

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 18.04.2017

+ **O.M.P. (COMM) 534/2016 & IA Nos. 14719/2016, 14721-22/2016**

**NATIONAL HIGHWAYS AUTHORITY OF
INDIA**

..... Petitioner

versus

M/S GAMMON INDIA LTD.

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr S. Nanda Kumar, Mr Parivesh Singh,
Mr M. S. Saran Kumar and Mr P.
Srinivasan.

For the Respondent : Mr Rajiv Bansal, Ms Charu Ambwani, Mr
Prashant Kumar and Mr Anuraj Tripathi.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. National Highways Authority of India (hereafter 'NHAI') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') assailing the arbitral award dated 31.03.2016 (hereafter 'the impugned award') rendered by the arbitral tribunal constituted by Shri N K Sharma, Shri V S Karandikar and Shri V Velayutham (Presiding Arbitrator) (hereafter collectively referred to as 'the arbitral tribunal').

2. The impugned award was made and published by the arbitral tribunal in respect of the disputes raised by the respondent, M/s Gammon India Ltd. (hereafter 'Gammon') in connection with the contract dated 07.02.2006 (hereafter 'the Agreement') entered into between the parties.

3. The impugned award was delivered on 31.03.2016. The petition was first filed on 08.07.2016, which is beyond the period of three months as specified under Section 34(3) of the Act. Undoubtedly, in terms of the proviso to Section 34(3), the petition can also be entertained if filed within a period of thirty days beyond the period of three months; however, this is subject to this Court being satisfied that NHAI was “prevented by sufficient cause from making the application within the said period of three months”. The only reason provided by NHAI (in I.A. 14721/2016) for seeking condonation of delay of 9 days in filing the petition is that the authorized officer resides at Araria, Bihar and he had to send the signed copy of the documents from there. It is seen that the petition as initially filed was supported by an affidavit, which was neither attested nor signed. Further, in addition to other defects, there were blanks in the Statement of Truth. Therefore, the petition was returned as being defective. The petition was re-filed on 04.08.2016 but all the defects were not cured. The affidavit supporting the petition was also not attested and there continued to be blanks in the Statement of Truth.

4. The petition was finally re-filed on 24.11.2016. It is seen that the time taken by NHAI to re-file the petition itself exceeded the time of three months as initially available under Section 34(3) to file the petition. Interestingly, the only explanation given for delay in re-filing (in I.A. 14722/2016) is that the authorized officer of NHAI is residing at Goa and had to send the signed copy of the documents from there. It is further stated that the documents were received by the counsel on 28.07.2016. However, the documents bear the stamp of the Project Director, NHAI, Purnia, Bihar. The Statement of Truth filed in support of the petition is also

affirmed by Mr A. N. Singh, Project Director, NHAI, Purnia, Bihar. Therefore, this Court is at loss to appreciate the explanation that the authorised signatory resides at Goa which is held out as the solitary reason for the delay in re-filing. It, *prima facie*, appears that the application for delay in re-filing is merely a copy of another application and has been filed without any attention to the contents thereof. The said application is also not supported by the affidavit of a responsible officer of NHAI but is supported by an advocate's affidavit. Be that as it may, the ground that the authorized officer is located outside Delhi and had to send the documents from the office in a different State, cannot be accepted as an excuse for a delay of over three and a half months. This can hardly be accepted as sufficient cause that prevented NHAI from re-filing the petition within the specified time.

5. A Division Bench of this Court in **Delhi Development Authority v. Durga Construction Co: 2013 (139) DRJ 133** had held that this Court would have the jurisdiction to condone delay in re-filing even beyond the period as specified under Section 34(3) of the Act; but a liberal approach to condone the delay would be unwarranted. This Court had held that while considering an application for condonation of delay in re-filing, it would be necessary to bear in mind the legislative intent of Section 34(3) of the Act and the petitioner would have to establish that it was prevented from filing/re-filing the petition within time for sufficient cause.

6. In the present case, the applications seeking that the delay in filing/re-filing be condoned are bereft of any details and this Court is unable to accept the explanations provided therein. The conduct in filing an inchoate petition belatedly, which is also not followed by any urgency in

curing the defects cannot - given the legislative intent - be countenanced. The casual approach in simply pinning the delay on the ground that the authorised officer is located outside Delhi is plainly unacceptable and in any view does not satisfy the requirement of presenting a sufficient cause preventing the filing of the petition within time. In the circumstances, this Court finds no ground to condone either the delay in filing or in re-filing the petition. The petition is liable to be dismissed on the ground of delay alone. However, notwithstanding the above, this Court has examined the contentions advanced on behalf of NHAI on merits as well.

