Delhi High Court
National Highways Authority Of ... vs M/S. C.P. Rama Rao [Proprietor] on 17 February, 2022
NEUTRAL CITATION NO: 2022/DHC/001124

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
Date of Decision: 17th February, 20
+ O.M.P. (COMM) 215/2019 & I.A. 7620/2019, 7311/2020
NATIONAL HIGHWAYS AUTHORITY OF INDIA..... Petitioner
Through: Mr. Saurabh Banerjee, Counsel.
versus

M/S. C.P. RAMA RAO [PROPRIETOR] ..... Respondent
Through: Mr. S. Ram Babu and Mr. Angad Mehta, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA
JUDGMENT

[VIA HYBRID MODE] 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 February, 2019 passed by the learned Sole Arbitrator, whereby claims of the Respondent (Claimant in Arbitration) stand allowed and the counter-claims of the Petitioner (Respondent therein) stand rejected.

BRIEF FACTS

2. National Highways Authority of India [hereinafter, "NHAI"], entrusted operations of the Toll Plaza at Vempadu, Visakhapatnam District, Andhra Pradesh [hereinafter, the "Toll Plaza"] to M/s. C.P. Rama Rao vide a Contract Agreement dated 30th July, 2016 [hereinafter, the "Contract This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/001124 Agreement"]. During the term of Contract, from 1st August, 2016 [08:00 hrs] to 01st August, 2017 [07:59 hrs] Respondent had agreed to pay Rs. 2,24,40,274/- as weekly remittance from user fee collections at the Toll Plaza.

3. Disputes arose in relation to collection of user fee at the Toll Plaza, consequent to demonetisation policy effectuated by the Union of India, whereby Rs. 500/- and Rs.1000/- notes (the extent of which was about 85% of the total currency in circulation) were withdrawn as legal tender w.e.f. 8th November, 2016. Respondent sought waiver in remittance of agreed weekly amount, claiming the act of demonetisation to be a "force majeure" event - in accordance with Clause 25(b) of the Contract Agreement. NHAI, on the other hand, disputed that the event was force majeure, and also the Respondent's entitlement for waiver in remittance of agreed weekly charges. The disputes

culminated in arbitration before an Arbitral Tribunal, appointed by this Court, on a petition filed by the Respondent.

4. In Arbitration, Respondent (Claimant therein), contended that as a result of demonetisation, collection of user fee at the Toll Plaza came to a grinding halt w.e.f. 9th November, 2016 [00:00 hrs]. NHAI, vide e-mail dated 9th November, 2016, suspended collection of user fee from vehicles passing through the Toll Plaza. Nonetheless, before receipt of notice of suspension, for approximately 21 hours, commencing from 8th November, 2016 [22:00 hrs], the Respondent could not collect user fee at the Toll Plaza, and accordingly, sought waiver of the same during the said period. Such suspension continued at the Toll Plaza from 9th November, 2016 [17:30 hrs] This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/001124 to 2nd December, 2016 [24:00 hrs] for approximately 23.263 days [hereinafter, "toll free period"], on the basis of different circulars issued by NHAI and its respective Regional Offices. However, Respondent contended that the effect of demonetisation persisted throughout the 'force majeure period' from 9th November, 2016 to 28th February, 2017, and thus, sought waiver of user fee during such period to the extent of the difference between actual weekly remittance and actual collection (minus the maintenance charges).

AT ARBITRATION

5. At Arbitration, the Respondents sought reliefs as follows:

> "i) Waiver of the payment of Rs.6,76,71,317/- out of the liability of Rs.
>
> 8,09,02,416/- considering the period 09.11.2016 to 28.02.2017 as period falling under Force Majeure period and;
>
> ii) Refund for a sum of Rs.1,32,31,099/- (already paid under duress) out of the liability of Rs.8,09,02,4161- considering the period 09,11.2016 to 28.02.2017 as period falling under Force Majeure period and;
>
> iii) Interest @ 18% per annum compounded quarterly on the amount of refund of Rs. 1,32,31,099/-."

