

\$~

\*

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

Reserved on: October 26, 2016  
Decision on: November 8, 2016

+ **O.M.P. (COMM) 84/2016 & IA No. 4396/2016 (delay)**

NATIONAL HIGHWAYS AUTHORITY  
OF INDIA

..... Petitioner

Through: Ms. Gunjan Sinha Jain with Mr. Mukesh  
Kumar, Advocates.

versus

PRAKASH ATLANTA JV

..... Respondent

Through: Mr. Sandeep Sethi, Senior Advocate  
with Mr. Chirag M. Shroff, Advocate.

**AND**

+

**O.M.P. 103/2015**

PRAKASH ATLANTA JV

..... Petitioner

Through: Mr. Sandeep Sethi, Senior Advocate  
with Mr. Chirag M. Shroff, Advocate.

versus

NATIONAL HIGHWAYS AUTHORITY OF  
INDIA

..... Respondent

Through: Mr. Pradeep K. Bakshi with Ms. Prachi  
V. Sharma, Advocates.

**CORAM: JUSTICE S. MURALIDHAR**

## **J U D G M E N T**

%

**08.11.2016**

### **IA No. 4396 of 2016 in O.M.P. (COMM) 84 of 2016**

1. This is an application filed by the National Highways Authority of India ('NHAI') for the condonation of the delay of 28 days in filing the application under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') against the impugned Award dated 30<sup>th</sup> January, 2015 and the corrected Award dated 7<sup>th</sup> November, 2015 passed by the Arbitral Tribunal ('AT') in the arbitration between NHAI and the Respondent herein, Prakash Atlanta JV ('PAJV').

2. It is stated that an application under Section 33 of the Act was filed for correction of the Award and the corrected Award dated 7<sup>th</sup> November, 2015 was received in the office of the NHAI through courier only on 4<sup>th</sup> January, 2016. However, the office which received it was that of the Project Director, Project Implementation Unit ('PIU') Lucknow. Thereafter, it was submitted to the Project Director on 19<sup>th</sup> January, 2016. Upon receiving recommendations from the Project Director around 20<sup>th</sup> February 2016, it was then sent to the General Manager and on 27<sup>th</sup> February, 2016 instructions were given to counsel to file the present application. After preparing the draft application, the petition under Section 34 of the Act was finally filed on 4<sup>th</sup> March, 2016.

3. It is submitted that NHAI was under the *bona fide* impression that the limitation period began to run only from the date of the receipt of the corrected Award. NHAI was fortified in this understanding by the decision

dated 7<sup>th</sup> August, 2015 of the learned Single Judge of this Court in O.M.P. No. 186 of 2015 (*National Highways Authority of India v. Prakash Atlanta JV*). The said judgment was, however, overturned by the Division Bench in its judgment dated 8<sup>th</sup> February 2016 in FAO (OS) No. 476 of 2015 (*M/s. Prakash Atlanta JV v. National Highways Authority of India*). The Division Bench held that limitation for the purposes of Section 34(3) of the Act would begin to run from the date of the disposal of the application under Section 33 of the Act and not from the date of receipt of the order passed by the AT correcting the Award. It is stated that soon after the above decision by the Division Bench, NHAI filed the petition under Section 34 of the Act.

4. The application is seriously resisted by PAJV by pointing out that the corrected Award was published by the AT on 7<sup>th</sup> November, 2015 there is no valid explanation as to why the application could not have been filed within three months of 7<sup>th</sup> November, 2015. The application was filed only on 4<sup>th</sup> March, 2016. The delay of 28 days beyond three months has not been explained. It is submitted that unless NHAI is able to show that it was prevented by sufficient cause from filing the petition within three months of the disposal of the application under Section 33 of the Act, the delay should not be condoned.

5. The Court, in the first instance, notices that indeed there was an application filed under Section 33 of the Act by PAJV on 27<sup>th</sup> February, 2015 before the AT. An order was passed thereon by the AT on 7<sup>th</sup> November, 2015 substituting paras 9.5.2, 13. 3 and 13.5 of the impugned

Award dated 30<sup>th</sup> January 2015.

