yet, they claimed interest of Rs. 9.69 Crores. The alleged loss of interest due to delayed remittance of toll revenue arising from the de-linking of 14.5 KM stretch cannot be claimed without adjustment of the amounts due under CA. It cannot be accepted that there is no connection between the above-stated amounts. The liability qua payment of interest would apply on payments due from one party to another under the provisions of CA. Therefore, the demand was contrary to the provisions of the CA and Supplementary Agreement. Further, it must also be noted that for the first time, NHAI filed a statement giving details of the amount reimbursable to VTPL towards the above expense, on 02nd December, 2019. Keeping that in This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/001972 view, the Tribunal directed that differential amount that is due from VTPL to NHAI shall be paid within 15 days from the date of receipt of the demand failing which, NHAI would be entitled to claim interest in terms of Article 47.5 of CA.

15. The provisions contained in CA, which governs the question regarding the payment of interest, cannot be side-stepped. The Tribunal rightly rejected the claim of NHAI relying upon Article 47.5 of CA, observing that the said provision is not an unreasonable stipulation. This finding is a reasonable construction of the terms of the agreements which the Court finds no ground to interfere.

II. CLAIM NO. 4/ DISPUTE NO. 3 - WHETHER VTPL IS ENTITLED FOR SUM OF RS. 4,34,63,014/- AS COMPENSATION ON ACCOUNT OF INTEREST ON DEBT DUE TO SUSPENSION OF 'USER FEE COLLECTION'/ 'TOLL COLLECTION' DURING DEMONETIZATION PERIOD OR ANY LESSER AMOUNT.

16. Ms. Sharma makes the following averments qua the afore-said claim:

(i) As per financial agreement and financial model, VTPL was required to pay principal amount plus interest accrued thereon irrespective of occurrence of any force majeure event, including interest on debt which was part of the 'debt repayment obligations' of VTPL. The Arbitral Tribunal erred in holding that force majeure costs involves 'interest payments on debt' but does not include 'debt repayment obligations' and awarded claim of Concessionaire/ VTPL for 'interest payments on debt' due to occurrence of force majeure event, as per Clause 34.7.2. ('Allocation of cost arising out of Force Majeure') of This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/001972 CA.

(ii) As per the finance agreement and refinance agreements of Concessionaire/ VTPL with its respective lender banks, VTPL was under debt payment obligations w.e.f. 30 th June, 2012 and 31st

December, 2015 (i.e., during the force majeure period from 09th November, 2016 to 02nd December, 2016) as per the amortization schedules contained therein and thus, no interest was payable by NHAI.

(iii) The Arbitral Tribunal did not consider the letter dated 05th June, 2018 issued by the IE which categorically recommended that no claim of 'interest on debt' can be allowed to VTPL as they had to pay debt, irrespective of occurrence of force majeure event.

## ANALYSIS

17. NHAI is aggrieved with award of Rs. 84,04,684/- towards 'interest payments on debt' as Force Majeure Costs during demonetization period. The Tribunal found that the Force Majeure Cost includes 'interest payments on debt' but not 'debt repayment obligations'.

18. According to VTPL, in terms of the office order dated 29th November, 2016, issued with the approval of the Competent Authority, during the period from 09th November, 2016 till midnight of 02nd December, 2016 - all losses on account of non-collection of tolls during the suspension of This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/001972 collection of user fees at toll plazas on national highways due to demonetization of Rs. 500/- and Rs. 1000/- bank notes, were to be addressed as per Article 34.7.2 of CA which reads as under: -

"34.7.2 Upon occurrence of any Force Majeure Event after the Appointed Date, the costs incurred and attributable to such event and directly relation to the Project (the "Force Majeure Costs") shall be allocated and paid as follows:

(a) upon occurrence of a Non-Political Event, the Parties shall bear their respective Force Majeure Costs and neither Party shall be required to pay to the other Party any costs thereof;

(b) Upon occurrence of an Indirect Political Event, all Force Majeure Costs attributable to such Indirect Political Event, and not exceeding the Insurance Cover for such Indirect Political Event, shall be borne by the Concessionaire, and to the extent Force Majeure Costs exceed such Insurance Cover, one half of such excess amount shall be reimbursed by the Authority to the Concessionaire; and

(c) Upon occurrence of a Political Event, all Force Majeure Costs attributable to such Political Event shall be reimbursed by the Authority to the Concessionaire.

