

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

Reserved on: 04.04.2018
Pronounced on: 11.04.2018

+ **FAO(OS) (COMM) 1/2017 & CM APPL. 114/2017**

NATIONAL HIGHWAYS AUTHORITY OF INDIA Appellant

Through : Ms. Gunjan Sinha Jain, Advocate.

versus

M/S PRAKASH ATLANTA (JV) Respondent

Through : Mr. Dayan Krishnan, Sr. Adv. with Mr. Chirag. M. Shroff, Ms. Neha Sangwan, Ms. Aakashi Lodha and Mr. Sanjeevi Seshadri, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereafter “the Act”) questions the decision of a learned Single Judge, rejecting the appellant's objections/petition under Section 34. The petition had challenged an arbitral award, dated 30.01.2015 (and the corrected award dated 07.11.2015). The appellant is described for convenience as “NHAI” and the respondent is hereafter referred to variously as “the Claimant” or “Prakash”.

2. The relevant facts, briefly are that NHAI entered into an agreement dated 10.08.2001 with Atlanta (JV), the Contractor for the construction of segment of Lucknow Bypass, as a part of the East-West Corridor, connecting

NH-25 and NH-28 via NH-56 passing through Lucknow city in the State of Uttar Pradesh [Contract Package No. EW-15/UP.] This became the subject matter of disputes on various issues, that were urged at various points of time; they were referred to three separate arbitration tribunals (AT). The awards in question were rendered by a three member tribunal (AT-I) comprising of M/s. Prafulla Kumar, the Presiding Arbitrator, V. Murahari Reddy and V.K. Shrotriya. The subject matter of AT-I were five claims by Prakash, i.e. (i) loss of overheads and expected profit (₹28,35,92,995/-) loss due to reduced productivity from machinery and equipment deployed (₹11,34,37,204), loss of bonus expected (₹9,52,82,544), loss due to additional expenditure incurred in executing the work during the extended period over and above the price adjustment relief received under the terms of the Contract on account of abnormal increase in the prices of inputs (₹35,28,00,000) in Claim No.1 (totaling to ₹84,51,12,743); (ii) Extension of time for completion of work in Claim No.2; (iii) claim seeking payment of cost of earth work in foundation and below ground level in reinforced earth structure in Claim No.3; (iv) claim seeking past Interest (@ 12%) pendente lite and future (@ 18%) in Claim No.4; and (v) cost of arbitral proceedings in Claim No.5.

3. The second AT (AT-II) was presided over by Mr. S.C. Gupta and with Mr. S.K. Jain and Mr. V.K. Shrotriya. They dealt with the counter-claims of NHAI relating to disputes regarding variation items. The third AT (AT-III) was presided over by Justice A.M. Ahmadi (Retd), former Chief Justice of India; it dealt with certain other claims and counter-claims and gave an Award in original on 05.08.2014 which was corrected subsequently by an

Award dated 13.09.2014. One portion of that Award is the subject matter of challenge in O.M.P. 103/2015 filed by Prakash.

4. The first challenge to AT-I's award by NHAI was that the AT-I acted in error in rejecting its counter-claims. The learned Single Judge noticed that not a single ground of challenge was laid on that aspect, in the petition under Section 34, preferred by NHAI to rejection of its counter-claims, by the AT. The grounds related to the acceptance of Prakash's Claim Nos. 1.1, 1.2 and 2 to 4. The learned Single Judge noted that the counter claim was for recovery of ₹15.88 crores claimed by NHAI towards liquidated damages. It was held that the AT noted that the date of commencement of the work was 30.08.2001 and the scheduled date of its completion was 25.08.2004. The work was not completed within the scheduled completion date and a final extension of time ("EOT") was granted up to 15.11.2006. Prakash terminated the contract on 14.03.2008 and NHAI on 23.03.2008. NHAI raised a counter-claim initially before the third AT presided over by Justice Ahmadi (Retd) but later raised them before the AT presided over by Shri Prafulla Kumar as it was thought that the EOT and LD were inter-related issues. The AT permitted it to do so. The learned Single Judge also noticed this and held that:

"the AT took into account the fact that NHAI's Engineer recommended the EOT till 31January, 2008 and this was recorded in the minutes of the meeting held on 26November, 2007. The record further showed that PAJV had committed to complete the Railway span within six to eight months from the date of the approval of the CRS. There was no comment on the said time frame by the NHAI or the Engineer. According to the AT, this led to the inference that the EOT was up to 31January, 2008. In the above circumstances, the claim of the NHAI for LD from 15November, 2006 does not appear to be justified.

