

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

Date of judgment: 18.05.2018

+ **FAO(OS) (COMM) 110/2018, CAV 468/2018, C.M. APPL
20529-20530/2018**

NATIONAL HIGHWAYS AUTHORITY OF INDIA Appellant

Through **Mr.Arun Kumar Sharma, Sr.
Advocate with Ms.Madhu,
Mr.Rohit Jain and Mr.Ashish
Joshi, Advocates.**

versus

AFCONS APIL(JV) ... Respondent

Through **Mr.Darpan Wadhwa,
Sr.Advocate with Mr.Mani
Seshadri, Mr.Samarth
Chowdhary, Mr.Tanmoy Nardi
and Ms.Adite Mohan,
Advocates.**

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

JUSTICE S. RAVINDRA BHAT

1. The National Highways Authority of India (NHAI) appeals under Section 37 of the Arbitration and Conciliation Act, 1996 – [“the

Act” hereafter] the decision of the learned Single Judge rejecting its objections under Section 34 of the Arbitration and Conciliation Act to an award made on 14.08.2017. It contends that the learned Single Judge fell into error in overlooking a salient but crucial illegality writ large on the face of the award, i.e. with respect to the directions to pay damages on account of loss of profit for the extended period of the contract.

2. NHAI is a statutory public body responsible for the building, development, maintenance and management of the National Highways entrusted to it under the provisions of National Highways Act, 1956 and the NHAI Act, 1988. The respondent (hereafter referred to variously as “the claimant” or “the contractor”) is a joint venture company of M/s. AFCONS and APIL engaged in the business of construction and development of infrastructure projects; it was awarded the contract works pursuant to an open tender process. The total contract value was for ₹18 crores. The parties entered into a contract on 22.05.2001 for four laning of km 340 to km 404 of Haveri-Hubli Section of NH-4 in the State of Karnataka Contract Package-I. The salient features of the Project Contract were as under:

Particulars	Figure
Contract Price	Rs.1,83,65,82,676/-
Date of Letter of Acceptance (LOA)	28.03.2001
Date of Agreement	22.05.2001
Contract Period	30 months
Date of commencement of work	30.06.2001

Scheduled date of completion	29.12.2003
Actual date of completion	29.02.2008

3. Considerable delays occurred in the execution of the project by the respondent due to various reasons. The scheduled date of completion of the project was 29.12.2003, whereas it was eventually completed on 29.02.2008, i.e. with a delay of about 62 months. Eight applications for grant of extension of time were made by the claimant to the Engineer were made in the meanwhile (as under the Contract, the Engineer was the appropriate authority to recommend Extension of Time in case of any delay). It is not in dispute that under the contract, the Engineer was empowered under Clause 28.1 read with Clause 44.2 to determine whether and by how much the intended completion date should be extended and by how much the contract price should be increased. Accordingly, the Engineer exercised its jurisdiction vested under the Project Contract and considered the EOT applications of the respondent and granted eight extensions on 04.05.2004, 25.07.2005, 27.03.2006, 12.09.2006, 27.11.2006, 13.06.2007, 07.09.2007 and 19.06.2008.

4. The project was eventually completed on 29.02.2008. Disputes and differences arose between the parties and arbitration proceedings were invoked by the respondent. Accordingly, the Arbitral Tribunal was constituted on

12.01.2001 and the respondent raised 4 claims before the Arbitral Tribunal, viz:

- (i) Claim No.1- Additional cost on account of extended stay;
- (ii) Claim No.2-Disallowed payments in the Final Bill;
- (iii) Claim No.3-Interest on the amount awarded in Claim No.1 and Claim No.2; and
- (iv) Claim No.4-Cost of arbitration.

5. By Award dated 14.08.2017, rendered by the majority of the Tribunal, several of the contractor's claims were accepted. These included claims of loss on account of lost opportunity during the extended period by way of damages. This was challenged in diverse grounds, before the court under Section 34 of the Arbitration and Conciliation Act. The Single Judge rejected the petition holding that the award was not patently erroneous or for any other reason liable to be set aside.

