

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

DECIDED ON : JULY 04, 2017

+ **FAO(OS) (COMM) 130/2017 & C.M.Nos.22940-41/2017**

M/S NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Appellant

Through : Mr.Rajiv Kapoor, Advocate.

versus

CEC-HCC JOINT VENTURE

..... Respondent

Through : Mr.Darpan Wadhwa, Sr.Advocate, with
Mr.Rishi Agrawala, Ms.Niyati Kohli
and Mr.Arn timer Kumar, Advocates.

CORAM:

**HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE S.P.GARG**

S. RAVINDRA BHAT, J. (OPEN COURT)

1. The National Highways Authority of India (hereinafter referred to as 'NHAI') challenges the decision of the learned Single Judge rejecting its objections under Section 34 of the Arbitration and Conciliation Act 1996 (hereinafter 'the Act') to an Award made by a majority of the Arbitral Tribunal, announced on 31.3.2014. The subject

matter of the Arbitration were claims of the respondent-CEC-HCC Joint Venture (hereinafter the 'contractor'), in respect of an agreement for the work of Rehabilitation and Upgrading of KM 253.00 to KM 316.00 of NH-76 to 4 lane configuration in the State of Rajasthan, (EW-II) known as Construction Package EW-11 RJ-7 (hereinafter the 'work').

2. The contractor successfully bid for and was awarded the work. The tender specified the General Conditions of the Contract. This was followed by signing of the contract which contained General Conditions of Contract and Special Conditions of Contract as well as what were known as Conditions of Particular Application ('COPA'). The agreed date of completion of work was 26.04.2008. The actual date of completion was 5.12.2008. The total extended period was 7.33 months. The value of the contract agreed to (at the stage of Award was ₹375,98,48,628/-). The contractor, after completion of work claimed additional payment towards losses suffered by it on account of delay in completion of the project. The Engineer-in-charge rejected the claim. The contractor approached the Dispute Review Board ('DRB') which did not decide the matter. Thereafter, the contractor invoked the arbitration clause.

3. The Arbitral Tribunal published the Award after conclusion of proceedings before it. A majority of the Arbitral Tribunal allowed the claim for payment of additional costs for total amount of ₹3143.86 lacs together with interest were @ 10% per annum compounded monthly from 16th October, 2009 till the date of the Award. Future interest was awarded @ 15% per annum in the event of default in compliance of the Award. The method adopted for computation of price adjustments was

in accordance with clause 70.3 of the COPA. However, no Award was made in respect of this since the claimant withdrew its claim which was recorded by the Tribunal on 25.01.2014. The dissenting Arbitrator rejected the claims.

4. The objections focused on three main issues and two of them were interrelated. The first pertains to the construction of Clause 53.1 to Clause 53.4 of GCC. According to the NHAI, the demands and claims were made without complying with clause 53.1. It was also argued that the nature of the evidence, led before the Tribunal, was not such that would justify any judicial forum, granting of damages, or compensation for the events claimed. Besides this issue, the NHAI's contention that the nature of damages granted by the Tribunal, were not in accordance with the principles of law specially Section 73 of the Contract Act 1872. The other main issue was with respect to the Extension of Time (EOT), given by the Engineer. The NHAI contended that mere extension of time did not entitle the contractor to damages, rather it only meant that the time for performance would be extended, without admitting any liability that a compensation event had occurred. Here it is emphasized that compensation under the contract was payable only and only if compensation events (as defined under the contract) occurred. Since no such compensation event occurred, by the mere Extension of Time (EOT), the damages as claimed by the contractor were not payable. The learned Single Judge rejected the submissions.

5. It was lastly urged that the Tribunal acted unreasonably in its interpretation of Clause 110 and chose to consider only part of Clause

110.3, holding it to be opposed to tender policy. The learned Single Judge discussed these issues in the impugned judgment and rejected all the contentions.

6. Mr. Rajiv Kapoor, learned counsel firstly urges that the interpretation of Clause 53.1 and 53.4, by the Arbitral Tribunal as endorsed by the Single Judge is contrary to law. He urged that while there cannot be any doubt that the contractor can choose to proceed without issuing notice, nevertheless, Clause 53.4 obliged the Tribunal, (whether or not the same was brought to the Engineer's notice) to grant claims or award compensation only based upon the contemporaneous evidence. It was emphasized that in the present case reliance has been placed upon the contractor's Chartered Accountant certification or verification, of what he termed to be contemporaneous evidence was insufficient. Highlighting that the Tribunal was under the duty to judicially examine the primary evidence and not fall back upon the certification of the third party termed as statutory auditor (when he actually was not so) it was submitted that the Arbitral Tribunal fell into great error in holding that the certificate itself constituted sufficient contemporaneous evidence.

