

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 08.05.2018

+ **O.M.P.(COMM.) 273/2017**

**MEP INFRASTRUCTURE DEVELOPERS
LIMITED**

..... Petitioner

versus

**NATIONAL HIGHWAYS AUTHORITY OF
INDIA**

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Sachin Datta, Senior Advocate with Mr
Rajiv Shankar Dwivedi.

For the Respondent : Mr Manish K. Bishnoi, Mr Devansh
Srivastava and Ms Ila Haldia.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, impugning an arbitral award dated 01.04.2017 (hereafter 'the impugned award') passed by the Arbitral Tribunal constituted by a sole arbitrator (hereafter 'the Arbitral Tribunal'). The impugned award was rendered in the context of the disputes that had arisen between the

parties in connection with the Contract Agreement dated 27.01.2001 (hereafter 'the Agreement') entered into between the parties.

2. In terms of the Agreement, the petitioner was engaged to collect user fee at the specified toll plaza. The term of the Agreement was for a period of one year commencing on 28.01.2014 and ending on 27.01.2015. However, the same was extended by NHAI for a further period of six months.

3. The controversy between the parties essentially relates to whether such extension was valid. The petitioner claims that the option to extend the term of the Agreement could only be exercised "in case of urgency" and the said condition was not satisfied. The petitioner claims that NHAI had extended the contract only because the bids received by NHAI were lower than the amounts being paid by the petitioner and not on account of any urgency. NHAI disputes the same. The Arbitral Tribunal has held that the Agreement between the parties entitled NHAI to extend the term of the contract in case of urgency and the decision whether a particular situation was urgent was left entirely at the discretion of NHAI. NHAI had not received bids above the Annual Potential Collection (APC), and this was accepted by the Arbitral Tribunal to fall within the scope of a case of urgency entitling NHAI to extend the term of the Agreement.

Factual Background:

4. The petitioner is a public company and is engaged in the work of toll collection, operation and maintenance as well as the

development of infrastructure projects in India. NHAI is a body constituted under National Highway Authorities of India Act, 1988, *inter alia*, for the purposes of development, maintenance and management of National Highways.

5. NHAI issued a Request For Proposal (RFP) inviting bids for the right of Toll Collection at Chamari (Usaka) Toll Plaza at Km 229.913 for the Section from Km 220.00 to Km 260.713 on NH-25 & Km 421.200 to Km 449.000 on NH-2 of National High No. 25 and 2 in the State of Uttar Pradesh. The APC was estimated at ₹47.09 crores.

6. The petitioner participated in the competitive bidding and its bid of ₹40.68 crores – although below the APC – was the highest. Accordingly, NHAI issued a letter of acceptance (LOA) dated 15.01.2014 accepting the petitioner's bid, which was duly adjusted on account of the increase in rates of user fees. The petitioner accepted the LOA on 18.01.2014. Thereafter, the petitioner and NHAI executed the Contract Agreement (the Agreement) on 27.01.2014. In terms of the Agreement, the petitioner agreed to pay an annual amount of ₹40.68 crores in weekly installments of ₹78,01,644/-. The said amount was subsequently revised to ₹53,14,88,568/- with effect from 01.04.2014 to 31.03.2015, which was further revised to ₹54,63,70,292/- for the period from 01.04.2015 to 28.07.2015. This revision was on account of increase in the rate of user fees.

7. The Agreement between the parties was for a period of one year commencing at 00:00:00 hours on 28.01.2014 and ending at 23:59:59 hours on 27.01.2015.

8. Prior to the expiry of the aforesaid term, NHAI issued another RFP (the first RFP) on 18.11.2014 inviting bids by 18.12.2014. The petitioner alleges that although the APC Committee of NHAI had estimated a lower APC, NHAI maintained the APC at ₹53.30 crores, since that was the annual amount at which the petitioner was making weekly remittances. Only one bidder submitted a bid in response to the aforesaid RFP, bidding an amount of ₹45.25 crores. Since there were no other competitive bids and the bid was below the APC of ₹53.30 crores, the said bid was rejected.

9. NHAI issued a fresh RFP (the second RFP) on 23.12.2014 indicating the Bid Opening Date as 06.01.2015. The APC for the said bidding process was maintained at ₹53.30 crores. Three bidders including the petitioner participated in the competitive bidding and the petitioner's bid of ₹50.67 crores was the highest.

10. The petitioner claims that NHAI called upon the petitioner to enter into a supplementary agreement, agreeing to continue paying the weekly remittances at the current level (that is, at an annual rate of ₹53.30 crores) for a period of six months after 28.01.2015 and to pay for the balance six months at a reduced amount computed on the basis of the petitioner's bid of ₹50.67 crores. However, the petitioner did not accept the same.

11. On 15.01.2015, the petitioner sent a letter requesting NHAI not to extend the *Contract Period* beyond 27th January, 2015 and to make

necessary arrangement for taking over the Chamari Toll Plaza w.e.f. 00:00 hours on 28th January, 2015.