6. NHAI, on the other hand, defended the claims and raised counter- claims against the Respondent to the extent of (i) recovery of unpaid balance in terms of Clause 'H' and 19 of the Contract Agreement; (ii) liquidated damages; and (iii) costs - all the tune of Rs. 17,29,77,390/-, along with interest. NHAI did not dispute the factual position emerging from demonetisation of Rs. 500/- and Rs. 1000/- notes, however, it contended that the incident of demonetisation did not come within the purview of 'change of law' as defined under Clause 25(b) of the Contract Agreement. NHAI also denied that the act of demonetisation had an adverse effect on user fee This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/001124 collection at the Toll Plazas during the period in dispute and argued that Respondent's claim - premised on Clause 25(b) of the Contract Agreement

- was contrary to the terms of the Contract Agreement and was entirely misconceived.

7. The learned Arbitrator identified seven issues for adjudication, as noted under paragraph no. 16 of the impugned Award, which are as follows:

> "16. After perusal of the pleadings and the above clarification rendered by the claimant's counsel, the tribunal identified the following points for determination:
>
> i) Whether the claimant is entitled to grant of waiver of the payment of Rs.6,76,71,317/- out of the liability of Rs.8,09,02,416/- considering the period 09.11.2016 to 28.02.2017 as period falling under Force Majeure period?
>
> ii) Whether the claimant is entitled to grant of refund for a sum of Rs.1,32,31,099/- (already paid under duress) out of the liability of Rs.8,09,02,416/- considering the period 09.11.2016 to 28.02.2017 as period falling under Force Majeure period?
>
> iii) Whether the claimant is entitled to grant of interest @ 18% per annum compounded quarterly on the amount of refund of Rs.1,32,31,099/-?.
>
> iv) Whether the respondent-NHAI is entitled to recover a sum of Rs.15,72,52,173/- from the claimant in terms of Clause-H and Clause- 19 of the Contract Agreement?
>
> v) Whether the respondent is entitled to recover a sum of Rs.1,57,25,217/- towards liquidated damages @ 10% of the total unpaid dues from the claimant?
>
> vi) Whether the parties are entitled to any pendente lite and future interest. in case any amounts are awarded in favour of either party and if so, at what rate? (As per Tribunal)
>
> vii) Which party is entitled to the cost of the present proceeding and what would be the amount of such cost?
>
> viii) Relief?"

8. The parties did not lead any oral evidence and disputes were decided purely on the basis of documents placed on record. The learned Arbitrator came to the conclusion that the incidence of demonetisation and claim raised This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/001124 thereon, fell within the scope of 'force majeure' under Clause 25(b) of the Contract Agreement, and allowed Respondent's claims accordingly, while rejecting the counter-claims of NHAI.

9. Aggrieved with the Award, the present petition has been filed NHAI under Section 34 of the Act.

CONTENTIONS OF THE PARTIES ON BEHALF OF NHAI

10. Mr. Saurabh Banerjee, Standing Counsel for NHAI, has made several submissions and placed reliance upon case laws to support his contentions which can be summarised as follows:

11. The act of demonetisation was not a force majeure event - since it was not an idea novel to India. In fact, there have been prior instances of the same viz. in 1946 and 1978. Demonetisation was a bona fide policy decision of the Government of India, issued in public interest and is constitutionally valid. Demonetisation was not an act of "taking away" legal tender of money, since the same was always available and in circulation, albeit in different denominations, and thus, there was no violation of any right(s) of any person and/ or party. Further, all previous acts of demonetisation challenged in various Courts had been upheld as legal and valid - to this effect, reliance is placed upon the judgements in Bimla Devi v. Union of This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/001124 India & Anr.,1 Jayantilal Ratanchand Shah etc. v. Reserve Bank of India & Ors.2 and M. Seeni Ahamed v. Union of India.3

