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

+ **FAO(OS) (COMM) 115/2017 & 19747/2017 (*stay*)**

NATIONAL HIGHWAYS AUTHORITY OF INDIA Appellant

Through: Mr. Manish K. Bishnoi, Adv.

versus

M/S GAMMON INDIA LTD

..... Respondent

Through: Ms. Subramonium Prasad, Sr. Adv.

**with Mrs. Awantika Manohar, Mr. Aniruddh
Singh & Mr. Prashant Kumar, Adv.**

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAVIN CHAWLA

ORDER

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29.05.2017

1. The appellant is aggrieved by a judgment of the learned Single Judge which rejected an application for condonation of delay of 109 days in refiling an application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act'). The appellant – NHAI had entered into a contract with the respondent (hereinafter referred to as 'the Contractor') for the construction/laying of 40 kms. stretch of highways in Bihar; this was later reduced to 35 kms.

2. The Single Judge noticed in the course of the impugned judgment that though the award was published on 31.03.2016, the challenge to it under Section 34 of the Act was preferred on 08.07.2016. This, according to the

Single Judge, amounted to a delayed proceeding inasmuch as it entailed a 9 days delay in the challenge to the award. More fundamentally, what impelled the Single Judge to decline the request of condoning the delay was the further delay entailed in the refiling of the petition under Section 34 of the Act after it was returned with some objections. This refiling was after 109 days, beyond the time permitted by the rules of this Court.

3. Learned counsel appearing for the appellant urged that the Single Judge was not informed of certain important facts. Here, it was emphasized that even though the award was made on 31.03.2016, the contractor had preferred an application under Section 33 of the Act for crystallizing the interest amounts. This eventually led to the publication of a supplementary award under Section 33(5), on 17.05.2016. The appellant urges that this aspect was notified to its counsel who appears to have either on inadvertence or some other account not incorporated it in the Section 34 application.

4. Learned senior counsel for the respondent submitted that there is no evidence to show that the appellant's counsel was in fact furnished a copy of the supplementary award; no such fact finds mention in the Section 34 application.

5. This Court has considered the material submissions with respect to the issue of condonation of delay. It is not in dispute that a supplementary award was made on 17.05.2016. Now, by virtue of Section 34(3) as well as the proviso thereof, the time for challenging – substantially – the main award gets extended for the period or duration for which the application under Section 33 remains pending. Obviously, this aspect was not considered by the learned Single Judge because it was not put to him by the

appellant. Even if that were to be taken into account, at best the result would have been for the appellant that its petition under Section 34 of the Act as originally filed on 08.07.2016 could not have been considered to be beyond time. The fact remains that the return objection was refiled on 24.11.2016. This would mean that the delay in refiling was in excess of 60 days. However, such delay as it were, would be condonable. To this extent, the appellant is undoubtedly correct.

6. The observations of the learned Single Judge, therefore, cannot be sustained on this ground. The above conclusions of this Court, however, are not decisive of the appeal. The Single Judge had in a substantial portion of the impugned judgment, proceeded to deal with the merits of the contentions urged by the appellant's counsel before him. The appellant's substantial argument before this Court, attacking the Single Judge's finding, hinged upon the interpretation of Section 3E of the National Highways Act, 1956 (as amended in 1997). It was urged that the Tribunal felt compelled to seek clarifications with respect to the claimant's assertions made primarily in relation to default on the part of the appellant to hand over stretches of land. The Tribunal, in the course of its proceedings, had heard specific arguments as to how the claimant could substantiate its plea with respect to NHAI/appellant's default, once it received amounts for work done in excess of the kilometres which it admittedly claimed to have been given possession of. The contractor had countered NHAI/appellant's submission that Section 3E of the National Highways Act, 1956 enabled it to take possession and that as a consequence, possession in excess of the extent claimed by the contractor had been given, by showing that there was no such material

objectively to establish it. The Arbitral Tribunal upheld the claimant's arguments after noticing that no less than three extensions of time were granted for concluding the part of the contract award.

7. Learned counsel for the appellant stressed that Section 3E read with Section 3H of the National Highways Act, 1956 is categorical, once the compensation determined is deposited. Compensation is a matter of discretion and that there was ample evidence on the record for the Tribunal to conclude that in fact NHAI was not at fault. It was submitted that the failure of the Tribunal to consider the mandate of Section 3E and Section 3H, initiates its error and renders it illegal.

8. This Court notices that the question of delay was addressed by the learned Single Judge, specifically with respect to the handing over of the site by the NHAI/appellant. It was observed *inter alia*:

“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,

9. This Court is unpersuaded by the NHAI's contention with respect to illegality in the award, on account of failure to take into account Section 3E of the National Highways Act, 1956. All that the said provision states is that where the compensation, as determined under its provisions, is deposited with the competent authority (i.e. the Central Government), the latter "may by notice in writing direct the owner as well as any other person who may be in possession of such land to surrender or deliver possession thereof" on a specified date. In the event of failure to comply with such direction, Section 3E(2) enables the authority to enforce the surrender of the land. Now, if in fact the land area to the extent contemplated in the contract were handed over to the NHAI, surely there would have been documentary evidence in this regard. That it deposited compensation is determined under Section 3H, *ipso facto* does not evidence handing over of possession which is spelt out clearly in a separate regime i.e. Section 3E. In other words, the NHAI's argument with respect to patent illegality are premised upon its assumption that deposit of compensation per se amounts to handing over of possession which is clearly belied by the terms of the contract.

10. In view of the above foregoing reasons, the Court is of the opinion that there is no merit in the appeal which is dismissed as unsubstantial.

S. RAVINDRA BHAT, J

NAVIN CHAWLA, J

MAY 29, 2017

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