

\$~29.

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

+ **FAO(OS) (COMM) No.294/2018 & CM APP No. 51863/2018**

Date of decision: 11th December, 2018

M/S JAINTIA HIGHWAY PVT LTD.

..... Appellant

Through: Mr.Sajan Poovayya, Sr. Adv. with
Ms. Aanchal Mullick, Mr.Prateek
Gupta, Mr.Madhur Mahajan,
Ms.Priyadarshi Banerjee, Advs.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA..... Respondent

Through: Adv. (appearance not given)

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

SANJIV KHANNA, J. (ORAL):

CM Nos. 51864-65/2018

Allowed, subject to all just exceptions.

FAO(OS) (COMM) No.294/2018

This intra-Court appeal under Section 37 of the Arbitration & Conciliation Act, 1996 (A&C Act, for short) impugns the order dated 28th September, 2018 passed by the learned single Judge whereby objections filed by M/S Jaintia Highway Pvt. Ltd. under Section 34 of the A&C Act challenging the Arbitral Award dated 7th October, 2016 have been dismissed.

2. The appellant was awarded contract for two laning of Jowai-Meghalaya/Assam Border section of NH-44 (km 69.2 to km 173.2) to be executed on Design Build Finance Operate and Transfer basis ('DBFOT', for short.). Concession Agreement dated 5th June, 2012 was executed between the appellant and National Highways Authority of India (NHAI, for short). It is accepted and admitted that the appellant did not carry out and commence construction of two laning projects of the aforesaid section of NH44. NHAI had thereupon invoked the bank guarantee of Rs.19.58 crores, which was encashed.

3. Disputes between the appellant and the respondent-NHAI were referred to Arbitration. The appellant had raised four claims for refund of the bank guarantee of more than Rs.19.58 crores; compensation for loss of profit of Rs.118 crores; reimbursement of expenses of Rs.10,03,966/- and interest on the aforesaid amounts. The Arbitral Tribunal while substantially rejecting the claims had directed that the respondent-NHAI should pay 10% of the performance guarantee amount, i.e., Rs.1.95 crores along with simple interest @ 12% per annum. Accordingly, a sum of Rs.2,39,44,462/- was awarded to the appellant. In the present appeal, we are not concerned with the amount awarded to the appellant. Hence, we are not dilating on the said aspect.

4. The appellant had filed objections against rejection of the claims by the Arbitral Tribunal and consequent to which the appellant had filed objections under Section 34 of the A&C Act, which too have been dismissed by the impugned judgment.

5. The contention of the appellant is that the respondents NHAI was guilty and had failed to provide 80% of the land constituting the 'right of

way’ as per the contractual terms and, therefore, had committed a fundamental breach of the terms of the agreement. It was submitted that the Arbitral Tribunal and the single Judge have erroneously interpreted different clauses of the concessionaire agreement to hold that the mandate to provide and make available 80% of the ‘right of way’ was restricted to the ‘site’ as mentioned in Annexure I of Schedule A and not the additional land for toll plazas, traffic aid posts, medical aid posts, vehicle rescue posts or for consideration of works specified in the change of scope order, etc mentioned in clause 1.3 of Schedule-A referred to in Clause 10.1.

6. Learned counsel for the appellant had drawn our attention to the expression “right of way”, “site”, “appointed date”, clauses 10.1, 4.1.2 and 10.3.2, of the concessionaire agreement, which read:-

"48.1. "Right of Way" means the constructive possession of the Site, together with all way leaves, easements, unrestricted access and other rights of way, howsoever described, necessary for construction, operation and maintenance of the Project Highway in accordance with this Agreement.

XXX

"10.1. The site of the Project Highway shall comprise the real estate described in Schedule-A and in respect of which the Right of Way shall be provided and granted by the Authority to the Concessionaire as a licensee under and in accordance with this Agreement (the "Site"). For the avoidance of doubt, it is hereby acknowledged and agreed that references to the Site shall be construed as references to the real estate required for Two-Laning of the Project Highway as set forth in Schedule-A.

XXX

"48.1 "Appointed Date" means the date on which Financial Close is achieved or an earlier date that the Parties may by mutual consent determine, and shall be deemed to be the date of commencement of the Concession Period. For the avoidance of doubt, every Condition Precedent shall have been satisfied or waived prior to the Appointed Date and in the event all Conditions Precedent are not satisfied or waived, as the case may be, the Appointed Date shall be deemed to occur only when each and every Condition Precedent is either satisfied or waived, as the case may be;

XXX

"4.1.2 The Concessionaire may, upon providing the Performance Security to the Authority in accordance with Article 9, at any time after 90 (ninety) days from the date of this Agreement or on an earlier day acceptable to the Authority, by notice require the Authority to satisfy any or all of the Conditions Precedent set forth in this Clause 4.1.2 within a period of 30 (thirty) days of the notice, or such longer period not exceeding 60 (sixty) days as may be specified therein, and the Conditions Precedent required to be satisfied by the Authority shall be deemed to have been fulfilled when the Authority shall have:

(a) procured for the Concessionaire the Right of way to the Site in accordance with the provisions of Clause 10.3.1;

(b) issued the Fee Notification:

(c) Deleted

(d) procured approval of the Railway authorities in the form of a general arrangement drawing that would enable the Concessionaire to construct road overbridges / underbridges at level crossings on the Project Highway in accordance with the Specifications and Standards and subject to the terms and conditions specified in such approval; and

(e) procured all Applicable Permits relating to environmental protection and conservation of the Site:

Provided that the Authority may from time to time by notice extend, for up to an aggregate of 6 (six) months, the period for procuring the approval set forth in Sub-clause (d) and / or Sub-clause (c) above and in that event the land to be covered by overbridges or the affected sections of the Project Highway, as the case may be, shall be included in the Appendix referred to in Clause 10.3 and dealt with in accordance with the provisions thereof; and provided further that upon procurement of such approval, the Concessionaire shall be entitled to a period of 12 (twelve) months therefrom for completion of the overbridges. For the avoidance of doubt, the approval specified in Sub-clauses (d) and (e) above shall cease to be a Condition Precedent upon the extension of time under this Proviso.

XXX

"10.3.2 Without prejudice to the provisions of Clause 10.3.1, the Parties hereto agree that on or prior to the Appointed Date, the Authority shall have granted vacant access and Right of Way such that the Appendix shall not include more than 20% (twenty per cent) of

the total area of the Site required and necessary for the Two-Lane Project Highway and in the event Financial Close is delayed solely on account of delay in grant of such vacant access and Right of Way, the Authority shall be liable to payment of Damages under and in accordance with the provisions of Clause 4.2.”

7. We would also like to refer to and reproduce Annexure I of Schedule A with reference to the site of the project highway and land, which reads as under:-

“1. Site

The Site of the Two-Lane Project Highway comprises the section of National Highway No. 44 commencing from Km 69.200 to Km 173.200 i.e. the Jowai – Assam Border section in the State of Meghalaya. The land, carriageway and structures comprising the Site are described below.

2. Land

The Site of the Project Highway comprises the land described below:

<i>S. No.</i>	<i>Chainage (In Km)</i>		<i>Total ROW (In m)</i>	<i>Remarks</i>
	<i>From</i>	<i>To</i>		
<i>1.</i>	<i>69.200</i>	<i>87.000</i>	<i>12.00</i>	
<i>2.</i>	<i>87.000</i>	<i>173.200</i>	<i>10.60</i>	

”

8. Schedule A had identified carriageway as the present carriageway that was two-lane with earthen shoulders in the entire border, major bridges which were identified, Railway over bridges (nil), grade separators (nil),

minor bridges 35 in number and total number of structures, bus bays and truck lay byes and permanent bridges, bye pass or tunnel costing Rs.50 crores or more. The work was bifurcated and divided into ten sub-headings with specific details. In so far as site is concerned, paragraph 1.1 had stated that the site of the project highway shall comprise of land from 69.200 km to 173.200 km in N.H. 44 in the Jawai- Assam Border section and 12 km and 10 km as Right to Way from 69.200 to 87.000 and 87.000 to 173.200 chainage (in kms).

9. The Arbitral Tribunal after referring to the relevant clauses had concluded that the expression “site” as defined in clause 10.1 had to be read with clause 10.3.2. The latter clause stipulates that without prejudice to clause 10.3.1, the parties had agreed that prior to the appointed date, the respondent-NHAI shall grant 'right of access' and 'right of way' such that the 'Appendix' shall not include more than 20% of the total area of the site required and necessary for two-lane highway. The total area required for two-lane highway was 186.02 hectares. The Arbitral Tribunal held that in terms of Annexure I of Schedule A, the respondent-NHAI was required to make available and transfer at least 112.73 hectares i.e. 80% of the right of way. Further, on the appointed date, the respondent NHAI had actually transferred or made available/accessible 132.75 hectares of land which was 95% of the Right of Way.

10. The appellant, however, submits that the total land to be acquired was 186.02 hectares and, therefore, the respondents were liable and should have made available 149 hectares being 80% of the Right of Way for the two-laning. Thus, the respondent-NHAI was at default and were liable to pay the

claims raised. The Arbitral Tribunal did not agree with the appellant for reasoning recorded in the Award, which read:

*“5.7.6 Another salient point which the AT noted was that the Concessionaire / Claimant had applied for financial closure in June, 2013. NHAI thereafter examined the papers for financial closure in consultation with its consultant- Delloite, before finally confirming the date of financial closure as 03.12.2013. In fact, the Concessionaire / Claimant had claimed financial closure from June 2013 itself, and NHAI could have approved financial close w.e.f. June, 2013. As per the definition of AD in Article 48, “AD means the **date on which the Financial Close is achieved** or an earlier date that the parties may by mutual consent determine”*