12. Demonetisation was only a 'change in economic policy' and there was no illegality committed in execution thereof. The wisdom and advisability of economic policies are ordinarily not amenable to judicial review, unless it is demonstrated that such policy is contrary to the Constitution of India and/ or any statutory provision. The impugned Award has considered relative merits of the act of demonetisation, the correctness whereof could only be questioned in the Parliament. Reliance is placed on the judgement in BALCO Employees' Union (Regd.) v. Union of India.4

13. The act of demonetisation was not a force majeure event as per Clause 25(b) of the Contract Agreement as it was too remote a change in circumstances. It was for a short span and of a temporary nature, having no material adverse effect upon the obligations of the Respondent, causing no hindrance/ stoppage of traffic. It therefore, does not constitute a 'change in law' which had a material adverse effect on the Respondent's obligations. Though admittedly there was a reduction in traffic flow during the demonetisation period, it did not have any adverse effect on the Contract Agreement as the fundamental basis was not dislodged.

1983 [4] DRJ 236 [See paragraphs no. 13-17].

1996 SCALE (5) 741 [See paragraphs no. 6-10].

2016 SCC OnLine Mad 10039 [See paragraphs no. 1, 2.1, 3, 7-9, 11-13 & 15-18].

(2002) 2 SCC 333 [See paragraphs no. 92-93].

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14. There was no frustration and/ or impossibility of performance of the Contract Agreement. The Respondent was always provided with, and in fact, it did avail the alternate means/ remedies. It never raised any complaint against insufficiency in respect of remedies made available to it, and rather, reaped benefits thereon - for instance, Respondent voluntarily chose not to execute and walk out of the 'Supplement and Closeout Agreement' offered to it by NHAI for the reimbursement of expenses incurred during the demonetisation period. The Respondent, is therefore, estopped from now seeking shelter under the garb of making fresh claims under the 'force majeure' clause - more so, for its non-performance of mandatory terms of the Contract Agreement. To this extent, reliance is placed on TGV Projects & Investments Private Limited v. National Highways Authority of India.5

15. The Contract Agreement inter se the parties was a 'commercial contract' for a fixed yearly term and with a fixed weekly amount - which was entered into by the Respondent for its business efficacy. The Contract Agreement was not a 'performance-based contract' and was in no manner dependent upon any vehicular movements or financial implications i.e., decrease or increase in weekly traffic and/ or in collection of weekly amounts at any period before, during or after the demonetisation period. Although there is no benchmark of minimum traffic flow or minimum weekly collection, the learned Arbitrator passed the impugned Award on a mere presumption that the collection of user fee was not matching the average fee collection. The Contract Agreement was not frustrated and the 'force majeure' clause is not applicable to the facts and circumstances of the FAO (OS) 244/ 2018 dated 11th December, 2018 [See paragraphs no. 18-21].

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NEUTRAL CITATION NO: 2022/DHC/001124 instant case, merely because there was a change in circumstances - more so, when the Respondent never challenged the act of demonetisation. In fact, Respondent's claim is rather only based upon after effects i.e., financial implications during the demonetisation period to somehow escape paying the mandatory weekly remittance of Rs. 2,24,40,274/- under Clause 'H' of the Contract Agreement. To this extent, reliance is placed on M/s. Alopi Prashad & Sons, Ltd. v. Union of India,6 Continental Construction Co. Ltd. v. State of Madhya Pradesh,7 Track Innovations India Pvt. Ltd. v. Union of India & Ors.8 Satyabrata Ghosh v. Mugneeram Bangur & Co. & Anr.9 and Sri Amuruvi Perumal Devasthanam v. K.R. Sabapathi & Anr.10

16. The Contract Agreement was never abandoned, altered or modified by mutual consent or otherwise, and thus, both parties are bound by Sections 91 and 92 of the Evidence Act, 1872. Thus, irrespective of the alleged 'change of event' or otherwise, in terms of Clauses 'H' and 19 of the Contract Agreement, the Respondent was obliged to pay the mandatory weekly remittance as well as interest for non-payment thereof to NHAI. When the Respondent failed to comply with Clause 'H' of the Contract Agreement and abruptly stopped making payments to NHAI, the learned Arbitrator - in stark contravention of the trite law that 'change in circumstances' would not be tantamount to 'change/ alteration in a contract' - has wrongly held that change in circumstances (in this case, the reduction in the volume of traffic) has altered the contractual obligations of the Respondent as

under Clause 1960 (2) SCR 793 [See paragraphs no. 20-20].