7. In para 9.14.1 of the Award, the Tribunal considered this precise issue of contemporaneous records. It went on to outline seven broad heads of documentary evidence which were necessary, to reasonably arrive at any findings. This included authenticated proof - with substantiation - towards costs and expenses incurred in respect of overhead expenses in an acceptable form under law or evidence; actual

number of deployment of equipments in the extended period of work executed and certificate of the Engineer till the end of the original contract period, actual quantum of material inputs to the works procured, the actual costs incurred in procuring those materials viz, POL, Cement, Steel etc; proof towards various category of the labour deployed in the extended period and documents to show that whether really the claimant had on his hand a contract of similar nature during the original completion period of the work. The Tribunal went on to note that the Claimant had, in fact, submitted contemporary records in respect of the claim for overhead expenses and costs, equipment costs, labour charges, financing/interest charges for delayed recovery of overheads and profits, proof towards work value done and overhead percentage etc. It also noticed the nature of evidence produced. All this documentary evidences was, in fact, produced before the Engineer, who did not reject the claim. The Tribunal considered these to award compensation. Likewise, the other claims for compensation too were supported by documentary evidence as were the claim for additional costs. In para 9.14.5, the Award noted that 'NHAI' did not dispute the authenticity of such evidence. The Tribunal then proceeded to record its findings in the following terms :

“(i) This is the case, wherein contemporary records as well as adequate evidences / supporting documents are submitted by the Claimant as required under the Contract and trade practice. Hence the submission of the Respondent that there are no contemporary record and no evidence has been filed to substantiate the Claim is erroneous and incorrect and Arbitral Tribunal dismisses the same.

(ii) Audited statements of books of accounts submitted by the Claimant represent the actual expenses incurred towards overheads. Arbitral Tribunal is of the considered opinion that such reports, duly audited and certified by the statutory auditors have sanction of the company law enacted by the Govt of India and are acknowledged as true representation of the state of and are acknowledged as the true representation of the state of affairs and thus admissible under law. Arbitral Tribunal would deal with this head of claim in detail in subsequent Point/Issues.

(iii) In so far as the details of deployment of equipments in the extended period are concerned, they are well supported by monthly reports submitted by the Claimant every month to the Engineer with a copy to the respondent, which show the actual equipments deployed in the extended period.

(iv) For the assessment of the time related costs, they are based on the invoices, depreciated/replacement costs of equipments are supported by Chartered Engineer giving detailed particulars.

(v) Adequate and sufficient proof has been furnished in respect of the additional cost incurred in respect of the materials procured in the extended period. Due offset/credit has been given for the compensation paid by way of the escalation/price adjustment in the EOT period backed by extracts from the bills/Interim Payment Certificates (IPC) certified by the Engineer.

(vi) As far as base price of the cement and steel are concerned, the same have been considered from the base rates adopted by the Engineer for determination of the price adjustment in monthly bills.

(vii) Actual rate/price of cement, steel and POL procured in the extended period are supported by invoices.

(viii) Actual quantity of procurement and consumption of POL for the works is supported by invoices, and the base price

and current price for the same have been considered as certified by the Engineer.

(ix) Relief given by way of Price adjustment formulae for each type of the material is supported by Engineer's certification of price adjustment in IPCs.

(x) The Claimant has submitted the extract of the copy of the Contract document to show that the Claimant was awarded a project of similar nature during the contractual completion time.

9.14.7 After review and scrutinisation, the Tribunal is of the opinion that the Claimant has submitted adequate contemporary records and evidences required for the assessment of the Claim. Accordingly, Respondent's contention that the Claimant had not submitted contemporary records and evidence to substantiate his claims is not tenable. The supporting documents submitted by the Claimant, which were earlier submitted to the Engineer, are adequate and sufficient to decide the claim."

8. It is quite evident from the above detailed discussion as well as the extracted portion of the Award that the Tribunal did not render its findings on the admissibility of claims for the extended period merely on the certificate of the Chartered Accountant. Rather the Chartered Accountant certificate served only as a reference to the compilation of the figures and primary evidence which was led both before the Engineer as well as Arbitral Tribunal. There is no dispute to the fact that this evidence was not denied by 'NHAI'. In these circumstances the objection that no contemporary document or evidence was looked into by Arbitral Tribunal, as it was expected under Clause 53.4, is devoid of merit. The argument is, therefore, rejected.

9. The next main contention is with respect to the Award of damages in respect of 255 days. The court noticed that extension of time granted by the Engineer was 255 days. Mr. Rajiv Kapoor contended that the interpretation of Clause 110 of the Technical Specification was unreasonable because the Tribunal noticed only the first sentence of Clause 110.3 and chose to overlook the rest.

