

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **EFA(OS) 23/2014 & CM No.16589/2014**

Date of decision : 18th November, 2015

M/S NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Appellant

Through: Mr. Arun Kumar Varma, Ms. Sahiti
Kachroo and Ms. Priyanka Ghosh,
Advs.

versus

M/S HINDUSTAN CONSTRUCTION CO. LTD Respondent

Through: Mr. Pravin H. Parekh, Sr. Adv. with
Mr. Sumit Goel, Ms. Ritika Sethi and
Ms. Sanjana Ramachandran, Advs.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MR. JUSTICE I.S.MEHTA

JUDGMENT (ORAL)

GITA MITTAL, J

1. The appellant – National Highways Authority of India ('NHAI' hereafter) before us assails an order dated 4th July, 2014 passed by the learned Single Judge dismissing EA No. 223/2014 in Execution Petition No. 263/2012.

2. The factual narration giving rise to the present appeal is not disputed and to the extent necessary briefly noted hereafter.

Three disputes arose out of a contract executed in 2005 between the parties resulting in a reference to arbitration in the year 2009. The arbitration proceedings culminated in an award dated 21st March,

2012 whereby the tribunal accepted the claims of the respondent (hereinafter referred to as 'HCC') herein and was awarded an amount of Rs.18,70,48,492/- qua dispute no. 1 ; Rs.2,24,60,120/- qua dispute no.2 and Rs.77,87,840/- qua dispute no.3.

Interest @ 10% per annum was awarded on the said amounts with effect from due dates till the date of the award and upon failure of the NHAI to pay the amount within 90 days, future interest @ 15% per annum till the date of actual payment was awarded.

3. NHAI belatedly filed objections under Section 34 of the Arbitration & Conciliation Act, 1996 which were registered as OMP No. 702/2012. The objections in respect of the award qua claim no. 1 came to be dismissed by an order passed on 28th August, 2012. So far as objections with regard to the award on claim nos. 2 and 3 are concerned, we are informed that they are still pending.

4. The important point to be noted is that NHAI accepted the adjudication by the court vide the order dated 28th August, 2012 and chose not to appeal the order passed thereon. As a result, the award of the Tribunal qua claim no.1 became enforceable and NHAI was bound to have made the payment without anything more being required to be done. This was not done.

5. We are informed by Mr. Pravin H. Parikh, learned senior counsel appearing for HCC that on expiry of the 30 days period, HCC had filed Execution Petition No. 263/2012 which was pending on 28th August, 2012 when the objections were rejected. In these proceedings also, NHAI chose not to offer the payment of the awarded amount qua claim no.1.

6. It appears that at this stage, parties entered into negotiations with regard to the subject matter of the arbitral award.

7. On the 8th of January, 2013, a statement was made by learned counsel for the parties that settlement talks are in progress and time was sought for settlement. The executing court directed the NHAI to deposit the “*decretal amount including the interest till 31st December, 2012 i.e. a sum of Rs.26,60,25,027.41*” within four weeks with the Registrar General of this court.

We are informed that this amount was deposited on 7th February, 2013 by NHAI. The amount, therefore, did not reach the hands of the decree holder even on date.

8. We now enter the arena of the disputes pressed before us. While NHAI would contend that a binding mutual settlement with regard to the amount payable to HCC and the other claims had been reached, on behalf of HCC it has been urged that several offers made by HCC to settle all disputes between the parties were never accepted by the NHAI. It is further submitted on behalf of HCC that, in any case its offers each time were predicated on a time bound payment by the NHAI which never happened. As such no binding settlement was reached or implemented.

9. We may also note the reason advanced on behalf of the respondent-HCC for exploring a negotiated settlement with NHAI. It is pointed out that amounts running into several crores of rupees were the subject matter of the Arbitral Award dated 21st March, 2012. The NHAI had not moved a step towards effecting payment of even a single penny towards this amount which were payments towards a

contract successfully completed by the respondents. For the reason the respondent is accountable to its shareholders, creditors, banks and several other parties, it was essential for the HCC to have the money in his hands at the earliest. For this reason, the HCC was willing to look at a time bound resolution and was willing to make a financial sacrifice in a case NHAI effected payment of the agreed amount.

