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

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Judgment delivered on: 08.11.2017

+ FAO (OS) (COMM) 157/2017

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Appellant

versus

EMAS EXPRESWAY PRIVATE LIMITED

..... Respondent

Advocates who appeared in this case:

For the Appellant(s) : Mr. Arun Batta, Advocate

For the Respondent(s) : None

CORAM:-

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJEEV SACHDEVA, J. (ORAL)

1. This appeal under Section 37 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as “the Act”) impugns the order dated 17.04.2017, whereby the petition of the appellant under Section 34 of the Act impugning the majority award dated 31.12.2013 has been rejected.

2. The appellant had awarded the Contract, for Four Laning including strengthening of the existing two lane pavement of National Highway No.2 from Palsit (km 581.457) to Dankuni (km 646) in the State of West Bengal (known as Durgapur Expressway), to the consortium of Gamuda Bhd and WCT Engineering Bhd. The consortium in terms of letter of acceptance promoted and caused the respondent company as a special purpose vehicle for implementation of the project.

3. The Concession Agreement was entered into between the appellant and the respondent on 27.03.2002. The project was awarded on build, operate and transfer basis on annuity approach. The concession was granted for a period of 17 years and four months, which included the construction period of 28 months commencing from the Commencement Date which was specified as 27.10.2002 and ending on 26.02.2020 (the Concession Period). The respondent – concessionaire was required to commence construction works with the commencement date as 27.10.2002. The scheduled Project Completion Date was specified as 26.02.2005. The commercial construction work was to end on start of the commercial operations on the project stretch. The Commercial Operation Date, as per the Concession Agreement was specified to be the date on which the Independent Engineer issues the provisional certificate or completion certificate in accordance with Article 5.4 of the Concession Agreement.

4. The project was completed achieving the Commercial Operation Date on 20.06.2005 i.e. 114 days after the Scheduled Project Completion Date of 26.02.2005.

5. Disputes arose between the parties, which were referred to arbitration. The respondent claimant raised claims under seven heads and the Arbitral Tribunal partly allowed claims in the following manner.

Claim No.	Brief of claim	Amount in Rs. In Crore		
		Claimed by the Respondent Concessionaire (in Rs)	By Majority Award (in Rs)	By Minority Award (In Rs)
1	EPC Contractor's prolongation costs	Rs. 3,90,99,636/-	3,52,97,431/-	0
2	Concessionaire's Prolongation costs	Rs.1,06,30,100/-	1,03,88,674/-	0
3	Additional Cost arising from Change in law	Rs. 15,42,36,720/-	13,37,82,038/-	6,52,70,424/-
4	(i) Financing Cost	Rs.8,57,74,880/-	0	0
5	Interest on amounts of Claims No.1 to 4	Interest @ 13.5% p.a. from the date of cause of action	Claim No. 1 & 2 5,26,19,086 Claim No.3 11,83,58,173 (Interest @	5,69,04,713 (interest only for claim 3)

			13.5% pa upto date of Award)	
6	Reimbursement of Electricity Charges and Cost of Diesel for standby Generation Sets supplied during operation period of the Project Facilities Electricity Charges and the supply of Diesel Electricity Charges -For the period Oct 2005 to Dec 2007- Rs. 13,626,630/- (a) For the period 1-1-2008 to 31-7-2008- Rs.3,564,656 (b) Cost of Diesel – For the period June 2005 to Dec 2007 – 383,178/- (c) – For the period 1-1-2008 to 31-7-2008 – Rs.211,841 (d) Plus interest	1,77,86,305 Plus Interest @ 18% per annum from the respective dates of payment of the Bills for Electricity Charges and the supply of Diesel to the date of reimbursement.	1,77,86,305 Plus interest 1,63,12,221 (Interest @ 13.5% pa up to date of Award)	Nil
7	Refund of Rs. 12,69,000 deducted from 1st Annuity payment plus interest	12,69,000 Plus interest @ 18% pa from 02.09.2005	12,69,000 Plus interest 14,27,311 (interest @ 13.5% pa upto date of Award)	12,69,000 Plus interest 14,27,311 (interest @ 13.5% pa upto date of Award)

Total		38,72,40,239/-	12,48,71,448/-
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6. The appellant aggrieved by the award filed the subject petition under Section 34 of the Act objecting to the awarded amount, which has been rejected by the impugned order.