6. In terms of the Section 34(3) of the Act, the limitation of three months begins to run from the date of disposal of the application under Section 33 of the Act by the AT. Therefore, in the present case, the period of three months would have to be reckoned not from the date of the receipt of the Award by NHAI, but from the date of disposal of the application filed under Section 33 of the Act which, in this case, is 7<sup>th</sup> November, 2015. Therefore, the application ought to have been filed by 7<sup>th</sup> February, 2016. It was, however, filed only on 4<sup>th</sup> March, 2016 and, admittedly, there has been a delay of 28 days. These facts are not in dispute. The only question, therefore, is whether NHAI has been able to demonstrate that it was prevented by sufficient cause from filing the application within the period of three months after 7<sup>th</sup> November, 2015.

7. NHAI appears to be justified in pointing out that it was under a *bona fide* impression that the period of three months would begin to run from the date of receiving a copy of the corrected Award i.e., 4<sup>th</sup> January, 2016 and not the date of disposal of the application under Section 33 of the Act. It went by the decision dated 7<sup>th</sup> August, 2015 of the learned Single Judge of this Court in O.M.P. No. 186 of 2015 (*National Highways Authority of India v. Prakash Atlanta JV*). That view was upset by the Division Bench in its judgment dated 8<sup>th</sup> February, 2016 in FAO (OS) No. 476 of 2015 (*M/s. Prakash Atlanta JV v. National Highways Authority of India*) and it was clarified that the period of three months would have to be reckoned from the date of disposal of the application by the AT under Section 33 of the Act.

The present petition has been filed within one month of that decision thus substantiating the plea of the NHAI that it has without undue delay filed the petition thereafter.

8. The Court is unable to accept the submissions on behalf of the PAJV that the above explanation for the delay of 28 days furnished by the NHAI is insufficient. The Court, accordingly, condones the delay of 28 days in filing the petition.

9. The application is allowed.

**O.M.P. (COMM) 84/2016**

10. As far as O.M.P. (COMM) 84 of 2016 is concerned, NHAI apart from challenging the impugned Award dated 30<sup>th</sup> January, 2015 and the corrected Award dated 7<sup>th</sup> November, 2015 also challenged an order dated 5<sup>th</sup> April, 2010 passed by the AT whereby the preliminary objections raised by NHAI to Claim No. 3 preferred by PAJV were rejected.

11. One of the first submissions made by Ms. Gunjan Sinha, learned counsel appearing for the NHAI is that the AT was in error in rejecting the counter-claims preferred by NHAI. However, it is pointed out by Mr. Sethi that there is not a single ground of challenge in the petition to the rejection of NHAI's counter-claim by the AT. The grounds only pertain to the allowing of Claims 1.1, 1.2 and 2 to 4.

12. Indeed, the Court did not find any specific ground of challenge to the rejection of NHAI's counter-claim by the AT. Ms. Sinha then referred to

para 16 of the petition where it has been stated that NHAI “seeks to challenge the impugned Award in respect of finding arriving at with respect to Claims No. 1.1, 1.2, 2 to 4 and rejection of the Counter-Claims preferred by the Petitioner.” Nevertheless, there are no specific grounds of challenge as regards rejection of the counter-claim. Ms. Sinha points out that notwithstanding that there was not specific ground of challenge, the Court should nevertheless examine the correctness of the impugned Award as far as rejection of NHAI’s counter-claim is concerned.

13. Before proceeding to examine the Award dated 30<sup>th</sup> January, 2015, the Court notes that disputes arising out of the contract between the parties were adjudicated before three ATs with each AT dealing with certain specific claims and counter-claims. The Award dated 30<sup>th</sup> January, 2015 as corrected by the Award dated 7<sup>th</sup> November, 2015 was delivered by a three-member AT of which Mr. Prafulla Kumar was the Presiding Arbitrator and Mr. V. Murahari Reddy and Mr. V.K. Shrotriya were Members. The said Award dated 30<sup>th</sup> January, 2015 as corrected by the Award dated 7<sup>th</sup> November, 2015 concerns five claims made by PAJV as under:

“(i) loss of overheads and expected profit (Rs.28,35,92,995/-) loss due to reduced productivity from machinery and equipment deployed (Rs.11,34,37,204), loss of bonus expected (Rs.9,52,82,544), loss due to additional expenditure incurred in executing the work during the extended period over and above the price adjustment relief received under the terms of the Contract on account of abnormal increase in the prices of inputs (Rs.35,28,00,000) in CLAIM No.1 (totalling to Rs.84,51,12,743);

(ii) Extension of time for completion of work in CLAIM No.2;

(iii) claim seeking payment of cost of earth work in foundation and below ground level in reinforced earth structure in CLAIM No.3;

(iv) claim seeking past Interest (@ 12%) pendent lite and future (@ 18%) in CLAIM No.4;

(v) and cost of Arbitral Proceedings in CLAIM No.5.”

