$~25.

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

\+ **Date of Decision: 05.04.2019**

% **FAO(OS) 65/2019**

NATIONAL HIGHWAYS AUTHORITY OF INDIA..... Appellant
Through: Dr. Maurya Vijay Chandra, Adv.

versus

SUNWAY CONSTRUCTION SDN BHD ..... Respondent
Through: Dr. Amit George with Mr. Rishabh Dheer, Mr. Amol Acharya and Mr. V.M.Vishnu, Advs.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MS. JUSTICE REKHA PALLI

VIPIN SANGHI, J. (ORAL)

C.M. No. 16091/2019

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

CAV No. 361/2019

Counsel for the respondent caveator has appeared.

The caveat stands discharged accordingly.

FAO(OS) 65/2019 & C.M. No. 16092/2019

1. Issue notice. Dr. Amit George accepts notice. We have heard the

submissions of learned counsels and proceed to dispose of the present appeal preferred by the appellant National Highways Authority of India (NHAI) under Section 37 of the Arbitration and Conciliation Act.

2. The appellant has assailed the order dated 22.01.2019 passed by the learned Single Judge in OMP No. 160/2012, whereby the objections to the Arbitral Award dated 03.10.2011 rendered by the Arbitral Tribunal consisting of three members have been dealt with. The learned Single Judge dismissed the appellant's objections to the Award made on Dispute No.3 – regarding reimbursement of toll tax collection. The present appeal is in relation to rejection of the said objections to the award on Dispute No.3.

3. The parties entered into a contract for "***Rehabilitation and Upgradation of Km 406.00 to km 449.150 of NH-76 to 4-lane configuration in the State of Rajasthan (Contract Pkg. RJ-9)***" referred to as the Project.

4. The scope of work involved in the Project was as follows:

> *"<u>SCOPE OF WORKS</u>*
>
> *The Works consist of:*
>
> *(a) construction of new flexible/rigid 2/3-lane pavement parallel to existing carriageway, construction of new flexible/rigid 4 lane road/bypass/ detours/service roads and reconstruction/strengthening/widening of the existing carriageway.*
>
> *(b)* ***construction of culverts, minor and major bridges and grade separators, rail over/under bridges, widening/ rehabilitation, repair of existing bridges.***
>
> *The works under this Contract shall be carried out in accordance with the bidding documents constituting the*

contract and shall consist of various salient items as generally described below." (emphasis supplied)

5. Thus, it would be seen that the scope of work involved the 4-laning of, inter alia, bridges which fell within the aforesaid stretch.

6. The dispute in question relates to the charging of toll on account of use of a toll bridge on river Kalisindh at Km. 437. Admittedly, the repair of the said Bridge fell within the scope of work, and it also included the work of construction of a parallel bridge alongside the existing Bridge on river Kalisindh. It is not in dispute that, on either side of the said Bridge, the contractor was required to carry out works.

7. During the course of carrying out the Project, the respondent contractor, obviously, used the said Bridge. The respondent contractor was charged toll for using of the said Bridge and was reimbursed the same till the raising of IPC15. However, thereafter, the appellant NHAI sought to charge and appropriate the toll for the use of the said Bridge by the respondent contractor. The appellant refused to reimburse the toll charges, and also sought to make a recovery of the already reimbursed amount. That gave rise to a dispute which, apart from other disputes, were eventually referred to Arbitration and the Arbitral Tribunal rendered its Award as aforesaid, allowing the claim of the respondent contractor for reimbursement of toll tax collection under Dispute No.3.

8. The learned Single Judge has rejected the objections of the appellant NHAI and affirmed the Award made by the Arbitral Tribunal on Dispute No.3.

9. The submission of learned counsel for the appellant is that the

impugned Award has been made contrary to the contractual terms as well as the Rules and Regulations under which toll has been levied.

10. Learned counsel for the appellant has, firstly, drawn our attention to ***"The National Highways (Rate of Fee) Rules, 1997"***, framed under the National Highways Act, 1956. Rule 3 prescribes the rate of fee for service or benefits rendered in relation to the use of ferries, permanent bridges, temporary bridges or tunnels on any section of National Highways, or bridges, or both as per the table given below the said Rule. Learned counsel for the appellant submits that the table stipulates the toll rates payable by different kinds of vehicles, such as, cars/ Jeep etc, light commercial vehicles/ minibuses and trucks/ buses and multi axle vehicles. It specifically provides in Sub Rule (2) that the fee prescribed for different kinds of vehicles "*for projects involving conversion into four-lanes of existing two-lane of national highways shall not exceed the capping rates given below at June 1997 prices, namely…….*". In respect of heavy construction machinery and earth moving equipment, the rate prescribed is Rs.3.00 per km.

11. Learned counsel submits that, thus, statutorily it is provided that even vehicles involved in the process of conversion of the existing two-lane bridges to four-lanes on National Highways, toll is chargeable and the rates therefor are prescribed.

