

IN HIGH COURT OF DELHI AT NEW DELHI

OMP No. 190/2015

NATIONAL HIGHWAYS AUTHORITY OF INDIA

.....PETITIONER

Through: Mr. Ravi Gupta, Senior Advocate with
Ms. Meenakshi Sood and Mr. Mukesh Kumar,
Advocates.

Versus

LUCKNOW VARANASI TOLLWAYS PVT. LTD.

..... RESPONDENT

Through: Mr. Kirti Uppal, Senior Advocate with
Mr. Chirag M. Shroff and Ms. Aastha Dhawan,
Advocates.

And

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CORAM: JUSTICE S. MURALIDHAR

ORDER

27.02.2015

IA No. 4115 of 2015 (for exemption) in OMP No. 190/2015

IA No. 4118 of 2015 (for exemption) in OMP No. 191/2015

1. The exemptions are allowed subject to all just exceptions.

2. The applications are disposed of.

OMP Nos.190 of 2015 & 191 of 2015

3. Both petitions arise out a common set of facts and are accordingly being disposed of by this common order.

4. OMP No. 190 of 2015 filed by the Petitioner National Highways Authority of India ('NHAI') under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') seeks the setting aside of an Award dated 19th January 2015 of the Arbitral Tribunal ('AT') in the disputes arising between NHAI and the Respondent, Lucknow Varanasi Tollways Private Limited, out of a Concession Agreement ('CA') dated 14th March 2012 whereunder the Respondent undertook to Design, Build, Finance, Operate and Transfer ('DBFOT') by augmenting the existing road from km 11/500 to km 134/700 on the Lucknow-Sultanpur section of NH-56 in the State of Uttar Pradesh by four-laning it.

5. By a majority of 2:1, the AT directed NHAI to return to the Respondent three bank guarantees ('BGs') amount to Rs. 10.44 crores submitted as bid security. Further, the AT rejected the claim of the Respondent for a sum of Rs. 3,80,36,294 spent by it on implementing the project.

6. The NHAI states that it has filed an application under Section 33 of the Act seeking certain corrections in the award. The AT has given the Respondent time till 4th March 2015 to file its reply to the said application. The NHAI nevertheless states that the corrections sought would not change the substance of the impugned Award challenged in the present petition.

7. OMP No. 191 of 2015 filed by NHAI is under Section 9 of the Act praying that during the pendency of the petition under Section 34 of the Act the Respondent should be directed to keep the BGs for the bid security renewed.

8. The Respondent went before the AT with the case that under Clause 47.3 of the CA the NHAI was obliged to provide certified true copy of the State Support Agreement ('SSA') executed between the Ministry of Road Transport and Highways ('MORTH'), Government of India and the Government of Uttar Pradesh for providing support and services thereunder on the date of execution of the CA, i.e., 14th March 2012. It was contended by the Respondent that the failure on the part of the NHAI in doing so was a material breach of the CA entitling the Respondent to terminate the CA under Clause 37.2.1. It was submitted that the NHAI had misrepresented to the Respondent regarding the existence of the SSA and induced the Respondent into signing the CA on the belief that the SSA would be provided soon. It was contended that the CA would be voidable even in terms of the Sections 17, 18 and 19 of the Indian Contract Act, 1872 ('ICA') read with Section 55 thereof.

9. The Respondent stated that it wrote to NHAI on 13th March 2012 granting 180 days time to furnish the SSA and yet NHAI failed to do so within such extended time. Thus, the CA is terminable under Section 55 of the ICA. It was further contended that the Respondent was justified in demanding costs/damages from NHAI in view of Section 73 of the ICA. The Respondent enclosed with its claim Exhibit C-48 which was a copy of the expenditure statement in the form of a certified copy of the Auditor's report to show that it had spent Rs. 3,80,36,294 till 30th September 2013 on the project. The Respondent stated that SSA was never provided till the

date of the termination of the CA on 26th April 2013. Without getting SSA the Respondent could not have waited endlessly and had to terminate the CA under Clause 37.2.

