Noida
Toll Bridge Co. Ltd.

December 6, 2023

To

Corporate Relations Department
Bombay Stock Exchange Limited
1st Floor, New Trading Ring Rotunda
Building, P J Towers Dalal Street, Fort
Mumbai – 400 001

Scrip Code No. 532481

Listing Department
National Stock Exchange of India
Ltd. Exchange Plaza, 5th Floor
Plot No. C/1, G Block
Bandra-Kurla Complex,
Bandra (E) Mumbai – 400 051

Scrip Code No. NOIDA TOLL EQ

Re : Noida Toll Bridge Co. Ltd. Vs. M/s Nidhi Sharma and Anr.- Update on Litigation

Dear Sir/ Madam,

This is to inform you that the above mentioned matter was listed on November 28, 2023, before the Hon'ble High Court of Delhi and the Order was received yesterday i.e. December 5, 2023.

In the said Order the Hon'ble Court has allowed the appeal of the Company and stated that the Impugned Order of the Learned Arbitral Tribunal directing the Appellant to submit a security of INR 5 Crores is not sustainable. The Appeal is allowed and the Impugned Order dated March 03, 2023 is set aside.

There would be no impact on the business operation of the Company. The Order of Proceedings is enclosed for your information and records.

Thanking You
For **Noida Toll Bridge Company Limited**

GAGAN SINGHAL
Digitally signed by GAGAN SINGHAL
Date: 2023.12.06 15:05:45 +05'30'

Gagan Singhal
Company Secretary & Compliance Officer

Encl: A/a

Annexure-A

Sl. No.	Particulars	Remarks
1.	Details of any change in status/ development in relation to such proceedings.	In the said Order the Hon'ble Court has allowed the appeal and stated that the impugned order directing the Appellant to submit a security of INR 5 Crores is not sustainable. The Appeal is allowed and the Impugned Order dated March 03, 2023 is set aside.
2.	Details of change in status in case of litigation against KMP or its promoter or ultimate person in control	Not Applicable
3.	Details of settlement, compensation / penalty paid (if any)	Not Applicable
4.	Impact of such settlement on the financial position of the Company	No impact

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

Date of Decision: 28th November, 2023

\+ ARB. A. (COMM.) 8/2023 & I.As. 6153/2023, 14860/2023

NOIDA TOLL BRIDGE COMPANY LIMITED ..... Appellant

Through: Mr. Jayant Mehta, Senior Advocate with Mr. Rounak Dhillon, Ms. Isha Malik and Mr. Anchit Jasiya, Advocates.

versus

NIDHI SHARMA & ANR. ..... Respondents

Through: Mr. J. Sai Deepak, Mr. Arjun Syal, Mr. Shreyan Das and Mr. Avinash Sharma, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J. (Oral):

1. The present appeal under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 [*hereinafter*, "*Arbitration Act*"] is directed against order dated 03rd March, 2023 passed by the Learned Sole Arbitrator under Section 17 of the said Act [*hereinafter*, "*impugned order*"]. The impugned order directs the Appellant to deposit an FDR for an amount of Rs. 5 crores with the Tribunal as an interim measure, in order to secure the claims made by the Respondents.

FACTS IN BRIEF

2. The Appellant, Noida Toll Bridge Company Limited, has been entrusted with the responsibility of maintaining, developing, establishing,

financing, designing, and constructing a stretch of 9.5 kilometres of the Delhi-Noida-Delhi ["DND"] Flyway, under a Concession Agreement dated 12th November, 1997 between Appellant and the New Okhla Industrial Development Authority. In furtherance of their responsibilities, Appellant executed two License Agreements with the Respondents on 23rd August, 2018 and 01st July, 2019, permitting Respondents to display outdoor advertisements on the designated areas of DND flyway for a period of five years, extendable up to two years.

3. On 15th November, 2022, the Appellant terminated the License Agreements. This termination was to take effect after three months of the termination notice (on 15th February, 2023).

4. Prior to initiation of the arbitration proceedings, the Respondents filed a petition under Section 9 of the Arbitration Act [bearing O.M.P.(I)(COMM.) 339/2022] seeking a stay on the termination notice as well as an interim order restraining Appellant from proceeding with fresh tender process for licensing of the concerned advertisement spaces. In the said proceedings, with parties' consent, the Court appointed a Sole Arbitrator and directed the petition to be treated as an application under Section 17 of the Arbitration Act before the Learned Arbitrator.