21. Learned counsel for NHAI was unable to point out any glaring error in the reasoning or conclusion of the AT which would attract any of the grounds under Section 34 of the Act in order to persuade this Court to interfere with the Award of the AT rejecting the NHAI's counter-claim. Indeed, if the work proceeded with NHAI not terminating the contract after 15 November, 2006 and ultimately terminating it only on 23 March, 2008, the claim for LD from 15 November, 2006 for delayed completion does not appear to be justified.

22. Consequently, this Court finds no error in the impugned Award insofar as it rejects the counter-claim of NHAI."

5. Before this court, Ms. Gunjan Jain Sinha reiterated the grounds urged in support of the appeal, with respect to rejection of NHAI's counter claim, urging that the learned Single Judge erred in not holding that the AT acted contrary to the record. However, this court is of opinion that the ET granted by NHAI, which resulted in extension of period of performance, and the subsequent termination of contract by NHAI, precludes a further inquiry into the matter. This court finds no patent or manifest illegality or unreasonableness in the findings of the AT, which could have justified interference under Section 34 of the Act. As a court of appeal, the Division Bench merely cures the errors if any rarely, usually only if a legal facet or glaring inference escapes scrutiny in the court of first instance. Barring such few exceptions, the court cannot substitute its opinion. For these reasons, the rejection of NHAI's counter claim does not call for interference.

6. Claim 1.1 pertains to loss of overheads and expected profits. In this claim Prakash had sought ₹43,20,96,967; the AT in its award granted ₹16,60,76,299; Claim 1.2 was for loss due to reduced productivity from machinery and equipment deployed (₹17,28,38,796/- was claimed; the AT

awarded ₹6,29,33,007). Prakash claimed loss of overheads and expected profits at 25% of the total cost which amounted to 33.33% of the basic cost for the stipulated 36 months plus the additional period of 42.5 months up to 14.03.2008. The AT awarded loss of overheads and profits for 35.17 months till 04.08.2007. AT held that there could not be any claim for profit since it had to be earned by the Contractor by doing work.

7. NHAI had urged that the AT gave no basis for arbitrarily granting the loss of profits and there was no material to support such an Award. On this aspect, the learned Single Judge held as follows:

“26. A perusal of para 7.4.1(iv) of the impugned Award reveals that the AT did not accept PAJV’s claim of 33.33% of the basic cost of material and labour. It was noted that industrial norm was 20 to 21% of the basic cost which amounted to 17% of the overall cost. The AT then decided to follow the norms laid down in the Ministry of Road Transport and Highways (“MORTH”) Standard Data Book for Analysis of Rates, published by the Indian Roads Congress in 2003. It discussed the norms laid down therein, applied those norms and, thereafter, computed the sum payable to PAJV. There is a detailed calculation forming part of the Award itself in para 7.4.1 (v) & (vi).

27. The Court is unable to discern any glaring error committed by the AT in coming to the above conclusion. It appears to be based on the correct interpretation of the clauses of the contract and also based on the norms set by the MORTH itself. The Award of Claim 1.1 to the above extent cannot, therefore, be said to be perverse, calling for any interference.

28. Even as regards Claim 1.2 which was for loss due to reduced production from the equipment deployed, the AT has discussed the issue at great length. It has gone by the records of the case. As already noticed, only 50% of the claim amount was awarded by the AT for loss due to reduced productivity from the

machinery and equipment deployed. Here, again, the learned counsel for the Petitioner has not been able to point out any glaring error that would persuade the Court to interfere with the impugned Award.”

8. For Claims 2 to 4 and the order dated 05.04.2010 passed by the AT rejecting NHAI’s preliminary objections raised by NHAI- to Claim No. 3 (preferred by Prakash), the learned Single Judge after considering the pleadings, stated that *“no ground has either been pleaded in the petition nor urged during arguments. Even otherwise, having perused the said order, the Court is unable to find any material error which would warrant interference under Section 34 of the Act.”*

9. The learned Single Judge then considered O.M.P. No. 103 of 2015 by Prakash against the Award dated 13.09.2004 passed by the AT only to the extent that it had permitted NHAI to retain the amount of performance bank guarantee ("PBG") with interest for adjustment against any other claims of NHAI against Prakash which may be held to be payable in any other Award. The learned Single Judge noted the submissions of Prakash (referred to as “PAJV” in the impugned order) that since NHAI’s challenge to the award, *“no grievance would be left for PAJV since there is no amount due to NHAI arising out of the contract in question and the amount of the PBG would have to be released.”*

10. It is argued by Ms. Gunjan Jain Sinha that the AT, instead of arriving at definite findings of fact on the important issues such as whether at all extension was granted by the Engineer and approved by the it, whether the amount claimed was not overlapping with the amount claimed before AT-III, completely abdicated that role and proceeded on the basis of mere

conjectures and surmises. She argued that the AT proceeded to allow the claim for the period 29.08.2004 till 04.08.2007 i.e. 35.17 months in a most laconic manner and held that all the events on the basis of which the claim was predicated, were “compensation events”, though there was no reference to any contractual clauses or determination on them being compensation events otherwise in law. This fact itself demonstrates total non- application of mind and appreciation of facts without any evidence whatsoever to support.

