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

Date of decision: 19.12.2018

+ O.M.P. (COMM) 462/2018

NATIONAL HIGHWAYS AUTHORITY OF INDIA (MINISTRY
OF ROAD TRANSPORT AND HIGHWAYS)

..... Petitioner

Through: Mr.Kanwarjeet Singh, Mr.Shekhar
Kumar, Ms.Vandana Rani, Advs.

versus

PATEL-KNR (JV)

..... Respondent

Through: Dr.Amit George, Mr.Rishabh
Dheer, Mr.Swaroop George,
Ms.Rajsree Ajay, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

IA No. 15412/2018

This is an application seeking condonation of eighteen days delay
in re-filing of the petition.

For the reason stated in the application, the delay is condoned and
the application stands allowed.

O.M.P. (COMM) 462/2018

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 07.06.2018 passed by the Arbitral Tribunal adjudicating the disputes that have arisen between the parties in relation to the Contract dated 27.01.2006 read with Supplementary Agreement dated 14.02.2008 with respect to the work of Widening and Strengthening of National Highways from 2 lane to 4 lane from Km 40.000 to Km 22.000 of Lumding to Lanka section including Lanka Bypass of NH- 54 in Assam.

2. Based on the Supplementary Agreement dated 14.02.2008, the date of commencement of the work was taken as 15.03.2008. The stipulated time for completion of the work was thirty months, however, the work was actually completed on 28.12.2011. The project Engineer vide letter dated 14.07.2011 had recommended the extension of time till 22.01.2012. The work had been completed within this period. The petitioner granted price escalation for the extended period in favour of the respondent. The respondent, however, claiming that the delay was wholly attributable to the petitioner raised a claim for overhead expenses, and other additional expenses incurred by it due to the extension of the period of the work.

3. The learned counsel for the petitioner submits that there were various reasons for the work not being completed within the stipulated period. He draws specific reference to the letters dated 04.07.2008, 22.08.2008, 06.11.2008, 26.06.2009, 03.08.2009, 08.10.2009 and 12.11.2009, wherein the respondent was claiming extension of time on

the account of “Assam Bandh” and letters dated 04.05.2010 and 31.08.2010, whereby the petitioner sought extension of time on the account of rainfall. He submits that the Arbitral Tribunal has not considered the reasons the delay in the execution of the work and has attributed the entire delay on to the petitioner. He submits that the Award is, therefore, liable to be set aside.

4. I have considered the submissions made by the learned counsel for the petitioner, however, find no merit in the same. The extension of time was firstly recommended by the Project Engineer in favour of the respondent by the letter dated 03.01.2011. This was preceded by the letter dated 29.12.2010 of the Project Engineer, which records the reason for grant of such extension in the following words:-

“5. However, the total Contract period for widening / strengthening of 18.00kms of National Highway to 4-lane was 30 months. The land falling in 7.00kms Reserve Forest, which was supposed to be handed over by 14.03.2009 was handed over to the Contractor as per the details given below:

(a) Km 33.000 to Km 38.000 - 5.00 Kms by 5.11.2010
(b) Km 38.000 to Km 40.000 - 2.00Kms (except the last 220m) on 20.12.2010

6. The time required for the completion of the above 7.00 kms of road stretch on pro-rata basis with respect to the original Contract period works out to 12 months ($30 \times 7/18 = 11.67$ months, say 12 months), i.e. 12 months additional

time is required from Nov 2010 onwards for completion of the 7.00 Kms stretch falling in Reserve Forest.

7. Keeping view of the above, 1st Extension of Time is recommended up to 30 Nov 2011. The EOT is recommended taking into account the situation prevailing up to 20 Dec 2010.”

5. The Engineer vide his letter dated 14.07.2011, thereafter, recommended the grant of extension of time upto 22.01.2012 in favour of the respondent. Admittedly the extension of time had been granted only on account of delay in handing over of the land to the respondent. Further as no liquidated damages have been levied on the respondent for such delay, it clearly evidences that the delay is not attributable to the respondent.

6. A reading of the above letters from the Engineer granting extension of time clearly show that the extension of time was granted only on account of delay in handing over of the land and not for any other reason. Therefore, the submission of the learned counsel for the petitioner that the Arbitral Tribunal should have considered the other reasons also cannot be sustained. The learned counsel for the respondent has also handed over a copy of the Statement of Defence filed by the petitioner before the Arbitral Tribunal, which clearly suggests that the extension of the time was granted only on the account of delay in handing over of the land and for no other reason.