The impugned order

5. The relevant findings of the impugned order are as follows:

> "*8. In the earlier order dated 15.12.2022, this Tribunal has noted that there are no apparent reasons stated commercial or otherwise which have warranted the respondent to take steps for terminating the Agreement in question. The Agreement is valid till 2024 or thereabout. There is not much change in the situation since the earlier order. The termination of the Agreement has been done by the respondent without giving any reasons whatsoever. It was not the case of the respondent when the matter was heard in December, 2022 that termination took place on account of*

any defaults of the claimant or on account of higher revenue earning potential of the project or otherwise.

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11. It is a matter of fact that the agreement was originally for a period of five years and was extended by about 15 months. The agreement expires sometimes in 2024 and has been prematurely terminated. As per the Respondent this termination is in terms of the agreement between the parties and no compensation is playable to the claimant for the same. The Respondent also in its preliminary statement of defence has urged that no liability was incurred by the Respondent on account of termination of the contract as no assets were constructed or owned by the claimant on the DND flyway. The fixed structures upon which admitted display was done were constructed and owned by the Respondent. Further in the event claimant installed any advertisement media or made repairs to reconstructive or restructured existing advertisement media the same was to be the sole property of the Respondent.

12. It however, cannot be ignored that for carrying out the terms and conditions of the Contract the Claimant would have generated resources and mobilised men and material. The premature termination of the contract would naturally have led to some loss/damages. I have already noted above that the respondents have not given any justification or reason for termination of the agreement. Their stand was that under the contract the respondent has a right to terminate the contract at any time without assigning any reasons.

13. However, this Tribunal has also noted that it appears that if an Award is passed by this Tribunal in favour of the claimant, for any amount it may turn out to be a paper Award and the respondent do not appear to have the means to pay for the same. This plea, of course, has been denied by the learned senior counsel for the respondent but no specific details of the assets available have been putforth.

14. In these facts and circumstances given the financial condition of the Respondent it would be appropriate and in the interest of justice to protect the interest of the claimant in some reasonable manner. Such a direction would be in the interest of justice. Accordingly I direct that within four weeks from today the Respondent shall make a fixed deposit for a sum of Rs.5 crores (Five crores) and deposit the original FD with the Arbitral Tribunal. This amount will be subject to the outcome of the Award that may be passed. This amount shall not be utilised by the Respondent whatsoever. On deposit of the said FD the interim order passed by this Tribunal on 15.12.2022 shall stand vacated."

CONTENTIONS

On behalf of Appellant

6. Mr. Jayant Mehta, Senior Counsel for Appellant, presents the following grounds of challenge:

6.1. The relief granted by the Learned Arbitrator is in the nature of a final relief, which could not have been rendered at an interim stage. It has been observed that premature termination of the License Agreements has caused loss to the Respondents. These findings would prejudice the final outcome of the arbitral proceedings.

6.2. The observations contained in the impugned order are premised on an erroneous interpretation of the facts of the case. In view of the COVID-19 pandemic, at Respondents' request, the License Agreements were suspended from 21st March, 2020 to 31st December, 2020, and their terms were extended by a period of 15 months and 10 days, *vide* communications dated 28th September, 2020 and 04th March, 2022. As per this renewed arrangement, the Appellant waived the license fee and instead, parties decided to split the revenue generated in the ratio of 70:30 between Appellant and Respondents, respectively. However, these extension letters carried a caveat – remission of the license fee/ revenue share payable by Appellant to the concerned Municipal Authorities (*i.e.*, the South and the East Delhi Municipal Corporations) under the concerned Memoranda of Understanding. Despite repeated attempts, the Municipal Authorities did not respond to Appellant's request to suspend their obligations under the Memoranda of Understanding. Accordingly, on 23rd September, 2022, Appellant informed the Respondents that the term of License Agreements shall remain unchanged, however, to foster cordial relations, the Appellant

did not rescind the relief pertaining to monthly license fee for the excluded period. In paragraph No. 11, the Learned Arbitrator has erred in holding that extension of license for 15 months 10 days is uncontroverted by the Appellant. On the contrary, this issue is heavily contested, and plays an integral role in adjudication of both parties' claims.

6.3. Learned Arbitrator has failed to consider that under Clause 10.4 of the License Agreements, the Appellant possesses an unrestricted right to terminate without cause and liability.