12. Learned counsel submits that ***"The National Highways (Collection of Fees By Any Person for the Use of Section of National Highways/ Permanent Bridge/ Temporary Bridge on National Highways) Rules, 1997"*** stipulate that the person authorized to collect and retain the fee under

the Rules, shall be responsible to ensure that fees are collected at not more than the agreed rates. It contains a proviso, that fee shall not be payable or collected in respect of certain vehicles. He points out that the vehicles of a contractor carrying out such like works are not included in the exempted category. Therefore, the respondent was not entitled to any exemption from payment of toll, merely on the ground that the scope of work involved the construction of a bridge/ widening/ rehabilitation, repair of the existing toll bridge on the Kalisindh River.

13. Learned counsel further submits that the contract, in clause 14.3, clearly stipulated that all duties, taxes and other levies payable by the contractor under the contract, or for any other cause, as of the date 28 days prior to the deadline for submission of bids, shall be included in the rates and prices, and the total bid price submitted by the bidder and the evaluation and comparison of bids by the employer shall be made accordingly.

14. He submits that there is no dispute about the fact that the toll bridge was operational, and toll was being collected in respect of use of bridge on river Kalisindh prior to the tendering of its rates by the respondent. Thus, the respondent was well aware of its obligation to pay the toll for the use of the bridge on river Kalisindh.

15. Learned counsel submits that under the scope of work, only minor works were required to be done on the bridge over river Kalisindh, and even that was not carried out by the respondent contractor. He submits that under Clause 51.1 of the conditions of contract, the Engineer was empowered to make variation, inter alia, in the quantity of works or any part thereof. Since

the works in relation to the existing bridge at river Kalisindh were not carried out, those works stood excluded from the scope of work, which was valued at only about Rs.7.45 lakh out of the total project value of Rs.286,65,00,000/-. Learned counsel, therefore, submits that merely because the respondent was a contractor working on the stretch within which the bridge on river Kalisindh fell, is no reason to exempt the respondent from paying the toll for the use the bridge on the said river.

16. On the other hand, learned counsel for the respondent supports the award made by the Arbitral Tribunal, as well as the decision of learned Single Judge rejecting the appellant's objection to the award made on Dispute No. 3. Dr. Amit George, firstly, submits that the scope of works under the contract, as noticed hereinabove, involved construction of, inter alia, minor and major bridges and repair of existing bridges, which included the bridge on river Kalisindh.

17. He next refers to para 3 of the instructions to bidders, under the heading "Scope of Works", which state that the employer, namely the NHAI shall provide the right-of-way for road and bridge works and other appurtenant works to the contractor as detailed in Schedule A in Section VIII. A perusal of Schedule A shows that within the time specified for commencement of work in the appendix to bid in accordance with Sub-clause 41.1, 20 Kilometers of the stretch was to be handed over to the contractor and the balance length of the stretch was required to be handed over within 6 months of commencement.

18. Thus, in any event, within 6 months of commencement, the

respondent contractor was entitled to be handled over the possession of the entire stretch, which included the toll bridge on river Kalisindh. Dr. George submits that if the toll bridge had been handed over to the respondent there would be no question of the contractor having to pay toll to itself.

19. Learned counsel has also drawn our attention to the definition of the expression "Cost" contained in Clause 1.1(g) of the conditions of contract to mean "*all expenditure properly incurred or to be incurred, whether on or off the Site, including overhead and other charges properly allocable thereto but does not include any allowance for profit.*" He submits that clause 42.2 of the conditions of contract stipulates the consequence of the failure on the part of the employer, namely NHAI, to deliver the possession of the said work site and it provides that if the contractor suffers delay and/ or incurs costs from failure on the part of the employer to give possession in accordance with the terms of Sub-Clause 42.1, the Engineer shall, after due consultation with the employer and the contractor determine, inter alia, the amount of such "costs" which shall be added to the Contract price, and shall notify the contractor accordingly with a copy to the employer.

20. Mr. George submits that on account of a dispute between the State of Rajasthan and the employer NHAI, the possession of the site and, in particular, the Bridge on river Kalisindh was, admittedly, not delivered to the respondent contractor and, consequently, clause 42.2 of the Conditions of the Contract was attracted. He submits that the contractor was entitled to reimbursement of "costs", which included all expenditure properly incurred or to be incurred on or off the site. This would include the toll incurred by the respondent on account of use of the bridge on river Kalisindh during the

execution of the work at the work site. Mr. George has also drawn our attention to the relevant part of the impugned award, wherein the Arbitral Tribunal has taken note of the reasons why the possession of the toll Bridge was not delivered by the State of Rajasthan to the NHAI. He submits that a perusal of the impugned award would show that the Bridge on Kalisindh river was not delivered by the State of Rajasthan on account of NHAI not depositing the cost of construction of the Bridge with the State of Rajasthan. He submits that, thus, the appellant itself was responsible for possession of the Bridge not being delivered by the State of Rajasthan.