10. The NHAI has contended that binding settlement came into existence by the letter dated 30th January, 2013 addressed by the HCC to it. By this letter, a reference is made to negotiations held on 29th January, 2013. The HCC pointed out in this letter that qua dispute no. 1, as on 31st January, 2013, an amount of Rs.26,90,58,789/- was payable by the NHAI to it. As against this, HCC was willing to accept a sum of Rs.25,11,82,273/- towards full and final settlement of the amount towards dispute no. 1 if the amount was paid on or before 28th February, 2013. HCC was willing to forego also the interest accruing on the arbitral award qua this dispute from 1st February, 2013 till the actual date of payment. However, the parties would continue to prosecute their rival contentions qua dispute nos. 2 and 3 in OMP No. 782/2013 before the court.

NHAI opted not to send any response to this offer. No payment as was tendered in terms thereof to the HCC. Clearly, there was no binding settlement between the parties on this date.

11. Strong reliance is placed thereafter on the minutes of a meeting dated 6th March, 2013 held under the aegis of three Chief General Managers of the NHAI, again pressing that it discloses a binding agreement. We extract hereunder the relevant portion of these

minutes which contained the offer for settlement made on behalf of HCC :-

“After discussion between the members of above committee and above representative of M/s HCC, M/s HCC agreed to forego their claim on amount for dispute/claim No.2&3 as brought out above and agreed to accept the amount of Rs.24,90,94,233/- already negotiated in earlier negotiation meeting held on 30.01.2013 for Claim No.1 as full and final settlement against dispute/claim no.1, 2 & 3, M/s HCC have given their consent/undertaking of this effect vide their letter No.HCC/CONT/PA/TRN/65 dated 06.03.2013 (Annexure-A)

M/s HCC also requested for release of settled amount before 31.03.2013.”

(Emphasis supplied)

12. These minutes were followed by a letter sent on the same date i.e. 6th March, 2013 by the HCC reiterating the above offer. It is to be noted that in the offer made on 6th March, 2013, the HCC had offered to receive the amount of Rs.24,90,94,233/- if the settlement amount was released before 31st March, 2013. This was lesser than the amount of Rs.25,11,82,273/- towards claim no.1 at which settlement was proposed by the letter of 30th January, 2013. An additional concession offered was that the HCC was receiving this amount in full and final settlement of all disputes i.e. inclusive of its claim nos. 2 and 3 as well. There is substance in the submission of MS. P.H. Parekh, learned senior counsel for the respondent that this involved substantial sacrifice on the part of the respondent which had an arbitral award in its favour qua these claims as well. We may note that the letter dated

6th March, 2013 refers to “*payment in respect of the aforesaid amount immediately without any further delay*”.

13. That the above offer of the HCC required acceptance on the part of NHAI is established by the statement made before the court on 14th March, 2013 when the execution case was listed. On this date, counsel for “both the parties” sought some more time for settlement. Clearly, the NHAI was not treating either the minutes or the letter dated 6th March, 2013 as a binding settlement. It made no submission to the executing court to release from the amount being deposited in court the sum agreed to be accepted by HCC in satisfaction of the settlement. If such settlement had been reached, the amount in court would have been released in favour of not only the HCC but the surplusage could have been returned to the coffers of NHAI on this date.

14. On record before us is also the reminder dated 21st March, 2013 from the HCC wherein reference is made to the offer of 30th January, 2013 as well as the letter dated 6th March, 2013.

