

IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB.A. 11/2015 & IA No. 3963 of 2015(stay)

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Appellant

Through: Mr. S. Nandakumar, Mr. R. Sathis
Kumar, Mr. Prateek Gupta, Mr. M.
Soundarasaran Kumar, Advocates.

versus

D.S. TOLL ROAD LTD. & ORS.

..... Respondents

Through: Mr. Hasan Murtaza, Advocate for R-1.

AND

ARB.A. 12/2015 & IA No. 3964 of 2015 (stay)

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Appellant

Through: Mr. S. Nandakumar, Mr. R.
Sathis Kumar, Mr. Prateek Gupta, Mr. M.
Soundarasaran Kumar, Advocates.

Versus

N K TOLL ROAD LTD. & ORS.

..... Respondents

Through: Mr. Hasan Murtaza, Advocate
for R-1.

CORAM: JUSTICE S.MURALIDHAR

ORDER

26.02.2015

Caveat Nos. 200 and 201 of 2015

1. Since learned counsel for the Caveator enters appearance, the caveats stand disposed of.

ARB.A. Nos. 11 and 12 of 2015

2. The National Highways Authority of India ('NHAI') has filed

these appeals under Section 37 (2) of the Arbitration and Conciliation Act, 1996 ('Act') against impugned orders of two Arbitral Tribunals (ATs) on the issue of fees payable to the Arbitrators.

Facts in Arbitration Appeal No.11 of 2015

3.1 The arbitral proceedings to adjudicate the disputes between the NHAI and the DS Toll Road Ltd. (DTRL) (Respondent No.1) are in progress before a three-member AT presided over by Shri Surjeet Singh. Shri Shyam Sunder Aggarwal (nominated by DTRL) and Shri Arun Kumar Sinha (nominated by NHAI) are the other two members.

3.2 The disputes have arisen from a concession agreement (CA) signed by NHAI and DTRL on 30th January 2006 for the design, construction, development, finance, operation and maintenance of Km 373.275 (start of proposed flyover at Dindigul Bypass) to Km 426.6 (Samyanallore) on NH-7 in the State of Tamil Nadu. Under Clause 39.2 of the CA the parties are to refer their disputes to arbitration under the aegis of the Indian Council of Arbitration ('ICA'). DTRL accordingly issued a notice dated 5th December 2013 to the ICA regarding commencement of arbitration proceedings and nominated Shri S.S. Aggarwal as its Arbitrator.

3.3 By letter dated 16th December 2013 the NHAI informed DTRL that in terms of its policy circulars dated 1st April and 8th May 2013, it proposed to enter into a Supplementary Agreement ('SA') for amendment of the arbitration clause in the CA to remove the requirement of reference of disputes to arbitration under the aegis of the ICA and proposed that the fee structure of the NHAI be adopted.

By its reply dated 2nd January 2014, DTRL agreed to the amendment regarding removal of reference to the ICA but declined to agree to adoption of the fee structure of NHAI.

3.4 The Registrar of ICA issued a letter dated 13th January 2014 to DTRL directing them to deposit Rs. 80,85,676 towards arbitral cost and expenses and refer the name of their nominee Arbitrator from the panel of Arbitrators of the ICA. Meanwhile, on 6th March 2014, the NHAI and DTRL entered into the SA to amend Clauses 39.1 and 39.2 of the CA to remove the reference to the ICA. On that date itself NHAI nominated Shri Arun Kumar Sinha as its Arbitrator. Thereafter the two Arbitrators of DTRL and NHAI appointed Shri Surjeet Singh as the Presiding Arbitrator of AT.

3.5 The AT held its first sitting on 23rd April 2014. It fixed the date for completion of pleadings. The AT directed that the fees of the Arbitrators shall be as per the latest ICA rules and shared by both the parties equally.

3.6 On 26th September 2014, the NHAI wrote to the AT that they should accept the fee structure as mentioned in NHAI's policy circular dated 13th January 2010. NHAI stated therein that Shri A.K. Sinha had accepted its fee structure.

