

\$~7(Special Bench)

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

% Judgment delivered on: 17th May, 2017

+ **F.A.O. (OS) No.254/2016 & CM No.31958/2016**

NATIONAL HIGHWAY AUTHORITY OF INDIA

..... Appellant

Through : Mr.Prashant Mehta & Ms.Vasundhra
Bhardwaj, Advocates.

versus

BEL-TBL (JOINT VENTURE)

..... Respondent

Through : Dr.Amit George, Mr.Swaroop George
and Ms.Rajsree Ajay, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. The appellant assails the order dated 08.07.2016 passed by the learned Single Judge of this Court whereby the objections of the appellant under Section 34 of the Arbitration and Conciliation Act, 1996 against the arbitral award dated 15.11.2013 were dismissed.

2. The appellant had awarded the work to the respondent, by letter of intent No.11011/9/98-C-F/Karur Bypass dated 08.07.1999 for the contract value of ₹34,95,72,588/-. The contract was entered into on 30.08.1999 and the entire work was to be completed within 24

months from the date of commencement of the work. Though the work started on 28.09.1999, it was completed only on 30.09.2002 with a delay of about 12 months; this delay was allowed vide three extensions given by the appellant itself.

3. In the arbitral award dated 15.11.2013 a few claims viz. claim Nos.1, 2.1, 2.2, & 4 of the respondents were partly allowed and whereas claim Nos.2.3, 2.4, and 3 were rejected. The appellant filed a petition under Section 34 of the Act and challenged the findings qua Claim Nos.2.1, 2.2 and 4, though accepted the award for claim No.1.

4. Claim No.2.1 pertains to awarding damages on account of the idling of machinery; claim No.2.2 is for the compensation of the expenses for the extended period of one year, which extensions were allowed by the appellant and claim No.4 pertains to losses incurred by the respondent on account of delay in the release of the retention money, as well as for arranging of the bank guarantee for the release of such retention money, despite there being no requirement under the contract.

5. The appellant here challenges the legality of the arbitral award and has alleged that it was the respondent who was mainly responsible for the delay in the completion of the contract and that it had only granted necessary extensions with adequate price escalations, hence the learned tribunal was wrong in allowing the claim for extra overheads and additional costs, over and above the price of the contract. On the other hand, the respondent had argued

that the extensions were attributable to the appellant.

6. It was further argued by the appellant that the learned Tribunal even failed to appreciate that no notice, as was required under Clause No.53.1 of the contract, was ever given and hence the claim under Clause Nos.2.1 and 2.2, ought not to have been granted.

7. Lastly, the appellant had argued that the arbitral tribunal committed illegality in granting the claim, since it was barred by limitation. It was stated that the draft final statement, in accordance with Clause No.60.11 of the Special Conditions of the contract was submitted by the respondent on 29.01.2004 detailing the claim due to it. Accordingly, the limitation period for invoking the arbitration would commence from 29.01.2004 and run till 29.01.2007. However, the Arbitrator was appointed only on 21.04.2010 and hence, the claim was not within limitation.

8. Qua the contention that additional costs for the extended period of contract ought not to have been allowed, the arbitral tribunal found that the work was delayed on account of non-availability of land, delay in fixing alignments, existence of utilities to be removed by the appellant and additional item of works to be executed. The learned Single Judge even noted that the arbitral tribunal had examined the extensive evidence presented by the claimant to prove that the delay in execution was on account of the aforesaid reasons and that the extension was granted by the appellant to complete the project upto 30.09.2002 (12 months) in three stages i.e. firstly vide the letter dated

22.10.2001, then vide the letter dated 14.03,2002 and lastly vide the letter dated 23.10.2002. The reasons for the grant of extensions are well mentioned in the aforesaid letters as being the delay in finalising the alignment, shifting of utilities, in getting prior 'enter upon permission' on the land under acquisition from land owners, increase in the number of culverts, sudden release of water into the river by the PWD resulting in dislodging of the frame work erected for the painting of the bridge etc. Such extensions were rather granted by the appellant without levy of any liquidated damages. None of the reasons as mentioned in the recommendations made by the Project Director and General Manager (Technical) were attributed to the complainant. The learned Single Judge though noted that notice, per Clause No.53.1 was issued by the claimant, but even otherwise, if no notice under Clause No.53.1 was issued or even if there was non-compliance of the procedure, it would not have precluded the contractor to make claim on the basis of the record so produced.