6.4. There were no pleadings in the Respondent's application under Section 17 of the Arbitration Act that warranted a direction to the Appellant to make a fixed deposit.

6.5. The impugned order incorrectly notes that if the Respondent succeeds before the Tribunal, given the financial situation of the Appellant, the award would be rendered ineffective as Respondent will not be able to recover the same from the Appellant. There is no cogent basis for arriving at such a conclusion.

On behalf of the Respondents

7. Mr. J. Sai Deepak, counsel for Respondents, contests the present appeal, arguing as under:

7.1. Section 17 of the Arbitration Act bestows a wide-ranging power on the Arbitral Tribunal to issue appropriate directions if the requirements of a *prima facie* case, balance of convenience, and irreparable harm are satisfied. In the present case, the Learned Arbitrator found *prima facie* merit in the Respondents' case and rightly protected their interests. The Arbitral Tribunal is not bound by the provisions of the Code of Civil Procedure,

1908 [“CPC”]. Even in absence of specific pleadings, the Arbitral Tribunal could have passed the interim directions.

7.2. Admittedly, the Appellant has been classified as a ‘red entity’ by the National Company Law Appellate Tribunal [“NCLAT”] on 11th December, 2019. Hence, the Learned Arbitrator’s conclusion that Appellant does not have the financial capacity to pay the damages that may be awarded in Respondents’ favour, is well-founded.

7.3. The Court’s power to interfere with orders assailed under Section 37(2) of the Arbitration Act is strictly constrained to cases of palpable arbitrariness, which has not been demonstrated here. Such an intervention at this stage, is likely to frustrate the arbitral proceedings.

7.4. In issuing the impugned directions, Learned Arbitrator has considered the aspect of protection of arbitral corpus, and balanced the equities between the parties.

7.5. Learned Arbitrator’s order of 15th December, 2022 provides vital context to the impugned findings. In the said order, Learned Arbitrator found *prima facie* substance in Respondents’ case and noted that the only remedy available to them would be to seek damages under law for the losses arising from the premature termination. If the Appellant does not deposit the amount as directed, the award would be rendered a ‘paper award’, leaving the Respondents remediless.

7.6. The amount of Rs. 5 crores, which has been directed to be secured, is only a small fraction of the total claims of the Respondents. The security deposit under the License Agreements alone amounts to Rs. 7.11 crores, which has not been refunded despite termination.

7.7. Reliance is placed upon the judgements in ***Skypower Solar India***

Private Limited v. Sterling and Wilson International FZE,[1] and ***Essar House Private Limited v. Arcellor Mittal Nippon Steel India Limited,***[2] in support of the afore-noted arguments.

ANALYSIS AND FINDINGS

8. The Respondents (Claimants) contend that Appellant has breached the terms of the License Agreements and unlawfully determined their contractual relationship. In contrast, the Appellant (Respondent) assert that their action is grounded in the right to terminate without cause, conferred upon them by Clause 10. 4 of the said Agreements, and thus, is valid and lawful. It is in this backdrop that the Respondents preferred an application under Section 17 of the Arbitration Act, requesting for following interim reliefs:

> "*i. Pending the adjudication of the dispute, injunct and restrain the Respondent, its officers, executives etc.*
> *from giving effect to the Impugned Notice dated 15.11.2022 whereby the Respondent has sought to terminate the License Agreements dated 23.08.2018 and 01.11.2018;*
> *ii. Pending the adjudication of the dispute, injunct and restrain the Respondent, its officers, executives etc.*
> *from giving effect to the letters dated 23.09.2022 whereby the Respondent has unilaterally rescinded*
> *the Amended and Restated Agreements dated 28.09.2020 and 04.03.2022; and*
> *iii. Pending the adjudication of the dispute, injunct and restrain the Respondent, its officers, executives etc.*
> *from giving effect to the Tendering Process/ Request for Proposal which has been initiated by the Respondent on 16.11.2022 for Licensing of Advertisement Spaces on DND Flyway for a period of 5 years.*
> *iv. Grant an ex parte ad interim relief in terms of prayer (i), (ii) and (iii)*"

9. The Learned Arbitrator, instead of granting the specific reliefs,

[1] 2023 SCC OnLine Del 7240.

ordered the Appellant to deposit a Fixed Deposit Receipt ["FDR"] for Rs. 5 crores, pending final resolution of the dispute. This interim direction clearly strays from the reliefs sought in the Section 17 application. Thus, the Court opines that if the Learned Arbitrator intended to grant reliefs beyond the application's prayers, it was essential for the Appellant to be given adequate notice to respond appropriately.

