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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 2nd November, 2018

+ O.M.P. (COMM) 456/2018

NATIONAL HIGHWAYS AUTHORITY OF INDIA (NHAI)

..... Petitioner

Through: Ms.Sumati Anand, Adv.

versus

SHILLONG EXPRESSWAY PRIVATE LTD.

..... Respondent

Through: Mr.Abhinav Vashisth, Sr. Adv.
with Mr.Prashant Pakhiddey,
Mr.Pranshu Paul, Ms.Lakshmi
Dwivedi, Ms.Priya &
Ms.Akshita Sachdeva, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

CAV. 1014/2018

As the counsel for the respondent enters appearance on advance notice, Caveat stands discharged.

I.A. No.15167/2018 (Delay)

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

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

I.A. No.15165-66/2018 (Exemptions)

Allowed, subject to all just exceptions.

O.M.P. (COMM) 456/2018 & I.A. No.15164/2018 (Stay)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act') has been filed by the petitioner challenging the Arbitral Award dated 27.06.2018 passed by the Arbitral Tribunal consisting of three Arbitrators.
2. The Arbitral Tribunal was constituted by the parties for adjudicating the disputes that have arisen between the parties in relation to the Concession Agreement dated 14.07.2010 for the work of Two Lanning of Shillong Bypass connecting NH-40 and NH-44 from the Km 61/800 of NH-40 to Km 34/850 of NH-44 in the State of Meghalaya on the concept of Design, Build, Finance, Operate and Transfer (DBFOT) pattern under SARDP-NE on Build, Operate and Transfer on (Annuity) basis.
3. The learned counsel for the petitioner has challenged the finding of the Arbitral Tribunal on claim no.2. Claim no. 2 of the respondent was with respect to additional bonus on account of delay in completion of the work attributable to the petitioner.
4. The relevant dates with respect to the completion of the work are mentioned by the Arbitral Tribunal in paragraph 17 of its Award and are reproduced hereinunder:-

"17. FACTUAL MATRIX:

i)	<i>Concessionaire (SPV)/Claimant</i>	<i>Shillong Expressway Limited</i>
ii)	<i>Total Project Cost as per Concession Agreement (CA)</i>	<i>Rs. 226.112 Cr.</i>
iii)	<i>Date of Signing of CA</i>	<i>14.07.2010</i>
iv)	<i>Concession Period from Appointed Date</i>	<i>15 years</i>

v)	<i>Length of Project Highway as per Scope of CA</i>	47.06 km
vi)	<i>Actual length of Highway as completed</i>	48.7 km
vii)	<i>Appointed Date in terms of Clause 4.1.2</i>	07.02.2011
viii)	<i>Scheduled Project Completion Date (SPCD)</i>	06.02.2014
ix)	<i>Target Date of Completion as per Programme submitted by Claimant</i>	20.10.2012
x)	<i>Effective Date of Provisional Certificate (PC) issued by Independent Engineer (I.E.)</i>	25.03.2013
xi)	<i>Effective Date of PC claimed by Claimant</i>	02.02.2013
xii)	<i>Number of Annuity (Schedule-M as per Clause 27.1.1) of Rs. 248700000 each</i>	II

5. The respondent claiming that there was a delay in handing over encumbrance free land by the petitioner resulting in delay in completion of work as also that the date of the completion of the project has been wrongly taken by the petitioner as 25.03.2013 instead of and in place of 02.02.2013, raised a claim of Rs. 11, 44,70,160/- as additional bonus on the petitioner as Claim No.2. The Arbitral Tribunal, upon consideration of the submission made before it, has concluded that a delay of 54 days is attributable to the petitioner on account of delay in handing over the land as also for moving other encumbrances on the land required for the project. The Arbitral Tribunal has also found that the date of completion has to be taken as 28.02.2013 instead of and in place of 25.03.2013. The Arbitral Tribunal, based on these findings, awarded an amount of

Rs.10,62,93,720/- to the respondent.

6. The learned counsel for the petitioner submits that the Arbitral Tribunal has erred in recording a finding that in terms of the Concession Agreement the petitioner was obliged to hand over the additional land required for the project to the respondent within 90 days of the appointed date. Drawing reference to Clause 1.3 and 10.3 of the Concession Agreement, she submits that the obligation to provide encumbrance free land within 90 days was only with respect to the original site as contemplated in the Agreement and not for any additional land requirement. She submits that for the additional land there was no time period prescribed in the Agreement and therefore, no delay can be attributed to the petitioner on this account.

7. I have considered the submissions made by the learned counsel for the petitioner, however, find no merit in the same. The Arbitral Tribunal while considering the submissions of the petitioner has found that the additional land was required primarily to negotiate the huge level difference of about 13m at Ch. 39+000 km as also to comply with the norms and guidelines laid in the Indian Roads Congress (IRC) Code. The Arbitral Tribunal has further found that the Detailed Project Report (DPR) prepared by the petitioner was flawed due to which the additional land was required. The Tribunal further rejected the submission of the petitioner that it was obligatory on the part of the respondent to point out such deficiency in the DPR drawing prior to the signing of the Agreement or within the Development Period. The relevant findings of the Arbitral Tribunal on this issue are reproduced hereinunder:-

“19.4 Findings of AT:

a) It is an admitted fact that additional land was primarily required to negotiate the huge level difference of about 13 m at Ch. 39+000 km (C-15/CD-/Page III-116) as also to comply with the norms and guidelines laid down in IRC Code.

b) Even as it was a DBFOT project, the claimant had to broadly follow the alignment as proposed by DPR and hence if the alignment proposed by DPR was flawed to the extent that acquisition of additional land was called for, only respondent can be held responsible for the same.

c) The contention of the respondent that the claimant was under obligation to point out the deficiency in the DPR drawings, if any, before signing the agreement is not substantiated as the respondent has not cited any such provision of the agreement.