AIR 1988 SC 1166 [See paragraphs no. 5-6, 8-9].

170 (2010) DLT 424 [DB] [See paragraphs no. 9, 12, 16, 18].

AIR 1954 SC 44 [See paragraphs no. 21-22, 24-25].

AIR 1962 Mad 132 [See paragraph no. 15].

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NEUTRAL CITATION NO: 2022/DHC/001124 'H' of the Contract Agreement qua payment of weekly remittance. In doing so, the learned Arbitrator has altered/ overlooked the terms stipulated under the Contract Agreement and has, in fact, re-written the terms, thereby, rendering the Contract Agreement otiose, redundant and frustrated.

17. The learned Arbitrator has wrongly awarded Rs. 7,41,36,597/- [Rs. 6,76,71,317/- (towards waiver of payment w.e.f. 3rd December, 2016 till 28th February, 2017, out of its liability of remittance of payment in accordance with Clause 'H' of the Contract Agreement) + Rs. 49,65,280/- (towards operation and maintenance w.e.f. 9th November, 2016 till 2nd December, 2016 along with simple interest of 14% p.a. w.e.f. 1st April, 2017 till date of payment) + Rs. 15,00,000/- towards cost)].

18. The learned Arbitrator has wrongly awarded an additional/ imaginary claim of Rs. 49,65,280/- to the Respondent as (i) NHAI had already suspended user fee collection at the Toll Plaza during the 'toll free period';

(ii) in terms of Clauses 12, 13(i), 15(a), (c), (f) and 23 of the Contract Agreement, the Respondent was obligated to carry out the overall work including - the functioning, deployment of personnel, infrastructure, maintenance and other operations relating to collection of user fee at the Toll Plaza; and (iii) despite recognising that there was no stoppage, and rather, only a reduction in traffic in paragraphs no. 25-27 of the impugned Award, the learned Arbitrator proceeded contradictorily hold that "the collection of user fee became zero during that period" in paragraphs no. 35-36, and subsequently thereto, wrongly proceeds to state that the same is justified.

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NEUTRAL CITATION NO: 2022/DHC/001124 The same has resulted in the double enrichment of the Respondent and is beyond the scope of the Contract Agreement.

19. Respondent never complied with the mandatory stipulations of Clause 25(c)(i)(1) of the Contract Agreement on two fronts - in that the Respondent failed to (i) make any 'Notice of Claim' in compliance thereof and (ii) provide the requisite particulars in compliance thereof. NHAI had already denied Respondent's claim vide letter dated 20th December, 2017 as it was not covered

under Clause 25(b) of the Contract Agreement, and was thus, not maintainable.

20. NHAI's counterclaims, which were for a longer period than that of the Respondent, have been completely ignored, and thus, the impugned Award is liable to be set-aside and NHAI's counter-claims be allowed.

ON BEHALF OF THE RESPONDENT

21. Mr. S. Ram. Babu, counsel for the Respondent, defended the impugned Award and submitted that the same suffers from no infirmity as contested by NHAI. The jurisdiction of the Court qua the scope of interreference in an arbitral award is extremely restricted under Section 34 of the Act. Since NHAI has been unable to show any perversity and/ or illegality in the impugned Award, the Court should not interfere with any of the findings made therein under its limited scope for review.

22. Mr. Ram Babu also argued that the view taken by the learned Arbitrator in coming to the conclusion that demonetisation constituted a This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/001124 'force majeure' event - is in consonance with the terms of the Contract Agreement. Pertinently, it is a subject-matter falling in the exclusive domain of the learned Arbitrator and even if NHAI's arguments were to be accepted, they, at best, can only raise a plausible view - which cannot be a basis to impugn the Award.

