

SUPREME COURT OF INDIA

M.C.Mehta

Vs.

Union of India & Ors.

W.P.(Civil)No.13029/1985

(T.S.Thakur,CJI., R.Banumathi,J.,)

13.05.2016

JUDGMENT

T.S.Thakur,CJI.,

1. Interlocutory applications No.363 and 364 of 2015 have been filed by the Consortium of Banks seeking direction from this Court that the rights of the Consortium of Banks who has financed the Kundli-Manesar-Palwal Expressway ('BOT') in the State of Haryana and has outstanding dues approximately Rs.1419.15 crores as on 28.02.2015 are not prejudiced by this Court's order dated 30.01.2015 passed in I.As. No.344, 355 and 362 in W.P.(C) No.13029 of 1985.

2. Shorn of unnecessary details, facts leading to the present applications are as follows: Haryana State Industrial and Infrastructure Development Corporation Limited (HSIIDC) invited bids for developing of 135.650 kms long Kundli-Manesar-Palwal Expressway in the State of Haryana. Following the bidding process, three companies viz., M/s. Madhucon Projects Limited, M/s. D.S. Construction Limited and M/s. Appolo Enterprises set up a Special Purpose Vehicle (SPV) named 'KMP Expressways Limited' ("concessionaire") and letter of acceptance was issued on 14.11.2005. The concessionaire and HSIIDC entered into a concession agreement dated 31.01.2006 and the same was for a period of twenty three years and nine months from the appointed date.

3. The concessionaire raised a loan from consortium of banks comprising of the banks namely IDBI Bank, State Bank of India, the applicants herein and other banks such as State Bank of Mysore, State Bank of Travancore, State Bank of Patiala, Canara Bank, Dena Bank, United Bank of India, UCO Bank, Vijaya Bank and India Infrastructure Finance Company Ltd. The original project cost of Rs.1915.00 crores was proposed to be financed by way of equity capital of Rs.766.00 crores and Rupee Term Loan of Rs.1149.00 crores. The lender banks have disbursed sums aggregating to Rs.1075.03 crores for the project. On 08.01.2007, a loan agreement was executed between the lender banks and concessionaire recognizing and strengthening the lenders' security interest over the concession agreement. In terms of loan agreement, concessionaire had inter alia agreed to create security interest over various

documents like all project documents which include concession agreement and all other assets and properties of the existing concessionaire. The concessionaire executed the indenture of mortgage dated 09.01.2007 securing the interest of the lenders as per the requirement of the loan agreement. In order to further secure the interest of the lender banks, on the same date i.e. 08.01.2007, a tripartite agreement was also entered into between HSIIDC, the concessionaire and the IDBI Bank as lenders' agent.

4. Proposed Kundli-Manesar-Palwal Expressway 135.650 kms long takes off from NH-1 near Kundli, crosses NH-10 in the west of Bahadurgarh, crosses NH-8 near Manesar and finally joins NH-2 near Palwal. As the project is being developed around the national capital, Delhi, by an order of this Court dated 18.08.2005 in IA No. 182-183 in W.P. (C) No. 13029/1985 titled as 'M.C Mehta v. Union of India' the same is being monitored by a special monitoring committee under the chairmanship of Secretary, Ministry of Road Transport and Highways with Chief Secretaries of Delhi, Haryana and U.P., Chairman, NHAI and Chairman, Environmental Pollution Control Authority (EPCA) as members. Also, the progress of the project was being reviewed by a High Powered Committee established under the chairmanship of Chief Secretary, Haryana and others. There was delay in execution of the work and the concessionaire was unable to achieve the commercial operation of the project. Consequently, this Court appointed the Environmental Protection Control Authority Committee (EPCA) to expedite the project. Several meetings were held between EPCA, HSIIDC, the concessionaire and the lender banks, the details of which may not be relevant for the issue raised before us. Suffice to note that it was agreed that an amicable substitution of the existing concessionaire shall be made so as to expedite the project. It was further agreed that in terms of the contract, the concessionaire would be paid Rs.1300.00 crores as termination payment for utilization towards payment of the debts due. However, HSIIDC vide its letter dated 28.01.2015 addressed to EPCA informed that it had revoked the arrangement of making termination payment to the concessionaire and approval for payment of the same was withdrawn. At the same time, HSIIDC issued a notice dated 28.01.2015 to the then existing concessionaire conveying its intention to terminate the Concession agreement, subject to a cure period of one month for curing the defaults.