3.7 The AT next held its sitting on 1st October 2014 and discussed the aforementioned letter of the NHAI. It held that “the AT has already fixed the fee and expenses payable to the Arbitrators and the fee and expenses so fixed shall be paid in this case”. Shri A.K. Sinha gave a dissenting note stating that “on the issue of fee and expenses payable to the Arbitration, I had drawn attention of similar Tribunal

(*M/s NK Toll Road Ltd. Vs. NHAI* in which Co-Arbitrators are same but the Presiding Arbitrator is different), towards the fact that I have accepted the fee and expenses provided in NHAI circular dt. 13.01.2010. I had also written a letter to fellow Arbitrators, with copy to parties, in this regard”.

3.8 NHAI filed an application before the AT seeking review of the orders dated 24th March 2014 and 1st October 2014. NHAI referred to its circular dated 13th January 2010 and submitted the AT should fix fees as per that circular. By a 2:1 majority, the AT by the impugned order dated 13th January 2015, dismissed NHAI's review petition and declined that its fees should be in terms of NHAI's policy circular dated 13th January 2010. The majority held that the fees already decided by the AT was reasonable. Shri A.K. Sinha in his dissenting note held that in the spirit of the decision of the Bombay High Court in *Amiraj Construction Co. v. State of Maharashtra 1987 (3) Bom CR 607* he was unable to concur with the view of the majority. He stated that his fees and expenses would be in terms of NHAI's circular dated 13th January 2010.

Facts in Arbitration Appeal No. 12 of 2015

4.1. The disputes between NHAI and (NK Toll Road Ltd.) (NTRL) (Respondent No.1) arising out a CA dated 30th January 2006 for design, construction, development, finance, operation and maintenance of Km 258.645 (End of Namakkal Bypass) to Km 292.6 (Start of Karur Bypass) and improvement, operation and maintenance of Km 248.625 (Start of proposed flyover on Namakkal bypass) to Km 258.645 (End of Namkkal Bypass) on NH-7 in the State of Tamil Nadu were referred to arbitration by NTRL by sending a notice of arbitration dated 18th December 2013 to the ICA

under Clause 39.2 of the CA. NTRL also nominated Shri S.S. Aggarwal as its Arbitrator.

4.2 The ICA by a notice dated 23rd December 2013 directed NTRL to deposit a sum of Rs.49,96,845 towards costs and expenses of arbitration and also asked NTRL to refer the name of its Arbitrator from the panel of Arbitrators of the ICA.

4.3 Meanwhile, NHAI and NTRL entered into an SA on 6th March 2014 to amend Clause 39.1 and 39.2 of the CA and remove the reference of disputes to arbitration by the ICA. NHAI nominated Shri A.K. Sinha as its Arbitrator. Both Shri. S.S. Aggarwal and Shri A.K. Sinha then nominated Shri Ravindra Kumar as the Presiding Arbitrator.

4.4 At the first hearing of the AT on 19th April 2014 the AT recorded in its proceedings of that date that the fees of the Arbitrators would be decided after receipt of copy of the contract and the statement of claim of the Claimant.

4.5. At the second hearing on 22nd September 2014, the AT decided that the fees would be as per the latest ICA rules. On 7th October 2014 the NHAI addressed a letter to the AT drawing its attention to its policy circular and stating that the payment of fees as per the latest ICA rules was not acceptable. At the hearing of the AT on 9th October 2014 the above letter was considered. The majority of the AT noted that in terms of the SA dated 6th March 2014, the matter of fixing of fees and expenses was left to be decided by the AT under Section 31(8) of the Act. Even otherwise the process of constitution of AT had started on 18th December 2013. The majority of the AT

observed that any proposal of NHAI for amending the fees subsequently would not be valid. It was reiterated that the fees fixed in the meeting of the 22nd September 2014 would stand and that the scale of fees and expenses which was based on the ICA rules was reasonable. Shri A.K. Sinha the nominee Arbitrator of the NHAI gave a dissenting note and accepted the fees and expenses in terms of the NHAI circular dated 13th January 2010. At the next hearing on 28th October 2014, the AT reiterated its order dated 22nd September 2014 on fees.