15. In the executing court on the next date of hearing i.e. 25th April, 2013, NHAI sought four weeks time with regard to the offer made by the decree holder on 30th January, 2013. In the meantime, the matter was adjourned directing the Registry to release the sum of Rs.25,11,82,273/- to the HCC without prejudice to the rights and contentions of the parties to contest the matter on merits. This also reiterates the position that 6th March, 2013 minutes or letter had not culminated in any binding settlement. The conduct of the NHAI in this matter to say the least discloses complete apathy and arrogance.

It has taken no action in the matter at all on the repeated offers of a contractor to resolve all disputes with it.

16. On record before us is a letter addressed on 8th July, 2013 written to the Project Manager of HCC, more than four months after 6th March, 2013. This letter is predicated on advice received by NHAI from ISAC advising the NHAI that it had several outstanding claims from the HCC for a total amount of Rs.253.50 crores and that it would be advised to settle all claims. The stand taken by the NHAI before us that there was a binding settlement as on 30th January, 2013 or on 6th March, 2013 is falsified by the statement by the NHAI in the letter dated 8th July, 2013 which refers to “offer” given by HCC to settle the matter. Even if the NHAI was not willing to accept the settlement proposed by HCC, as a responsible statutory and public authority, it was incumbent to immediately respond to the repeated communications of the HCC. Public money was being dealt with and it was duty bound to ensure that the same is not frittered away towards the mounting interest liability on the voluminous award against it.

17. The HCC responded by a letter dated 12th July, 2014 clearly notifying the NHAI that its settlement offer and concessions were not available after 1st April, 2013 in as much as NHAI had failed to release the payment to HCC by 31st March, 2013.

18. Before the executing court on 12th August, 2013, HCC sought release of the balance amount also which was lying in the court. This was resisted on behalf of the NHAI on the ground that a settlement had been arrived at with the decree holder with regard to not only dispute no.1 but also with regard to dispute nos. 2 and 3 as well. On

the issue as to whether the amount should be released to the decree holder-HCC, or not, the executing court concluded that the parties did not appear to have arrived at a settlement with regard to dispute nos. 1 and 2 as offer to settlement with the decree holder was open only till 31st March, 2013; since the money was released to it after that date, the offer had consequently perished. It was also held that the parties had not arrived at a settlement with regard to dispute nos. 2 and 3. Consequently, the Registry was directed to release the balance amount deposited by the NHAI alongwith the accrued interest in favour of the decree holder. The decree holder was directed to file calculations of the balance amount being claimed towards the interest between the period January, 2013 and 12th August, 2013. The judgment debtor was directed to pay such amount if the calculations were correct before the next date of hearing.

It is to be noted that the NHAI had relied on the letters dated 30th January, 2013 and 21st March, 2013 in the proceedings before the learned Single Judge on 12th August, 2013 without placing either the offer contained in the minutes dated 6th March, 2013 or the letter of the HCC of even date.

19. The appellant assailed this order by way of EFA(OS) No. 23/2013. A new plea was pressed before the Division Bench seized of the appeal to the effect that the deposit of the amount in court by NHAI pursuant to the order dated 8th January, 2013 tantamounted to full satisfaction of the decree. The Division Bench recorded its opinion that the offer made by the HCC to settle the disputes upon accepting the amount of Rs.25,11,12,273/- was conditional upon the

payment being unconditionally made on or before 28th February, 2013 and extended to 31st March, 2013.

It was held that there was nothing on record which would enable the court to record satisfaction for payment of the decretal amount. The court however, accepted the submission on behalf of NHAI that there were subsequent negotiations between the parties evidenced by letters and permitted the NHAI to withdraw the appeal to approach the learned Single Judge with such correspondence.

