

## Delhi High Court ("Court") Upholds Contractors' Rights: Supplementary Agreements ("SA") Signed Under Pressure Not a Barrier to Claims for Damages

The Court in the case of *National Highways Authority of India v. M/s T.K. Toll Road Private Limited*, has *inter alia* held that a SA executed between parties to an infrastructure project whereby the contractor has relinquished his claim to damages, does not prevent it from seeking damages against the employer, especially if the SA was executed as a pre-requisite to obtain a Provisional Completion Certificate ("PCC"), which is crucial for toll collection in Build, Operate, Transfer ("BOT") contracts.

### Brief Facts:

- In December 2006, NHAI invited proposals for the design, engineering, finance, construction, operation and maintenance of Trichy-Karur Section from Km. 135.800 to Km. 218.000 of National Highway - 67 in the state of Tamil Nadu. This project intended to augment the current roadway of the Trichy-Karur Section, expand it to four lanes, and enhance its operation and upkeep using a BOT concession model.
- In March 2007, Reliance Energy Limited ("the Contractor") was declared as the successful bidder for the project, and NHAI issued a Letter of Acceptance in their favour. The parties executed a Concession Agreement on July 19, 2007. Additionally, a tripartite State Support Agreement was also executed with the Government of Tamil Nadu.
- The project was set to be completed 30 (thirty) months from the designated Appointed Date, with a concession tenure of 30 (thirty) years. The Appointed Date, as declared by NHAI, was January 15, 2008. Thus, the scheduled completion date for the project was set as July 14, 2010, with the concession duration extending until January 14, 2038.
- On November 14, 2013, both parties signed a SA which granted the Contractor a PCC, thereby allowing it to start toll collection in a section of the project. The parties also agreed to waive claims on project delays up to the SA date, and the completion date was rescheduled to February 24, 2014.
- On account of disputes arising between the parties, the Contractor issued a notice of arbitration to NHAI on December 17, 2018.
- On October 1, 2022, the arbitral tribunal passed its final award, awarding the Contractor a sum of INR 10,56,54,93,214 (ten trillion fifty-six billion five hundred forty-nine million three hundred fourteen thousand two hundred fourteen). Vis-à-vis the SA, the tribunal found that it had been executed under coercion.

- NHAI challenged the award before the Court, under Section 34 of the Arbitration and Conciliation Act, 1996 (“**A&C Act**”), whereas the Contractor filed an application under Section 36(1) of the A&C Act for enforcement of the award. NHAI also sought a stay against the operation of the award under Section 36(3) of the A&C Act.

### Issue:

While hearing NHAI’s application for stay of the operation of the award, the Court was called upon to answer whether the arbitral tribunal failed to appreciate that the SA, under which parties had agreed not to raise any claims on account of delay and extension of the project, was a bar on the claims.

### NHAI’s Primary Grounds of Challenge:

- Plea of coercion not taken: NHAI contended that there was no substantial evidence to support the claim that the SA was signed under economic pressure or coercion. They highlighted that although the SA was signed in November 2013, the Contractor first questioned its validity only in August 2016, and the allegation of coercion was first made in October 2016.
- Challenge to the validity of the SA was barred by limitation: NHAI asserted that if there was genuine coercion during the signing of the SA, it should have been contested promptly or upon grant of the PCC in February 2014. However, this was never done. Thus, the limitation to challenge the SA expired in February 2017.

### Findings and Analysis:

The Court declined to stay the operation of the arbitral award, observing that:

- Based on the evidence put forth by the Contractor’s expert witness, a delay of 1668 (one thousand six hundred and sixty-eight) days was attributable to NHAI on account of failure to hand over the project site, while a delay of 300 (three hundred) days was attributable to the Contractor. Such a delay by NHAI could not have been overlooked by the Contractor unless there was pressure to sign the SA. This finding was further corroborated by the testimony of NHAI’s witness. During cross-examination, the witness acknowledged the absence of any documentation indicating that the request for the SA originated from the Contractor. The witness had also admitted that without receiving the PCC and the rights to collect tolls, the Contractor could not have recovered any portion of its investment.
- NHAI had issued a circular which approved the execution of an SA in the given circumstances. However, the circular mandated that the SA must include an undertaking by the Contractor to forego any claims against the NHAI under any clause of the CA, for delay in handing over the affected stretch of the project highway.
- During cross-examination, NHAI’s witness admitted that had the SA not been signed, the PCC and extension of time would not have been granted to the Contractor. NHAI had also stated in its Statement of Defence that had the Contractor not given an undertaking not to make any claims against NHAI, the SA would not have been executed.
- Further, the arbitral record showed that the drafts of the SA underwent two revisions, and the Contractor had raised objections to the clause stating that neither party would seek damages against the other.
- Regarding the issue of limitation, the Court observed that NHAI had not dismissed the immediate claims put forward by the Contractor, and without such dismissal, the limitation period had not started. The Court also noted that since the project was ongoing, the payable dues under each claim could be quantified only after completion of the project. Therefore, there was no question of the claims being barred by limitation.
- Drawing from the above findings, the Court observed that there was a clear effort on NHAI’s part to protect itself from potential financial repercussions stemming from its own delays. Consequently, the Court found that NHAI was unable to demonstrate any apparent glaring error which would entitle it to a stay on the operation thereof. Accordingly, the application filed by NHAI challenging the arbitral award was dismissed with the observation that

no stay was warranted. NHA I was directed to pay 50% (fifty percent) of the awarded sum to the Contractor within 4 (four) weeks, and the balance 50% (fifty percent) within 4 (four) weeks thereafter.

### JSA Comment:

In recent times, it has become increasingly common for supplementary agreements to be executed, often limiting contractors' abilities to pursue damages. Given the state-backed authorities' control over aspects such as time extensions and the imposition of liquidated damages, contractors frequently find themselves cornered into meeting these demands. This judgment correctly recognises the glaring power imbalance in such cases and takes a step towards restoring the legal and contractual rights of the contractors. It must be noted, however, that a plea of coercion and/or duress must be made out on the facts of each case

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**This Prism has been prepared by:**



**Ananya Kumar**  
Partner



**Nikhil Ratti Kapoor**  
Senior Associate



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