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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO(OS) (COMM) 174/2019**

NATIONAL HIGHWAYS AUTHORITY OF INDIA Appellant
Through: Mr. Siddharth Pandey and Mr. Ramesh
Kumar, Advocates
versus

PNC-BEL (JV) Respondent
Through: Mr. Manoj K. Singh, Mr. Nilova
Banduyopadhyay, Mr. Rahul Pandey and
Mr. Adhip Roy, Advocates

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MS. JUSTICE ASHA MENON

ORDER
26.07.2019

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CAV 744/2019

1. Counsel for the respondent/caveator enters appearance and states that he has been furnished a complete set of the paper book.
2. The caveat stands discharged.

CM APPL. 33317/2019 (exemption)

Allowed, subject to all just exceptions.

FAO(OS) (COMM) 174/2019 and CM APPL. 33318/2019 (stay)

1. The appellant/National Highways Authority of India (in short 'NHAI') is aggrieved by the judgment dated 24.05.2019, passed by the learned Single Judge, dismissing its petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'A&C Act'), challenging an Award dated 20.09.2018, passed by the Arbitral Tribunal in respect of the disputes that had arisen between the parties in relation to an agreement dated 04.02.2005 for the Project of Widening and

Strengthening of National Highway No.24 from Km 93.00 to Km 149.25, to four lane standards (Garhmukteshwar to Moradabad) and ROB at Km 181 of NH-24 and Bridges on NH-87 in Uttar Pradesh (Package-II).

2. The total contract price for executing the work was Rs.221,42,18,567/-. The date of commencement of the work was 31.03.2005 and the date of completion was on or before 30.09.2007. It is an undisputed position that the work with respect to Widening and Strengthening of NH-24 from KM 93.00 to Km 149.25, measuring 56.25 Km, to four lanes standard was completed by the respondent on 15.07.2009. In other words, there was a delay of 22 months reckoned from the scheduled date of completion. The Road Over Bridge (in short 'ROB') work was completed on 10.10.2012, after a delay of 45 months. Disputes and differences had arisen between the parties and vide notice dated 04.02.2014, the respondent had invoked the arbitration clause and filed their statement of claims before the Arbitral Tribunal. The appellant/NHAI also filed its counter claim. By the Award dated 20.09.2018, the Arbitral Tribunal has partly allowed the claims of the respondent while dismissing the counter claim of the appellant/NHAI. Aggrieved thereby, the appellant/NHAI filed a petition under Section 34 of the A&C Act that has been dismissed by the judgment dated 24.05.2019.

3. Though several grounds have been taken in the grounds of appeal to assail the impugned judgment, during the course of making submissions, learned counsel for the appellant/NHAI has confined the challenge to three fold grounds. Firstly, that the learned Single Judge erred in rejecting the objection taken by the appellant/NHAI to the effect that the respondent was not entitled to claim any damages when there was such a prolonged delay in completion of the work. Secondly, it is urged that on the one hand, there is

an observation in the impugned judgment that the delay in removal of trees, shifting of utilities, removal of encroachment etc. is attributable to the respondent and at the same time, the learned Single Judge has rejected the plea of the appellant/NHAI that the respondent was responsible for causing delay in the execution of the work. Lastly, it has been canvassed that the learned Single Judge erred in upholding the Award in respect of release of payments under items No.4, 6 and 8 out of ten non-BOQ items by relying on the certification of the Engineer, particularly, when no reasons or justifications for allowing the same have been given by the Arbitral Tribunal.

4. To start with, a quick glance at the scope of interference by the Court in exercising the jurisdiction under Section 37 of the A&C Act. The structure of dispute resolution contemplated under the A&C Act is pyramidal in nature. At the first tier is the Arbitral Tribunal that has been held to be the master of the qualitative and quantitative evidence led before it. At the second tier is a Court that exercises powers vested in it under Section 34 of the Act. The said Court is not expected to sit in appeal over the Award of an Arbitral Tribunal and reassess or reappraise the evidence to find out as to whether a different conclusion could be arrived at and if so, substitute its view with that of the Arbitral Tribunal. The focus of the scrutiny at this stage is to examine whether the decision of the Arbitral Tribunal is based on a legitimate process, regardless of the errors on the application of law or on the determination of facts. (Refer: Kwality Manufacturing Corporation vs. Central Warehousing Corporation (2009) 5 SCC 142, Sumitomo Heavy Industries Limited vs. Oil & Natural Gas Commission of India (2010) 11 SCC 296, P.R. Shah, Shares and Stock

Brokers (P) Ltd. vs. B.H.H. Securities (P) Ltd. & Ors. (2012) 1 SCC 594 and Sutlej Construction vs. Union Territory of Chandigarh 2018 (1) SCC 718).

