

\$~30

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

+ **FAO(OS) (COMM) 93/2017**

NATIONAL HIGHWAYS AUTHORITY OF INDIA Appellant

Through **Mr. Manish K. Bishnoi, Adv.**

versus

M/S NCC-VEE (JV)

..... Respondent

Through **Mr. Krishna Vijay Singh, Adv.**

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE ANIL KUMAR CHAWLA

ORDER

%

28.04.2017

Counsel for the respondent has entered appearance and waives service of notice.

2. With the consent of the ld. Counsel for the parties, we have taken up this appeal for hearing.

3. The impugned order dated 28.3.2017 passed in OMP(Comm) no. 149/2017 issues notice in the objection petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (Act). The order refers to the decision of the Division Bench in FAO(OS) (Comm) no. 47/2017, ***National Highways Authority of India vs. Baharampore-Farakka Highways Ltd*** dated 2.3.2017. This judgment holds that an order passed by the Arbitral Tribunal deciding the challenge to the constitution of a Arbitral Tribunal, is an interim award, that can be challenged under Section 34 of the Act.

4. The appellant submits that they have challenged the majority

interim award relating to constitution of the Tribunal and therefore, the challenge under Section 34 is maintainable. It is submitted that the arbitration proceedings having commenced in 2012, there would be automatic stay of the interim award till the petition/objections under Section 34 are decided. The amended provisions of Section 34 of the Act w.e.f. 23.10.2015 would not be applicable.

5. Counsel for the respondent on the other hand has relied upon the Constitutional Bench judgment of seven Judges in ***S.B.P. and Co. vs. Patel Engineering Ltd. & Anr.*** (2005) 8 SCC 618 and submits that the decision in ***National Highways Authority of India*** (supra) may not be apposite and is in fact contrary to the ratio expounded in ***S.B.P. and Co.*** (supra). Without prejudice to the first submission, he relies upon para 36 of the decision in ***National Highways Authority of India*** (supra). and submits that there would not be any automatic stay under Section 34, even if the amended provisions are not applicable.

6. Counsel for the appellant submits that para 36 of the aforesaid decision is being misread by the respondent. He highlights that para 36 relates to a case of an unsuccessful challenge to the constitution of an Arbitral Tribunal and in that context, it has been observed that there would not be automatic stay of the arbitration proceedings. In the present case, the majority “interim award” accepts the challenge to the constitution of the Arbitral Tribunal and therefore, the observation in para 36 would not be applicable.

7. We have considered the rival contentions and in view of the statements made, feel that the issues raised and the contentions

require consideration and examination.

8. Appellant had filed applications for stay being IA no. 3726-28/2017, which are now listed on 30th May, 2017. Till the disposal of stay applications and due consideration, the proceedings before Arbitral Tribunal would remain in abeyance and stayed. We have deliberately not expressed any opinion on merits and only referred to the respective contentions raised by the parties as the issue/question has to be still adjudicated and decided by the Single Judge. The only reason given in the impugned order not to stay further proceedings is that pursuant to the decision/interim award of the Arbitral Tribunal, a new Arbitral Tribunal has been constituted.

9. We further clarify that the Single Judge would be entitled to examine the entire controversy on merits, including the submissions of the respondent on per incurium and the contra submission of the appellant.

10. Parties request that there should be expeditious disposal of the aforesaid issue as the matter has remained pending in arbitration for the last about five years.

11. Appeal is disposed off in the above terms. No costs.

SANJIV KHANNA, J

ANIL KUMAR CHAWLA, J

APRIL 28, 2017/rc