9. As the extensions were for reasons attributable to the appellant, the respondent was certainly entitled to recover the additional costs per Clause Nos.42.2, 6.4, and 12.2 of the contract. Clause No.6.4 deals with delay and cost of delay in drawings; Clause No.12.2 deals with unforeseeable physical obstructions or conditions and Clause No.42.2 deals with the failure on the part of the appellant to give possession of the site to the respondent. All these Clauses envisage additional costs to be awarded to the respondent. Thus, considering the extensive evidence led by the respondent to prove damages

suffered by it and the fact that appellant had extended time without imposing any liquidated damages, the findings of the learned Single Judge are fully justified.

10. The scope of interference by Courts in an arbitral award is discussed in *National Highways Authority of India vs. Oriental Structural Engineers Pvt Ltd Gammon India Ltd* (2013) 2 Arb. LR 264 (Delhi) (DB) that if the factual findings are based on voluminous evidence then such findings are not to be interfered with under Section 34 of the Act, it being limited in scope. The Court dealing with the objections is not an appellate forum and unless there is a plain perversity appearing on the fact of the award, there is limited scope of interference.

11. In *Associate Builders v. Delhi Development Authority* [(2015)3 SCC 49] it was held that it is not every illegality that would attract the scrutiny and interference on the part of the Civil Court but one that is so unreasonable and contrary to notions of justice as embodied in some salient features of positive law, that it would require judicial intervention.

12. Thus, considering the extensions given by the appellant without levy of any liquidated damages and that the respondent having proved damages suffered by it on account of overhead expenses / machinery costs in the extended period as per the Ministry of Road Transport and Highways (MORTH) Data Book through extensive evidence, it cannot be said that there is any perversity in the award of the arbitral

tribunal. The tribunal further rejected the claim of damages for loss of profit due to extension of time.

13. Moreover, in *National Highways Authority of India v. Ssangyong –OSE (JV)* OMP No.424/2006 decided on 25.04.2012 it was observed that the employer has to be in possession of the site and has clear access to it even before notice to commence the work is to be sent and that the employer has to hand over the requisite site to the contractor without examining the readiness/preparedness of the contractor for starting actual execution of work and that the contractor is entitled for extension of time on the part of the delayed handing over of site by the respondent.

14. Thus, if the delay was caused to handover the land, it was open to the contractor to contend for compensation for the loss caused due to reasons attributable to the employer.

15. On the aspect of limitation, we note that in para No.2.4.1 of the award dated 15.11.2013, the arbitral tribunal had recorded that in the modified defence statement dated 17.09.2012 the appellant though has vehemently contended that the claims are barred by limitation, they have not specified how the claims are barred. Further, during the course of arguments the appellant rather had stated that it does not press the issue of limitation in claim No.1; this being recorded in the proceedings of arbitral tribunal in its 9th and 10th hearing held on 13.07.2012 and 14.07.2012. Moreover, qua claim No.2 the appellant specifically stated that the objection of limitation is not pressed. Even

in its written arguments no such objection of limitation was ever raised by the appellant herein.

16. Thus, where the appellant itself had waived the objection qua limitation, it cannot now be allowed to re-agitate the same, more so, when it did not challenge claim No.1 awarded to the respondent by the arbitral tribunal even before this Court.

17. Hence, we find no reason to interfere with the impugned order passed by learned Single Judge, the scope of interference under Section 34 of the Act, certainly being limited.

18. The appeal being devoid of merit is dismissed.

19. Consequently, the pending miscellaneous application is also dismissed.

YOGESH KHANNA, J

S. RAVINDRA BHAT, J

MAY 17, 2017

M/RS