6. The NHAI and its learned senior counsel contend that the tribunal ignored the facts that the engineer was empowered under clauses 28.1 and 44.2 to recommend extension of time and also determine by how much the contract price could be increased in case of extension of time. It is urged that since the arrangement was based upon item rate, contract component was inbuilt in the rates of the BOQ items. The decision of the tribunal, to award additional compensation on account of overheads and idling as well as the so-called loss of opportunity

were unjustified. It is stated that such award is patently illegal and deserves to be set aside.

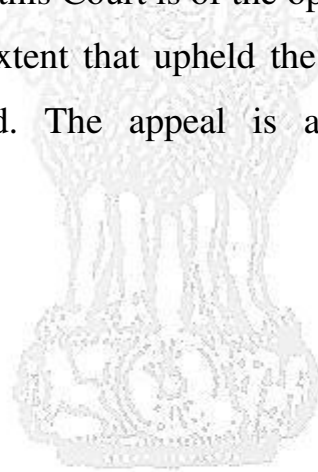
7. Learned senior counsel points out that the tribunal's finding in para 42 rejecting its contention with respect to preclusion of any claim for compensation is contrary to law. In this regard, he points out that the Tribunal referred only to clause 28.1 and overlooked clause 44.2 which empowered the engineer to determine the increase, if any, of the contract price; since the engineer exercised the power and did not grant any additional amount, the Tribunal exceeded its jurisdiction. It was argued besides that the compensation on account of lost opportunity to earn profits owing to delay in completion of works was entirely without any basis. Learned counsel emphasizes that the learned single judge failed to appreciate that the contractor's claim was not due to loss of profit due to extended period but on account of lost opportunity owing to delay in work. Since the Tribunal granted contractor additional costs on account of Head Office overhead due to extended period of contract, however, amounts on account of lost opportunity of profits was wholly beyond the contract and, therefore, contrary to law.

8. This Court notices that the learned Single Judge dealt with this aspect in paras 14-18 of the impugned order. Reliance was placed upon the decision in *A.T. Brij Paul Singh and Ors. v. Govt. of Gujarat* 1984 (4) SCC 59 as well as the subsequent

decisions such as *Bharat Coking Coal Ltd. v. L.K. Ahuja* 2004 (5) SCC 109 and *Assam State Electricity Board v. Buildworth (P) Ltd.* 2017 (8) SCC 146. The basis of this reasoning is that a party in breach of a contract, especially in works contract, is liable to compensate by way of damages for loss of profit that the aggrieved/injured party would have ordinarily expected to earn in the normal course of its business. In the present instance, the facts disclose that what was to be originally completed in about 30-31 months entailed a delay of 62 months. In other words, the contract period contemplated by the parties, got delayed two fold in point of time as it were. In fact, the engineer granted no less than eight extensions. Although in one or two of these extensions, the blame was sought to be laid at the door of contractor, the fact remains that before the Tribunal, the appellant could not establish that the contractor was at fault or that its contract was such as to allow the blame even for such period upon it. The Tribunal granted additional amounts towards certain components during the extended period. However, the head of damages, i.e. loss of profit on account of lost opportunity was a distinct claim made by the contractor which was adjudicated by the Tribunal.

9. It is now firmly established that in the absence of a patent illegality or a conclusion so unreasonable that no reasonable Tribunal would have reached it given the same circumstances, the award cannot be interfered with under Section 34 of the Act.

This being the narrow scope of the Court's power, learned Single Judge correctly in this Court's opinion relied upon a host of previous authorities, including *Brij Paul Singh (supra)* and *Assam State Electricity Board (supra)* to hold that such award of damages for loss of profit or loss of opportunity was justified and not illegal. After all, the contractor had to extend its resources and energies them almost an additional period of five years which meant that it could not bid concurrently during that period in other contracts and enjoy reasonable returns. Given these imperatives, this Court is of the opinion that the impugned judgment to the extent that upheld the award of these aspects cannot be faulted. The appeal is accordingly rejected as unmerited.



S. RAVINDRA BHAT
(JUDGE)

A. K. CHAWLA
(JUDGE)

MAY 18, 2018