4.6 The NHAI then filed an application for review of the orders dated 22nd September 2014, 9th October 2014 and 28th October 2014. The attention of the AT was again drawn to the SA in terms of which Clause 39.1 and 39.2 concerning reference to the ICA rules was removed. It was accordingly contended that the AT could not fix the fees structure as per the ICA rules. It was contended that the fees fixed by the AT was not reasonable. Reference was made to the decision of the Supreme Court in *Union of India v. Singh Builders Syndicate (2009) 4 SCC 523* and to the decision of the Bombay High Court in *Amiraj Construction Co. v. State of Maharashtra* (supra).

4.7 In its reply to the above application, NTRL did not agree with the stand of the NHAI that the fees fixed by the AT was not reasonable. It pointed out that while the SA did amend Clauses 39.1 and 39.2 of the CA to remove the reference to the ICA, NTRL had not agreed that the fees should be in terms of NHAI's circular dated 13th January 2010. NTRL requested that the proceedings be continued by the AT and that it had no objection to the fees fixed by the AT.

4.8. By the impugned order dated 5th December 2014, the majority of

the AT rejected NHAI's review petition. It noted that the SA did not bar the AT from fixing the fees under Section 31(8) (a) of the Act. All that the SA did was to remove the mention of ICA in Clauses 39.1 and 39.2 of the CA. It was held that the fees fixed by the AT in its meeting on 22nd September 2014 “is quite reasonable and need no modification”. Shri A.K. Sinha gave a dissenting note stating that the fees of the AT should be in terms of NHAI's circular dated 13th January 2010.

Maintainability of the appeals

5. The first issue that arises concerns the maintainability of these appeals under Section 37 of the Act against the impugned interlocutory orders dated 5th December 2014 and 13th January 2015 of the ATs dismissing NHAI's review petitions on the issue of fixing of the AT's fees.

6. Mr. S. Nandakumar, learned counsel for the Appellant, submitted that the appeal was maintainable in terms of Section 37 (2) (a) read with Section 16 (3) of the Act. According to him inasmuch as the fees fixed by the AT was unreasonable and contrary to Section 31 (8) (a) of the Act, the AT was exceeding the scope of its authority and therefore the appeals were maintainable.

7. Under Section 37 (2) (a) and appeal shall lie to a court from an order of an AT "accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16" or "granting or refusing to grant an interim measure under Section 17". What NHAI was seeking in its review petitions was certainly not an interim measure under Section 17 of the Act. As far as Section 16 (3) of the Act is concerned it contemplates a party raising the plea that the AT "is exceeding the

scope of its authority". An appeal under Section 37 (2) (a) would lie only where the AT accepts the plea and not where it refuses it. Neither were NHAI's applications seeking review of the AT's orders on fees under Section 16 (3) of the Act nor the ATs' impugned orders accepted such a plea. While the plea was the fees fixed was not reasonable, the plea was not that in fixing the fees the AT was acting beyond the scope of its authority. The Court is unable to agree that merely because one of the parties alleges that the fees fixed by the AT under Section 31 (8) of the Act is 'unreasonable', the AT can be held to be acting beyond the scope of its authority for the purposes of Section 16 (3) of the Act. In any event, the plea having been negatived in the present cases by both ATs, the question of appeals being preferred against such orders under Section 37 (2) (a) of the Act does not arise.

8. Consequently, the Court holds that these appeals are not maintainable under Section 37 (2) (a) of the Act and require to be dismissed on that ground alone.

Merits of the impugned orders

9. Be that as it may, Mr. Nandakumar's submissions on merits have also been considered. He referred to Section 31 (8) (a) of the Act, which reads as under:

“31. Form and contents of arbitral award...

(8) Unless otherwise agreed by the parties.

(a) the costs of an arbitration shall be fixed by the arbitral tribunal

(b)

Explanation- For the purpose of clause (a), "costs" means reasonable costs relating to-

- i. the fees and expenses of the arbitrators and witnesses,
- ii. ..."

