

\$~14

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

+ **O.M.P. (COMM) 126/2017**

NATIONAL HIGHWAYS AUTHORITY OF
INDIA

..... Petitioner

Through: Mr S. Nanda Kumar, Mr Pravnish
Singh, Mr M.S. Saran Kumar and Mr
Ramdhan Singh Narwal, Advocates.

versus

N.K. TOLL ROAD LIMITED

..... Respondent

Through: Mr Akhil Sibal, Mr Hasan Murtaza
and Ms Tanvi Mishra, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

%

23.03.2017

VIBHU BAKHRU, J

CAV No. 247/2017

1. The caveat stands discharged as the learned counsel for the respondent has entered appearance.

I.A. No. 3311/2017

2. Allowed, subject to all just exceptions.

3. Application stands disposed of.

I.A. No. 3312/2017 (Condonation of Delay in re-filing)

4. National Highways Authority of India (hereafter 'NHAI') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') assailing the arbitral award dated 31.08.2016 (hereafter 'the impugned award') rendered by the Arbitral Tribunal,

constituted by Shri S. S. Agarwal, Shri Arun Kumar Sinha and Shri Ravindra Kumar (Presiding Arbitrator) (hereafter collectively referred to as ‘the Arbitral Tribunal’) by majority. The dissenting award was passed by Shri Arun Kumar Sinha, which is being relied upon by NHAI.

5. The impugned award was made and published by the Arbitral Tribunal in respect of the disputes raised by the respondent, M/s N. K. Toll Road Ltd. (hereafter ‘N K Toll’), in connection with the Concession Agreement dated 30.01.2006 (hereafter ‘the Agreement’) entered into between the parties.

6. The impugned award was made on 31.08.2016 and the present petition was filed on 28.11.2016. However, the petition was defective and was, therefore, returned under objection. Admittedly, NHAI was unable to rectify the defects till 15.03.2017; that is, about six and a half months after the impugned award was made.

7. It is, thus, seen that the time taken by NHAI in re-filing far exceeds the period available under Section 34(3) of the Act for filing a petition assailing the award. A Division Bench of this Court in the case of **Delhi Development Authority v. Durga Construction Co: 2013 (139) DRJ 133** had considered the issue whether the cumulative delay in filing and re-filing the petition under Section 34 of the Act could be condoned by this Court beyond the period of three months and thirty days as specified under Section 34(3) of the Act. This Court concluded that whilst the Court has the power to condone the delay in re-filing even if the period cumulatively taken exceeds the maximum period available under section 34(3) of the Act; the

discretion to do so must be exercised in conformity with the legislative intent as expressed under Section 34(3) of the Act. Thus, it would be necessary for a party seeking condonation of delay in re-filing to satisfy the Court that it was prevented by sufficient cause to re-file the petition within the time specified.

8. In the present case, the only explanation provided for the inordinate delay in re-filing is that it was caused because of delay in getting “*the copy of the documents from the project office which is situated at Karur, Tamil Nadu*”. Plainly, the said explanation cannot be accepted. Merely because the project office of NHAI is located in Tamil Nadu cannot justify a period of over about three months to obtain the relevant documents.

9. This excuse - of delay in obtaining the relevant documents - seems even more hollow, when one finds that, in fact, NHAI has not even filed the most basic documents required for examining the controversy between the parties; NHAI has neither filed a copy of the Agreement nor the statement of claims/defence. The only documents filed along with the present petition are a copy of the impugned award along with the dissenting note and four letters issued by NHAI/Engineer. Having heard the learned counsel for NHAI on merits, the said letters are of little relevance to the arguments advanced for assailing the impugned award. The Statement of Truth filed in support with the petition inasmuch as it has been affirmed that all relevant documents have been filed with the petition, is also palpably false.

10. In view of the above, this Court is unable to condone the delay in re-filing and the application is dismissed.

11. Accordingly, the petition is liable to be dismissed on the ground of delay alone. However, notwithstanding the above, this Court has also heard the arguments advanced by Mr Nanda Kumar, learned counsel appearing for NHAI and has considered the petition on merits as well.

O.M.P. (COMM) 126/2017 and IA No. 3310/2017

12. The only controversy raised on behalf of NHAI is that, according to NHAI, the damages awarded are in conflict with the terms of the Agreement.