21. In his rejoinder, learned counsel for the appellant submits that the existing two bridges on river Kalisindh do not form part of the site as defined in Clause 1.1(f)(VII). He submits that, thus, it was not obligatory on the part of the appellant to hand over the possession of the existing bridge on river Kalisindh to the respondent contractor. He submits that the respondent was obliged to pay the toll in respect of the use of the bridge, just like it would pay toll in respect of any other toll bridge, which it may use for the purpose of executing the contract.

22. Having heard learned counsel for the parties and perused the judgment of the learned Single Judge, the award, as well as the documents relied upon by learned counsels, we are of the view that the impugned judgment rendered by the learned Single Judge in relation to Dispute No.3, does not call for interference by this Court and the learned Single Judge has rightly upheld the award made by the learned Arbitral Tribunal on the said Dispute No.3 regarding reimbursement of toll tax collection to the respondent contractor.

23. We have noticed the fact that till IPC15 the toll collected from the respondent contractor was reimbursed by the appellant NHAI. Thus, even the NHAI was initially of the view that the respondent contractor was not obliged to bear the cost of the toll charged for use of the existing bridge on river Kalisindh.

24. The Arbitral Tribunal has considered the rival submissions of the parties in great detail in the impugned award made on Claim No.3. Thus, firstly, it cannot be said that the award made by the Tribunal on Claim No.3 is in ignorance of the contractual terms relied upon by the respective parties and taken note of hereinabove. The Tribunal was conscious of the said terms and has interpreted and applied the same. Interpretation of contractual terms falls squarely within the realm of the Arbitral Tribunal, and unless the objector is able to show that the interpretation adopted by the Arbitral Tribunal is completely perverse, and is not a plausible interpretation, it is not open to the Court to interfere with the interpretation adopted by the Tribunal. Merely because a different interpretation may also be plausible, would not be a ground to interfere with the interpretation adopted by the Arbitral Tribunal in respect of the contractual clauses.

25. It is not the appellant's case that the Arbitral Tribunal has not correctly appreciated the factual position. Thus, there is no patent error of fact pointed out by the appellant while advancing its submissions in support of the objection. The learned Single Judge has quoted the relevant extract from the arbitral award, wherein the Tribunal has deliberated upon and discussed Claim No.3. We do not consider it necessary to reproduce the said extract in our order, and it would suffice for us to say that the reasoning

adopted by the learned Tribunal appears to be reasonable and plausible. It takes into account the submissions and counter-submissions of the parties, as advanced before the Tribunal. Pertinently, it is the same submissions which are advanced before us. Objections to arbitral award are not a substitute for an appeal, much less, this Court while hearing an appeal under Section 37 of the Arbitration & Conciliation Act can treat the objections as an appeal against the impugned award.

26. There can be no dispute that the scope of work under the contract involved construction of, inter alia, minor and major bridges and widening/ rehabilitation, repair of existing bridges. Even the appellant does not dispute that the scope of the work involved the work of repair of the bridge on river Kalisindh, apart from the work of construction of a parallel bridge alongside the existing bridge on river Kalisindh. There can be no dispute about the fact that under The National Highways (Rate of Fee) Rules, 1997 and The National Highways (Collection of Fees By Any Person for the Use of Section of National Highways/ Permanent Bridge/ Temporary Bridge on National Highways) Rules, 1997, even the contractor is obliged to pay the toll at the prescribed rate. However, the matter does not end there.

27. As pointed out by Dr. Amit George, firstly, the appellant was obliged to handover the complete stretch on which the work had to be carried out – which included the toll bridge on river Kalisindh. The scope of the work was not limited to works on either side of the said bridge, but it also involved work on the said bridge itself. Moreover, looking to the definition of the expression "cost", it is clear that it was for the employer, namely NHAI to eventually foot the bill in respect of all the expenditures properly

incurred on or off the site, including other charges properly allocable to the contract. Admittedly, the stretch comprising the bridge on river Kalisindh was not delivered to the respondent contractor. In terms of clause 44.2 of the conditions of contract, the contractor was entitled to reimbursement of "costs", including all expenditures properly incurred, or to be incurred, on or off the site. The view taken by the Tribunal that this would include the toll incurred on account of the use of the bridge on river Kalisindh, during the execution of the work, is a plausible view. It also appears to us that the appellant sought to take advantage of its own default inasmuch, as, the possession of the bridge could not be delivered to the respondent on account of a dispute between the appellant and the State of Rajasthan regarding the cost of construction of the existing bridge.

28. For all the aforesaid reasons we are of the view that neither the arbitral award on Claim No.3, nor the impugned judgment rendered by the learned Single Judge, call for interference by us. The appeal is, accordingly, dismissed.

VIPIN SANGHI, J.

REKHA PALLI, J.

APRIL 05, 2019
N.Khanna