d) Respondent has also contended that the deficiencies, if any, in the DPR drawings had to be pointed out by the claimant within the development period, which as per Article 48/Page 131 of the Agreement means the period from the date of the agreement until the appointed date, that is from 14.07.2010 to 07.02.2011. But the contention is not substantiated as the respondent has not cited any provision of the agreement in support of the same.

e) It is on record that the claimant vide letter dated 14.02.2011 (C- 12/CD-III/Page 107), that is, only a week after the appointed date submitted the Drawings of Highway alignment to respondent with proposed FRLs for review and comments and which the respondent in turn sent to the DPR Consultant. It goes without saying that it would not have been possible for the claimant to submit drawings and proposal just after a week of Appointed Date, had the claimant not done the requisite ground work during development period. Hence the contention of respondent that claimant did not act with due diligence in the development period is belied by the facts on record.

f) It is evident from the report and comments of DPR Consultant dated 02.04.2011 (C-13/CD-III/Page-110) addressed to respondent and respondent's letter dated 10.05.2011 (C-14/CD-III/Page-112) addressed to claimant that the original alignment as proposed by the DPR Consultant had several deficiencies in regard to levels and gradients which necessitated acquisition of additional land."

8. The learned counsel for the petitioner has placed reliance on Article 8 of the Concession Agreement to contend that even if there was a discrepancy in the DPR drawings, the respondent was not entitled to seek any benefit of the same as it should have done due diligence of the same before entering into an Agreement. Article 8 of the Concession Agreement is reproduced hereinbelow:-

***"ARTICLE 8
DISCLAIMER***

8.1 Disclaimer

8.1.1 The Concessionaire acknowledges that prior to the execution of this Agreement, the Concessionaire has, after a complete and careful examination, made an independent evaluation of the Tender Notice, Scope of the Project Specifications and Standards, Site, Local conditions, physical qualities of ground, subsoil and geology, traffic volumes and all information provided by the Authority or obtained procured or gathered otherwise, and has determined to its satisfaction the accuracy or otherwise thereof and the nature and extent of difficulties, risks and hazards as are likely to arise or may be faced by it in the course of performance of its obligations hereunder. Save as provided in Clauses 7.2, the Authority makes no representation whatsoever, express, implicit or otherwise, regarding the accuracy and/or completeness of the information provided by it and the Concessionaire confirms that it shall have no claim whatsoever against the Authority in this regard.

8.1.2 The Concessionaire acknowledges and hereby accepts the risk of inadequacy, mistake or error in or relating to any of the

matters set forth in Clause 8.1.1 above and hereby acknowledges and agrees that the Authority shall not be liable for the same in any manner whatsoever to the Concessionaire, the Consortium Members and their Associates or any person claiming through or under any of them.”

9. A reading of the above Article does not justify the inference that the petitioner seeks to draw from the same. The Arbitral Tribunal having found that even the DPR Consultant acknowledged several deficiencies with regard to level and gradients which necessitated the acquisition of additional land, the finding of the Arbitral Tribunal cannot be said to be unreasonable or perverse so as to warrant any interference of this Court in exercise of its power under Section 34 of the Act.

10. Learned counsel for the petitioner further submitted that the respondent had not sought any benefit of change of completion date as far as its claim no. 2 was concerned. Such change of completion date was sought only with respect to the claim no. 7 raised by the respondent.

11. I must first note that a copy of the Statement of Claim has not been filed by the petitioner in the present proceedings. It is therefore, not possible to conclude that there was no claim made by the respondent on the basis of the change in the completion date as far as claim no. 2 is concerned. However, a reading of the Award would show that the submission made by the counsel for the petitioner is not correct. The Arbitral Tribunal, while discussing claim no.2, has recorded the submissions on behalf of the respondent that it was seeking the shifting of the completion date from 25.03.2013 to 02.02.2013. In

any case, the Arbitral Tribunal, placing reliance on Article 28.1.3 of the Concession Agreement, found that the number of days by which the Certificate of Completion preceded the Scheduled Project Completion Date was also to include aggregate numbers of days of delay caused *inter alia* by Authority's Event of Default. The Arbitral Tribunal on facts found that the date of completion has to be taken as 28.02.2013. It also found that there was a 54 days delay attributable to the petitioner and, therefore, gave the benefit of the two while calculating the amount awarded under claim no. 2 in favour of the respondent. The same being in terms of Article 28.1.3 cannot be faulted.

12. The learned counsel for the petitioner has lastly argued that the claim of the respondent was based on its submission that there was an additional land of about more than 3.832 Kms required for completion of the project, while Arbitral Tribunal found it to be only 2.022 Kms; the claim amount of the petitioner was Rs. 11,44,70,160/-; therefore, the amount of Rs. 10,62,93,720/- awarded in favour of the respondent under claim no. 2 is totally unreasonable and is not proportionate to its claim.

13. I again do not find any merit in the said submission. The respondent had raised its claim by applying a certain formula for the effect of the delay and for calculating period of delay attributable to the petitioner. The Arbitral Tribunal, on the other hand, adopted yet another different formula for the said purpose. It is not shown that the formula adopted by the Arbitral Tribunal is in any manner perverse or unreasonable or against the normal industry practice. In any case, the amount awarded in favour of the respondent is below what has been

claimed by the respondent under claim no. 2. In *Associate Builders vs. Delhi Development Authority* (2015) 3 SCC 49, it was held that “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.”

14. The learned counsel for the petitioner has further challenged the Award in respect of claim no.8, which was the interest awarded on the above amount. As the principle amount has been found to be correctly awarded, I find no merit in the said objection.

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

NAVIN CHAWLA, J

NOVEMBER 02, 2018/rv