13. Briefly stated, the relevant facts necessary to address the controversy are as under:-

13.1 NHAI had invited bids for the work of *'design, construction, development, finance, operation and maintenance of km. 258.645 (end of Namakkal Bypass) to km. 292.6 (start of Karur Bypass) and (ii) improvement, operation and maintenance of km 248.645 (start of proposed flyover on Namakkal Bypass) to km 258.645 (end of Namakkal Bypass) on NH-7 in the state of Tamil Nadu on Build Operate & Transfer (BOT) basis: Contract Package NS-2/BOT/TN-3'* (hereafter 'the works'). Reliance Energy Limited submitted its bid, which was accepted by issuance of a letter of acceptance dated 30.09.2005. For the execution of the works, N K Toll was incorporated as a Special Purpose Vehicle.

13.2 Subsequently, the parties entered into the Agreement dated 30.01.2006. In terms of the Agreement, the works had to be completed within 30 months from the date of Notice to proceed. The concession was

granted for a period of 20 years from the appointed date. A tripartite agreement also existed between the parties and the State of Tamil Nadu.

14. According to NHAI, the execution of the Agreement was delayed by N K Toll as it neither completed the pre-construction activities before the appointed date nor mobilized the requisite manpower and other resources. As a result, disputes arose between the parties. On the other hand, it is the stand of N K Toll that NHAI defaulted in performance of its obligations of handing over the land for the works within the time prescribed which resulted in delay in execution of the works, increased costs and resultant loss to N K Toll.

15. In view of the disputes, N K Toll invoked the arbitration clause by its letter dated 18.12.2013 pursuant to which the Arbitral Tribunal was appointed.

16. N K Toll filed its statement of claims raising the following claims: Claim no.1 - ₹13,11,85,005/- as compensation for additional expenses on account of extended stay of machineries at site; Claim no. 2 - ₹1,59,86,791/- compensation for additional increase in cost of input materials incurred due to extended construction period; Claim no.3 - ₹6,28,02,533/- being compensation for loss of opportunity and profits due to extended period of construction; Claim no.4 - ₹20,87,00,000/- towards compensation for loss of revenue due to delay in commercial operation date (COD); Claim no.5 - ₹10,03,08,510/- as compensation for additional overhead costs incurred due to extended construction period; and Claim no.6 - ₹71,20,945/- as compensation for delayed payment of grant during the construction period.

17. On considering the material available on record, the Arbitral Tribunal found that land was not handed over to N K Toll on time as the payment of compensation to the landowners was delayed by NHAI. And, therefore, the Arbitral Tribunal held NHAI responsible to pay compensation to N K Toll for breach of Agreement, in terms of Sub-clause 31.2 of the Agreement. Further, the deployment of machineries at the site was also considered to be adequate and NHAI's contention in this regard was rejected.

18. In view of the above, insofar as Claim no.1 was concerned, the Arbitral Tribunal allowed the claim to the extent of ₹9,64,66,650/- on the basis of percentage costs. Similarly, Claim no.2 to the extent of ₹1,32,98,506/- was also accepted. With regard to Claim no.3, an amount of ₹6,28,025/- was awarded in the absence of adequate proof of loss of opportunity. A sum of ₹18,26,07,897/- was also awarded in respect of Claim no. 4 as the principle of payment of compensation to the concessionaire for delays not attributable to it, was recognized by the Government of India.

19. In addition, under Claim no.5, N K Toll was awarded a sum of ₹3,09,33,245/-. Likewise, Claim no.6 for ₹71,20,945/- was also accepted as the terms of the Agreement provided for payment of interest on delayed disbursement of grant.

20. The awarded amounts in Claim nos.1 to 5 also carried interest at the rate of 2% above the SBI PLR from the date of actual COD till the date of the impugned award. Further, the Arbitral Tribunal also awarded interest at the rate of 12% p.a. on the amounts awarded from the date of the impugned award till realization. However, it was also held that future interest would be

payable only if the awarded amounts were not discharged within a period of 60 days from the date of the award. Further, N K Toll was awarded ₹47.66 lacs along with interest at the rate of 12% p.a. for the share paid by it on behalf of NHAI towards arbitration.