10. The above provision states that unless otherwise agreed by the parties, the cost of arbitration shall be fixed by the AT. The Explanation states that the costs would be 'reasonable costs' relating to "the fees and expenses of the arbitrators". In the present case under the CAs as originally entered into, the parties had agreed that the arbitration would be in terms of the ICA's rules and regulations, including those relating to fees of arbitrators. Thereafter even while the parties signed the SAs, they did not agree on what should be the fees payable to the arbitrators. The amendment to Clauses 39.1 and 39.2 of the CA only removed the reference to the reference to the ICA. The amended Clauses 39.1 and 39.2 of the CA were silent on the fixation of fees of the members of the AT. It may be recalled that NHAI wrote both to DRTL and NTRL that they should agree to payment of fees of the AT in terms of NHAI's circular dated 13th January 2010. Neither DRTL nor NTRL agreed to that proposal. Therefore in the amended Clauses 39.1 and 39.2 of the CA, while there was a removal of reference to the ICA, there was no clause inserted stating that the fees of the AT would be fixed in terms of the NHAI's circular dated 13th January 2010. Resultantly, there was, for the purposes of Section 31 (8) of the Act, no agreement between the parties on the fees to be paid to the arbitrators.

11. In the absence of any agreement between the parties on fees to be paid to the arbitrators, the ATs were free to fix 'reasonable' fees in terms of Section 31 (8) (a) of the Act. The question that then arises is whether in fixing their respective fees as per the ICA Rules the ATs have fixed fees that were not 'reasonable' and therefore contrary to

the requirement of Section 31 (8) (a) of the Act.

12. At the outset it must be observed that even though the SAs dated 6th March 2014 amended Clauses 39.1 and 39.2 of the CA and removed the reference to the ICA, the dates of commencement of arbitration were stated to be the very dates when notice of arbitration was given to the ICA by DTRL (5th December 2013) and NTRL (18th December 2013). As of those dates of commencement of arbitration proceedings, the unamended Clauses 39.1 and 39.2 of the CA were applicable and the fees of the AT would be governed by the ICA Rules. The view of one of the ATs in the order dated 9th October 2014 that the amendment to the CA made subsequent to the commencement of the arbitration proceedings would not apply is a plausible view to take. In any event, even the amended CAs entitled the ATs to fix fees in exercise of the powers under Section 31 (8) (a) of the Act.

13. In terms of Section 31 (8) (a) the ATs were required to fix 'reasonable' fees. Unless the fees fixed by them are construed to not be 'reasonable', it cannot be said that they have acted in contravention of Section 31 (8) (a) of the Act. Both the ATs fixed their fees as per the ICA Rules and held that those were 'reasonable' fees. The mere reference to the ICA Rules would not *per se* render the fees not 'reasonable'. On the contrary, going by the observations of the Supreme Court in ***Singh Builders Syndicate*** (supra) one yardstick for determining whether the fees charged by an arbitrator is reasonable is to compare the fees with those fixed in institutional arbitrations. The ICA is an institution that has for many years now been providing arbitration services. It can be safely presumed that the fees fixed by it is consistent with the acceptable norms. It is nobody's

the case that the fees structure of the ICA is not 'reasonable'. Merely because the fees in terms of NHAI's circular dated 13th January 2010 is less than the fees as per the ICA Rules, would not by itself make the fees in terms of the ICA Rules 'unreasonable'. Consequently, the Court is unable to agree with the submission of the learned counsel for the Appellant that the fees fixed by the ATs in the instant cases are not 'reasonable'. The observation of the Bombay High Court in *Amiraj Construction* (supra) reflects the general concern about arbitrators charging exorbitant fees. It by no means held that the fees under the ICA Rules is unreasonable.

14. Consequently, the Court is of the view that the orders passed by the ATs on 5th December 2014 and 13th January 2015 holding that the fees fixed by them is reasonable suffer from no legal infirmity.

15. The appeals and applications are accordingly dismissed.

S. MURALIDHAR, J.

FEBRUARY 26, 2015
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