5. The provisions of Section 37 of the A&C Act entails a second round of scrutiny of the Arbitral Award, which is more in the nature of a judicial review, since the first round of scrutiny has already been undertaken by a Court under Section 34. At the third tier, while exercising jurisdiction under Section 37 of the A&C Act, the Superior Court is not to act as an Appellate Court and proceed to independently assess the relative merits/demerits of the Award. The limited scope of determination under the said provision is to assess as to whether the views expressed by the learned Single Judge falls within the parameters laid down under Section 34 of the Act. Only when the Court has taken a glaringly preposterous view or has overlooked a patent error in the Award, is interference called for under Section 37 of the Act. Another note of caution may be added here. In circumstances where the Arbitral Award has been upheld under Section 34 of the Act, while considering an appeal preferred under Section 37 of the Act against the decision taken, the Court should show circumspection and be slow to disturb the concurrent findings. In a nutshell, higher the tier of scrutiny under the Act, narrower becomes the scope of interference. [Refer Associate Builders vs. Delhi Development Authority AIR 2015 SC 620, M/s. CWHEC-HCIL (JV) vs. M/s. CHPRCL 2017 SCC OnLine Del 9074, M/s. Telecommunication Consultants India Limited v. M/s. Catvision Ltd. 2017 SCC OnLine Del 9235 and Container Corporation of India Ltd. through its Regional General Manager and Anr. vs. Kandla Cargo Handlers, through its Partner Shri B.L. Agrawal 2019 SCC OnLine Bom 1245].

6. Coming back to the case in hand, the appellant/NHAI has raised the aspect of delay in completion of the work, claiming the same to be solely attributable to the respondent. The plea taken by the appellant/NHAI that any damages suffered on this count were not payable by it to the respondent, has been considered in the impugned judgment. The learned Single Judge has referred to the findings returned by the Arbitral Tribunal to the effect that the stretch of forest land from 93 Km to 104.7 Km, i.e, 11.7 Km (approx.) was not handed over by the appellant/NHAI to the respondent and the alignment of the said stretch was changed after four months from the start date. In fact, the order for commencement of work in respect of the aforesaid stretch was issued by the appellant/NHAI as late as on 20.09.2007, which was 10 days short of the scheduled date of completion of work. The impugned order records that in the same stretch of forest land, the decision in respect of 10 meter wide plantation strip was deferred and the work on the Left Hand Side (in short 'LHS') could not make progress as it was a part of the Hastinapur Wild Life Sanctuary. Similarly, for the stretch of forest land between 106-107 Km, the appellant/NHAI had changed the alignment of the said stretch after about 17 months from the start date, i.e., on 12.08.2006. Again, for the stretch between 117-118 Km, the work in the section of approaches for the proposed overpass structure could be taken up by the respondent only in the month of March, 2007 after the deletion of structure was communicated to them by the appellant/NHAI.

7. Taking into consideration the aforesaid facts and circumstances, the Arbitral Tribunal had observed that the change in the alignment at a belated stage would virtually amount to failure to hand over the stretch until a later date. We do not find any error in the impugned judgment, which finds

favour with the reasoning given by the Arbitral Tribunal as above, for granting damages to the respondent due to extension of time for completion of the work. The said view stands reinforced by the finding on facts returned by the Tribunal that there was a delay ranging from 51 days to 687 days on the part of the appellant/NHAI in supplying the drawings to the respondent and in issuing approvals of drawings of bearings for bridges and crash barriers. The learned Single Judge has also taken note of the findings on facts returned by the Tribunal that there was a delay on the part of the appellant/NHAI in making payments of the Interim Payment Certificates (IPCs) to the respondent and in granting extension of time (EOT) within a reasonable time, thereby contributing further to the delay in completion of the work.

