



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

% Date of Decision: 03.02.2025

+ **O.M.P.(I) (COMM.) 26/2025, IA 1716/2025**

ETAWAH CHAKERI (KANPUR)
HIGHWAY PRIVATE LIMITED

..... Petitioner

Through: Mr. Anil Airi, Senior Advocate with
Mr.Mudit Ruhella and Mr.Vishal
Tyagi, Advocates

Versus

NATIONAL HIGHWAY
AUTHORITY OF INDIA & ANR

..... Respondents

Through: Mr.Santosh Kumar, Standing Counsel
with Mr.Arjun Singh Bhati and Mr.
Kartik K. Gupta, Advocates for
respondent no.1 (M:9818309301).
Mr. P.K. Jaiswal, Advocate for
respondent no.2.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT (ORAL)

1. By way of present petition filed under Section 9 of the Arbitration & Conciliation Act, the petitioner seeks the following prayers:-

“...A. Restrain the Respondent no. 1 from recovering an amount of Rs. 44,28,32,815/- from the Petitioner and also from the Escrow account pursuant to the letter dated 02.01.2025.

B. Restrain respondent no. 2 from releasing any such amount of Rs. 44,28,32,815/- pursuant to the letter dated 02.01 .2025 till the pendency of the Arbitral proceedings.

C. Any amount released 111 the violation of the Concession



Agreement...”

2. The petitioner and respondent No.1/NHAI entered into a Concession Agreement dated 05.03.2012 and Escrow Agreement dated 27.08.2021, and Clause 44.3 of the Concession Agreement thereof stipulates resolution of disputes through arbitration as governed under the A&C Act and further provides for the venue of Arbitration to be Delhi.

3. The present dispute arises in the context of enhanced fee collected by the petitioner for overloaded vehicles in compliance with amended Fee Rules, which, as per respondent No.1, had to be remitted to respondent No.1/NHAI in terms of the subject Concession Agreement, whereas it is the case of the petitioner that it is liable to pay only the concession fee and premium under the subject agreement. Resultantly, respondent No.1 directed respondent No.2/Axis Bank Ltd., which maintains the escrow account in terms of the Escrow Agreement between the parties, vide letter dated 02.01.2025, to deposit the contested amount as penalty from the escrow account into the account of respondent No.1. This Court, vide order dated 31.01.2025, has directed the parties to maintain *status quo* regarding the operation of the aforesaid letter.

4. Learned counsel for the petitioner, on instructions, prays that the Arbitration Agreement not being denied, the disputes arising in the context of the subject agreement be referred to the Arbitral Tribunal comprising of three Arbitrators, one nominated by each party and the third Arbitrator to be jointly appointed by the two selected Arbitrators. It is further prayed that the present petition filed under Section 9 of the A&C Act be treated as an application under Section 17 of the A&C Act.



Learned counsel further submits, on instructions, that the aforesaid prayer for reference of the present dispute to arbitration is only pressed against respondent No.1 since respondent No. 2 is a non-signatory to the subject agreement and the dispute persists qua respondent No.1 only.

5. Learned counsel appearing for respondent No.1 disputes neither the subject agreement nor the jurisdiction of this Court. However, he objects to the reference of the present dispute to arbitration by contending that the petitioner has failed to follow the pre-referral dispute resolution process as stipulated in the subject Concession Agreement. He submits that Clause 44.2 of the subject agreement stipulates the parties to first undergo conciliation and only upon failure to resolve the disputes amicably by way of conciliation, the parties shall refer the matter to arbitration under Clause 44.3. It is the case of the respondent No.1 that even though the petitioner had initiated conciliation regarding the subject dispute vide letter dated 22.07.2021, the petitioner never pursued the same and in fact, abandoned the process.

6. At this stage, learned counsel for the petitioner, while disputing the above contentions of the respondent No.1, submits that even though the petitioner took requisite steps and referred the dispute for conciliation under Clause 44.2 of the Concession Agreement vide Concessionaire letter no.1675 dated 22.07.2021 and even requested the Chairman, NHAI/respondent No.1 to refer the disputes to Conciliation & Settlement Committee of Independent Experts, however, respondent No.1 failed to take effective steps to complete the process. It is further pointed out that the petitioner had even given detailed response to the Independent Experts/Authority, despite which the Authority/NHAI still asked the



petitioner to deposit the disputed penalty amount. It is also submitted that there have been multiple communications to respondent No.1 to that effect, however, no correspondence or decision was ever received from respondent No.1/NHAI. Therefore, it is submitted that in compliance with the Concession Agreement, in case of failure to resolve the dispute through conciliation, reference of the present dispute to arbitration under Clause 44.3 of the subject agreement is warranted by either party to the dispute.

7. Article 44 of the Concession Agreement provides for the process of dispute resolution between the parties in case of disputes arising out of the said agreement. The same is reproduced as hereunder:

*“ARTICLE 44
DISPUTE RESOLUTION*

44.1 Dispute resolution

44.1.1 Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the "Dispute") shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 44.2.

44.1.2 The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

44.2 Conciliation

In the event of any Dispute between the Parties, either Party may call upon the Independent Engineer to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Independent Engineer or without the intervention of the Independent Engineer, either Party may require such Dispute to be referred to the Chairman of the Authority and the Chairman of the Board of Directors of the Concessionaire for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) days from the date of reference to discuss and attempt to



amicably resolve the Dispute. If such meeting does not take place within the 7 (seven)

day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 44.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 44.3.