23. On merits, Mr. Ram Babu submits that demonetisation was a 'change in law' which cannot be disputed, and thus, the findings of the learned Arbitrator to that effect cannot be faulted with. That demonetisation had adversely affected the Respondent is beyond any air of controversy, as NHAI itself has acknowledged the same by suspending the user fee collection on six different occasions, for brief periods, from 09 th November, 2016 to 30th November, 2016 - lasting for nearly 23 days. Besides, the impact on the user fee collection owing to demonetisation, and consequently, the withdrawal of the Rs. 500/- and Rs. 1000/- notes as legal tender was also successfully established by leading evidence before the learned Arbitrator. Therefore, the findings are absolutely correct and the petition deserves to be dismissed.

24. Mr. Angad Mehta, appearing along with Mr. Ram Babu, also placed reliance upon the judgments of this Court in National Highways Authority of India v. C.P. Rama Rao (Proprietor) 11 and the decision of the Division Bench in the same matter.12 O.M.P. (COMM) 127/2021.

In F.A.O. (COMM) 116/2021.

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NEUTRAL CITATION NO: 2022/DHC/001124 ANALYSIS

25. The Court has considered the contentions advanced by the parties. The position in contract law relating to force majeure, taken note of by the learned Arbitrator in paragraph no. 20 of the

impugned Award is in consonance with the view expressed by the Supreme Court. In Energy Watchdog v. CERC & Ors.,13 relying upon the earlier decision Satyabrata Ghosh v. Mugneeram Bangur & Co. & Anr.,14 the Supreme Court held that when a contract contains a force majeure clause, which on construction is held attracted to the facts of the case, Section 56 of the Indian Contract Act 1972 can have no application.

26. In that light, the learned Arbitrator noticed that Respondent's claim of force majeure was not premised on Section 56 of the Indian Contract Act, 1872, but rather, based on contractual terms viz. Clause 25(b). He then rightly proceeded to examine whether the 'force majeure event', as claimed by the Respondent, could be held to be so, on the basis of the facts and material produced in arbitration.

27. Thus, the short question that arises before the Court pertains to the interpretation of the terms of the Contract Agreement viz. whether the act of demonetisation, which forms the basis of the Respondent's claim, falls within the scope of 'force majeure event' in terms of the Contract Agreement. For this purpose, it is considered apposite to analyse the relevant clause, which reads as follows:

(2017) 14 SCC 80.

AIR 1954 SC 44.

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NEUTRAL CITATION NO: 2022/DHC/001124 "25(b) FORCE MAJEURE EVENT:

Except as sated 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 tf1e 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 in the nature, without limitation of those described below:

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(i)     xx..xxx...xx
(ii)    xx..xxx...xx
(iii) xx..xxx...xx
(iv)    xx..xxx...xx
(v)     Any change in law which has a material adverse effect
        on the obligation of the parties hereto.
(vi)    xx..xxx...xx
(vii) xx..xxx...xx
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(viii) Any event or circumstances of a nature analogous to the foregoing.

Either 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 for 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."