7. The disputes between the parties, which culminated into the impugned award, arose in the following context:

7.1 NHAI had invited bids for '*widening and strengthening to 4 lane of existing Single/ Intermediate lane carriageway of NH-57 section from KM 230.00 to KM 190.00 (Forbesganj - Simrahi section) in the State of Bihar on East West Corridor under NHDP - Phase - II (Contract Package C-II/BR-3)*' (hereafter 'the works'). Gammon submitted its bid which was accepted by issuance of a letter of acceptance dated 29.11.2005. Subsequently, the parties entered into the Agreement dated 07.02.2006. In terms of the Agreement, the works had to be completed within a period of 30 months from the date of Notice to Proceed, which was issued by NHAI on 08.03.2006; accordingly the scheduled date of completion of the works was 07.09.2008.

7.2 According to NHAI, the execution of the works was delayed by Gammon as it neither completed the pre-construction activities before the appointed date nor mobilized the requisite manpower and other resources.

Therefore, the completion period had to be extended on several occasions. NHAI claims that several communications were issued wherein lack of progress in the works on the part of Gammon were highlighted. This was not accepted by Gammon, resulting in disputes between the parties.

8. In view of the disputes, Gammon invoked the arbitration clause by its letter dated 16.04.2012, pursuant to which the arbitral tribunal was appointed.

8.1 Gammon filed its statement of claims raising the following claims: Claim no. 1 - ₹3530.80 lacs - as additional costs/ losses incurred during original Agreement period and the prolonged stay from October 2008 to August 2009; Claim no. 2 - ₹3094.31 lacs - being additional costs incurred in procuring materials for executing balance works in the extended period of the Agreement; Claim no. 3 - interest at the rate of 12% p.a. compounded monthly from the date on which the above amounts became due till date of payment; and Claim no. 4 - costs of arbitration.

8.2 On considering the material available on record, the arbitral tribunal found that encumbrance free land was not handed over to Gammon even till the expiry of the extended period of the Agreement which led to gross underutilization of the resources. The arbitral tribunal held that NHAI failed to pay compensation to the landowners and take possession of the site in time. Gammon was also found to have undertaken extensive rehabilitation work - which were not included in its scope of works - due to the Kosi floods in August 2008. Further, on a reading of clauses 20.4, 40.2 and 42.2 of the General Conditions of Contract (GCC), included as part of

the Agreement, the arbitral tribunal held Gammon as entitled to receive compensation for the delays attributable to NHAI.

8.3 In the light of the above findings, the arbitral tribunal allowed Gammon's Claim no. 1 to the extent of ₹3001.11 lacs on the basis of records furnished by Gammon. However, Claim no. 2 - for additional costs incurred for procuring materials during the extended period - was rejected by the arbitral tribunal as the same was found to have been computed on a hypothetical basis. In addition, the arbitral tribunal also awarded interest at the rate of 10% p.a. on the amount awarded from the date the amount became due till its payment.

9. Mr Nanda Kumar, learned counsel for NHAI advanced the following contentions to assail the impugned award:

- (i) that the finding of the arbitral tribunal that NHAI had delayed handing over the site affected by Kosi floods was erroneous as NHAI has handed over the priority stretch within time;
- (ii) that the arbitral tribunal had erred in not appreciating that Gammon had delayed submission of the work programme for completion of the works;
- (iii) that the arbitral tribunal had not considered that Gammon had not deployed adequate resources for execution of the works;
- (iv) that the works were delayed on account of Gammon not obtaining permission from the authorized department for cutting trees.

10. In this Court's view, none of the aforesaid contentions are merited. There is ample material on record to support the findings arrived at by the

arbitral tribunal and none of the findings can be stated to be perverse or without sufficient evidence. The scope of the present proceedings does not entail re-appreciation of evidence as an appellate court. The impugned award can be set aside only if it is established that the findings are perverse, patently illegal and/or unreasonable on the touchstone of the *wednesbury* principle; that is; no reasonable person could have arrived at the findings as returned by the arbitral tribunal.

11. As indicated above, the works entailed widening and strengthening of stretch of carriageway from KM 230 to KM 190 (Forbesganj – Simrahi section); thus, Gammon was to execute the works on a stretch of approximately KM 40. This stretch was subsequently reduced by approximately KM 5. In terms of Section VIII - Schedule A of the Agreement, NHAI had to handover the site as per the following schedule:-

Time Schedule	Section to be handed over
Within the time specified for commencement of work in the appendix to bid in accordance with clause 41.1	5-10 Km (priority stretches)
After 12 months of commencement	Balance length of Project

12. It is not disputed that only KM 4 of priority stretch was handed over to Gammon. Admittedly, NHAI had failed to hand over the balance site. It is thus indisputable that NHAI had not even performed its obligations to hand over the minimum of KM 5 of priority stretch for commencement of works. Mr Nanda Kumar conceded that NHAI had defaulted in handing

over the priority stretch but sought to argue that the stretch handed over was short by only KM 1. Be that as it may, the finding of the arbitral tribunal that NHAI had defaulted in performance of its fundamental obligation to handover the site cannot be faulted.