14. The second AT presided over by Mr. S.C. Gupta and with Mr. S.K. Jain and Mr. V.K. Shrotriya as members dealt with the counter-claims of NHAI relating to disputes regarding variation items. The third AT presided over by Mr. Justice A.M. Ahmadi, former Chief Justice of India dealt with certain other claims and counter-claims and gave an Award in original on 5<sup>th</sup> August, 2014 which was corrected subsequently by an Award dated 13<sup>th</sup> September, 2014. One portion of that Award is the subject matter of challenge in O.M.P. 103/2015 filed by PAJV.

15. Although the NHAI has not specifically raised grounds in its petition under Section 34 of the Act as regards the rejection of its counter-claims by the AT presided over by Shri Prafulla Kumar, the Court has examined the substance of that challenge as articulated by Ms. Gunjan Sinha, learned counsel appearing for the NHAI.

16. The counter-claims of NHAI have been considered in para 10 of the impugned Award dated 30<sup>th</sup> January 2015. The counter-claim was for recovery of liquidated damages (‘LD’) amounting to Rs. 15.88 crores. The AT noted that the date of commencement of the work was 30<sup>th</sup> August, 2001 and the scheduled date of its completion was 25<sup>th</sup> August, 2004. The work

was not completed within the scheduled completion date and a final extension of time ('EOT') was granted up to 15<sup>th</sup> November, 2006.

17. PAJV terminated the contract on 14<sup>th</sup> March, 2008 and NHAI on 23<sup>rd</sup> March, 2008. NHAI raised a counter-claim initially before the third AT presided over by Mr. Justice Ahmadi but later raised them before the AT presided over by Shri Prafulla Kumar as it was thought that the EOT and LD were inter-related issues. The AT permitted it to do so.

18. It was submitted by the NHAI before the AT that Clause 49.3 of the General Conditions of the Contract ('GCC') which provides for payment of LD applies only where "the contractor fails to comply with the time for completion as stipulated in the tender". It would apply where the cause for the failure is attributable to the Contractor i.e., PAJV. The contract further empowered the Engineer to extend the time within 28 days from the beginning of the event. Despite not granting an EOT beyond 15<sup>th</sup> November, 2006, NHAI allowed the work to proceed thereafter and in fact terminated the contract only on 14<sup>th</sup> March, 2008. The AT noted that up to the date of the termination of the contract by NHAI, it did not impose any LD but the Engineer continued to accept the work performed by PAJV. NHAI also paid the IPCs.

19. Before this Court, it was urged by Ms. Sinha that at the highest the work had to be completed by 4<sup>th</sup> August, 2007, the date on which the approval of the Commissioner of Railway Safety ('CRS') was obtained, and any delay beyond that would make the Contractor liable for LD.

20. The AT noted that the Engineer himself recommended the EOT till 31<sup>st</sup> January, 2008 and this was recorded in the minutes of the meeting held on 26<sup>th</sup> November, 2007. The record further showed that PAJV had committed to complete the Railway span within six to eight months from the date of the approval of the CRS. There was no comment on the said time frame by the NHAI or the Engineer. According to the AT, this led to the inference that the EOT was up to 31<sup>st</sup> January, 2008. In the above circumstances, the claim of the NHAI for LD from 15<sup>th</sup> November, 2006 does not appear to be justified.

21. Learned counsel for NHAI was unable to point out any glaring error in the reasoning or conclusion of the AT which would attract any of the grounds under Section 34 of the Act in order to persuade this Court to interfere with the Award of the AT rejecting the NHAI's counter-claim. Indeed, if the work proceeded with NHAI not terminating the contract after 15<sup>th</sup> November, 2006 and ultimately terminating it only on 23<sup>rd</sup> March, 2008, the claim for LD from 15<sup>th</sup> November, 2006 for delayed completion does not appear to be justified.

22. Consequently, this Court finds no error in the impugned Award insofar as it rejects the counter-claim of NHAI.

23. Ms. Sinha then pressed the other grounds of challenge in the present petition to the allowing some of the claims of PAJV as referred to hereinbefore.