10. The Respondent pointed out that in terms of the Common Loan Agreement ('CLA') entered into by it with the lenders, a copy of the SSA had to be furnished to the lenders within six months from the date of the initial drawdown. Since no firm commitment was forthcoming from NHAI regarding provision of SSA, the Respondent could not have proceeded for construction without having certainty about all future disbursements of loan installments. The relevance of the SSA was so grave that even breach of any clause in the agreement by the State was a ground for the Respondent to terminate the CA under Clause 37.2 (d) of the CA.

11. The NHAI contended that the fact of SSA not being available at the time of signing of the CA was known to the Respondent as was evident from the letter dated 13th March 2012. The CA was signed on the following day, i.e., 14th March 2012. This meant that the Respondent had waived its right to have a certified copy of the SSA at the time of signing of the CA under clause 47.3 of the CA. It was not open to the Respondent to fix 180 days time limited for supply of the SSA. There is no such time limit under Clause 47.3. There was no obstruction caused to the Respondent in performing its obligations under the CA for want of the SSA.

12. NHAI contended that under Clause 9.1.2, which was a non-obstante clause, the Performance Security ('PS') had to be provided within 180 days of the signing of the CA and if it was not so provided, would be entitled to encash the bid security. Although the PS was allowed to be deposited by

22nd December 2012, the Respondent did not do so. According to NHAI, the Respondent never had any intention to provide the PS.

13. NHAI pointed out that the Respondent was a joint venture of M/s. Essar Projects India Limited and Atlanta Infra Assets Limited (M/s. Atlanta). The minority partner of the JV, i.e., M/s. Atlanta was declared as a wilful defaulter by ICICI Bank by its letter dated 25th July 2012. M/s. Atlanta wrote to M/s. Essar Projects stating that the contract price needed upward revision by 20% on account of steep rise in prices. On this ground M/s. Atlanta wanted to withdraw from the project. The Respondent wrote to the NHAI on 7th November 2012 seeking extension of time upto 9th January 2013 for furnishing the PS. According to NHAI, this was merely a ruse to avoid payment of PS as long as it could be managed.

14. NHAI contended that the termination of the CA by the Respondent on 26th April 2013 was illegal. The letter of termination did not specify which provisions of CA had been breached by NHAI and therefore, Clause 37.2.1 (a) could not have been invoked. NHAI denied that the Respondent was induced into signing the CA without getting a copy of the SSA. Therefore, the claim of Rs. 3,80,36,294 and the interest thereon was untenable

15. In the impugned Award, the majority of the AT, i.e., the Presiding Arbitrator and another Arbitrator came to the following conclusions:

- (i) The SSA was required to maintain smooth flow of funds from the financial institutions without which the project would have remained a non-starter. The SSA was eventually procured by the NHAI on 20th February 2014 and a copy thereof was filed by NHAI only on 16th July 2014.

(ii) The Respondent could be held to have waived its right to receive SSA only by signing the CA. The Respondent had throughout been pressing for the supply of SSA. On the other hand NHAI had failed to reply to any of these letters repeatedly written by the Respondent requesting for the supply of the SSA.

(iii) The SSA was “such a vital document that its absence has contributed substantially to convert the project into a non-starter.” Without the SSA, the Respondent could not have procured loan from the lenders and the project would have remained a non-starter. The NHAI by its conduct had breached the relevant clauses of the CA by not providing a copy of the SSA.

(iv) However, there was no evidence regarding any false promise or misrepresentation made by NHAI and therefore, the said allegation made by the Respondent was not tenable.

(v) NHAI did not take any initiative to expedite this project and the inaction of the NHAI was not in terms and spirit of the CA. The NHAI thus breached the provisions of the Clauses 4.1.4 and 4.1.5 of the CA.

(vi) The developments resulting from M/s. Atlanta being declared a wilful defaulter were not the subject matter of the dispute before the AT. The NHAI was free to take any action against either of the partners and/or the JV itself.