For the avoidance of doubt, Force Majeure Costs may include interest payments on debt, O&M Expenses, any increase in the cost of Construction Works on account of inflation and all other costs directly attributable to the Fore Majeure Event, but shall not include loss of Fee revenues or debt repayment obligations, and for determining

such costs information contained in the Financial Package may be relied upon to the extent that such information is relevant."

19. VTPL claimed that the reimbursement of costs due towards 'interest payments on debt' is included under the afore-noted provision. On this aspect, the Tribunal analyzed the relevant provision of CA as under: -

"5.3.5. On a reading of the provisions of the last portion of Article 34.7.2 of the Concession Agreement, the arbitral Tribunal finds that the said portion states that for avoidance of doubt "Force Majeure Costs may include interest payment on debt" but shall not include "debt repayment obligations". Thus, Article 34.7.2 makes a distinction between 'debt' and This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/001972 'interest payment on debt' and makes it abundantly clear that while repayment of debt (lower of Statutory Auditor certificate and Lead Bank certificate) may be released to the Claimant on account of Interest on debt during the period of toll suspension. She submitted that the Respondent however did not release the said amount of costs towards interest on debt obligations is not part of Force Majeure costs, interest payment on debt may be included in Force Majeure costs. Therefore, the contention on behalf of the Respondent that interest payment on debt is part of debt repayment obligations and cannot be included In Force Majeure costs is misconceived.

5.3.6. The arbitral Tribunal further finds on a reading of the last portion of Article 34.7.2 of the Concession Agreement that for determining Force Majeure costs, information contained in the Financial Package may be relied upon to the extent such information is relevant. The expressions 'Financial Package' and 'Financial Agreements' have been defined in Article 48.1 of the Concession Agreement and are extracted hereunder:

"Financial Package means the financing package, indicating the total capital cost of Six-Laning and the means of financing thereof, as set forth in the Financial Model and approved by the Senior Lenders, and includes Equity, all financial assistance specified in the Financing Agreements, Subordinated Debt and Equity Support, if any.

Financing Agreements means the agreements executed by the Concessionaire le respect of financial assistance to be provided by the Senior Lenders by way of loans, guarantees, subscription to non- convertible debentures and other debt instruments including loan agreements, guarantees, notes, debentures and other debt instruments including loan agreements, guarantees, notes, debentures, bonds and other debt instruments, security agreements, and other documents relating to the financing (including refinancing) of the Total Project Cost, and includes amendments or modifications made in accordance with Clause 5.2.2"



From the definition of Financial Package in the Concession Agreement given above, it is clear that all financial assistance specified in the Financing Agreements. for financing the total project cost of six-laning were included. Further, from the definition of Financing Agreements given above, it is also clear that not only agreements executed by the Concessionaire in respect of Financial Assistance to be provided by the Senior Lenders by way of loans, but also other documents relating to the financing (including refinancing) of the Total Project Cost who are included in the definition of Financing Agreements. Thus, the original Financing Agreements as well as the Refinanced Agreement are included in Financing This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/001972 Agreements and can be looked into for the purpose of determining the Force Majeure costs.