8. It is no longer *res integra* that once the Arbitral Tribunal has determined the damages payables under the Award on the basis of a particular methodology adopted by it or a formula applied by it, merely because there could have been another methodology adopted or some other formula applied, would hardly be a ground for the courts to interfere in the Arbitral Award. [Refer: Associate Builders vs. Delhi Development Authority reported as (2015) 3 SCC 49]

9. Coming next to the contention of the learned counsel for the appellant/NHAI that the delay of removing hindrances at the site was attributable to the respondent for which NHAI could not be held responsible, we may refer to the following findings returned in the paras 11 and 12 of the impugned judgment:-

“11. The learned counsel for the petitioner submits that in reaching the above conclusion the Arbitral Tribunal has failed

to consider the effect of Clause 110.1 of the Technical Specifications of Contract and Clause 21 of the Contract Data. He submits that in terms of these Clauses, it was the responsibility of the respondent to coordinate with the service provider/concerned authority for cutting of trees, shifting of utilities, removal of encroachments etc. The respondent had failed to discharge this responsibility and therefore, could not have claimed that the petitioner was in default for allegedly not giving unhindered access to the site. He further submits that in terms of Clause 110.6 of the Technical Specifications of Contract, it had clearly been stipulated that for coordinating the work of cutting of trees, shifting of utilities, removal of encroachments etc., the respondent shall be paid a lump sum amount per Kilometer of the section. This payment would be deemed to cover all coordination work plus any risk associated with delay in tree cutting, shifting of utilities, removal of encroachments etc. The petitioner has admittedly made this payment to the respondent and therefore, even assuming that there was some delay in removal of such hindrances, the claim of the respondent for further damages was not maintainable.

12. I am unable to agree with the submission made by the learned counsel for the petitioner. As noted hereinabove, the Arbitral Tribunal has not passed its Award merely on the ground that there were certain hindrances in the form of trees and other public utilities on the site. The Arbitral Tribunal found that there were delays in form of realignment being ordered over a period of time; delay in making payments of IPCs; delay in grant of EOT in a timely manner and so on. Therefore, even assuming that the petitioner is right in its submission that delay in removal of trees, shifting of utilities, removal of encroachments etc. is attributable to the respondent, this alone would not make the respondent guilty of causing delay in the execution of the work. The same would also not be sufficient to interfere with the award.”

10. On examining the view expressed by the learned Single Judge in para 12 above, it is clear that the Court did not find any merit in the submission

made on the part of the appellant/NHAI that simply because the terms and conditions of Clause 110.6 of the Technical Specifications of Contract stipulated that the respondent shall be paid a lump sum amount per kilometre of the section, for coordinating the work of cutting of trees, shifting utilities and removal of encroachment etc., that alone would be a ground to absolve NHAI from paying damages to the respondent for the delay caused in execution of the contract. We are in complete agreement with the view expressed by the learned Single Judge that the damages granted by the Arbitral Tribunal in favour of the respondent were due to belated directions issued by the appellant/NHAI, calling upon the respondent to undertake re-alignment of certain stretches of land, delay on their part in making payments of IPCs and granting EOT, as per schedule etc. Thus, the aspect of lump sum payments made by the appellant/NHAI to the respondent under the Technical Specification of Contract for felling of trees, shifting of utilities, removal of encroachment etc. would not be enough to lay the entire blame for the delay in execution of the work, at the door of the respondent. Clearly, there were other weightier contributory factors attributable to the appellant/NHAI.

11. In any event re-appreciation of the evidence is not permissible under Section 34 of the A&C Act, much less under Section 37. In a recent decision of the Supreme Court cited by the learned Single Judge in Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI) reported as **2019 SCC OnLine 677**, it has been emphasised that re-appreciation of evidence is not permissible by the Appellate Court and construction of terms of a contract is within the exclusive domain of the Arbitral Tribunal unless and until the aggrieved party is able to demonstrate

that the contract has been construed in such a manner that no fair-minded or reasonable person would be able to take the said view. In the instant case, learned counsel for the appellant/NHAI has failed to persuade us on this count.

12. Lastly, it has been urged before us that the learned Single Judge failed to appreciate that the Arbitral Tribunal had erred in directing release of payment in respect of items No.4, 6 and 8 out of ten non-BOQ items in favour of the respondent by relying on the certification of the rates submitted by the Engineer for approval on 13.03.2012. It is an admitted position that the Engineer, who had certified the rates, is an independent professional appointed by none other than the appellant/NHAI itself. Once the Engineer had finally certified the rates and submitted the same for approval in respect of all the ten non-BOQ items, there was no justification for the appellant/NHAI to have selectively released payments in respect of items No.1, 2, 3, 5, 7, 9 and 10 while withholding payments in respect of items No.4, 6 and 8. This is more so when the rates relating to non-BOQ items had already been approved by the appellant/NHAI.

13. For all the aforesaid reasons, we do not see any merit in the appeal. The impugned judgment is accordingly upheld and the present appeal is dismissed alongwith the pending application.

HIMA KOHLI, J

ASHA MENON, J

JULY 26, 2019

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