7. The impugned order notices that the claims raised by the respondent were referred to the Independent Engineer by the appellant for detailed observation. The Independent Engineer made his recommendations in respect of Claim Nos. 1 & 2 on 16.06.2007 and Claim Nos. 3 & 4 on 18.06.2007. Clarification was sought from the respondent in the form of a certificate in support of the amount claimed, on submission of which, on 13.11.2007 the Independent Engineer opined that the appellant had to pay to the respondent in respect of Claim No.6 also.

8. As noticed above, there is a difference of opinion between the Members of the Arbitral Tribunal in respect of Claim Nos. 1 to 6, whereas the Arbitral Tribunal was unanimous as regards Claim No.7 and with regard to the rate of interest awarded under Claim No.5. Though the Majority Award awarded Claim Nos. 1, 2, 3 & 6, the Minority Award rejected Claim Nos. 1, 2 & 6 and awarded a lesser amount, in relation to Claim No.3 as compared to the Majority Award.

9. As noticed by the impugned order, the Arbitral Tribunal has found as of fact, that there was delay of 599 days in handing over the land to the concessionaire for the interchanges. This was an essential

requirement and obligation of the appellant. The Independent Engineer in its letter dated 16.06.2007 has opined that the project was beset by regular forceful protracted stoppages and interruptions of construction work by local residents bringing up various demands. The Arbitral Tribunal on scrutiny of the relevant documents found that *“Employer delayed in acquiring land and providing access to the site required for implementing the project and that the project was affected by numerous forced stoppages and interruptions of the construction work by local residents”*.

10. As noticed above, the scheduled project completion date, which was specified as 26.02.2005, was prolonged and the actual completion date as certified by the Independent Engineer was 20.06.2005, thus causing a delay of 114 days in the completion of the project. The Arbitral Tribunal has further noticed that although land was to be handed over within one month of the signing of the Concession Agreement on 27.03.2002, the whole land for the mainline expressway along with its right of way was acquired only on 24.01.2003. The Arbitral Tribunal has recorded categorical finding of fact that there was a delay of 599 days (20 months) in the handing over of the possession of 26.35 acres of land for interchanges at km 602.000 and km 628.00 which was handed over only on 16.07.2004 as against the stipulated date of 27.11.2002. The Arbitral Tribunal noted that though the delay attributable to the appellant was 599 days, the prolongation cost was claimed for a shorter period of 114 days, which period had already been certified by the Independent Engineer. The

Tribunal categorically held that the delay of 114 days was on account of the appellant, as the result of which the respondent was compelled to stay at the site.

11. With regard to the contention of waiver of the right to claim interest under Section 55 of the Indian Contract Act, the Arbitral Tribunal concluded that as time was not of essence of the contract, second part of Section 55 of the Indian Contract Act would be applicable and not the third part. Consequently, the Arbitral Tribunal held that the respondent would be entitled to compensation from the appellant for the loss occasioned due to prolongation without requirement of a notice. The Arbitral Tribunal further held that the EPC Contract was a back to back contract with all liabilities, obligations and rights of the Concession Agreement and further notices that the respondent Concessionaire had sub-contracted the construction work of the project to Gamuda- WCT (India) Pvt. Ltd., which fact was known to NHAI from the commencement date throughout. The Arbitral Tribunal further referred to Article 19.3(a) (ii) of the Concession Agreement, which provided for indemnification of the Concessionaire against third party claim for loss, damages and expenditure arising out of breach by NHAI.

12. The impugned order notices that the conclusions of the majority award are based on the record as well as certification of Claim Nos. 1, 2, 3 & 6 by M/s K.L. Chatrath & Company and further the Certificate dated 03.04.2007 of M/s Krag & Associates, Chartered

Accountants. As there was variation in the prolongation costs in the report submitted by both the parties, the 10% additional sum included in the certificate issued by M/s Krag 7 Associates was found to be not justified and rejected. On this basis he said, an amount of Rs.3,52,97,431/- was allowed.

13. Claim No.2 pertaining to Concessionaire's claim relating prolongation costs to the tune of Rs. 1,03,88,674/- was found to have been certified by M/s K.L. Chatrath & Co. and accordingly the Arbitral Tribunal allowed the said claim in favour of the respondent. The impugned order notices that the appellant has not been able to substantiate that the finding recorded by the Arbitral Tribunal is contrary to the evidence on record or perverse. On this ground learned Single Judge declined to interfere with the award in respect of Claim Nos. 1 & 2.