5. At this juncture, applications being I.As. No.344/2012 and 362/2014 were filed by the amicus curie and I.A.No.355/2014 filed by Government of NCT of Delhi in WP (C) No.13029/1985. This Court vide its order dated 30.01.2015, directed the State of Haryana to replace the existing concessionaire by following due procedure. The operative part of the order dated 30.01.2015 reads as under:-

“In the meanwhile, the State of Haryana will ensure that appropriate steps would be taken to award the contract for the project to the new concessionaire within two months' time from today. The new concessionaire shall commence the work within a month's time thereafter.”

6. Later, vide a letter dated 13.02.2015, HSIIDC informed IDBI Bank that in view of the order of the Supreme Court dated 30.01.2015, the process of selecting a new concessionaire through its own efforts is under process and that if lender banks propose to bring a new

concessionaire, the lenders would have to adhere to the time frame fixed by the Supreme Court. Vide its letter dated 16.02.2015, IDBI intimated HSIIDC that in order to facilitate compliance with the order of the Supreme Court, the senior lenders have agreed that the entity selected by HSIIDC shall be the 'selectee' of the lenders for the purposes of the substitution agreement. However, lender banks asked HSIIDC to ensure that the new concessionaire takes over the debt due to the lenders. Applicant No.1-IDBI Bank vide letters dated 16.02.2015, 25.02.2015, 27.02.2015, 05.03.2015, 16.04.2015 and 02.05.2015 repeatedly asked HSIIDC to comply with clause 3.5 (i) of the substitution agreement and to ensure that the new concessionaire takes over the senior lenders' debt dues.

7. Subsequently, HSIIDC issued tender dated 20.02.2015 and subsequent addendum dated 10.03.2015 and 13.03.2015 inviting bids 'for execution of development of access controlled Kundli-Manesar-Palwal Expressway Section (Manesar RD. 83.320 km to Palwal RD 135.650 kms) (Balance Work) on Item Rate Mode amounting to Rs.4,01,49,97,931.00'. Bid submitted by M/s. KCC Buildcon Pvt. Ltd.-Dilip Buildcon Ltd. (JV) was accepted by HSIIDC on 28.03.2015 for execution and development of the project on 'Item Rate Mode' for the said stretch of the road project of 52.33 km (Manesar-Palwal) (Balance Work). Subsequently, in the first week of April, 2015, HSIIDC issued invitation for bids for development of access controlled six lane Kundli-Manesar Section (km 0.00 to km 83.320) valued at Rs.1774.00 crores on 'BOT' (annuity basis). After evaluation of the bids from the qualified bidders, HSIIDC accepted the bid of ESSEL on 'BOT' (annuity basis) and issued letter of acceptance on 31.07.2015 with a project cost of Rs.1863.00 crores. ESSEL incorporated M/s. Kundli-Manesar Expressways Limited as a limited liability company and the concession agreement was executed by HSIIDC with M/s. Kundli-Manesar Expressways Limited on 03.09.2015 for execution of work of development of access controlled six lane Kundli-Manesar Section km 0.00 to km 83.320 in the State of Haryana on 'BOT' (annuity basis). Be it noted, in the tender as well as the concession agreement with the ESSEL, there was neither mention of debts due to the lender banks nor any clause was incorporated to secure the loans of the lender banks.