21. However, Shri Arun Kumar Sinha in his dissenting award observed that damages for delay in handing over the land had to be determined as per Sub-clauses 13.5.1 and 13.5.2 of the Agreement and found N K Toll entitled to a sum of ₹1,23,52,215/- along with interest at the rate of 10% p.a. as pre-award interest for its claims. Future interest was also awarded at 2% above the current rate of interest.

22. Mr Nanda Kumar, did not dispute that NHAI had defaulted in handing over the site to N K Toll. He sought to assail the impugned award on the solitary ground that the Arbitral Tribunal had erred in holding that the question of damages was to be addressed in terms of Sub-clause 31.2 of the Agreement read with Sections 55 and 73 of the Indian Contract Act, 1872 (hereafter 'the Contract Act'). He submitted that the Agreement between the parties included specific clauses for award of damages in case of delay in handing over the Right of Way (ROW)/additional ROW: Sub-clauses 13.5.1 and 13.5.2 of the Agreement. He submitted that in terms of the Agreement, any default in handing over the site was required to be compensated in terms of the aforesaid sub-clauses and the Arbitral Tribunal had grossly erred in taking recourse to Sub-clause 31.2 of the Agreement. He earnestly contended that the Arbitral Tribunal had not considered the applicability of Sub-clauses 13.5.1 and 13.5.2 of the Agreement and, therefore, the impugned award needs to be set aside. He referred to the dissenting note

entered by one of the members of the Arbitral Tribunal, accepting the contention now advanced by Mr Nanda Kumar and holding that compensation as specified in Sub-clauses 13.5.1 and 13.5.2 would be payable.

23. I have heard Mr Nanda Kumar at length.

24. At the outset, it is necessary to observe that there is no dispute that NHAI had committed a default in handing over of land for the works to be executed. The Arbitral Tribunal had found that there was a delay of at least 206 days in handing over the site, which was wholly attributable to NHAI. The dissenting note entered by Mr Arun Kumar Sinha, which is heavily relied upon by Mr Nanda Kumar also accepts that NHAI had delayed handing over the land for at least a period of 206 days.

25. It is also not disputed that NHAI is liable to compensate N K Toll for the damages on account of delay in handing over the site. The only question to be addressed is whether the Arbitral Tribunal had erred in assessing the damages in terms of Sub-clause 31.2 of the Agreement and in terms of Sections 55 and 73 of the Contract Act. It is, at this stage, also relevant to note that although Mr Nanda Kumar had contended that Sub-clause 31.2 of the Agreement was not applicable, he did not articulate any grievance with regard to the quantum of damages as assessed (assuming that Sub-clause 31.2 of the Agreement was applicable). Thus, the only question to be addressed is whether the Arbitral Tribunal (majority) had erred in holding that Sub-clause 31.2 of the Agreement was applicable for determining damages.

26. Mr Nanda Kumar's contention that Arbitral Tribunal had not taken into account the provisions of Sub-clauses 13.5.1 and 13.5.2 of the Agreement is *ex facie* incorrect. A plain reading of the impugned award indicates that the Arbitral Tribunal had discussed the issue whether the said sub-clauses were applicable and had rejected the same. The relevant extracts of the impugned award wherein the question of applicability of the provisions of Sub-Clause 13.5.2 are discussed are set out below:-

“Now considering the effect on compensation of clause 13.5.2 of the contract agreement (page 41), it states, quote “*Additional right of way for construction of main carriageway shall be made available to the concessionaire as per the handing over schedule mentioned herein free from all encumbrances and without the concessionaire being required to make any payment to NHAI on account of any costs, expenses and charges for the use of such additional right of way for the duration of the Concession Period. 50% (fifty percent) of additional right of way for construction of main carriageway on or before 6 (six) months from the appointed date, balance 50% (fifty percent) of the additional right of way for construction of main carriageway on or before 12 (twelve) months from the appointed date. Additional right of ways for service roads and other facilities shall be handed over to the concessionaire on or before 18 (eighteen) months from the appointed date. On or after the appointed date, the concessionaire shall commence, undertake and complete all construction works on the project highway in accordance with this agreement. Provided, however, that if NHAI does not enable such access to any part or parts of the additional right of way for any reason other than a force majeure Event or breach of this agreement by the concessionaire as per the schedule mentioned herein, NHAI shall pay to the concessionaire damages at the rate of Rs. 1,000 (Rupees one thousand) per month per 1,000 (one thousand) sq. meters or part thereof if such area is required by the concessionaire for*

construction works. Such Damages shall be raised to Rs.2,000 (Rupees two thousand) per month after COD if such area is essential for smooth and efficient operation of the project highway. Provided further that the completion certificate or the provisional certificate, as the case may be, for the project highway shall not be affected or delayed as a consequence of such parts of the existing right of way remaining under construction after the scheduled project completion date”.