13. The arbitral tribunal had examined the letters submitted by the Engineer for extension of time and observed that even according to the Engineer, the KM 4 stretch handed over to Gammon was not free from encumbrances and hindrances. The arbitral tribunal noted that NHAI had also delayed in making payment for acquisition of the said stretch to land owners. In addition, the site had other obstructions and Gammon could not work upto the toe of the embankment. The arbitral tribunal rejected NHAI's contention that it had made sufficient site available to Gammon to continue the works. It noted that the making of payment of compensation to the land owners was still in progress as late as 02.12.2013 and NHAI had defaulted in its primary duty to provide land as envisaged in the Agreement for completing the works in time. Further, the arbitral tribunal also held that the site handed over to Gammon was full of encroachment and hindrances such as electric poles, HT electric lines, permanent structures like schools, mosques, dwelling hutments, compound walls, etc. and in addition, there was the issue of non-payment of compensation to the landowners which was not the responsibility of Gammon. The said issues had been discussed in various meetings and had also been highlighted in various letters sent by Gammon, which were considered by the arbitral tribunal in arriving at its finding.

14. The arbitral tribunal also accepted the reasons as provided by the Engineer in its letters recommending extension of time for completion of

the works. It is also relevant to note that the Engineer while recommending extension of time had also made it clear that since large part of the site had not been handed over and there were several issues such as acquisition of land, clearance of outstanding dues to the landowners and making land free from encumbrances, the final determination of extension of time could not be made.

15. The arbitral tribunal also held that there were other delays attributable to NHAI like delay in providing centre line co-ordinates, providing GFC Drawings, etc. These were concurrent; the main delay being non-handing over of site.

16. The contention that the arbitral tribunal erred in not appreciating that Gammon had not submitted its work programme within time and, therefore, the impugned award is liable to be set aside, is also unpersuasive. There is no dispute that Gammon had submitted the work programme after 07.02.2006. It is after receiving the work programme that Notice to Proceed was issued on 08.03.2006. Mr Nanda Kumar contended that the work programme had to be submitted prior to signing of the Agreement. Without going into the question whether there was in fact any delay in submission of the work programme, it is obvious that even if Mr Nanda Kumar's contention is accepted, a few days delay in submitting the work programme would not be material, given the unequivocal findings of the arbitral tribunal with regard to delay in handing over the site, centre line co-ordinates and GFC Drawings.

17. The arbitral tribunal had also noted the impact caused by the Kosi floods. Concededly, these were not normal floods but were unprecedented.

The floods were declared as a national calamity as Kosi river shifted its course by almost KM 120. There is no dispute that the site was severally affected and was submerged in parts under 7 to 8 ft of water.

18. Insofar as the contention regarding delay in cutting of trees is concerned, the arbitral tribunal had noted that the Notice to Proceed was issued on 08.03.2006 and Gammon had obtained permission from the Forest Department on 05.05.2006 and, therefore, there is no delay in obtaining the permission. This issue is also not material, considering that the arbitral tribunal had returned the finding that the delays on several accounts including cutting of trees were concurrent to the main delay caused on account of non-handing over of site by NHAI.

19. The contention that the impugned award is liable to be set aside as the arbitral tribunal had erred in not appreciating that Gammon had not employed adequate resources and equipment at site, is also unmerited. The arbitral tribunal had considered the material placed on record including copies of the salary sheets for manpower deployed at site as well as the details pertaining to mobilization of plant and machinery. Such material included copies of store receipts indicating the receipt of a particular plant and machinery. In view of the above, this Court cannot accept that the finding of the arbitral tribunal is without any material, perverse or patently illegal. As indicated above, the scope of the present proceedings does not entail re-appreciation of evidence considered by the arbitral tribunal. Once, it is clear that there was sufficient evidence and material before the arbitral tribunal which was appreciated in returning a finding of fact, the same cannot be interfered with. (See: **Associate Builders v. Delhi Development Authority**: (2015) 3 SCC 49).

20. In view of the above, the present petition and pending applications are dismissed both on the grounds of delay as well as on merits.

VIBHU BAKHRU, J

APRIL 18, 2017

RK/MK

