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

% *Date of Judgment: 15th October, 2018*

+ **FAO(OS) (COMM) 234/2018**

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Appellant

Through Dr. Maurya Vijay Chandra & Ms.
Meenu Chandra, Advocates.

versus

HINDUSTAN CONTRUCTION CO LTD

..... Respondent

Through Mr. Dayan Krishnan, Sr. Advocate
with Mr. Rishi Agrawala, Ms.
Sanjeevi Sisadhari & Ms. Shrouti
Arora, Advocates.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S. SISTANI, J. (ORAL)

CM.APPL 43311/2018 (exemption)

1. Exemption allowed, subject to all just exceptions.
2. The application stands disposed of.

CM.APPL 43312/2018 (delay in re-filing)

3. This application has been filed by the applicant/appellant seeking condonation of 4 days delay in re-filing the appeal.
4. Prayer made in this application is not opposed. Accordingly, the same is allowed. Delay of 4 days in re-filing the appeal is condoned.
5. The application stands disposed of.

FAO(OS) (COMM) 234/2018

6. The present appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 read with Section 13 of the Commercial

Courts Act, 2015 for setting aside the judgment/order dated 02.07.2018 passed by learned Single Judge of this Court whereby it has been held that the award dated 03.09.2017 to the extent that it refused to award the claim amount has been found to be not perverse.

7. We may also note that the counter claim of the respondent was rejected by the Arbitrator, which was also a subject matter of a separate petition under Section 34 of the Arbitration and Conciliation Act, 1996. However, the learned Single Judge allowed the objections of the appellant herein with respect to counter claim raised by the respondent. Disputes arose between the parties with respect to the agreement dated 21.10.2005 entered into between the parties in relation to works to be carried out at Lucknow-Muzaffarpur Highway project NH-4. The Tribunal rejected the claim of the appellant herein while allowing the counter claim of the respondent with interest. The subject matter of this appeal relates to rejecting the claim of interest of deferment of recovery of mobilization and equipment advance as per clause 60 of the Conditions of Particular Application (COCA) preferred by NHAI.

“6. On 21.10.2005, NHAI and HCL entered into the Agreement for execution of the work of four laning of Lucknow-Muzzaffarpur National Highway-4 (NH-4) from km 135.000 to km 164.000 of Ayodhya to Gorakhpur Section of NH-28 in the State of Uttar Pradesh (hereafter ‘the Project’).

7. The Agreement was a unit rate contract. The bidding documents contained a detailed document ‘Bill of Quantities’ (hereafter ‘BOQ’) containing the items of work with the estimated quantities of each item to be executed by HCL. The parties adopted the terms and conditions of the contract as contained in the General Conditions of Contract

(GCC) and Special Conditions of Contract (SCC). These terms are based on standard format FIDIC Contract 4th Edition in 1987 with certain Conditions of Particular Application (COPA) amending the FIDIC and GCC.

8. On 22.03.2007, HCL requested the Engineer to defer the recovery of mobilization and machinery advance from interim payment certificates till the Project progress reaches 20%.

Claims

9. NHAI filed its Statement of Claims before the Arbitral Tribunal claiming (i) ₹3,19,14,314/- on account of loss of interest in respect of deferment of recovery of mobilization and equipment advance for three months, which continued for over thirty months (Claim No.1); (ii) pendente lite interest at the rate of SBI-PLR + 2% on the abovementioned amount (Claim No.2); (iii) future interest at the rate of 18% per annum (Claim No.3); and (iv) cost of arbitration (Claim No.4).

12. In terms of the Agreement, HCL was provided mobilization advance of a sum of ₹12.76 crores on 24.01.2006 and equipment advance of an amount of ₹12.76 crores on 13.09.2006. Thus, in aggregate, NHAI provided an advance of ₹25.52 crores to HCL. The said advance was an interest free advance and was to be recovered from interim payments. In terms of Clause 60.7 (C) of COPA (Conditions of Particular Application), the recovery of advance was agreed to commence from interim payment certificates (IPC) after the cumulative value of IPCs reach 20% of the contract price or 12 months after the disbursement of the first installment whichever is earlier. The recovery was to be made at the rate of 30% of the amount of each interim payment (IPC).”