10. As the Learned Arbitrator has directed the alleged amount in dispute to be secured by way of an FDR, the impugned direction for a deposit is an exercise of powers akin to those provided in Order XXXVIII Rule 5 of the CPC. Mr. Mehta contends that in issuing these directions, the Learned Arbitrator has failed to adhere to the principles governing the requirement for security under Order XXXVIII Rule 5. This argument is strongly refuted by Mr. Sai Deepak, who maintains that the Arbitral Tribunal, when issuing interim measures under Section 17 of the Arbitration Act, is not limited by the provisions of the CPC. According to him, the Tribunal possesses the discretion to shape reliefs as necessary to safeguard the interests of the affected parties. However, considering the entirety of the facts in this case, the Court does not concur with Mr. Sai Deepak's submission. Section 17 of the Arbitration Act empowers the Arbitral Tribunal to issue interim reliefs to the parties involved. For making such orders, the Tribunal is conferred with the same power as the Court possesses for the purpose of, and in relation to, any proceedings before it. Although the Arbitration Act allows for some flexibility regarding adherence to the CPC, the Tribunal's mandate to issue interim orders must still align with the legal principles that underpin the granting of such reliefs. Consequently, in issuing such an order, Learned

[2] 2022 SCC OnLine SC 1219.

Arbitrator should have ensured that the prerequisites associated with an order for attachment or deposit of security before judgment – a *prima facie* case and Respondents' intent to obstruct the execution of the final award – ought to have been fulfilled.[3]

11. The Arbitrator's findings are premised on several factors: (*a*) termination of License Agreements by the Appellant without assigning a reason, commercial or otherwise, (*b*) Respondent's perceived loss due to the expenditure incurred in fulfilling contractual obligations, and (*c*) Appellant's reported precarious financial status. However, in the Court's opinion, these factors alone do not meet the threshold required for issuing an order for the deposit of an FDR, at this interim stage. There is a lack of a finding of a strong *prima facie* case on merits in favour of Respondents/ Claimants. The Respondents have not convincingly shown a high likelihood of success in their claim, which was the first prerequisite.

12. The Learned Arbitrator, in the preceding hearing held on 15th December, 2022 as well in the impugned order recognized that, given the contractual nature between the parties, damages would be the only possible remedy for the Respondents, should they prevail. Although these orders take note of Appellant's right of termination of the License Agreements without specifying reasons, they fall short of expressing a *prima facie* view on the legality of such termination. This omission is significant; without an initial assessment of the action of termination, the foundation for the Respondents' prayer for interim measures, remain inadequately established. Therefore, the Court finds that the *prima facie* threshold necessary for the imposition of such interim measures has not been met, underscoring a gap in the Learned

[3] *See:* ***Natrip Implementation Society v. IVRCL Limited,*** 2016 SCC OnLine Del 5023.

Arbitrator's reasoning and the justification of the impugned order.

13. Furthermore, as is apparent from the reading of the impugned order, in deciding the interim application, the Appellant's financial volatility weighed heavily with the Learned Arbitrator. The order points out that the NCLAT has labelled the Appellant as a 'red entity', indicating their inability to repay the debts of secured creditors. Consequently, the Learned Arbitrator inferred that the Respondents' chances of recovering any award amount from the Appellant would be significantly diminished. Mr. Sai Deepak refers to an observation made by the Learned Arbitrator in the order dated 15th December 2022, wherein the Arbitrator noted that, considering the Appellant's status as a 'red entity' identified by NCLAT and its apparent inability to pay any creditors, an award for damages might result in a mere 'paper award', without practical enforceability. Learned Arbitrator expressed concern that the Respondent may lack the means to fulfil any damages awarded, stating as under:

> "*20. It is true that prima facie an Agreement of this nature in view of Section 14 and Section 41 of The Specific Relief Act would not be specifically enforceable and the only remedy the Claimant may have, if at all, would be damages. But as already noted by NCLAT the Respondent is identified as "Red Entity" by NCLAT and is presently unlikely to be able pay any of its creditors. An Award for damages, if passed by this Tribunal in favour of the Claimant may in these facts and circumstances, turn out to be a paper award. This is so as Respondent would have no means to pay for the same.*"