28. It is unassailable that the act of demonetisation was beyond control of the parties - which the Respondent could not have prevented or reasonably overcome. The nature of the events described in the clause are varied and the relevant sub-clause relied upon by the Respondent uses the expression "Any change in law which has a material adverse effect on the obligation of the parties hereto." The afore-noted clause is widely worded but spells out pre-conditions for falling within its ambit. The first one is that there has to be a 'change in law'. Here, the Court is unable to agree with the contention This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/001124 of Mr. Banerjee that the act of demonetisation - was only a 'change in economic policy'. On this issue, it must be noted that the learned Arbitrator has analysed the legal provisions governing the act of demonetisation. He has traced it to Government of India notification viz. S.O. No. 3407(E) dated 8th November, 2016 [hereinafter, the "Notification"] and the specified bank notes (Cession of Liabilities) Ordinance, 2016 dated 30 th December, 2016 issued under Article 123 of the Constitution of India read with Section 24 of the Reserve Bank of India Act, 1934 [hereinafter, the "Ordinance"]. The learned Arbitrator has also referred to the definition of the term "law" by placing reliance on Article 13 of the Constitution of India, and concluded that the afore-noted Notification and Ordinance issued by the Government of India were well within the ambit of the definition of "law" - having the effect of bringing change in the existing law with regard to the nationwide revocation of the 500/- and 1000/- notes on 8th November, 2016. The relevant portion from the findings of the learned Arbitrator on this issue is as follows:

> "22. A bare reading of the above provision of the Constitution makes it amply clear that the notification S.O. No.3407(E) dated 08.11.2016 and the above referred ordinance are well covered under the term "law" and it had the effect of bringing change in the existing law in regard to the GC Notes which were in vogue in the Country as on 08.11.2016. [...]"

The afore-noted analysis is in consonance with the law and the Court finds no infirmity in the view taken by the learned Arbitrator.

29. As regards Mr. Banerjee's contention relating to the legality of execution of demonetisation is concerned, the Court finds the submissions to be misconceived. The Respondent did not and was not required to assail the This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/001124 act of demonetisation in order to succeed in arbitration. This decision was well-within the powers of the Government of India. The question in arbitration was not regarding the legality or the merits of such decision, but rather, whether the afore-noted Notification and Ordinance would fall within the scope of "change in law" as provided in the Contract Agreement. The learned Arbitrator has only discussed the impact of such act to the

extent it was necessary for determination of the claims.

30. Holding the act of demonetisation to constitute a 'change in law', the next aspect dwelled into by the learned Arbitrator was qua the effect thereof on the obligations of parties. This was the next requisite for falling within the scope of Clause 25(b)(v) of the Contract Agreement, which stipulates that the change of law should also have "material adverse effect on the obligations of the parties hereto", meaning thereby, that not every change in law can absolve a party to a contract from performance of its obligations.

31. According to the Respondent, there were several practical difficulties at the ground level impeding the movement of traffic, resulting in a substantially lower collection of user fee at the Toll Plaza due to a visibly reduced number of vehicles passing through the Toll Plaza as compared to the period prior to 8th November, 2016 i.e., before the force majeure act of demonetisation. Such reduction in vehicular traffic was due to the impact of demonetisation and not attributable to the Respondent. The Respondent has claimed the difference in user fee collection per day during the force majeure event and the average amount of collection per day arrived at on the agreed weekly remittance multiplied by the number of days of the force This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/001124 majeure event. The Respondent contended that the force majeure period persisted as late as 28th February, 2017 and requested for relief under Clause 25(c)(ii)(5) of the Contract Agreement, which reads as follows:

> "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."

On this crucial question as to whether the act of demonetisation resulted in consequences having a "material adverse effect on the obligations of the parties", the learned Arbitrator rightly rejected the NHAI's contention that there was no situation affecting traffic flow. The Respondent demonstrated that the 'change in law' had an effect of drastic reduction in vehicular traffic

- which resulted in non-performance of the obligations under the Contract Agreement. Concededly, post-demonetisation, NHAI recognised the impact on user fee collection at the Toll Plazas, and took the decision to lower the Annual Potential Collection valued up to 29% for allotment of contracts during the period from 6th January, 2017 to 6th February, 2017 at several of its Toll Plazas. NHAI had suspended the collection of user fee during the 'toll free period' from 9th November, 2016 and had directed the Toll Plazas to recommence the collection only from 03rd December, 2016.