“Thus, the AD could have been announced w.e.f. June 2013, when the Concessionaire had claimed financial close. The noteworthy aspect in this regard is that the correspondence which the Claimant first initiated with the Respondent for seeking higher quantum of land as total ROW for the project, was first initiated vide its letter dated 13.09.2013 (Ex C-16); which is much after the Claimant applied for Financial Close. Prior to that date, there had been no reference or suggestion by the Claimant / concessionaire that the ROW envisaged in the CA i.e. Schedule ‘A’ is inadequate. The AT noted that if there had been any doubt in the mind of the Claimant / concessionaire that the available ROW is less than the required 80% of prescribed ROW or that the total ROW is inadequate, the concessionaire would not have claimed and applied for financial close in June 2013 to the NHAI. It is also relevant to note that under the said Clause of the CA, the situation of delay in financial closure because of delay in providing of the required 80% of the ROW by the

Authority is clearly envisaged, and it is explicitly stipulated under Clause 10.3.2 that “in the event financial close is delayed solely on account of delay in grant of such vacant access and ROW, the Authority shall be liable to payment of damages under and in accordance with the provisions of Clause 4.2”. Thus, if there had been any short-fall in the ROW, as contractually stipulated/ required under the CA, the concessionaire would have claimed damages from the Authority under Clause 10.3.2 read with Clause 4.2 of the CA. There would have been no question of the concessionaire proceeding further with financial closure, because as soon as the financial closure were to be accepted by NHAI, the AD would be ipso facto issued immediately thereafter. Clearly, the requirement of additional land seems to be an afterthought of the concessionaire.”

11. It is an accepted and an admitted position that the appellant had achieved financial closure on 4.6.2013, which was duly communicated by their bankers to the respondent-NHAI. This would be the 'appointed date' as per the definition clause quoted above, which means the date of financial closure was achieved or an earlier date as per the schedule. 'Right of Way' as per the definition clause means constructive possession of the site necessary for construction, operation and maintenance of the project highway in accordance with the agreement. Right of Way, therefore, can fluctuate depending upon the land required for construction, operation and maintenance of the project highway. This is clear from the term “site” as defined, which refers to the real estate described in schedule A and in respect of which right of way was to be provided. The clause removes doubts, if any, and clarifies that the site shall be construed with reference to real estate required for two-laning of the project highway as per schedule A

under the heading “site” in clause 1.1, which refers to Annexure I. We have quoted relevant portion of Annexure I, which refers to the land, i.e., site of the project highway in the form of chainage in 69.200 to 173.200 kilometers and the Right of Way in meters. As noted above, it has ten different sub-headings which are specific and detailed for major and minor bridges, etc. Clause 1.3 refers to additional land required for toll plazas, etc. and states that this shall be acquired in accordance with the provisions of clause 10.3.6 and only upon such acquisition shall form part of the site and vest with the authority. Clause 10.3.6 reads as under:-

“The Concessionaire shall, if so required by the Authority, procure on behalf of the Authority, on the terms and to the extent specified by the Authority, the additional land required for Toll Plazas, Traffic Aid Posts, Medical Aid Posts, under passes and over passes or for construction of works specified in Change of Scope Order issued under Article 16, in accordance with this Agreement and upon procurement, such land shall form part of the Site and vest in the Authority; provided that the Concessionaire may, by notice given to the Authority no later than 60 (sixty) days from the Appointed Date or the date of change of Scope Order, as the case may be, require the Authority to and undertake proceedings for acquisition of such land under the provisions of the National Highways Act, 1956 and the Authority shall take all such steps as may be reasonably necessary for such land acquisition forthwith; provided further that the cost of land acquired under this Clause 10.3.6 shall be borne by the Authority in accordance with the Act; provided also that the land to be acquired by the Authority hereunder as a part of the Site shall be deemed to be included in the Appendix referred to in this Clause 10.3 and dealt with in accordance with the provisions thereof. For the avoidance of doubt, it is agreed that the minimum area of land to be acquired for the Toll Plazas and approach roads thereof shall conform to the provisions of

Schedule – B and Schedule- C. It is further agreed that the Authority may, at any time after the Bid Date, suo moto acquire the land required hereunder.

Clearly, therefore, there is sound merit in the reasoning given by the Arbitral Tribunal.

12. The Arbitral Tribunal had also noticed that the concessionaire i.e. the appellant had applied for financial closure on 4th June, 2013. The appellant thereafter for the first time vide letter dated 13th September, 2013 had raised the plea seeking access to higher quantum of land as a part of Right of Way. This was after the respondent-NHAI had already made available 132.75 hectares of land, which was accessible and could be used for construction of the highway. The appellant did not commence and start construction of the highway. Not even a single kilometer of highway was constructed. A sham and a bogus plea that the respondent-NHAI had failed to provide 80% of the Right of Way after including additional land required for toll plazas, traffic aid posts, medical aid posts, under passes etc. was raised. It is obvious that these facilities would have been required only after the construction had commenced and the highway was on verge of completion. There is no merit in the present appeal and the same is dismissed.

SANJIV KHANNA, J.

ANUP JAIRAM BHAMBHANI, J.

DECEMBER 11, 2018

neelam/VKR