5.3.7. The arbitral Tribunal finds that originally under the Common Loan Agreement dated 18.03.2009 between the Claimant as the borrower a consortium of lenders, with the State Bank of India as the Lender's Agent. In the Schedule II of the Common Loan Agreement is titled "Financial Planning and the total project cost in Schedule II is shown as Rs. 804 Crores for which the equity contribution was Rs. 216.20 Crores and the Rupee term loan was Rs. 587.80 Crores. The repayment of the term loan of Rs. 587.80 was to commence in the quarter ending 30.06.2012 and was to be completed in the quarter ending 31.03.2022. This would be clear from a reading of the Amortisation Schedule in Schedule IV of the Common Loan Agreement Clause 2.6 (i) of this Common Loan Agreement provided that the borrower should pay to the lenders interest for the interest period at the applicable interest rates on the principal amounts of the respective leaders outstanding on due dates are set out in Schedule III of the common loan Agreement and such interest has to be paid monthly on the Interest payment dates. The arbitral Tribunal further finds that on 16.06.2015, the Claimant and HSBC as the lender entered into a Refinanced Loan Agreement for a facility amount in foreign currency of USD 60,000,000 with a view to clear off its loans to the lender banks under the Common Loan Agreement. Section 5 of this Refinanced Loan Agreement furnishes the repayment dates and the repayment amounts. Section 4 of this Refinanced Loan Agreement is titled 'Interest' and Section 4.1.1 provides that on the last day of each interest period the borrower shall pay the accrued interest on the advance to which the interest period relates. The arbitral Tribunal further finds that as per the certificate of the HSBC Bank dated 11.04.2017 for the interest period 09.11.2016 to 02.12.2016 (inclusive) interest applicable for the period was USD 123,680.63 for the debt in foreign currency of USD 60,000,0 The arbitral Tribunal further finds that the IE in its letter dated 27.09.2017 (Annexure C-75 Pg. 657 Vol. C-3) has recommended that as per the certificate from the lead bank, the interest on the foreign currency term loan availed towards the project from the bank during the period 09.11.2016 to 02.12.2016 is worked out at Rs. 84,04,684. On the aforesaid analysis of the facts and the law, the arbitral Tribunal does not accept the contention on behalf of the Respondent that Rs. 84.04.684 was part of the

debt repayment obligation of the Claimant and cannot be included as Force Majeure costs under Article 34.7.2 of the Concession Agreement. The arbitral Tribunal therefore holds that the Claimant is entitled to interest of debt amounting to Rs. 84,04,684 as Force-Majeure Costs for the period 09.11.2016 to 02.12.2016. Point of Dispute No. 3 is answered accordingly."

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20. Article 34.7.2 of CA categorically provides that - "For the avoidance of doubt, Force Majeure Costs may include interest payments on debt" but does not include "debt repayment obligations". The Tribunal therefore, held that the said provision makes no distinction between 'debt' and 'interest payments on debt' and makes it abundantly clear that while 'debt repayment obligations' is not part of Force Majeure Costs, 'interest payments on debt' would be included. [See paragraph No. 5.3.5 of impugned Award]. The afore-noted interpretation of the terms of CA squarely falls within the domain of the Arbitral Tribunal and is reasonable and cannot be interfered with.<sup>2</sup> Therefore, the Court finds no ground to interfere with the impugned Award and there is no merit in the contentions of NHAH qua the afore-noted claim.

21. NHAH also argued the impugned Award does not consider the letter dated 05th June, 2018. This letter never formed part of the arbitral record, as confirmed by Ms. Sharma and noted in the Order dated 22nd April, 2022. There is thus no justification to set-aside the impugned Award on the strength of the said letter which indeed does not form part of the arbitral record. Accordingly, the challenge to the aforesaid claim is rejected.

III. CLAIM NO. 5/ DISPUTE NO. 4 - WHETHER VTPL IS ENTITLED TO A SUM OF RS. 18,91,455 ON ACCOUNT OF INTEREST FOR DELAY IN PAYMENT OF RS. 1,37,63,577/- OR FOR ANY LESSER AMOUNT?

22. Ms. Sharma makes the following submissions impugning the afore- said claim: -

Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49.

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(i) The Competent Authority of NHAH gave approval vide letter dated 02nd August, 2018 for release of O&M expenses amounting to Rs. 1,37,63,577/- and extended the 'concession period' by 23.75 days (based on the recommendations of the IE vide letter dated 05th June, 2018). Thereafter, the Competent Authority issued SoP for immediate relief to be provided to BOT (Toll) Concessions. The aforesaid SoP did not stipulate any timelines for release of the claims/ expenses borne by the Concessionaires. Accordingly, NHAH released O&M expenses during the actual period of suspension

after due certification/ recommendation of IE and approvals of the Competent Authority on 10th November, 2018. Therefore, the question of payment of interest under Article 47 of CA does not arise.

(ii) The Arbitral Tribunal failed to appreciate the award of interest to NHAI on account of delayed remittance of proportionate toll revenue for the de-linked portion of 14.5 KM in accordance with the provisions of Clause 47.5 of CA ('Delayed Payments'). Thus, by relying upon the award of interest for delay in release of force majeure relief is contradicting its own findings.

## ANALYSIS

23. Claim No. 5/ Dispute No. 4 relates to interest qua delayed payments of Rs. 1,37,63,577/-, which NHAI released towards O&M expenses during the demonetization period, in terms of Article 47.5 of CA.