8. Dr. Chandra, counsel for the appellant submits that no doubt at the request of respondent, NHAI agreed deferment of recovery of

mobilization and equipment advances from monthly IPCs with interest at the rate of SBI PLR + 2% on deferred amount for a period of three months but the Arbitrator and the learned Single Judge have completely misread and misunderstood the concessions shown by NHAI to the contractor for the reason that at the end of three months, not only was the respondent/contractor suppose to pay the interest as agreed to but also the actual amount, which had been deferred amounting to Rs.6,24,72,455/-. It is thus contended that the effect of the interpretation given by the Arbitrator and learned Single Judge has resulted in loss to NHAI to the tune of Rs.3,19,14,314/- as the amount of Rs.6,24,72,455/- was merged in the total mobilization advance and deductions were made only at the end of the contract.

9. Mr. Dayan Krishnan, learned senior counsel, appearing for the respondent submits that there is no infirmity, impropriety in the award as also the order passed by the learned Single Judge which would require interference in proceedings arising out of Section 37 of the Arbitration and Conciliation Act, 1996. He submits that the understanding of the parties were crystal clear and the reason for seeking such adjustment was as the work did not progress as scheduled and the respondent had claimed that the delay in execution of the work was attributable to NHAI as it has failed to handover the site within the stipulated period and further the site handed over was not free from encumbrances besides there was other delay beyond the control of the contractor. It is for this reason that 20% of the contract was not complied within the period of 12 months and the recovery of mobilization advance would have resulted in great prejudice and

financial loss to the respondent. It is contended that this aspect was appreciated by NHAI and it is only for this reason that NHAI agreed to deferment of recovery of mobilization advance, which was not stipulated, as per the terms of the contract. It is emphasized by Mr. Krishnan, had the respondent been at fault, NHAI would not have granted this concession to the respondent. He further submits that this was the only understanding and only interpretation of the communication exchanged between the parties, which was plausible and in the present proceeding, this Court cannot substitute its own view unless the view taken by the Arbitrator was highly unreasonable, improbable and illegal.

10. We have heard learned counsels for the parties. In para foregoing, we have set out the relevant clauses around which the disputes between the parties revolved. The operative portion of two communications dated 19.04.2007 and 17.05.2007 exchanged between the parties read as under :

“19.04.2007

In pursuance of the further discussions on the above subject, we do hereby undertake that the interest @ SBI PLR + 2%, on the recoverable amounts of advance (30% of the gross IPC value), which will actually be deferred from various interim payment certificate, beyond the actual date of recovery for a further period of 3 months or till the progress reaches 20%, whichever is earlier would be borne by us.”

“17.05.2007

Sir,

With reference in the above mentioned subject it is to inform that NHAI has agreed for the following :-

- i. Deferment of recovery of mobilization and equipment advances from monthly IPCs with interest rate at SBI PLR + 2% on deferred amount for the period of next three months from the date of issue of this letter.

This issues with the approval of competent authority.”

11. It is not in doubt and not in dispute that for IPC nos.8, 9 & 10, NHAI did not recover the proportionate figure of mobilization advance from the respondent. It is also not disputed that the respondent paid interest as agreed between the parties, which is reflected in table given below :

IPC No.	Gross IPC Amount (Rs.)	30% of Gross IPC Amount (Rs.)	Amount of Interest @ SBI – PLR + 2% (i.e. 12.75% + 2%) Rs.	Recovery of Interest in IPC No.
	a	b=ax30%	c=bx(12.75+2)%/12	d=c
8	7,71,90,097	2,31,57,029	2,84,638	IPC No.8
9	7,47,65,702	2,24,29,711	5,60,337	IPC No.9
10	5,62,85,718	1,68,85,715	13,28,228	IPC No.10
	Total :	6,24,72,455	21,73,203	

12. It is also not disputed before us during the course of hearing that post IPC no.10 i.e. IPC no.11 onwards the sailing was smooth, the mobilization advance was recovered and no concession was sought.
13. Dr. Chandra has strongly urged before us that at the end of IPC no.10, the respondent was liable to pay the amount recoverable and this amount could not have merged with the remaining amount. In our view, the interpretation of a contract purely lies within the domain of the Arbitrator and we see no reason to interfere in the view of the

Arbitrator, which is found to be accepted by the learned Single Judge, the same is neither illegal nor irrational but plausible. In the case of *Associate Builders Vs. Delhi Development Authority*, reported at (2015) 3 SCC 49, it has been held as under :

“33. 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. In *P.R. Shah, Shares and Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.* (2012) 1 SCC 594, this Court held:

21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second Respondent and the Appellant are liable. The case as put forward by the first Respondent has been accepted. Even the minority view was that the second Respondent was liable as claimed by the first Respondent, but the Appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Byelaw 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the Appellant did the transaction in the name of the second Respondent and is therefore, liable along with the second Respondent. Therefore, in the absence of any ground Under Section 34(2) of the Act, it is not

possible to re-examine the facts to find out whether a different decision can be arrived at.”