20. Based on the above, NHAI filed EA No. 223/2014 before the learned Single Judge praying for recall of the order dated 12th August, 2013. This application has been rejected by the learned Single Judge by the order dated 4th July, 2014 which has been impugned before us. Perusal of the application and the impugned order would show that the only new documents placed before the learned Single Judge were the copy of the minutes dated 6th March, 2013 and the letter of the same date. The learned Single Judge has dealt with the contention on behalf of NHAI that a settlement was reached as is manifested in the minutes dated 6th March, 2013 whereby the HCC had agreed to a full and final settlement of all claims on receipt of sum of Rs.24,90,94,233/- and that such payment was not conditional upon it is being made before 31st March, 2013. The learned Single Judge has considered the conduct of the parties which we have noticed heretofore as well as the correspondence on record and concluded that the decree holder intended to keep the offer open only till 31st March, 2013. In this regard, reliance has been placed on the clear communication from the side of the respondent contained in the letter

dated 6th March, 2013 wherein the HCC has expressed its urgency calling upon NHAI to effect immediate payment.

21. In the impugned order, the learned Single Judge has also noted the letter dated 21st March, 2013 wherein HCC had demanded the sum of Rs.25,13,58,045/- as against the amount of Rs.29,90,94,233/-. Additionally, the HCC had insisted that the amount had to be paid on or before 31st March, 2013 failing which the settlement offer stood automatically withdrawn.

22. By this reminder, the HCC reminded NHAI that despite the concessions extended in these letters and “*more than 15 days have been passed*” after the letter dated 6th March, 2013, no payment had been received by it. The NHAI was unequivocally notified that if it failed to make the payment of Rs.25,13,58,045/- on or before 31st March, 2013, all concessions made vide these letters “*shall automatically stand withdrawn*”. NHAI was also put to notice that HCC would press the total amounts due to it under the Award dated 21st March, 2013 in respect of all the three disputes. The amount after 31st March, 2013 was quantified at Rs.31,91,90,014/-.

Even this did not motivate the NHAI to either respond to these communications or to make the payment by 31st March, 2013.

23. As noted above, NHAI has not accepted the settlement offer made by HCC. It has also not effected the payment on the terms on which the settlement was proposed from the side of the HCC. In this background, the submission on behalf of NHAI that there was a binding settlement between the parties premised on the letter of HCC either on 30th January, 2013 or on the minutes of 6th March, 2013 is

completely baseless and devoid of any legal merit.

24. In these circumstances, the present appeal is clearly misconceived.

25. We may note that Mr. P.H. Parekh, learned senior counsel for the respondent has also objected to the maintainability of the appeal on the ground that Rule 9 of Order XLVII of the CPC precludes an appeal against an order dismissing a review application. The further submission is that an order dismissing a review as in the present case could not be covered under the definition of an appealable judgment within the meaning of the expression in Section 10 of the Delhi High Court Act, 1966. In support of this contention, learned senior counsel has placed reliance on judicial pronouncements reported at **(1994) 2 SCC 753 *Shanker Notiram Nale v. Shiolalsing Gannusing Rajput*; (2012) 6 SCC 782 *DSR Steel (Private) Limited v. State of Rajasthan & Ors.*; 2013(5) SCALE 447 *Municipal Corporation of Delhi v. Yashwant Singh Negi*; 1997 (40) DRJ (DB) *Basant Kharbanda v. Punjab & Sind Bank* and AIR 1954 SC 526 *Moran Mar Basselios Catholicos & Anr. v. Mar Poulose Athanasius & Ors.***

26. We may note that EA No. 223/2014 was couched as an application seeking recall of an order dated 12th August, 2013. The learned Single Judge was of the view that it substantially sought review of the said order and consequently was so treated and placed for hearing before the same learned Judge who had passed the order dated 12th August, 2013.

27. As against this, it is contended by Mr. Arun Verma, learned counsel for the appellant that the learned Single Judge has considered

the merits of the issues placed before him and the substantial controversy raised on behalf of the appellant. It has been contended that an appeal would therefore lie.