8. In this factual background, the lender banks have come before us by these applications inter alia seeking various directions:

“(a) To direct HSIIDC to amend the concession agreement between HSIIDC and ESSEL so as to include a suitable condition to take over the notice and other amounts owed to the senior lenders;

(b) To direct HSIIDC to take over the balance loan and other amounts owed to the lenders under the financing documents proportionate to the 52.33 kms of the project road which is constructed and completed by the new EPCA Director and subsequently taken over by the HSIIDC;

(c) To direct HSIIDC to ensure that new concessionaire/ ESSEL who would substitute the existing concessionaire to assume all the existing liabilities and obligations of the existing concessionaire towards the senior lenders proportionate to 83.320 kms.;

(d) To direct HSIIDC to enter into a supplementary agreement with the ESSEL so as to include a suitable condition to ensure that the rights of senior lenders under the substitution agreement are duly protected;

(e) To direct and collect all tax levy from both the sections of the project road i.e. Kundli-Manesar Section (83.320 kms) awarded to ESSEL and Mensar-Palwal of 52.33 kms as taken over by HSIIDC are deposited into Escrow Account to be opened with applicant No. 1 the lead bank”

9. Grievance of the lender banks is that though the rights of the senior lenders were acknowledged by HSIIDC in its letter dated 13.02.2015, HSIIDC proceeded with the bid without disclosing to the new concessionaire that it will have to take upon debts due to the lender banks. On behalf of the appellants, the learned Attorney General, Mr. Mukul Rohtagi appearing along with Additional Solicitor General of India, Mr. Neeraj Kishan Kaul submitted that inspite of repeated letters by banks asking HSIIDC to act in terms of substitution agreement, HSIIDC has ignored the request of lenders and has gone ahead with the appointment of new concessionaire without acknowledging the rights of the lenders and thus HSIIDC failed to act in terms of the contract, in particular clause 3.5 (i) of the substitution agreement.

10. Contention of the lender banks is that in terms of clause 3.5 (i) of the substitution agreement while substituting the concessionaire by ESSEL, HSIIDC ought to have taken into account lenders' dues and ought to have incorporated necessary clause in the concession agreement obligating the Selectee to take over lender banks' dues. It is contended that HSIIDC is bound to execute a substitution agreement with the Selectee on the same terms and conditions as provided in the substitution agreement dated 08.01.2007 and that HSIIDC has committed breach of contract. Further grievance of the lender banks is that unilateral revocation of HSIIDC's commitment to make termination payment of Rs.1300.00 crores for utilization towards payment of dues payable to the lender banks has caused serious prejudice to the rights of the lender banks. Yet another grievance of the lender banks is that corresponding to clause 3.5.(i) of the substitution agreement, no clause was shown in the advertisement for development of six lane access controlled Kundli-Manesar Expressway km 0.00 to km 83.320 nor the same was incorporated in the concession agreement which was awarded to ESSEL for the development of six lane access controlled Kundli-Manesar Expressway from km 0.00 to km 83.320. It was submitted that while awarding the work to ESSEL, HSIIDC ought to have acted in accordance with the terms of substitution/tripartite agreement dated 08.01.2007 and HSIIDC committed breach of contract by not incorporating the suitable condition in the new concession agreement for the payment or take over of lenders' dues by the new concessionaire/ESSEL. It was further argued that unilateral revocation of consensus arrived at between HSIIDC and lender banks to make termination payment of Rs.1300.00 crores for utilization towards payment of dues to the lender banks was in breach of HSIIDC's contractual obligations and the same caused serious prejudice to the rights of the banks.

11. Lender banks relied upon clause 7.1.2 of the Common Rupee Term Loan Agreement dated 08.01.2007 between the lender banks and concessionaire where right of the lenders to receive toll collections from the project, deposited in an escrow account is recognised. Lender banks rely upon various clauses in tripartite agreement/substitution agreement dated 08.01.2007 between HSIIDC, the concessionaire and the lenders' agent. As per the substitution agreement/tripartite agreement, obligation of the HSIIDC to inform the lenders' agent about any notice of termination of the concession agreement is provided in clause 5.1 of the substitution agreement. In case of default, right is given to lender banks to substitute the concessionaire by a Selectee subject to approval of such 'Selectee' by HSIIDC. Clause 2.1 of the substitution agreement provides for substitution of the concessionaire by a 'Selectee'. Clause 3 of the substitution agreement provides the modality for substitution of the Selectee by the lender banks. On behalf of the banks, much emphasis is laid upon clause 3.5.1 to contend that as per clause 3.5.1 it is the responsibility of HSIIDC to ensure that a suitable condition acceptable to the lenders' agent is provided for payment or take over of the lenders' dues. Clause 3.5 (i) of the substitution agreement very much relied by the banks reads as under:-