12. On 20.01.2015, the petitioner sent another letter declining to give an unconditional consent to operate the Chamari Toll Plaza with effect from 28.01.2015 on the existing rate of weekly remittance for a further period of six months – that is, upto 27.07.2015 – and for the balance six months as per the amount quoted by the petitioner pursuant to the second RFP. The petitioner further stated that it was suffering heavy revenue losses and would not be able to continue with the toll collection at Chamari (Usaka) Toll Plaza beyond the Contract Period at the existing rate of remittances.

13. On 21.01.2015, NHAI sent a letter, *inter alia*, stating as under:-

“Since the handing of toll plaza is not possible due to non completion of tendering process for ukase toll plaza which is in process at NHAI, Headquarters.

Therefore, your contract period is extended as per clause 2(ii) of contract agreement for further six months or till the mobilization of fresh agency, whichever is earlier.”

14. Thereafter, the petitioner made a representation on 23.03.2015, but that too was not accepted. In the meanwhile, NHAI imposed a penalty of ₹96,67,389/- for delayed remittance, which was paid by the petitioner.

15. NHAI issued another RFP (the third RFP) on 19.05.2016 inviting fresh bids for operating the toll plaza. The due date for

opening the bids was fixed as 19.06.2015. The APC was computed at ₹54.79 crores. Three bidders participated in the said bid. The highest bid was for a sum of ₹52.12 crores. The said bid was received from one M/s Eagle Infra and the contract was awarded to the said bidder. Thereafter, on 27.07.2015, the petitioner invoked the arbitration clause, which led to the constitution of the Arbitral Tribunal on 17.08.2015.

The Arbitral Proceedings

16. Before the Arbitral Tribunal, the petitioner claimed that extension of the Contract Period beyond 27.01.2015 was illegal. It is contended that there was no emergency or urgency, which would warrant NHAI invoking clause 2(ii) of the Agreement for extending the contract for a further period of six months. The petitioner, *inter alia*, prayed that extension of the Contract Period beyond 27.01.2015 be declared as illegal and further sought damages quantified at ₹1,29,97,715/- being the difference between the amount of bid by the petitioner pursuant to the second RFP (which was opened on 06.01.2015) and the amount recovered by NHAI. The petitioner also sought refund of penalty of ₹96,67,389/-, which was imposed by NHAI for delayed remittance during the extended period. In addition, the petitioner also sought interest at the rate of 18% per annum and costs, which was tentatively quantified at ₹10 lacs.

17. NHAI contested the claims made by the petitioner. NHAI also claimed that the disputes raised by the petitioner were not arbitrable.

The Arbitral Tribunal considered the same and rejected the contention that the disputes raised by the petitioner were not arbitrable.

18. The Arbitral Tribunal noticed that RFP issued on 13.11.2013 expressly provided that NHAI would have the unconditional right to increase the contract period for up to six months. However, in terms of Clause 2(ii) of the Agreement, NHAI's right to increase the contract period for up to six months was qualified by the words "in case of urgency". The Arbitral Tribunal held that the word 'urgency' as used in Clause 2(ii) of the Agreement was "*broad based in content and meaning*" and would also include a situation where not getting a higher bid than current remittance for no apparent reason may lead to annulment of the bidding process. The Arbitral Tribunal also held that the question as to existence of urgency was to be determined by NHAI without any involvement of the petitioner. The Arbitral Tribunal then proceeded to examine the facts. It reasoned that since the highest bid received by NHAI pursuant to the second RFP was 4.91% lower than the APC, NHAI had an option to either accept the same or to proceed with a fresh bid.

19. The acceptance of a lower bid would have resulted in sub-optimal revenue collection attracting "criticism, adverse action and could not have withstood the public scrutiny". In view of the above, the Arbitral Tribunal held that NHAI's decision to reject the bid, which was 4.91% below the APC, could not be faulted. And, NHAI's decision to invoke Clause 2(ii) of the Agreement could not be termed as *malafide* or unjust and, therefore, could not be faulted.

Submissions

20. Mr Datta, learned Senior Counsel appearing for the petitioner contended that NHAI's right to extend the term of the Agreement for a period of six months was not unqualified and the same could be exercised only in case of urgency. He submitted that the Arbitral Tribunal had grossly erred in holding that non-receipt of a bid below the APC presented a case of urgency. He submitted that merely not achieving the financial returns as desired could not be termed as an urgent situation. He stated that the APC computed was always higher than the bids received. In the RFP, pursuant to which the Agreement was entered into between the parties, the APC was fixed at ₹47.09 crores and the highest bid was ₹40.68 crores (the same was revised to ₹54,63,70,292/- crores on account of increase in user fee). In response to the first RFP, the sole bid received was for a sum of ₹45.25 crores, which too was below the APC of ₹53.30 crores. The highest bid in response to the second RFP (which was offered by the petitioner) was also below the APC. Mr Dutta stated that although the concerned Committee had computed the APC at lower than ₹53.30 crores, the same was fixed at ₹53.30 crores only because that was the annual remittance being made by the petitioner. He earnestly contended that Clause 2(ii) of the Agreement could not be resorted to for the purpose of enhancing revenue. Next, he submitted that the fact that NHAI was agreeable to accept the petitioner's bid pursuant to the second RFP with the condition that the petitioner continue to pay the existing rate for a period of six months, clearly reflected that NHAI had accepted

the earning potential of the Toll Plaza but it desired to extend the term of the Agreement only for receiving additional revenue.