14. However, contrary to Mr. Sai Deepak's interpretation, the excerpt cited does not convince the Court that the Learned Arbitrator was *prima facie* satisfied with Respondents' claims. This inference is mainly based on the potential damages incurred by the Respondents due to the loss of resources invested in fulfilling their obligations under the now terminated

License Agreements. However, the order conspicuously lacks a discussion or a preliminary view on the Appellant's alleged breach of these Agreements. Given that the amounts claimed by the Respondents are strongly contested by the Appellant and do not constitute an acknowledged debt, an in-depth examination of this contention becomes critically important. Yet, such an analysis is absent in the impugned order. Without a *prima facie* assessment of these vital issues, the Court holds that the Learned Arbitrator's decision to impose a burdensome direction on the Appellant is unsustainable.

15. In addressing the second critical condition – whether the Appellant (Respondent in the arbitration proceedings) is acting to obstruct or defeat the enforcement of a potential final award, it is important to recognize the intended purpose of the Arbitral Tribunal's power to grant interim measures. This power, including the issuance of orders akin to the relief provided under Order XXXVIII Rule 5 of the CPC, to safeguard the interests of the parties involved, is intended towards aiding the cause of justice. However, considering the significant implications of measures under Order XXXVIII Rule 5, courts have consistently emphasized that such powers must be exercised with caution. The primary objective of this provision is not to secure an unsecured debt, but to prevent the Respondent (Appellant in the current case) from impeding the realization of an award that upholds the Claimants' (Respondents in the present case) claims.[4]

16. It is an admitted fact that IL&FS Group, to which the Appellant belongs, is undergoing insolvency proceedings. This situation has led to a presumption that, should the final award favour the Respondents, they may

be unable to effectively enforce it to reap its fruits. Consequently, the question that arises is whether the Appellant can be compelled to provide security pending the final judgment, solely based on their financial difficulties potentially affecting award enforcement, especially in the absence of a *prima facie* case being established.

17. In ***Natrip Implementation Society*** *(Supra)*, a Coordinate Bench of this Court was faced with a similar scenario, wherein a party requested for securing the claimed amount, citing crippling financial condition of the opposite party. The Court held that the principles applicable to Order XXXVIII Rule 5 of CPC must be followed while deciding interim applications under Section 9 of the Arbitration Act, and rejected the plea as there were no allegations to indicate that the Respondent (therein) was attempting to defeat the potential award. Similarly, in the instant case, the Respondents have not alleged that the Appellant is disposing of assets or engaging in activities that would obstruct the enforcement of the final award. The request for securing such a significant amount was not even part of the Respondents' original application under Section 17 of the Arbitration Act. This absence of any assertion or evidence suggesting the Appellant's intent to frustrate the award's enforcement, further weakens the justification for the Learned Arbitrator's direction to provide security, deviating from the established legal standards and principles.

18. Another critical aspect that merits mentioning is the Appellant's counter-claim of Rs. 28.40 crores in the arbitral proceedings. This fact although noted in the impugned order, has not been considered by the Learned Arbitrator. As the Learned Arbitrator did not conclude that a

[4] ***Raman Tech. and Process Engg. Co. and Anr. v. Solanki Traders,*** (2008) 2 SCC 302.

reasonably strong *prima facie* case exists in Respondents' favour, Appellant's counter-claim should have been weighed in his deliberations. As such, this Court does not find that the balance of convenience lies in favour of the Respondents.

19. Moreover, in the event that the Respondents prevail in the arbitral proceedings and are deemed entitled to damages, their position, in light of the Appellant's declared financial incapacity, would be analogous to that of other unsecured creditors. Thus, the impugned direction of the Learned Arbitrator raises a significant concern: it provides the Respondents with an undue advantage over other unsecured creditors, who may have equally valid claims. Granting this preferential status to the Respondents through the interim measure undermines the principle of equitable treatment of creditors, especially in situations involving an entity facing financial distress.

20. In view of the foregoing discussion, in the Court's opinion, impugned order directing Appellant to submit a security of Rs. 5 crores, is not sustainable. The nature of relief being analogous to a direction under Order XXXVIII Rule 5 of CPC, ought to have fulfilled the legal principles governing such orders, as discussed above.

21. Accordingly, the appeal is allowed and the impugned order dated 03rd March, 2023 is set aside.

22. Disposed of.

SANJEEV NARULA, J

NOVEMBER 28, 2023
AS
(corrected and released on 05th December, 2023)