“3.5 (i) If HSIIDC decides to substitute the Concessionaire by any other person (“HSIIDC Nominee”), it shall take into account the Senior Lender’s Dues while considering offers from such persons and shall include a suitable condition as agreed to by the lenders’ agent on behalf of the Senior Lenders for payment or take over of such dues by such HSIIDC Nominee to the extent agreed by the lenders’ agent while substituting the Concessionaire by the HSIIDC Nominee. The HSIIDC Nominee shall similarly be bound to execute a supplementary/fresh substitution agreement on the same terms and conditions as provided herein.”

12. Having regard to the nature of the order we propose to pass, it is not necessary for us to go into the merits of the submission of the banks and interpretation of the various clauses relied upon by the lender banks. Suffice to notice the facts emerging and the material on record and the need to protect the interest of the lender banks by an interim order.

13. (a) Delay in Completion of Work and Substitution of Concessionaire thereafter: As brought on record that though concessionaire had executed part of the work, progress of the work by the concessionaire was delayed and the concessionaire was unable to achieve the work target. The lender banks served a notice of occurrence of default dated 13.08.2013 to the concessionaire asking him to cure the defects within a period of thirty days from the date of delivery of the notice. The concessionaire replied to the default notice vide its reply dated 17.09.2013 stating that the payment default was on account of delay by HSIIDC in making payments to the concessionaire. On 13.01.2014, substitution notice was served on concessionaire by the lender banks under article 2.2 of the substitution agreement which was objected by the concessionaire vide its letter dated 03.02.2014.

(b) Termination Payment and Unilateral Revocation of the same by HSIIDC: While hearing I.A. No.344 of 2012, an interim order dated

10.03.2014 was passed by this Court, thereby authorizing Environmental Protection Control Authority (EPCA) to proceed with the proposal of replacing the concessionaire. Accordingly several meetings were held between the lenders, HSIIDC and the EPCA. Vide letter dated 01.07.2014, EPCA recorded its comments to the Government of Haryana on the proposal regarding fixation of amount of 'consideration for work done' sent to EPCA by the lenders. The lender banks sought termination payment to the tune of Rs.1711.38 crores. However, HSIIDC vide its letter dated 05.08.2014 conveyed its decision to pay Rs.1300.00 crores as a settlement/termination payment and the same was maintained in the EPCA meeting on 09.08.2014. In the said meeting, HSIIDC informed that termination payment of Rs.1300.00 crores has been approved by its highest authority and HSIIDC cannot accede to the lenders request to increase the amount to Rs. 1711.38 crores. In the EPCA meeting dated 01.11.2014 HSIIDC informed that in view of formation of the new government in the State of Haryana, a fresh approval from the new government would be required on the amount of Rs.1300.00 crores fixed to be paid as termination payment. According to the lender banks in its letter dated 05.08.2014 (Annx. R-3), HSIIDC stated that:

“it has been decided that INR 1300 crore (is) the most reasonable amount out of different valuations done by the Lenders’ Engineer, Independent Consultant, Lenders’ Consultant and Lead Lenders” “while conveying as above, I would also like to assure full support and co-operation of the State Government in your endeavour for getting the Project implemented. ”

Later, HSIIDC is said to have unilaterally revoked its consent to termination payment of Rs.1300.00 crores vide its letter dated 28.01.2015 to EPCA while simultaneously issuing notice of default to the concessionaire. According to lender banks, HSIIDC had not kept up its commitment and has not honoured the consensus arrived at between the lender banks and HSIIDC regarding the termination payment of Rs.1300.00 crores and committed breach of contract.

(c) Order of this Court dated 30.01.2015: As noticed earlier, by order dated 30.01.2015, this Court directed HSIIDC to appoint a new concessionaire. On behalf of the applicants, it was submitted that the above developments and various communications between the lender banks and HSIIDC and concessionaire, consensus arrived at between the parties to pay termination payment of Rs.1300.00 crores and the rights of the lender banks were not brought to the notice of this Court. It was submitted that in order to facilitate compliance of the order of this Court, lenders vide letters dated 16.02.2015 and 25.02.2015 intimated HSIIDC that the Selectee by HSIIDC is acceptable to the lenders as Selectee for the purpose of substitution agreement. However, lender banks repeatedly requested HSIIDC to ensure that the Selectee/ concessionaire takes over the debts due to lender banks and secure the same by incorporating appropriate clauses in the concession agreement.