24. In respect of the afore-noted claim, the Tribunal held as under: -

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NEUTRAL CITATION NO: 2022/DHC/001972 "5.4.4. The arbitral Tribunal finds that in the office order dated 29.11.2016 issued by the Competent Authority of the Respondent on the subject: Suspension of user fee at toll plaza on NHS due to demonetisation of Rs. 500 & Rs. 1000 notes- immediate relief to be provided to BOP (Toll Concessions) it is provided in Paras 5 & 6 as follows:

"5. As the payment are to be released urgently, an undertaking will be submitted by the Concessionaire that these costs (interest payment on debt and O&M expenses) are arising due to the force majeure event and while auditing, if any amounts is found due to the Authority, it will be recovered from the Escrow Account of the Concessionaire

6. We may release 90% of the amount so arrived to keep a reconciliation margin."

5.4.5. The arbitral Tribunal further finds that in the NHAI/Policy Guidelines/SOP dated 13.03.2018 for providing relief to Concessionaires/2018 (Annexure R-13 Pg. 100 of Statement of Defence), the process for release of payment under Clause 34.7 of the Concession Agreement, has been detailed. At Page 103 of the Statement of Defence in Annexure R-13 It is stated in Para 5 that the IE will within 3 working days certify the claim in line with the definition of O&M Expenses provided in the Concession Agreement and as depicted in the SOP dated 13.03.2018. It is further stated in Para 7 at Pg. 103 that the Concessionaire will submit the copies of the documents to the RO within 7 working days of receipt of the certification of the IE and in Para 7 (i) at Pg. 104 of the Statement of Defence, one of the documents to be submitted by the Concessionaire is an undertaking that the claims are true and correct and authorised in favour of NHAI to recover from Escrow Account of the concessionaire if any amount has been found to be paid excess in comparison to the due amount during subsequent audits etc. In Para B at Pg. 104 of the Statement of Defence, It is further stated:

"The RO will release 90% of the claim amount of the Concessionaire within 5 working days upon submission of the above documents by the Concessionaire itself"

Therefore, the contention of the Respondent that no time limit was fixed in the SOP dated 13.03.2018 of NHAI for release of O&M Expenses to the Concessionaire is not correct. It is thus clear that the RO of the Respondent was to release 90% of the claim amount of the Concessionaire within 5 working days on submission of the required documents by the Concessionaire.

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NEUTRAL CITATION NO: 2022/DHC/001972 5.4.6. The arbitral Tribunal also finds that the Claimant by its letter dated 16.06.2017 (Annexure C-71 Pg. 639 Vol C-31 has submitted its claims for D&M Expenses to the Project Director amounting to Rs. 1,47,80,514 and has also stated at Pg. 640 Vol. C-3 that as the Claimant has to make payments to its creditors and maintain sustainable cash flow to meet its ongoing O&M expenditures, 90% of the payment determined under Article 37.4.2 be credited to the Escrow Account within 15 days. The arbitral Tribunal further finds that by letter dated 16.08.2017 to the IE, Ms. Aarvee Associates (Annexure C-74 Pg. 656 Vol. C-3), the Claimant submitted the undertaking to reimburse NHAI any difference that arises on reconciliation of its claims and also apprise NHAI to recover the differential amount from Escrow Account by writing to the Escrow Bank directly. In the said letter, the Claimant also requested for earlier release of payment of compensation as per the Force Majeure clause. Therefore, the contention of the Respondent that the Claimant never made a demand for payment of the O&M expenses during the period the toll collection was suspended due to demonetisation of Rs. 500 and Rs. 1000 is not correct.