11. Ms. Sinha argued that besides the erroneous rejection of counter claims (of NHAI) and the findings regarding extension of time, the award was also untenable in so far as it granted claims on the merits, to Prakash. She urged that the AT fell into error in granting amounts that overlapped in respect of claims that were *sub judice* before other ATs and in respect of one of which an adverse award was suffered. She elaborated on this aspect, drawing notice of the court to the submission that the subject matter of another reference was variation and claims pertaining to it; those were, however, also claimed in the present arbitral proceedings, the content of which were the claims under the contract and the extended period. She also urged, in addition, that the award had clearly rejected the claim for loss of profit; however, quite contrary to that finding, amounts were granted to Prakash, in regard to loss of profits in the broad overhead claims. This was a plain and patent error on the face of the record.

12. Mr. Dayan Krishna, learned senior counsel for Prakash, the claimant, urged that the question of overlapping of claims and duplication of amounts is an argument based on a misreading of the award. The counsel relied on Para 7.3 and Para 7.4 of the AT’s findings, which addressed both the issue of

overheads and the question of what claims were within the jurisdiction of other arbitral tribunals. He urged that with regard to the rest of the arguments, this court, sitting in appeal should not interfere with the decision of the learned Single Judge who considered the pleadings, the award on the merits having regard to the arbitral records and the evidence led before the AT.

13. The court, at the outset, recollects that it is asked to consider, from an appellate perch as it were, whether the limited oversight of an award by an arbitral tribunal can be interfered with. Even in the case of appeal from a regular civil cause in the first instance, well-defined boundaries constrain an appellate court. The latter cannot upset findings of fact or law, unless the court of first instance omits to consider relevant and material facts or provisions of law; or renders findings that are plainly contrary to the statute or binding authorities or its findings on an appreciation of those factors are manifestly unreasonable, or it refused to exercise jurisdiction or oversteps it. If all the findings are within the bounds of law and based on relevant findings and facts, merely because the appellate court prefers an alternative view of facts or law, would be insufficient for it to substitute that view. In the present case, we remind ourselves that the court of first instance was severely constrained from rendering factual findings; its jurisdiction was limited to discerning, from the award whether it was patently erroneous, or contrary to fundamental policy of India, or was based on patently unreasonable findings. None of these elements were made out on the merits of the case; this court finds none that were overlooked or were erroneously upheld by the learned Single Judge, who considered all submissions and grounds of challenge.

14. As regards the argument that duplication of amounts has resulted as a consequence of claims entertained and adjudicated by the AT (AT-I), the submission is, in this court's opinion, misconceived. The AT considered what was before it and what was before the other ATs. It also quantified the amounts payable *under the contract*, i.e. in terms of the agreement and the works agreed by the parties pursuant to the contract, to Prakash. The delineation of these claims (including contractual claims made for the extended period) are clearly and expressly delineated in the award. The other ATs dealt with the merits of the variation claims, counter claims on other items, etc. There is consequently no merit in this argument.

15. The next head of challenge to the impugned judgment is in respect of the loss of profit element in the overhead claim. Facially, the award rejects loss of profits for the extended period; however, it awards a loss of profit element under the overheads claim. This court notices that the justification for the grant of the "loss of profit" element as a part of the broader overhead claims, is the AT's reliance upon norms prescribed and applied in the Ministry of Road Transport and Highway's Standard Data Book for analysis of rates published by the Indian Roads Congress which is widely accepted in the field of highway constructions. The AT awarded overheads @ 11.82% by applying those standards, which included a flat "loss of profit" element. In view of this circumstance, having regard to the further fact that the AT was comprised of members agreed upon mutually, who appear to have domain expertise in the field of construction and highway contracts, this court is of opinion that the award does not disclose any error.

16. In view of the foregoing reasons, this court holds that the impugned judgment does not disclose any error or infirmity, calling for interference. The appeal has to fail and is, therefore, dismissed without order on costs.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

APRIL 11, 2018

