

* **HIGH COURT OF DELHI: NEW DELHI**
+ **FAO (OS)No.230/2010 & CM No.6478/2010**

% Judgment reserved on: 13th April, 2010
Judgment delivered on: 29th April, 2010

NATIONAL HIGHWAYS AUTHORITY OF INDIA Appellant

Through: Mr. Ramji Sriniasan, Sr.
Adv. with Mr. Sumit
Gahlot and Ms. Padma
Priya, Advs.

Versus

ANDHRA EXPRESSWAY LIMITED Respondent

Through: Mr. Sumeet Lal, Adv.

Coram:

HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE A.K. PATHAK

1. Whether the Reporters of local papers may be allowed to see the judgment? Not necessary
2. To be referred to Reporter or not? Not necessary
3. Whether the judgment should be reported in the Digest? Yes

A.K. PATHAK, J.

1. Appellant assails the judgement dated 29th January, 2010 passed by the learned Single Judge whereby objections under Section 34 of the Arbitration and Conciliation Act,

1996 (for short hereinafter referred to as A & C Act) against the award dated 14th September, 2009 passed by the Arbitral Tribunal, have been dismissed.

2. The brief background of the case, leading to the passing of the impugned order, is that the Respondent was incorporated by a consortium of M/s. Gammon India Ltd. & Punj Llyod Ltd., the two joint venture partners. Respondent entered into a Concession Agreement (hereinafter referred to as "Agreement") with the Appellant on 30th October, 2001 for the work of strengthening the existing two lane carriageway between Dharamvaram and Tuni from 253 Kilometers to 300 Kilometers, on N.H. 5 in the state of Andhra Pradesh and for widening thereof to four lanes dual carriageway. The concession period was to start from 30th May, 2002 and end on 29th November, 2019. As per the Agreement, Respondent was to construct the carriageway within the stipulated period and had to operate and maintain the same thereafter. In return, the Respondent was to receive Annuity to the tune of Rs.279.12 million on each Annuity Payment Date as specified in Schedule 'J' of the Agreement. The first instalment of Annuity payment was to be released to the Respondent on 30th May, 2005.

Agreement envisaged appointment of an Independent Engineer for supervision and monitoring of the contracted work, carried out by the Respondent. M/s. Zaidun Leeng SDN. BHD-Acrtefact Projects (JV) was appointed as the Independent Engineer. In addition to the payment of Annuity under Article 8 of the agreement, Respondent was also entitled to bonus if project was completed before the stipulated date, that is, 29th November, 2004, as certified by the Independent Engineer. Bonus amount was to be determined on the basis of a formula, as contained in clause 8.3 of the Agreement.

3. During execution of the project, there were delays and hindrances at various stages, inasmuch as, the project sites were not handed over to the Respondent in time even though, the same was Appellant's obligation as envisaged under Article 3 of the Agreement. That apart, villagers had also obstructed the work at the sites in various stretches. In spite of these obstructions, delays and hindrances, Respondent succeeded in completing almost the entire construction work by July, 2004, except with respect to the certain parts of the Project Sites, which were not handed over to it by the Appellant. Under the Agreement it was

open to the Independent Engineer to issue Provisional Certificate to the Respondent if the project facilities could be opened for commercial operations notwithstanding the fact that certain incomplete items of work referred to as "Punch List" items were not complete. More over according to the Agreement the date of issue of such certificate was deemed to be the Commercial Operation Date (COD).

4. By a letter dated 16th July, 2004 Respondent requested the Independent Engineer for its concurrence for exclusion of incomplete work from COD requirement. Said request had to be made as payment of annuity could not have commenced from 30th May, 2005 i.e. first Annuity Payment Date, resulting in Respondent being unable to repay outstanding loans taken by it, inasmuch as, the Appellant would have also incurred liability to extend time for completion of project work, thus pay bigger amount of bonus later because of delay, as the 'X' factor in the formula for determination of bonus would have become operative. In these circumstances, keeping in mind the far reaching ramifications that would have ensued on both the parties, a supplementary agreement dated 12th May, 2005 was executed between Appellant and the Respondent whereby

incomplete part of work was delinked from the COD requirement and pursuant thereof a Provisional Certificate was issued.