7. The learned counsel for the petitioner further submits that even assuming that the delay was attributable to the petitioner, the claims as awarded by the Arbitral Tribunal were not sustainable. He submits that no proof in support of such claims was filed by the respondent before the Arbitral Tribunal. He places reliance on the following judgments of the Supreme Court:-

1. *Bharat Coking Coal Ltd. v. L.K. Ahuja*, (2004) 5 SCC 109;
2. *Union of India v. M/s. Jasumall & Co.*, AIR 2017 Calcutta 206;
3. *Narmada Equipments Private Limited v. State of Chhattisgarh*, 2017 (1) C.G.L.J, 146.

8. I am unable to agree with the submission made by the learned counsel for the petitioner. The Arbitral Tribunal has awarded the claim of the respondent for the additional cost incurred as overhead expenses during the extended period by applying the MORT & H Standard Data Book. As far as the additional cost due to the extended deployment of machinery is concerned, the Arbitral Tribunal relied upon monthly deployment of machinery as recorded and certified by the engineer of the petitioner in the Monthly Progress Report and usage rate taken from the MORT & H Data Book. For the claim of additional premium paid on CAR Policy due to prolongation, the Tribunal found that the respondent was entitled to the same in terms of Clause 12.2 and 42.2 of the General Conditions of Contract. For the claim of loss of profit due to prolongation, the Tribunal has awarded the same at 10% of the value of the work remaining to be executed as on the scheduled date of

completion. The assessment made by the Arbitral Tribunal, therefore, cannot be said to be unreasonable or perverse in any manner so as to warrant any interference from this Court.

9. In ***Associate Builders v. DDA***, (2015) 3 SCC 49, the Supreme Court has cautioned the Court exercising power under Section 34 of the Act in the following words:-

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 [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows:

“General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong”.

It is very important to bear this in mind when awards of lay arbitrators are challenged.] . 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 & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating 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 Bye-law 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.

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56. Here again, the Division Bench has interfered wrongly with the arbitral award on several counts. It had no business to enter into a pure question of fact to set aside the arbitrator for having applied a formula of 20 months instead of 25 months. Though this would inure in favour of the appellant, it is clear that the appellant did not file any cross-objection on this score. Also, it is extremely curious that the Division Bench found that an adjustment would have to be made with claims awarded under Claims 2, 3 and 4 which are entirely separate and independent claims and have

nothing to do with Claims 12 and 13. The formula then applied by the Division Bench was that it would itself do “rough and ready justice”. We are at a complete loss to understand how this can be done by any court under the jurisdiction exercised under Section 34 of the Arbitration Act. As has been held above, the expression “justice” when it comes to setting aside an award under the public policy ground can only mean that an award shocks the conscience of the court. It cannot possibly include what the court thinks is unjust on the facts of a case for which it then seeks to substitute its view for the arbitrator's view and does what it considers to be “justice”. With great respect to the Division Bench, the whole approach to setting aside arbitral awards is incorrect. The Division Bench has lost sight of the fact that it is not a first appellate court and cannot interfere with errors of fact.”

10. In ***Bharat Coking Coal Ltd.*** (Supra), the Supreme Court found that the Arbitrator having found that there was not much justification in the Contractor asking for compensation for loss of profits on account of prolongation of works, still awarded Rs. 6,00,000/- in favour of the Contractor. In these circumstances, the Supreme Court held that the Award of amount under heading “loss of profit” was not justified.

11. In ***M/s. Jasumall & Co.*** (Supra), the Court found that even the fact as to how much work the Contractor completed, how much they were paid for and how much was outstanding had not been elaborated by the Arbitrators. It was, therefore, held that the Arbitrators had not applied their mind to the evidence or to the terms of the Contract and passed an unreasoned Award.

12. In *Narmada Equipments Private Limited* (Supra), the Court refused to interfere with an Award that had refused to grant the claim of the Contractor for lack of proper pleading and evidence.

13. The above cases, therefore, were dealt with in their own peculiar facts. In the present case, the Arbitrator having held that the entire delay was attributable to the petitioner, has awarded the claims in favour of the respondent and such Award, unless found to be totally unreasonable or perverse, cannot be interfered with by this Court.

14. In view of the above, I find no merit in the present petition and the same is accordingly dismissed, with no order as to cost.

NAVIN CHAWLA, J

DECEMBER 19, 2018/rv