(vii) It was in the interests of justice for NHAI to extend assistance to the Respondent in terms of Clause 4.1.4 of the CA to obtain a

suitable substitute partner as early as possible. However, NHAI preferred to remain a passive spectator and took two months and nine days for grant of permission to the Respondent to replace the defaulter partner.

(viii) In view of the breaches by NHAI of Clauses 47.3, 47.10, 4.1.4 and 4.1.5 and in view of Clause 35.6 which required the Respondent to safeguard its interests and that of the project in the long run, the Respondent was very much empowered to refuse to pay the PS. The failure to provide SSA was a material default on the part of the NHAI and this default was not cured within 90 days. Therefore, the termination of the CA by the Respondent was upheld.

(ix) It could not be said with certainty that even if the NHAI had not defaulted in any manner whatsoever the Respondent would have surmounted this problem by successfully replacing its minority partner with another entity or by any other manner and would have successfully put the project on rails. Therefore, the Respondent was not entitled to any termination payment and its claim of Rs. 3,80,36,294/- was rejected. Consequently, there was no question of payment of interest in the said sum.

16. The Court has perused the relevant clauses of the CA. The 'conditions precedent' as set out in Clause 4.1.3 (a) to (h) would be required to be satisfied by the Respondent prior to the Appointed Date. The conditions precedent would be deemed to be fulfilled when the Respondent provided *inter alia* the PS to the NHAI. Under Clause 4.1.4 both the parties were to make all reasonable endeavours to satisfy the conditions precedent within

the time stipulated and to provide the other party “with such reasonable cooperation as may be required to assist that party in satisfying the conditions precedent for which the party is responsible.”

17. Under Clause 9.1.1 the Respondent was to provide NHAI not later than 180 days from the date of signing of the CA, an irrevocable and unconditional guarantee from a Bank “for a sum equivalent to Rs. 52.18 crores”. Until such time the bid security was to remain in force. Upon provision of the PS, NHAI was to release the bid security to the Respondent. Under Clause 9.1.2 of the CA, in the event PS was not provided within 180 days NHAI could encash the bid security and appropriate the proceeds thereof as damages.....” and “the agreement shall be deemed to have been terminated by mutual agreement of the parties.”

18. Under Clause 24.1.1 the Respondent undertook that it shall achieve financial close within 180 days from the date of the CA and in the event of delay, it would be entitled to a further period not exceeding 120 days, subject to payment of damages. However, no damages would be payable if such delay in financial close occurred solely as a result of any default or delay by the NHAI in procuring satisfaction of the conditions specified in Clause 4.1.2.

19. Under Clause 37.2, if the NHAI committed a material breach of any of the provisions of the CA and such default had a material adverse effect on the Concessionaire or the State commits a material default in complying with the provisions of the SSA and such default has a material adverse effect on the Concessionaire and the breach continued for a period of 90 days from the date of notice given in this behalf by the NHAI, the Respondent could terminate the agreement and upon such termination the

NHAI was to pay the Respondent by way of termination payment, an amount equal to “debt due and 150% of the adjusted equity.”

20. Clause 47.3 dealt with the SSA and read as under:

“47.3. State Support Agreement

The Concessionaire acknowledges that it has received from the Authority a certified true copy of the agreement executed between MORTH and the State Government for providing the support and services specified therein (the "State Support Agreement"), and the Parties hereto agree to make their best endeavors to procure the support of the State Government.”

21. Clause 48.1 dealt with the appointed date on which financial close is achieved or an earlier date that the parties may by mutual consent determine, and shall be deemed to be the date of commencement of the concession period.

22. This Court has heard the submissions of Mr. Ravi Gupta, learned Senior counsel for the NHAI and Mr. Kirti Uppal, learned Senior counsel for the Respondent.