It is evident that NHAI did not keep its obligations in providing additional right of way as scheduled in the above clause of the CA. The consequence of such failure are dealt with by two provisos to clause 13.5.2. The first proviso states, quote. *“Provided, however, that if NHAI does not enable such access to any part or parts of the additional right of way for any reason other than a force majeure Event or breach of this agreement by the concessionaire as per the schedule mentioned herein, NHAI shall pay to the concessionaire damages at the rate of Rs.1,000 (Rupees one thousand) per month per 1,000 (one thousand) sq. meters or part thereof if such area is required by the concessionaire for construction works. Such Damages shall be raised to Rs, 2,000(Rupees two thousand) per month after COD if such area is essential for smooth and efficient operation of the project highway”.*

The second proviso puts a further condition, stating that, quote *“Provided further that the completion certificate or the provisional certificate, as the case may be, for the project highway shall not be affected or delayed as a consequence of such parts of the existing right of way remaining under construction after the scheduled project completion date”.*

Thus considering clause 13.5.2 in its entirety, the stated sums mentioned as Damages against the failure of the Respondent to make available additional ROW can be applicable only if the provisional completion certificate was not delayed or affected as a consequence of delay/non-fulfillment of reciprocal promises by the Respondent.”

27. The Arbitral Tribunal further examined the correspondence between the parties in relation to N K Toll's request for issue of provisional completion certificate and concluded that the same had been denied to N K Toll until it completed the entire four laning of the Project Highway, meeting all the requirements as per the specifications and standard. The Arbitral Tribunal concluded as under:-

“The denial of PCC to the Claimant resulted in non-fulfillment of second proviso of clause 13.5.2 of the CA and breach of contract, thereby the pre-determined damages provided therein will no longer apply. The rate of damages payable by NHAI to the Concessionaire, if it does not enable access to any part or parts of the additional ROW to the Concessionaire as per the schedule mentioned in this clause are covered by two riders, and there can be no other interpretation that these damages will not be applicable, if the second rider is not complied with.

Thus material breach has been committed by the Respondent and the damages on this account will have to be dealt with by clause 31.2 (page 74 of CA) read with section 55 and 73 of the Indian Contract Act 1872.”

28. Sub-clause 31.2 of the Agreement (as quoted in the impugned award) reads as under:

"31.2 In the event of NHAI being in material default of this Agreement and such default is cured before Termination, NHAI shall pay to the Concessionaire as compensation, all direct additional costs suffered or incurred by the Concessionaire arising out of such material default by NHAI, in one lumpsum within 30 (thirty) days of receiving the demand or at NHAI's option in 3 (three) equal installments with interest @ SBI PLR plus 2% (two per cent)".

29. As noticed above, there is no dispute that the damages awarded by the Arbitral Tribunal are in conformity with the aforesaid sub-clause.

30. The extent of judicial review in proceedings under Section 34 of the Act is limited. The arbitral tribunal is the final adjudicating authority in respect of the disputes between the parties. The question as to the interpretation of the agreement between the parties falls squarely within the jurisdiction of the arbitral tribunal. Thus, even if it is accepted – although there is no reason to do so – that the Arbitral Tribunal has interpreted the Agreement erroneously, no interference with the impugned award would be warranted unless the Court finds that the view is patently illegal and perverse. The Court does not act as a Court of first appeal over the decision of the arbitral tribunal and cannot supplant its view over that of the arbitral tribunal. In **Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49**, the Supreme Court had explained the above principle in the following words:-

“It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.”

31. Thus, if the view expressed by the arbitral tribunal is a plausible one, the same cannot be interfered with even if the Court disagrees with the

same.

32. In view of the above, this Court is unable to hold that the decision of the Arbitral Tribunal is perverse or patently illegal.

33. In view of the above, the petition and the pending application are dismissed, both on the grounds of limitation as well as on merits.

34. No order as to costs.

MARCH 23, 2017
RK

VIBHU BAKHRU, J