44.3 Arbitration

44.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 44.2, shall be finally decided by reference to arbitration by a Board of Arbitrators appointed in accordance with Clause 44.3.2. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the "Rules"), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions, of the Arbitration Act. The venue of such arbitration shall be Delhi, and the language of arbitration proceedings shall be English.

44.3.2 There shall be a Board of three arbitrators, of whom each Party shall select one, and the third arbitrator shall be appointed by the two arbitrators so selected, and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules.

44.3.3 The arbitrators shall make a reasoned award (the "Award"). Any Award made in any arbitration held pursuant to this Article 44 shall be final and binding on the Parties as from the date it is made, and the Concessionaire and the Authority agree and undertake to carry out such Award without delay.

44.3.4 The Concessionaire and the Authority agree that an Award may be enforced against the Concessionaire and/or the Authority, as the case may be, and their respective assets wherever situated.

44.3.5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.

44.4 Adjudication by Regulatory Authority or Commission

In the event of constitution of a statutory Regulatory Authority or Commission with powers to adjudicate upon disputes between the



Concessionaire and the Authority, all Disputes arising after such constitution shall, instead of reference to arbitration under Clause 44.3, be adjudicated upon by such Regulatory Authority or Commission in accordance with the Applicable Law and all references to Dispute Resolution Procedure shall be construed accordingly. For the avoidance of doubt, the Parties hereto agree that the adjudication hereunder shall not be final and binding until an appeal against such adjudication has been decided by an appellate tribunal or High Court, as the case may be, or no such appeal has been preferred within the time specified in the Applicable Law.”

8. Concededly, the petitioner had taken the requisite steps in terms of Clause 44.2 however, the same could not materialise and no conciliation proceedings were held. Five long years have passed since the process for conciliation was initiated. Moreover, it is a settled position in law that compliance with any amicable resolution process at the pre-referral stage in an arbitration agreement is merely directory in nature and not mandatory. A Coordinate Bench of this Court in Jhajharia Nirman Ltd. v. South Western Railways, reported as **2024 SCC OnLine Del 7133**, while taking note of the previous decisions of this Court, has categorically held to a similar extent. The relevant portion of the same is reproduced hereinunder:

“18. In numerous judicial precedents, this Court has taken the view that any pre-condition in an arbitration agreement obliging one of the contracting parties to either exhaust the pre-arbitral amicable resolution avenues or to take recourse to Conciliation are directory and not mandatory.

19. In this regard, reference may be made to Oasis Projects Ltd. v. National Highway & Infrastructure Development Corporation Limited, (2023) 1 HCC (Del) 525, wherein the Court has observed as under:

“12. The primary issue to be decided in the present petition is, therefore, as to whether it was mandatory for the petitioner to resort to the conciliation process by the Committee before invoking arbitration. Though Article 26.2



clearly states that before resorting to arbitration, the parties agree to explore conciliation by the Committee, in my opinion, the same cannot be held to be mandatory in nature. It needs no emphasis that conciliation as a dispute resolution mechanism must be encouraged and should be one of the first endeavours of the parties when a dispute arises between them. However, having said that, conciliation expresses a broad notion of a voluntary process, controlled by the parties and conducted with the assistance of a neutral third person or persons. It can be terminated by the parties at any time as per their free will. Therefore, while interpreting Article 26.2, the basic concept of conciliation would have to be kept in mind.”...”

Therefore, having considered the contentions of the parties and the aforementioned legal position, this Court is not inclined to accede to the objection raised by learned counsel for respondent No.1.

9. It is noted that the subject agreement stipulates for the reference of the disputes to an Arbitral Tribunal comprising of three Arbitrators, where the petitioner and respondent No.1 each shall appoint one Arbitrator and such appointed Arbitrators shall appoint the 3rd Arbitrator. Learned counsel for the petitioner states, upon instructions, that the petitioner proposes the name of Hon’ble Mr. Justice P.K. Jaiswal, Former Judge of Allahabad High Court as its nominee Arbitrator.

10. At this stage, learned counsel for the respondent submits that respondent No.1 seeks one week’s time to nominate its Arbitrator. He also prays that liberty be granted to raise all contentions as to the merits of the case before the Arbitral Tribunal.

11. Accordingly, the present petition is disposed of with the following directions:

i) The disputes between the petitioner and respondent No.1 under the



subject agreement are referred to the Arbitral Tribunal and the present petition itself shall be treated as an application under Section 17 of the A&C Act. Upon the respondent No.1 doing the needful, the parties shall approach the two nominated Arbitrators within one week thereafter, for the appointment of the third Arbitrator.

ii) The interim order dated 31.01.2025 directing the parties to maintain *status quo* with respect to the letter dated 02.01.2025, shall continue to operate till the application is taken up by the Arbitral Tribunal, whereafter the parties shall be at liberty to seek continuation, confirmation, modification or vacation of the aforesaid order passed by this Court.

iii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi (hereinafter, referred to as the 'DIAC'). The remuneration of the learned Arbitrator shall be in terms of DIAC (Administrative Cost and Arbitrators' Fees) Rules, 2018 or as the parties may agree.

iv) The learned Arbitrators shall furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.

v) All the rights and contentions of the parties, including on the existence and validity of the Arbitration Agreement, arbitrability of any of the claim/counter-claim, any other preliminary objection including on jurisdiction, as well as claims on merits of the dispute of either of the parties are left open for adjudication by the Arbitral Tribunal.

12. The pending application is also disposed of accordingly.

**MANOJ KUMAR OHRI
(JUDGE)**

FEBRUARY 3, 2025/rd