(d) Proceedings before the Debt Recovery Tribunal: As seen from the material on record, the consortium of banks has filed an application before the Debts Recovery Tribunal for recovery of their dues of Rs.1607,97,51,108 against the previous

concessionaire and others. It is brought on record that in the said proceeding, by order dated 23.12.2015, the Debts Recovery Tribunal restrained outgoing concessionaire M/s. KMP Expressways Limited from receiving any amount/fee/charges from the Government of Haryana or any other authority in respect of refund/transfer of KMP Expressway Project without permission of Debts Recovery Tribunal. This was communicated by the lender banks to HSIIDC vide its letter dated 27.01.2016 calling upon HSIIDC not to make any payment to the outgoing concessionaire.

(e) Arbitration Proceedings: As seen from legal notice dated 03.07.2015, M/s. KMP Expressways Limited invoked arbitration clause contained in clause 39.2 of the concession agreement. Arbitration claim is pending before the Arbitral Tribunal comprising of Justice N.K. Sodhi (Former Chief Justice) presiding Arbitrator, Justice (Retd.) T.S. Doabia, arbitrator and Shri K.B. La! Singa! (Engineer-in-Chief) (Retd.), arbitrator in Arbitration Case No. 103 of 2013 against HSIIDC.”

14. As discussed earlier, development of 4/6 lane Kundli-Manesar-Palwal Expressway from km 0.00 to km 83.320 in the State of Haryana on ‘BOT’ basis was awarded to erstwhile concessionaire M/s. KMP Expressways Limited. Because of the incompleteness of the work as aforesaid and intervention of this Court by order dated 30.01.2015, the work was divided into two parts and awarded to M/s. KCC Buildcon Pvt. Ltd.-Dilip Buildcon Ltd. (JV) and ESSEL as under:-

“Stretch Amount To whom awarded Manesar-Palwal Expressway Section (Manesar RD.83.320 km to Palwal RD 135.650km) (Balance Work) on Item Rate Mode. INR 401.49 crores M/s. KCC Buildcon Pvt. Ltd.-Dilip Buildcon Ltd. (JV) Development of access controlled 4/6 Lane Kundli-Manesar (0.00km to 83.320 km) in the State of Haryana on Build-Operate-Transfer (Annuity INR 1774 crores M/s ESSEL basis) (Balance Work)”

15. Since the work of development of access controlled six lane Kundli-Manesar Section (from km 0.00 to km 83.320) is awarded to M/s. ESSEL, the applicants now seek a direction to amend the concession agreement between HSIIDC and ESSEL, so as to include a suitable condition to take over lenders’ dues and other amounts due to the senior lenders. In our view, such a relief cannot be granted by an order of this Court, as the same would amount to variation of the contractual terms between the parties i.e. HSIIDC and ESSEL. Even so the lender banks are complaining about the violation of the terms of the tripartite agreement between them and concessionaire. Any such dispute regarding the alleged violation of the terms and conditions of a contract shall have to be resolved in an appropriate civil action before the competent civil court. That is because the same are not amenable to adjudication in these proceedings. Fortunately, however, the parties may not have to resort to any civil action because of the presence of clause

“7.11 in the tripartite agreement between the lender banks, HSIIDC and erstwhile concessionaire which provide for adjudication inter-se disputes between the parties by way of arbitration. Clause

7.11 reads as under:-

“7.11 Any dispute, difference or claim arising out of or in connection with or in relation to this Agreement which is not resolved amicably shall be decided finally by reference to arbitration to a board of arbitrators comprising of one nominee of each party to the dispute. Such arbitration shall be held in accordance with the Rules of Arbitration of the Indian Council of Arbitration and shall be subject to the provisions of the Arbitration and Conciliation Act, 1996. The arbitrators shall issue a reasoned award. The venue of such arbitration shall be at Chandigarh, India. The award shall be final and binding on the parties. The parties agree and undertake to carry out the award of the arbitrators (the “Award”) without delay.”