14. With regard to additional costs arising from change in law, the impugned order held as under:-

“29. Turning to Claim No.3 which was for additional cost arising from change in law whereby the revised figure claim came to Rs. 154,236,720/-, the majority AT has discussed the relevant Article 11 as well as Articles 11.1, 11.2 and 11.3 which provide for reimbursement. The majority AT found that the Respondent had claimed reimbursement of additional cost in accordance with Article 11.2. The majority also examined the certificate dated 12th August, 2008 and affidavit dated 29th June, 2009 of M/s Krag & Associates. The affidavit of Mr Abhijit Ghosh and the above certificate formed part of the evidence.

30. *It was concluded by majority AT, that the Respondent had fulfilled its obligations and followed the procedure under Article 11.3(a) & (b). It was also found that no discussion was held by NHAI or the Concessionaire along with the IE on the subject pursuant to Clause 11.3 (b) for certification by IE and determination of the additional cost to borne by the Respondent. The majority AT found that the large number of vouchers submitted could hardly be doubted.*

31. *Under Article 11.1, taxes and levies if any payable in an accounting year and the increase in expenditure had to be borne by the Respondent. The remaining was to be compensated by NHAI. However, any increase in cost to the EPC Contractor/Concessionaire on transportation of stone due to change in law could not be accepted. Therefore, the amount of Rs.1,48,88,267 was "not found to be admissible". The majority AT also discussed the increase in the minimum wages and accepted the recommendation for reduction of 25% of the said amount of Rs. 17,55,704/-. Ultimately, it was found that as against a sum of Rs.15,42,36,718, the amount awarded the Respondent a sum of Rs.13,37,82,038/-.*

32. *The challenge to the majority Award is basically on the same grounds urged before it by the NHAI. The Court is unable to be persuaded to interfere with the impugned Award insofar as it has allowed Claim No.3."*

15. We do not find any infirmity with the view taken by the learned Single Judge and find no reason to interfere with the impugned award, insofar as it allows Claim No.3.

16. Claim No.4, pertaining to financing cost, has been rejected by the Arbitral Tribunal unanimously. Learned Single Judge has not found any reason to interfere with the said finding. The said finding is not even impugned by the respondent. Accordingly, the same is not interfered with.

17. With regard to claim of interest claim under Claim No.5, it is noticed that the Arbitral Tribunal has referred to Article 19.2 and Section 31(7) of the Act and has gone by the prime lending rate fixed by the Reserve Bank of India. 2% above the prime lending rate was considered by the Arbitral Tribunal to be reasonable, consequently holding that effective rate of interest to be 13.5% p.a. As noticed above, the Arbitral Tribunal is unanimous with regard to the rate of interest. We find no reason to interfere with the same.

18. With regard to Claim No.6 i.e. for reimbursement of electricity charges and cost of diesel for standby generator sets supplied during operation period of the project facilities, the Arbitral Tribunal after considering the correspondence between the parties at some length has held the respondent entitled to reimbursement on account of electricity charges and cost of diesel for operation of the project facilities. We find no reason to interfere with the impugned order declining to interfere with the said finding of the Arbitral Tribunal. Further, the said finding is purely factual in nature not warranting any interference.

19. With regard to Claim No.7 for refund of the deduction made by the appellant from the first annuity payment, the Arbitral Tribunal has held that the same was without any justification and not as per the terms of the Concession Agreement. No clause was pointed out in the Concession Agreement for any appropriation by the appellant from the annuity payment. There is also no term for any reduction from the amount payable or any imposition of penalty, token or otherwise. The Arbitral Tribunal found the said deduction was beyond the scope of the Concession Agreement. The finding is purely factual and does not warrant any interference in exercise of powers under Sections 34 or 37 of the Act.

20. It is noticed that the findings rendered by the Arbitral Tribunal, which are impugned by the appellant, are purely factual in nature. The interpretation to the various clauses as noticed hereinabove is a plausible interpretation rendered by the majority Arbitral Tribunal not warranting any interference.

21. The Court in exercise of powers under Section 34 does sit as a Court of Appeal and is not required to re-appreciate the entire evidence.

22. In view of the above, we find no infirmity with the factual findings returned by the Arbitral Tribunal and its interpretation of the terms & conditions of the Concession Agreement. We find no infirmity with the view taken by the learned Single Judge in the impugned order and no reason to interfere with the impugned award.

23. In view of the above, the appeal is dismissed, however in the facts of the case, without any costs.

**SANJEEV SACHDEVA
(JUDGE)**

**S. RAVINDRA BHAT
(JUDGE)**

NOVEMBER 08, 2017/km