5. On delinking the incomplete work by 30th October, 2004, road was ready for commercial operations; meaning thereby that COD had been achieved thirty days prior to the Stipulated Project Completion Date (SPCD) which was 29th November, 2004. On 6th May, 2005, Respondent requested the Independent Engineer to issue a Provisional Certificate and also approve Respondent's invoice in terms of clause 8.5 (a) of the Agreement and also requested the Appellant to pay first annuity of Rs.279.12 million along with bonus of Rs. 4,65,20,000/- for achieving the COD on 30th October, 2004.

6. Appellant communicated its approval to the Independent Engineer on 13th May, 2005 for issuing a Provisional Certificate with effect from 30th October, 2004. In turn, Independent Engineer issued a Provisional Certificate dated 14th May, 2005 mentioning COD as 30th October, 2004. In spite of issuance of Provisional Certificate, Appellant did not pay bonus amount. Consequently, Respondent invoked arbitration proceedings

in terms of Article 17.1 of the Agreement. Respondent appointed Hon'ble Mr. Justice G.T. Nanavati. Former Judge, Supreme Court of India; whereas Appellant appointed Lieutenant General Y.P. Khurana (Retired) as its Arbitrator. Two Arbitrators then appointed Justice A.M. Ahmadi, Former Chief Justice of India as the Presiding Arbitrator. Three Arbitrators constituted an Arbitral Tribunal, which published its Award on 14th September, 2009 thereby directing Appellant to pay Rs.4,65,20,000/- as bonus to the Respondent for early completion of the work together with interest @ 9% per annum with effect from 30th May, 2005 till the awarded amount was paid by the Appellant along with cost of arbitration amounting to Rs.5,00,000/-.

7. The question raised before the Arbitral Tribunal was whether Respondent was entitled to claim bonus for early completion of work or not.

8. Before the Arbitral Tribunal Respondent contended that the work was to commence from 30th May, 2002 and to be completed on 29th November, 2004 in terms of the Agreement dated 30th October, 2001. The first date of payment of annuity was 30th May, 2005. For the reasons

beyond the control of either party to the contract, certain items of work could not be completed before SPCD, therefore, both the parties, in terms of Article 19.7 of the Agreement, entered into Supplementary Agreement on 12th May, 2005 to provide for various situations which were not foreseen by the parties at the time of signing the Original Agreement dated 30th October 2001. By virtue of Supplementary Agreement certain terms in the main contract were modified and it was decided to delink certain items which could not be completed due to obstructions and hindrances in the project work which were beyond the control of either of the parties.

9. Relevant clauses of Article 5.4 of the Agreement reads as under :-

“Project Implementation

(a) Construction Works

(i) xxxxxxxxxx

(ii) xxxxxxxxxx

(iii) xxxxxxxxxx

(iv) xxxxxxxxxx

(v) xxxxxxxxxx

(vi) xxxxxxxxxx

(vii) All Tests shall be conducted in accordance with Construction Requirements. If the Tests are successful and all parts of Project Facilities can be safely and reliably opened for commercial operation, the Independent Engineer shall issue Completion Certificate:

Provided, notwithstanding that certain works or things forming part of Construction Works are not complete, if following Tests the Independent Engineer determines that the Project Facilities can be safely and reliably opened for operations, the Independent Engineer may issue the Provisional Certificate to the Concessionaire. The Provisional Certificate shall have appended thereto a list of outstanding items signed jointly by the Independent Engineer and the Concessionaire ("Punch List"). All Punch List items shall be completed by the Concessionaire within such time as may be determined by the Independent Engineer, not exceeding 90 (ninety) days of the date of issue of the Provisional Certificate. Upon satisfactory completion of all Punch List items, the Independent Engineer, shall promptly and in any case within 15 days thereof, issue Completion Certificate.

(viii) xxxxxxxxxx

(ix) xxxxxxxxxx

(x) The Project shall be deemed to be completed and open to traffic only when the Provisional certificate or the completion is issued

by the Independent Engineer in accordance with the provisions hereof”.