32. NHAI had extended the suspension on collection of user fee from time to time. NHAI also does not dispute that it had suspended the collection of user fee by Toll Plaza collectors during the 'toll free period' from 9th November, 2016 to 2nd December, 2016, yet, it denies that the same resulted owing to the occurrence of a 'force majeure event'. That apart, this stand, is This is a digitally signed

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NEUTRAL CITATION NO: 2022/DHC/001124 evidently contrary to NHAI's own circulars. Conduct of the parties is a relevant factor and has a bearing in the construction of the obligations under a contract. Since NHAI had itself recognised the extraordinary situation arising due to demonetisation and had temporarily suspended user fee collection at Tolls Plazas, the only germane question is whether the reduction in user fee collection beyond the suspension period was a result of force majeure conditions. In other words, did the condition persist as claimed by the Respondent.

33. In order to prove its claim, Respondent had also relied upon several circulars issued by the Reserve Bank of India from time to time, instructing the banks with regard to limits on exchange of cash, withdrawals from ATMs and weekly limits for withdrawal from the bank accounts. The Respondent placed on record - RBI Reports of 10th November, 2016 and November, 2017 on the impact of demonetisation - which spell out that the Government of India demonetised 86.9% value of the money in force and categorically explained that remonetisation of the currency could not be achieved as on 28th February, 2017. In fact, the November, 2017 report notes that even as late as 27th October, 2017, the cash in circulation growth was far below said growth as on 07th November, 2016.

34. The RBI, had initially, vide notification dated 8th November, 2016, imposed restrictions on the afore-mentioned limits, and thereafter, vide circular dated 13th November, 2016, enhanced the exchange limit from Rs. 4000/- to Rs. 4500/-. Thereafter, vide circular dated 6th January, 2017, the ATM withdrawal limit was enhanced from Rs. 4500/- to Rs. 10,000/-, and This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/001124 subsequently, vide circular dated 8th February, 2017, the withdrawal limits of Saving Bank account were enhanced to Rs. 50,000/- per week from Rs. 24,000/- w.e.f. 20th February, 2017 - all of which indicate that the shortage of cash in circulation continued. Respondent proved that withdrawal of high- value banknotes posed cash-flow concerns and resulting in decreased rates of user fee collection at Toll Plazas. These aspects were considered by the learned Arbitrator and it was found that Respondent had successfully demonstrated that the 'change in law' adversely impacted it during the 'force majeure period', in question. This factual determination, arrived at by the learned Arbitrator on the basis of the material placed on record, appears to be reasonable and cannot be corrected as an error of fact. The Court is therefore, unable to agree with Mr. Banerjee that the 'change in law' did not have any material adverse effect on the Respondent's obligations.

35. Mr. Banerjee also argued that the act of demonetisation did not have any adverse effect on the Contract Agreement as the Respondent was provided with alternate modes. This aspect has also been considered by the learned Arbitrator, however, he concluded that the adverse impact continued for the force majeure period, in question, notwithstanding the options extended by NHAI, as has been stated by Mr. Banerjee.

36. The Respondent had duly notified the event to NHAI, which has been taken note of by the learned Arbitrator. The contention of Mr. Banerjee that the materially adverse effect, as contemplated under Clause 25(b)(v) of the Contract Agreement, must be understood to be a case of zero collection alone, is also unmerited. The scope under Clause 25(b)(v) of the Contract This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/001124 Agreement does not provide for any such qualification. It stipulates that "any material adverse effect" resulting from any 'change in law' would be sufficient to attract the said provision, and therefore, it would not be permissible to restrict the import of the said sub-clause only to such 'changes in law', which result in zero collections of user fee at the Toll Plaza.

37. In somewhat similar facts, a co-ordinate bench of this Court in National Highways Authority of India v. M/s C.P. Rama Rao 15 has construed the said clause in relation to the impact of 'change in law' brought in by the introduction of the Goods and Service Tax ("GST") which led to a sharp reduction of traffic, resulting in lower collection of user fee. The Court therein, considered similar contentions as advanced by NHAI, however, found Clause 25(b)(v) of the Contract Agreement not to be restrictive in nature.