16. That certain disputes between HSIIDC and the concessionaire have already been referred by arbitration to an Arbitral Tribunal comprising of Justice N.K. Sodhi, Former Chief Justice of Karnataka High Court and Justice (Retd.) T.S. Doabia, former Judge of the Jammu and Kashmir High Court is admitted. Given the fact that two of the parties to the disputes sought to be raised in the present applications, are already before the Arbitral Tribunal, we see no reason why the disputes raised in the present applications should also not be referred to the Arbitral Tribunal in terms of clause 7.11 (supra). To the credit of learned counsel for the parties, we must mention that they were also agreeable to the making of such a reference leaving it open to the arbitral tribunal to entertain claims and counter claims based on the contractual obligations flowing from the agreements and to adjudicate upon the same.

17. The only question then is whether we ought to make any interim arrangement pending adjudication of the disputes by the arbitral tribunal. Having heard learned counsel for the parties at some length, on that aspect, we are inclined to make a suitable arrangement to protect the interest of all concerned. We say so, because Manesar RD 83.320 km to Palwal RD 135.650 km = 52.330 km has been completed at least in part by the outgoing concessionaire while the remaining was completed by M/s. KCC Buildcon Pvt. Ltd. The amount advanced by the lender banks to the outgoing concessionaire has been, it is reasonable to presume, utilized for construction of the said portion of the road. HSIIDC has now appointed an agent to collect the toll for the use of the said road. Ends of justice, in our opinion, demand that the amount so collected is secured to the extent of 80 percent by deposit of the same in an escrow account to be opened in the IDBI (Lead bank) while, the balance 20 percent can be utilized by the HSIIDC for maintenance etc. The amount so collected shall be available to the arbitral tribunal for disbursement in such ratio as the arbitral tribunal may after hearing the parties deem just and proper to direct.

18. In the result, we dispose of these applications with the following directions:-

“(i) All disputes between the lender banks, the HSIIDC and the outgoing concessionaire-KMP Expressways Ltd. arising out of or in relation to the tripartite agreement dated 08.01.2007 executed between the parties shall stand referred to the arbitral tribunal headed by Justice N.K. Sodhi.

(ii) The parties namely, the lender banks, HSIIDC and the outgoing concessionaire shall file their claims, and counter claims before the arbitral tribunal who shall then adjudicate upon and decide the same in accordance with the law giving to each one of them an opportunity of being heard in the matter.

(iii) Pending adjudication of the claims as aforesaid, we direct deposit of eighty percent of the amount collected towards toll for use of Manesar-Palwa! Section (Manesar RD 83.320 km to Palwa! RD 135.650 km= 52.330 km) in an escrow account to be opened in IDBI-the lead bank. The said amount shall then be available to the arbitral tribunal for disbursement to the lender banks by way of an interim arrangement or otherwise as it may consider appropriate after hearing the parties.

(iv) This order of reference to arbitration or the pendency of the proceedings before the arbitral tribunal shall not be considered as an impediment for the new concessionaire to commence its work of widening 4/6 lane work pertaining to Kundli-Manesar (0.00 km-83.320 km.), subject however, to the condition that before ESSEL, the new concessionaire commences the work in Kundli-Manesar (0.00 km-83.320 km) in terms of the contract allotted to it, HSIIDC shall appoint a committee of engineers/experts for measurement of the work done on (i) Kundli-Manesar-0.00km-83.320km and (ii) Manesar-Palwal-83.320km-135.650km by the outgoing concessionaire. The report shall be filed before the arbitrators within four weeks from the date of this order. The outgoing concessionaire, the lender banks and the new concessionaire shall associate with the process of measurement of the work.

(v) Needful shall be done expeditiously to avoid any delay in commencement of the work by ESSEL. Reference of the disputes to arbitration shall not be an impediment for the Debts Recovery Tribunal to proceed with the application filed by the banks pending before it. We make it clear that we have not expressed any opinion as to the merits of the claims or Contentions opened to the parties before the arbitral tribunal. No costs.