(Emphasis Supplied)

10. Clause 3 of the Supplementary Agreement reads as under:

“3. That in consideration of the following items, having been de-linked by the NHAI from the COD requirement, the concessionaire shall not claim additional time, additional annuity or bonus for the delays like delay in delivery of the sites, stoppages of construction works by villagers etc., and that they shall complete all the remaining works with due expedition as per provisions and as and when the site is made available after the COD, issue of Provisional Certificate.

(a) xxxxxxxxxxxx

(b) xxxxxxxxxxxx

(c) xxxxxxxxxxxx

(d) xxxxxxxxxxxx

11. In view of the supplementary agreement, Provisional Certificate was issued on 14th May, 2005 by the Independent Engineer mentioning therein the date of completion of project as 30th October, 2004 which was prior to the SPCD,

i.e. 29th November, 2004. The work was completed one month prior thereto; thereby making Respondent available to the benefit of bonus in terms of clause 8.3 of the Agreement read with Supplementary Agreement.

12. As per the Appellant, as the project work was not completed in all respect, therefore, Respondent was not entitled to bonus in terms of the Agreement only on the basis of a Provisional Certificate in spite of the Supplementary Agreement. Respondent was entitled to bonus, had it completed the entire project before the stipulated SPCD.

13. After scrutinizing the relevant clauses of the Agreement as well as Supplementary Agreement Arbitral Tribunal concluded as under:

“16. This provision of the contract and the above formula make it clear that early completion of the Project i.e. SPCD-COD and positive ‘X’ factor because of delays mentioned in that provision would entitle the Concessionaire to get bonus. In this case bonus is not claimed on the basis that there were delays of the type entitling the Concessionaire to get the Bonus. It is claimed because the claimant/concessionaire was able

to complete the project work before SPCD. As stated earlier the project work was successfully completed by the claimant over the site which were made available to it. It was not possible for the respondent to hand over other sites to the claimant. As the whole project work was not completed, the Independent Engineer could not have issued Completion Certificate, in absence of which the claimant would not have got his request for payment of Annuity processed by the Respondent and would have suffered financial difficulties. The Respondent would have incurred liability to extend time for completion of the Project and also pay more bonus because of the delay which was likely to be caused. Thus a situation had arisen for both the parties to find some solution and as the Supplementary Agreement states it was decided to de-link the incomplete part and provide for it separately. Article-(iii) of the Supplementary Agreement if read carefully makes it clear that in consideration of de-linking the incomplete works from COD, the claimant gave up its right to claim additional time for the delays referred to in that Article and also the higher amount of bonus. It is a matter of fact that there was considerable delay of the type contemplated by Article (iii)

and even when Provisional Certificate was granted, some obstructions and hindrances still existed. The claimant was not responsible for the delay and he could not have completed the work because of those obstructions and hindrances. That would have entitled the claimant to ask for extension of time and other consequential entitlements including more bonus. It was this benefit which the claimant gave up. It had not given up the right accrued to get bonus which had accrued earlier on early completion of the project work. In our opinion, this is the correct reading of that article and therefore the contention raised by the learned counsel Mr. Ramaswamy has to be rejected as misconceived as it is based upon misreading of that article.”

(Emphasis supplied)

14. Learned Single Judge was of the view that the Arbitral Tribunal had rendered findings after construing the merits of the case and scrutinising the relevant clauses of the Agreement read with Supplementary Agreement and that no manifest error or perversity could be found therein; that the interpretation put by the Arbitral Tribunal on the relevant Clauses of Agreement and Supplementary Agreement was

justified, equitable and valid interpretation of the said Clauses. Hence the courts' interference was not required.