28. In support of this submission, Mr. Arun Verma has relied on the landmark judgment of the Supreme Court reported at ***AIR 1981 SC 1786 Shah Babulal Khimji v. Jayaben D. Kania & Anr.*** (para 112 at page 1814); ***AIR 1974 SC 1719 Shanti Kumar R. Canji v. The Home Insurance Co. of New York*** (paras 18 and 19) on the issue as to whether an appeal would lie against an order dismissing a review. Mr. Arun Verma, learned counsel has also placed reliance on a Division Bench judgment of this court reported at ***199 (2013) DLT 568 Neelam Arya v. Din Mohd.(Deceased) & Ors.*** (paras 2 and 6).

29. Mr. Verma has contended that the documents placed before the court on 4th July, 2014 were never placed before the learned Single Judge prior thereto and that an impugned order was a decision on merits so far as these documents were concerned. For this reason, the appeal was maintainable. We have noted above that the appellant had placed the letters dated 31st March, 2013; 8th July, 2013 and 12th July, 2013 before the learned Single Judge. The minutes dated 6th March, 2013 and the letter dated 6th March, 2013 were referred to in the letter dated 12th July, 2013. These were documents which were in the power and possession of the appellant and these were not documents which came into existence after the passing of the order dated 12th August, 2013. No reason or explanation is forthcoming as to why these documents were not placed earlier. Given the above narration of facts and circumstances, EA No. 223/2014 was also misconceived.

30. We have substantially heard the appeal on merits and it is necessary to put a quietus to the entire matter. We have passed an order on the merits.

31. We now examine the submission on behalf of the NHAI that the deposit in court by it tantamounted to satisfaction of the decree. The submission is that the NHAI had deposited the amount on 7th February, 2013 and that such deposit was prior to the deadline of 31st March, 2013. Such submission ignores the basic objection of HCC that no settlement had come into effect. It is noteworthy that if this deposit was to be considered as discharge of the liability under a binding settlement, the first step towards the same would be an acceptance of HCC's offer by the NHAI. The deposit was made on 7th February, 2013. On that date, the offer of the HCC made on 30th January, 2013 was pending without any acceptance on the part of the NHAI. If NHAI was making a deposit under the settlement, instead of so depositing it in court, NHAI would have informed HCC that the offer made by it on 30th January, 2013 was acceptable to it. In these circumstances, the NHAI would not have deposited the amount in court but would have tendered the amount for payment to the HCC.

32. We may examine this submission even from the context of the offer made by HCC in its letter dated 6th March, 2013. Certainly, the deposit by NHAI on 7th February, 2013 was not towards satisfaction of a proposal which had not even come into existence on that date. Furthermore, if such deposit had to be treated as satisfaction of such settlement, then NHAI would have informed the court on 14th April, 2013 that it had deposited the amount agreed to be accepted by the

HCC. The submission, therefore, that the deposit on 7th February, 2013 was discharge of NHAI's liability under any binding settlement is misconceived. No settlement at all had been reached between the parties.

Furthermore, as per the letter dated 30th January, 2013, HCC had offered to accept Rs.25,11,82,273/- in satisfaction of the claim and award w.r.t. the first dispute.

NHAI did not deposit this lesser amount on the 7th of February, 2013, but the larger amount of over Rs.26 crores. This is an important circumstance establishing that the settlement offer of HCC was not acceptable to NHAI.

33. We are of the view that the judicial time has been expended on a matter which did not call for any appeal. The facts and circumstances are clear and glaring on the face of the record. The executing court has also been called upon to pass repeated orders despite the fact that the NHAI has on no occasion manifested its acceptance of the settlement offers proposed by the respondent. At any stage at all, has it informed the court that it had settled the matter or that it had no objection to release of the quantified amount to the HCC. In this background, NHAI deserves to be burdened with costs of the present proceedings. The present appeal is, therefore, dismissed with costs which are quantified at Rs.25,000/- to be paid within four weeks from today.

34. As no settlement has taken place, the Execution Petition and OMP No. 782/2012 shall proceed.

CM No.16589/2014

In view of the dismissal of the appeal, the application does not survive for adjudication and is dismissed as such.

GITA MITTAL, J

I.S.MEHTA, J

NOVEMBER 18, 2015

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