Reasons and Conclusion

21. At the outset, it would be relevant to refer to Clause 2 of the Agreement, which provides for the period of the contract. The said Clause reads as under:-

“2. PERIOD OF CONTRACT:

(i) “The Contract shall be for a period of One year beginning on 28.01.2014 from 28.01.2014 (00:00 hrs.) to 27.01.2015 (23:59:59 hrs.), (hereinafter referred to as “One year”)

OR

till the plaza is handed over to the other collection agency (OMT Concessionaire/BOT Concessionaire etc.) as per directions issued by NHAI, whichever is earlier.”. However, in case of certain stretches going for BOT/OMT, the Authority reserves the right to reduce the period of contract without any compensation and in such cases of early termination of contract, the total amount payable by the bidder to the Authority will be proportionately modified depending upon the period.

(ii) The period of contract shall be One Year. However, in case of urgency, the Authority reserves the right to increase the contract period upto Six months.”

22. Indisputably, in terms of Clause 2(ii) of the Agreement, NHAI had the right to increase the contract period up to six months “*in case*

of urgency”. The RFP, pursuant to which the petitioner had submitted its bid, provided for an unconditional right to NHAI to extend the term of the contract for the period of six months. Thus, the petitioner’s bid was on its understanding that the term of the contract could be extended for a period of six months at the option of NHAI. However, this may not be material in view of Clause 37 of the Agreement, which expressly provides that the Agreement represents the entire contract between the parties and shall not be explained, modified or contradicted by any prior or contemporaneous negotiations, representations or contract(s) or *bid documents*. In view of the said Clause 37, the Agreement has to be construed on its own terms.

23. In the aforesaid context, the only controversy that is required to be addressed is whether non-receipt of bids up to the level of the APC presented the case of urgency entitling NHAI to extend the term of the Agreement. Indisputably, NHAI had issued the first RFP much prior to the expiry of the term of the Agreement for the purposes of awarding the contract for a period subsequent thereto. The first RFP was issued on 18.11.2014 with the Bid Due Date as 18.12.2014. Thus, in normal course, NHAI could have concluded the bidding process for awarding of the contract for the period after 28.01.2015 prior to the said date. However, only one bidder responded to the said bid and the value of his bid was also lower than the APC; therefore, the said bidding process could not be completed. It cannot be seriously contested that the failure of the bidding process would warrant an extension of the term of the Agreement. The second RFP was issued

on 23.12.2014 with the Bid Opening Date of 06.01.2015. Thus, NHAI had acted well in time to conclude the bidding process prior to expiry of the term of the Agreement. However, the highest bid received by NHAI was of ₹50.67 crores. This amount was offered by the petitioner and, as noticed above, was 4.9% lower than the APC.

24. As noticed by the Arbitral Tribunal, NHAI was presented with the situation whether to accept the said bid or proceed for re-bidding. The object of providing NHAI, the right to extend the contract period was to ensure that NHAI was not constrained to take any *ad hoc* measures, arrangement for collection of user fee beyond 28.01.2015 was not finalised. Thus, in view of Clause 2(ii) of the Agreement, NHAI was not required to feel compelled to accept the bid which, according to it, did not match up to the level required. It is also admitted that NHAI also made efforts to close a fresh contract with the petitioner by offering a midway approach; that is, by accepting the petitioner's bid for an annual contract at the amount offered by it with the condition that the petitioner continues to pay at the existing rate for a further period of six months. However, this was not accepted to the petitioner. In these circumstances, NHAI was not left with no option but to accept the petitioner's bid or to proceed for a fresh bidding. The Arbitral Tribunal found that the decision of NHAI to proceed for a fresh bidding could not be termed as malafide or unjust and could not be faulted. Since, the contract for collection of user fee for the period after 28.01.2015 could not be satisfactorily closed prior to 28.01.2015,

NHAI was entitled to exercise its right to extend the term of the Agreement.

25. This Court is unable to accept that the Arbitral Tribunal's conclusion is perverse or patently illegal. The view expressed by the Arbitral Tribunal is plainly a plausible view and, thus, is not open to judicial review under Section 34 of the Act.

26. The petitioner has sought to place the challenge to the impugned award in terms of Section 34(2)(b)(ii) of the Act; it claims that the impugned award is in conflict with the public policy of India as it is opposed to the fundamental principles of Indian law. This Court is unable to accept the aforesaid contention. The interpretation of Clause 2(ii) of the Agreement, as accepted by the Arbitral Tribunal, cannot be termed as perverse or unreasonable so as to fail the *wednesbury* test; that is, no sensible person could possibly have arrived at such a conclusion.

27. In view of the above, the present petition is disposed of. The parties are left to bear their own costs.

VIBHU BAKHRU, J

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