15. It was contended by the Appellant before the learned Single Judge, by placing reliance on clauses 3 and 7 of the Supplementary Agreement, that merely on the basis of Provisional Certificate, Respondent was not entitled to receive bonus, since by virtue of Clauses 3 and 7 of the Supplementary Agreement, the respondent had relinquished its right to claim additional annuity and bonus as contained in Original Concession Agreement because certain items of work remained incomplete. Learned Single Judge negated this argument on the ground that in a commercial contract such as the present one, on the commencement of the toll road, on issuing of a Provisional Certificate, Appellant started earning toll from the road built by the Respondent. Road became operational and toll started flowing resulting earnings to the Appellant rendering corresponding benefit to the Respondent as well. Learned Single Judge, inter alia, observed as under:

“Keeping in view the aforesaid parameters, I do not find any illegality or violation of the contractual provisions or any perversity by the Arbitration Tribunal. The

interpretation put by the Arbitration Tribunal on the clauses of the Supplementary Agreement is a justified, equitable and valid interpretation of the clauses of the Supplementary Agreement. In any case the interpretation is one plausible interpretation of a reasonable person, such interpretation cannot be interfered with while hearing objections to an Award under Section 34. In fact, I find the opposition of the petitioner to be very surprising because I cannot understand how the petitioner can claim commercial benefits from an earlier completion of the contract but deny the commercial benefits to the contractor for early completion viz the bonus payable for early completion. The scales of justice in commercial contracts of this nature, in my opinion, have been very evenly balanced by the Arbitrator and I do not find any fault whatsoever in the Award."

16. Arguments advanced by the Appellant before the learned Single Judge have been reiterated before us but we are not convinced with the same. The scope of interference by the court under Section 34 of the A & C Act is very limited. Unless the action of the Arbitrator is illegal, that is, it is beyond the law of the land or that the same is beyond the contractual provisions or that the findings/conclusions are so perverse which shocks the judicial conscience, award cannot be interfered with. In other words, if the action of Arbitrator is illegal the court would interfere with an award.

The court does not sit as an Appellate Court over the findings and conclusions of the Arbitrator and if two views are possible, the court will not interfere with the award merely if it is of another view than the view taken by the Arbitrator. There is no doubt in mentioning that the Arbitrator is entitled to interpret the relevant clauses of the contract. Unless there is gross perversity in such interpretation, the court would refrain itself from the interfering in the award in exercise of its jurisdiction under Section 34 of the A & C Act.

17. In Delhi Development Authority vs. R.S. Sharma and Company, New Delhi, reported in (2008) 13 Supreme Court Cases 80, it was held that interference by the court under Section 34(2) of the A & C Act is open only if an award is (i) contrary to substantive provisions of law; or (ii) the provisions of the Arbitration and Conciliation Act, 1996; or (iii) against the terms of the respective contract; or (iv) patently illegal; or (v) prejudicial to the rights of the parties; the award could be set aside if it is contrary to: (a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality. The award could also be set aside

if it is so unfair and unreasonable that it shocks the conscience of the court.

18. In the backdrop of above settled legal position, we have examined the award and do not find any perversity therein. Facts are not in dispute. Concession Agreement was entered into on 30th October, 2001; work was to commence from 30th May, 2002 and was to be completed on 29th November, 2004. Majority of the substantial work was completed on 30th October, 2004, i.e., much prior to the stipulated date of completion of work. However, entire work could not be done for the reasons which were beyond the control of both the parties, inasmuch as, the site could not be handed over by the Appellant to the Respondent in time. In these circumstances, both the parties sat across the table and decided to delink such incomplete items vide Supplementary Agreement executed between the parties on 12th May, 2005, pursuant whereof a Provisional Certificate was issued mentioning the date of completion as 30th October, 2004, which admittedly was one month prior to the stipulated date of completion. The said certificate was issued by the Independent Engineer only after obtaining approval of the competent authority. Work having been

completed prior to the stipulated date of completion Respondent became entitled to bonus as has been held by the Arbitral Tribunal. We do not find any perversity in the view taken by the Arbitral Tribunal.

19. After having scrutinized the relevant clauses of the Agreement and the Supplementary Agreement, in the facts of this case, the Arbitral Tribunal as also the learned Single Judge have arrived at a conclusion that Respondent was entitled to bonus, which is a possible view. We also do not find any justifiable reason to interfere with the same.

20. In the light of the above discussions, we find the present appeal to be devoid of merits and the same is dismissed.

A.K. PATHAK, J

VIKRAMAJIT SEN, J.

April 29, 2010
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