14. Even otherwise, the scope of interference in proceeding under Section 37 of Arbitration and Conciliation Act, 1996 is even narrower. In the case of *State Trading Corporation of India Vs. Helm Dungemittel GMBH & Anr.*, *FAO (OS) (COMM) 76/2016 decided on 30.05.2018*, this Court has held as under :

“27. It is no longer *res integra* that the scope of judicial interference in an application under Section 34 of the Arbitration and Conciliation Act, 1996 is limited in nature. It has further been held that the scope of interference while deciding an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 is even more restrictive in nature. The Supreme Court of India has consistently held that an arbitration award should not be lightly interfered with. (See *Renusagar Power Co. Ltd. v. General Electric*, (1994) *Supp. 1 SCC*; *ONGC v. Saw Pipes*, (2003) 5 *SCC* 705, *Hindustan Zinc Ltd. v. Friends Coal Carbonisation*, (2006) 4 *SCC* 445; and *Associate Builders v. DDA*, (2015 3 *SCC* 49).

28. While deciding an appeal it must be kept in mind that the Arbitrator/Tribunal is the final arbiter on facts as well as law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Act. In the case of *P.C.L Suncon (JV) v N.H.A.I.*, 2015 *SCC Online Del* 13192 , in para 24, it was held that:

“24. As a postscript, this Court believes that it is imperative to sound a word of caution. Notwithstanding the considerable jurisprudence advising the Courts to remain circumspect in denying the enforcement of arbitral awards, interference with the awards challenged in the petitions before them has become a matter of routine, imperceptibly but surely erasing the distinction between arbitral

tribunals and courts. Section 34 jurisdiction calls for judicial restraint and an awareness that the process is removed from appellate review. Arbitration as a form of alternate dispute resolution, running parallel to the judicial system, attempts to avoid the prolix and lengthy process of the courts and presupposes parties consciously agreeing to submit a potential dispute to arbitration with the object of actively avoiding a confrontation in the precincts of the judicial system. If a court is allowed to review the decision of the arbitral tribunal on the law or on the merits, the speed and, above all, the efficacy of the arbitral process is lost.”

29. The scope of judicial scrutiny and interference by an appellate court under Section 37 of the Act is even more restricted in comparison to deciding objections to the Award under Section 34 of the Act. In the case of ***State Trading Corporation of India Ltd. v. Toepfer International Asia Pte. Ltd.***, reported at 2014(144) DRJ 220(DB), in para 16 it has been held as under:

“16. The senior counsel for the respondent has in this regard rightly argued that the scope of appeal under Section 37 is even more restricted. It has been so held by the Division Benches of this Court in Thyssen Krupp Werkstoffe Vs. Steel Authority of India (2011) 123 DRJ 724 (DB) and Shree Vinayaka Cement Clearing Agency Vs. Cement Corporation of India (2007) 142 DLT 385. It is also the contention of the senior counsel for the respondent that the argument made by the appellant before the learned Single Judge and being made before this Court, that the particular clause in the contract is a contract of indemnification, was not even raised before the Arbitral Tribunal and did not form the ground in the OMP filed under Section 34 of the Act and was raised for the first time in the arguments.”

30. In the case of **Steel Authority of India v. Gupta Brothers Steel Tubes Limited**, (2009) 10 SCC 63, the Supreme Court has laid down that an error relating to interpretations of the contract by an Arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award. The Supreme Court has further laid down that the Arbitrator having been made the final arbiter of resolution of disputes between the parties, the award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion. The courts do not interfere with the conclusion of the Arbitrator even with regard to the construction of contract, if it is a plausible view of the matter.”

15. Applying the law to the facts of the present case, the table which we have extracted above, in clear terms would show, that in terms of the arrangement arrived at between the parties, the respondent paid the interest for IPC nos.8, 9 & 10 and the mobilization advance, which was received by the respondent stands completely paid to the appellant herein. We find no ground to interfere. Accordingly, the appeal is dismissed.
16. No costs.

G.S.SISTANI, J.

SANGITA DHINGRA SEHGAL, J.

OCTOBER 15, 2018

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