5.4.7. A reading of Clause 47.5 of the Concession Agreement extracted above would show that where the Concession Agreement is silent regarding the period in which the payments has to be made from one party to the other party and if no period as such is specified in the Concession Agreement then the payment has to be made within 15 days of receiving a demand along with necessary particulars. Article 47.5 further provides that in the event of delay beyond such period, the defaulting party shall pay interest for the period of delay calculated at the rate equal to 5% above the Bank Rate, Article 34.7.2 of the Concession Agreement only states that upon occurrence of a force majeure event after the appointed date the costs incurred and attributed to such event and directly relating to the project shall be allocated and paid but does not specify the the limit within which a party has to be paid the force majeure costs. In the absence of any specific period mentioned in Clause 34.7.2 of the Concession Agreement, the payment of Force Majeure cost has to be made within 15 days from the date of demand. In this case, the demand was made by the Claimant by its letter dated 16.06.2017 (Annexure C-71 Pg. 639 Vol. C-3) but the Claimant submitted the undertaking to reimburse the differential amount to the Respondent on 16.08.2017 (Annexure C-74 Pg. 656 Vol. C-3). The 15 days period calculated from 16.08.2017 expired on 30.08.2017. The payment of Rs. 1,37,63,577 was made on 10.11.2018. The Claimant was therefore entitled to interest at 5% higher than the Bank Rate as on 16.08.2017 for the period from 30.08.2017 to 10.11.2018 under Article 47.5 of the Concession Agreement.

The arbitral Tribunal finds that the Bank Rate as on 30.08.2017 was 6.5%. 5% higher than this Bank Rate would be 11.5% per annum. Hence, the This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/001972 Claimant will be entitled to interest at the rate of 11.5% per annum for the period from 30.08.2017 to 10.11.2018 (437 days). The calculation of this interest is as follows:

Principal Amount: Rs. 1,37,63,577 Interest Rate: 11.5% Time: 437 days (1.2 years) Simple Interest: Principal Amount x Rate x Time/100 Simple Interest -  $1,37,63,577 \times 11.5 \times 1.2/100 = 18,95,037.16$  Therefore, the Claimant is entitled to an award of interest of Rs. 18,95,037.16."

25. VTPL submitted their claim on O&M expenses vide letter dated 16th August, 2017. The O&M charges were paid by NHAI only on 10th November, 2018. Article 34.7.2 of CA does not specify the limit to which the force majeure costs have to be paid to the parties. Accordingly, reference was made to Article 47.5 and the Tribunal found that the Force Majeure Costs were payable within 15 days from the date of demand, which, in the instant case, expired on 30th August, 2017. Accordingly, the Tribunal proceeded to award interest of Rs. 18,95,037.16 to VTPL calculated @ 11.5% for a period of 437 days (i.e., 30th August, 2017 to 10th November, 2018). VTPL submitted its requisite undertakings vide communication dated 16th August, 2017 and also requested for the release of payment of compensation as per force majeure clause. The rate of interest awarded under the impugned Award is in consonance with Article 47.5 of CA which stipulates that, in the event of delay, the defaulting party shall pay interest for the period of delay calculate at the @ 5% above the bank rate.

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26. The afore-noted determination contained in the impugned Award is based on factual events as well as correspondence exchanged between the parties. The Tribunal has made purely factual determination qua the said claim and the Court does not find any merit in interfering with the findings rendered by the Tribunal.3 IV. DISPUTE NO. 6 AND 7 - PRE-AWARD AND POST AWARD INTEREST

27. Ms. Sharma contends that the Arbitral Tribunal erroneously awarded pre-award interest qua Dispute No. 3 and post-award interest qua Dispute No. 7, by wrongly placing reliance upon Article 47.5 of CA.

#### ANALYSIS

28. The Arbitral Tribunal awarded pre-award interest @11% and post- award interest @11.5% simple interest on the sum awarded in respect of Dispute No. 3/ Claim No. 4. The said award of interest is in consonance with Article 47.5 of CA.

29. The interest herein has been awarded as per the contractual rate and the same is reasonable and therefore, the Court finds no ground whatsoever to interfere with the same.

#### V. DISPUTE NO. 8 - COST OF ARBITRATION

30. Ms. Sharma argues that since Tribunal partly awarded claims in favour of VTPL as well as NHAI - NHAI cannot be said to be the See: Associate Builders (supra) and ONGC (supra).

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NEUTRAL CITATION NO: 2022/DHC/001972 unsuccessful party that is liable to bear the arbitration costs.

#### ANALYSIS

31. The Tribunal awarded the cost in favour of VTPL as they succeeded in the arbitration proceedings. It is certainly the successful party. The award of cost is found to be reasonable and no ground whatsoever is made out to interfere with the same.

32. In view of the above, the Court does not find any merit in the present petition and the same is dismissed along with pending applications.

SANJEEV NARULA, J MAY 13, 2022 akansha/nd (Corrected and released on 21st May,2022) This is a digitally signed Judgement.