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

\+ O.M.P. (I)(COMM) 141/2022 & I.A. 7048/2022

ANKAPALLI TOLLWAY PRIVATE LTD. ..... Petitioner

Through: Mr. Madhur Baya, Ms. Geetanjali and Mr. Mahesh Sahasranaman, Advocates.

versus

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

Through: Mr. Ankur Mittal, Mr. Abhay Gupta and Mr. Debojyoti Sengupta, Advocates.
Mr. S. L. Gupta and Mr. Pragati Srivastava, Advocates for R-2/SBI.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

O R D E R

% 06.05.2022

I.A. 7048/2022 *(u/S. 151 of the Code of Civil Procedure, 1908 seeking exemption from filing legible copies of dim documents, underline and font size of documents and lengthy list of dates)*

1. Exemption is granted, subject to all just exceptions.

2. The Petitioner shall file legible and clearer copies of exempted documents, compliant with practice rules, before the next date of hearing.

3. Accordingly, the application stands disposed of.

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4. The Petitioner has invoked Section 9 of the Arbitration and

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Conciliation Act, 1996 [hereinafter, '***the Act***'] to seek urgent interim protection and restraint against Respondent No. 1 from taking any coercive action, including but not limited to taking recourse to the Escrow Account No. 40221375493 (maintained at State Bank of India, Overseas Branch, World Trade Centre, Mumbai), for recovering/realizing an amount of INR 4,21,41,589/- pursuant to Respondent No. 1's letter dated 02nd May, 2022. According to the Petitioner, NHAI has not undertaken the remedial works or incurred any cost for the alleged failure on the part of the Petitioner to complete the work. Therefore, no amount has been found due under Article 15.9.2 read with 15.9.1 and 23A.3.1(f) of the Concession Agreement. In such circumstances, the Escrow Account could not have been invoked.

5. The Petitioner, at the outset, relies upon the interim order dated 14th December, 2021 of the Division Bench in FAO(OS)(COMM) 171/2021 titled ***Bamanbore Tollway Private Ltd v. National Highways Authority of India & Anr.***, wherein, while examining a challenge to the decision dated 01st December, 2021 rendered by this Court in O.M.P.(I)(COMM) 392/2021, the Division Bench has passed the following order:

> *"Issue notice. Mr. Mittal accepts notice on behalf of the respondent. In the meantime, the respondent shall not make recovery of damages under Clause 15.8.1 by resort to Clause 23A.3 .1 (f) of the agreement. However, it shall be open to the respondent to make recovery in terms of Clause 15.8.1 from the performance security.*
>
> *Mr. Nayar states that as and when the performance security is invoked, the appellant shall raise its defences in that regard."*

6. Mr. Madhur Baya, counsel for the Petitioner, states that invocation of Escrow Account is contrary to the aforenoted Order dated 14th December, 2021. He further states that the view taken by this Court in O.M.P.(I)(COMM) 392/2021 has not been accepted by the Division Bench.

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7. Mr. Ankur Mittal, counsel for the Respondent, on the other hand, states that the judgment dated 01st December, 2021 has not been stayed, and therefore, the Respondent has the right to recover the amounts demanded from the Escrow Account. He argues that the Order dated 14th December, 2021 extracted above is only an interim measure, pending adjudication of the appeal. He further states that the Appellant therein had argued that there is a performance security available to make recovery in terms of Clause 15.8.1; thus, the said interim measure was passed in the facts and circumstances of the said case, and cannot be applied blindly to the present case.

8. Having considered the submissions of the counsel for the parties, the Court finds merit in the contention of the Respondent that there is no stay of the decision of this Court in O.M.P.(I)(COMM) 392/2021. Nevertheless, the said judgment of this Court is presently under challenge. Whether the interim measure put in place by the Division Bench is to apply only in the facts of the said case, is not apparent from a reading of the Order dated 14th December 2021. It is for NHAI to seek appropriate clarification on this aspect. Therefore, conscious of the fact that the adjudication of the appeal, in somewhat similar circumstances, is still pending, and that the Division Bench has restrained the Respondent from effecting recovery of damages under Clause 15.8.1 by resorting to Clause 23A.3.1(f) of the agreement, this court deems it fit to pass similar order protecting the Petitioner herein. Thus, in the instant case as well, the following interim measures are passed:

8.1. The Respondent shall not make recovery of damages under Clause 15.8.1 by resorting to Clause 23A.3.1(f) of the Agreement.

8.2. It shall, however, be open for NHAI to make recovery in terms of

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Clause 15.8.1 from the Performance Security of the Petitioner.

8.3. In case the performance security is invoked, the Petitioner shall be entitled to raise defences as available to it in accordance with law.

9. Reply to the present petition be filed within a period of four weeks from today. Rejoinder thereto, if any, be filed within a period of two weeks thereafter.

10. Re-notify on 01st August, 2022.

SANJEEV NARULA, J

MAY 6, 2022
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