10. The learned Single Judge, on this aspect held as follows:

*“13. Mr Kapoor took exception to the finding in the majority Award that it was the NHAI which was responsible for the delay in completion of the project. Mr Kapoor placed reliance on the decision in **Kailash Nath & Associates v. New Delhi Municipal Committee** 2002 (3) Art. LR 631 (Del) (DB) where it was held that merely because EOT was granted by the employer in that case it did not mean that the employer was responsible for the delay or that it had admitted its liability resulting therefrom.*

14. The Court finds that there is a detailed assessment of the Extension of Time (EOT) granted from time to time. An EOT assessment table has been set out in para 9.5.5 of the impugned majority Award. The majority Award noted that the EOT determined by the Engineer was accepted by the NHAI. Further, the majority Award noted that whereas the EOT determined by the Engineer was for 255 days, the EOT approved by the NHAI was only for 223 days limiting it to the date of completion of work. The Engineer had only considered those delays that were not attributable to the Respondent herein and had determined the EOT on that basis. The NHAI has also accepted the reasons given by the Engineer for the EOT. Accordingly the majority Award concluded that the extension of the contract period from 27th April, 2008 to 5th December, 2008 was on account of delays/default of the NHAI and for reasons not attributable to the Respondent.

15. The Court is unable to discern any legal infirmity in the said factual finding based as it is on a proper appreciation of the evidence before the AT. The reliance placed by the NHAI on the decision in **Kailash Nath & Associates v. New Delhi Municipal Committee** (supra) is misplaced since in the present case the evidence has been discussed in detail by the majority to arrive at a definite conclusion that the NHAI was responsible for the delay in completion of the project.

Interpretation of the TS Clauses

16. Mr Kapoor submitted that the majority Award erred in shifting the responsibility for removal of the encroachments on to NHAI. It selectively read Clauses 110.3 and 110.6 of the Technical Specifications ('TS'), which when read as a whole gave a different interpretation and meaning. He also referred to the minutes of the pre-bid meetings (PBMs), which showed that the attempts by the Respondent to have the above clauses changed was unsuccessful. This, according to him, distinguished the present case from the one in FAO(OS) No. 402/2014 {**National Highways Authority of India v. Hindustan Construction Company**) in which the DB gave a decision dated 24th February, 2016.

17. As regards the PBMs and the discussions with regard to the Clause 110 of the TS, Mr. Krishnan is right in his contention that the Respondent's responsibility as per this clause was limited only to co-ordinating with the service providers. It was indeed not the responsibility of the Respondent to actually ensure the removal of the encroachments by obtaining the permissions. The above findings of the majority Award are based on an analysis of the relevant clauses of the contract as well as the evidence on record. It is a plausible view to take. As explained by the Supreme Court in **NHAI V. ITD Cementation India Limited** (2015) 14 SCC 21, where it was observed as under:

25. It is thus well settled that construction of the terms of a contract is primarily for an arbitrator to decide. He is

entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the contract. The court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the contract in such a way that no fair minded or reasonable person could do."

11. This Court is of the opinion that there is no infirmity in the impugned order or to the conclusion of the learned Single Judge. As to the interpretation of the terms of the contract, it is now too well settled that unlike other, while it is deemed to be a question of law that can be gone into by the court, in India, right from the decision in *Vishwanath Sood vs. UOI & Anr.* AIR 1989 SC 952 onwards till date, interpretation of contract is deemed to be within the exclusive domain of the Arbitral Tribunal. In the present case, the Tribunal was circumspect in respect of the grant of damages. As against the claim for the period of 255 days, what was, in fact, finally permitted was damages/compensation for 223 days. That fact was noticed by the Single Judge as well. Consequently, we find no infirmity in the impugned order on this aspect.

12. While exercising the appellate review under Section 37 of the Act, the court cannot second guess, (twice removed in a sense) the decision of the Arbitrator. The parameters for intervention by the court are limited i.e. the findings are so reasonable that no reasonable Tribunal placed in similar circumstances with respect to the same facts could arrive at; or patent illegality. These stringent circumstances have to be always kept in mind by the appellate court in its scrutiny of the order of court of first instance which adjudicates upon the objections under Section 34. If the court strays from these principles, it can

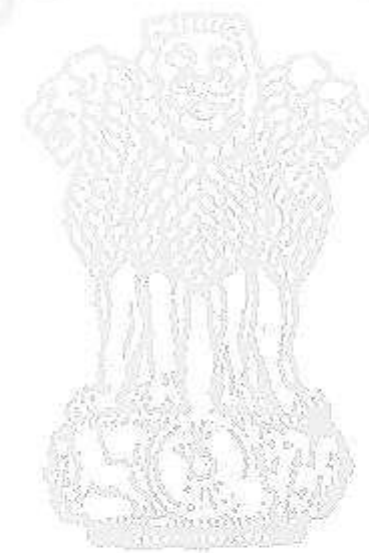
justifiably be accused of rendering ‘rough and uneven justice’ a course that is not permissible in law. For the foregoing reasons, this Court is of the opinion that there is no infirmity in the impugned judgment.

13. The appeal is, therefore, dismissed. All pending applications stand disposed of.

**S. RAVINDRA BHAT
(JUDGE)**

**S.P.GARG
(JUDGE)**

JULY 04, 2017/sa



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