24. Claim 1.1 pertains to loss of overheads and expected profits. This was

for a sum of Rs.43,20,96,967. What ultimately was awarded to the Contractor was Rs.16,60,76,299. Claim 1.2 was on account of loss due to reduced productivity from machinery and equipment deployed. As against the claim of Rs.17,28,38,796, the AT awarded Rs.6,29,33,007. PAJV claimed loss of overheads and expected profits at 25% of the total cost which amounted to 33.33% of the basic cost for the stipulated 36 months plus the additional period of 42.5 months up to 14<sup>th</sup> March, 2008. The AT granted a loss of overheads and profits only for 35.17 months i.e. up to 4<sup>th</sup> August 2007. In para 7.4.1(iii) of the impugned Award the AT held that there could not be any claim for profit since it had to be earned by the Contractor by doing work.

25. It was urged by Ms. Sinha that no basis had been furnished by the AT for arbitrarily granting the loss of profits and there was no material to support such an Award.

26. A perusal of para 7.4.1(iv) of the impugned Award reveals that the AT did not accept PAJV's claim of 33.33% of the basic cost of material and labour. It was noted that industrial norm was 20 to 21% of the basic cost which amounted to 17% of the overall cost. The AT then decided to follow the norms laid down in the Ministry of Road Transport and Highway's ('MORTH') Standard Data Book for Analysis of Rates, published by the Indian Roads Congress in 2003. It discussed the norms laid down therein, applied those norms and, thereafter, computed the sum payable to PAJV. There is a detailed calculation forming part of the Award itself in para 7.4.1 (v) & (vi).

27. The Court is unable to discern any glaring error committed by the AT in coming to the above conclusion. It appears to be based on the correct interpretation of the clauses of the contract and also based on the norms set by the MORTH itself. The Award of Claim 1.1 to the above extent cannot, therefore, be said to be perverse, calling for any interference.

28. Even as regards Claim 1.2 which was for loss due to reduced production from the equipment deployed, the AT has discussed the issue at great length. It has gone by the records of the case. As already noticed, only 50% of the claim amount was awarded by the AT for loss due to reduced productivity from the machinery and equipment deployed. Here, again, the learned counsel for the Petitioner has not been able to point out any glaring error that would persuade the Court to interfere with the impugned Award.

29. Likewise, as regards the challenge to the Award in respect of Claims 2 to 4 and the order dated 5<sup>th</sup> April, 2010 passed by the AT whereby the preliminary objections raised by NHAI to Claim No. 3 preferred by PAJV were rejected, no ground has either been pleaded in the petition nor urged during arguments. Even otherwise, having perused the said order, the Court is unable to find any material error which would warrant interference under Section 34 of the Act.

30. NHAI has failed to make out any ground for interference with the impugned Award dated 30<sup>th</sup> January 2015 as corrected by the Award dated 7<sup>th</sup> November 2015.

31. O.M.P. (COMM) 84 of 2016 is, accordingly, dismissed.

**OMP No. 103 of 2015**

32. O.M.P. No. 103 of 2015 by PAJV is against the Award dated 13<sup>th</sup> September, 2014 passed by the AT. The petition challenges the Award only to the extent that it has permitted NHAI to retain the amount of performance bank guarantee ('PBG') with interest for adjustment against any other claims of NHAI against the PAJV which may be held to be payable in any other Award.

33. It is pointed out by Mr. Sandeep Sethi, learned Senior counsel appearing for the PAJV that since the Court has rejected the challenge of NHAI to the Award dated 30<sup>th</sup> January, 2015 as corrected by the Award dated 7<sup>th</sup> November, 2015, no grievance would be left for PAJV since there is no amount due to NHAI arising out of the contract in question and the amount of the PBG would have to be released.

34. The Award dated 13<sup>th</sup> September, 2014 held that the sum towards the said PBG would be recovered by PAJV only after "ultimate resolution of various pending disputes between the parties." As has been rightly pointed out by Mr. Sethi, learned Senior counsel appearing for PAJV with the dismissal of the counter-claims of NHAI by the AT, which dismissal has been upheld by the Court by the dismissal of NHAI's petition O.M.P. (COMM) 84/2016, there cannot possibly be any impediment for releasing to PAJV the money constituting the encashment of the PBG. The AT's direction for recovery of said amount for adjustment against other possible dues was in any event not warranted.

35. The Court directs that the amount owed to PAJV on account of the wrongful encashment of the PBG in question, which forms the subject matter of the Award dated 5<sup>th</sup> August, 2014 as corrected by the Award dated 13<sup>th</sup> September 2014, be paid to the PAJV by the NHAI within a period of four weeks from today.

36. O.M.P. 103/2015 is disposed of in the above terms.

**NOVEMBER 8, 2016**  
dn

**S. MURALIDHAR, J**