38. As regards Mr. Banerjee's contention qua Respondent's failure to notify the claim in compliance of Clause 25(c)(i)(1) of the Contract Agreement, it is apposite to note the findings of the learned Arbitrator on the same, which read as follows:

> "32. The Ld. Counsel for the respondent has not cited any decision on the question which had taken a contrary view, while interpreting clause (b) of Section 28 of the Contract Act. The tribunal, is therefore inclined to accept the plea put forth from the claimant side and hold that failure of strict non- compliance of the provisions of clause 25(c)(1)(1) of the Agreement will not debar the contractor from making a claim based on force majeure event. In any case, the Tribunal finds that there has been sufficient compliance of the O.M.P. (COMM.) 127/2021 dated 23rd March, 2021.

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NEUTRAL CITATION NO: 2022/DHC/001124 said provision, if we make a conjoint reading of the said clause alongwith sub-clauses (4) & (5) of clause (c).

33. In view of the above findings, point No.1 must be answered in affirmative and in favour of the claimant. Since there is no dispute that the as per clause H of the agreement, the liability of the claimant to remit the user collection charges between 03.12.2016 to 28.02.2017 was to the tune of Rs.28,21,06,264/- calculated at the rate of Rs.2,24,40,274/- (Rupees Two Crore Twenty Four Lac Forty Thousand Two Hundred Seventy Four only) per week and the claimant has already remitted a sum of Rs.21,44,34,947/- to the respondent, so the claimant is entitled to the waiver of a sum of Rs.6,76,71,317/- and the respondent is not entitled to recover the same from the claimant, as there has been reduction in the collection of user fee at the toll plaza, due to the force majeure event

happening on impact of demonetization of the govt. currency."

The afore-noted findings are rational and the challenge on this ground is without substance. Therefore, the Court finds no infirmity, patent illegality or perversity in the view taken by the learned Arbitrator. As already mentioned above, the interpretation of an arbitration clause falls within the jurisdiction of the Arbitral Tribunal and may only be interfered on limited grounds as set out under Section 34(2) of the Act. The view on facts taken by the learned Arbitrator, who is the ultimate master of the quantity and quality of evidence, cannot be a ground of challenge under Section 34 of the Act.

39. Lastly, reliance placed on the judgments in Energy Watchdogs v. Central Electricity Regulatory Commission & Ors;16 (ii) Coastal Andhra Power Limited v. Andhra Pradesh Central Power Distribution Co. Limited & Ors.;17 (iii) Zee Entertainment Enterprises v. Railtel Corporation of (2017) 14 SCC 80.

2019 SCC OnLine Del 6499.

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NEUTRAL CITATION NO: 2022/DHC/001124 India18 are not applicable to the factual matrix in the present case.

40. It is observed that in Energy Watchdogs (Supra), the Court interpreted the force majeure clause as found in Clause 12.4 of the PPA therein and noted that the event claimed as force majeure therein - was contrary to the contractual provisions. Similarly, in Coastal Andhra Power Limited (Supra), reliance was placed on the judgment in Energy Watchdogs (Supra), to hold that price escalation and change in law abroad (in Indonesia) as stipulated under Clause 12.4 of the PPA therein - does not amount to force majeure and change in law. Further, in Zee Entertainment Enterprises (Supra), in terms of Clause 3.26 of the GCC therein, it was observed that the claim of COVID-19 as a force majeure event - would not excuse performance of payment obligations under the contract. Therefore, it emerges that if there is a contractual stipulation with respect to the occurrence of a 'force majeure event', its interpretation has to be in terms of the contractual provisions therein. That precisely has been done by the learned Arbitrator on the basis of the material produced before him. In absence of any manifest patent illegality in the view taken by the learned Arbitrator, the Court is not inclined to interfere with the award.

41. For the aforesaid reasons, the Court does not find any merit in the contentions of Mr. Banerjee. Dismissed.

SANJEEV NARULA, J FEBRUARY 17, 2022/d.negi (corrected and released on 29th March, 2022) 2021 SCC OnLine Del 5004.

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