23. According to Mr. Ravi Gupta, on a collective reading of the above clauses it could not be said that providing the SSA was a condition precedent in terms of Clause 4.1.2, and failure to provide SSA being not a condition precedent, would not entitle the Respondent to allege material breach. According to him, the Respondent could not have invoked Clause 37.2.1 to terminate the CA. Mr. Gupta took serious exception to the manner in which the said clause was interpreted by the AT. Mr. Gupta sought support for his submission from the minority opinion of the AT which accepted the above plea of the NHAI and held that the Respondent was not entitled to return of the bid security. According to Mr. Gupta, the failure to

furnish the PS by the Respondent was a separate obligation under Clause 9.1.1 which was not linked to the furnishing of the copy of the SSA. The failure to furnish PS would entail the bid security to be forfeited to the NHAI in terms of Clause 9.1.2.

24. The Court would like to preface the discussion with reference to the recent judgment of the Supreme Court in *Associate Builders v. Delhi Development Authority* 215 (2014) DLT 204 which recapitulates the entire law on the scope of the powers of the Court to interfere with the arbitral award under Section 34 of the Act. *Inter alia* it was observed that “an Arbitral Tribunal must decide in accordance with the terms of the contract, but if any arbitrator construes a term of the contract in an unreasonable manner, it will not mean that the Award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.” It was further reiterated that “once it is found that the arbitrator's approach is not arbitrary or capricious, then he is the last word on facts.” The Supreme Court also reiterated that “an award can be said to be against justice only when it shocks the conscience of the Court.” The Court observed that it is settled law that where a finding is based on no evidence, and the AT takes into account something irrelevant to the decision which it arrives at, or ignores vital evidence in arriving at its decision, such decision would be termed as perverse. The above principles were reiterated in *ONGC Limited v. Western Geco International Limited* 2014 (9) SCC 263 where the Supreme Court elaborated on what construes “the fundamental policy of Indian law” for the purposes of Section 34 (2) (b) (ii) of the Act.

25. Keeping in view the settled legal position, the Court proceeds to examine whether the impugned Award could be said to be vulnerable to being interfered with under Section 34 (2) (b) (ii) of the Act. There can be no doubt that the CA proceeded on the basis that SSA was in fact available at the time of signing of the CA. It is surprising that NHAI allowed Clause 47.3 (which makes a factually incorrect assertion) to be incorporated in the CA. Clause 47.3 of the CA records an acknowledgment by the Respondent that “it has received from the authority a certified true copy of the application executed between MORTH and the State.” It also states that “the parties hereto agree to make their best endeavors to procure the support of the State Government.” Clearly both the parties knew that SSA was not still in their hands. In fact, the Respondent wrote a letter to NHAI on 13th March 2012, one day prior to the signing of the CA, asking for a copy of the SSA. The Respondent waited for 180 days for the NHAI to produce a copy of the SSA. The discussion in the majority award of the AT about the conduct of the respective parties in relation to procuring SSA is essentially on a question of fact. The majority of the AT found that the NHAI did not really make efforts to procure a copy of the SSA.

26. In terms of the CLA executed by the Respondent with its lenders, without the SSA, the lenders would not have advanced any loan for the project. Clause 37.2 (b) is also significant as regards to the importance of the SSA. If the SSA was not there, then the project could not have started.

27. In the circumstances, the Court is not persuaded to hold that the conclusion of the majority of the AT that NHAI committed a breach of the CA by not procuring the SSA is either perverse or irrational. A collective reading of the clauses of the CA, as was done by the majority of the AT, leads to the conclusion that a failure to provide SSA by the NHAI was a

material breach which justified the Respondent not furnishing the PS. With the project not having started due to the breach of its obligations by the NHAI, there was no justification for the NHAI to retain the bid security.

28. This Court finds no error whatsoever in the conclusion of the majority of the AT, that NHAI should be required to return the bid security to the Respondent. The impugned majority award of the AT does not suffer from any material illegality and does not attract any of the grounds under Section 34 of the Act warranting interference by the Court.

29. Consequently, the question of requiring the Respondent to keep the BGs for the bid security renewed does not arise.

30. Both the petitions are accordingly dismissed but in the facts and circumstances of the case, with no order as to costs.

S. MURALIDHAR, J.

FEBRUARY 27, 2015

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