

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 17.02.2021

+ **O.M.P. (COMM) 455/2020 & I.A. 7355/2020**

**NATIONAL HIGHWAYS AUTHORITY
OF INDIA**

.... Petitioner

versus

**M/S BSCPL GODHRA
TOLLWAYS LIMITED**

.... Respondent

Advocates who appeared in this case:

For the Petitioner: Mr Viplav Sharma, Advocate.
For the Respondent: Dr Amit George, with Mr Mukesh Kumar,
Mr Amol Acharya and Ms Meenakshi Sood,
Advocates.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

1. National Highway Authority of India (hereafter 'NHAI') has filed the present petition impugning the arbitral award dated 27.11.2019 (hereafter 'the impugned award') rendered by the Arbitral Tribunal comprising of three members. The impugned award was rendered in respect of disputes that had arisen between NHAI and M/s BSCPL Godhra Tollways Limited (hereafter 'the Concessionaire') in respect of the Concession Agreement dated 25.02.2010 (hereafter 'the Concession Agreement').

2. M/s BSCPL Infrastructure Ltd., a company incorporated under the Companies Act, 1956 submitted a Request For Proposal (RFP) in respect of “*Contract for Four Laning of Godhra to Gujarat/ Madhya Pradesh Border Section of NH-59 from Km 129.300 to Km. 215.900 in the State of Gujarat on Design, Build, Finance, Operate and Transfer (DBFOT) basis under NHDP – III*”(hereafter ‘the Project’). By a letter of intent dated 01.01.2010 (LOA), NHAI accepted the proposal, quoting a premium of ₹7.83 crores, submitted by BSCPL Infrastructure Ltd. It was further agreed that the concession period would be for twenty-seven years including the construction period of nine hundred and ten days from the ‘Appointed Date’. In terms of the RFP Document, BSCPL Infrastructure Ltd. was required to incorporate a Special Purpose Vehicle (SPV) for the purposes of the Project. Pursuant to the said LOA, BSCPL Infrastructure Ltd. incorporated the respondent company (the Concessionaire) as the SPV. The Concessionaire entered into the Concession Agreement on 25.02.2010.

3. The Appointed Date for commencement of the work was fixed at 01.03.2011 and the construction of the Project was agreed to be completed within a period of nine hundred and ten days, that is, on or before 26.08.2013. The execution of the contract was delayed and the time for completion of the Project was extended. NHAI accepted the first Provisional Commercial Operation Date (PCOD) for 78.271 kms on 31.10.2013 and the second PCOD for 7.196 kms on 25.09.2015.

The Completion Certificate was issued on 29.06.2016 upon completion of the remaining works.

4. Disputes arose between the parties in connection with the construction of Road Over Bridges (ROBs). The Contract provided for the construction of five ROBs. However, with mutual agreement, the Concession Agreement was modified to include construction of only four ROBs. Admittedly, the specification of the ROBs as indicated in the Concession Agreement were changed. The Concessionaire claimed that the same resulted in a Change of Scope (hereafter 'COS') and in terms of the Concession Agreement, it was entitled to additional cost. According to the Concessionaire, the additional costs were to be determined on the basis of actual costs incurred in construction of the ROB's, less costs as envisaged for construction of ROB's as per the specifications stipulated in Concession Agreement. The said disputes could not be resolved amicably and were referred to arbitration.

5. NHAI does not dispute that there was a change in the specifications of the ROBs as originally envisaged. In terms of the Concession Agreement, NHAI was obliged to secure the approval of the Railway Authorities for the General Arrangement Drawing (GAD) and was required to provide the same to the Concessionaire. NHAI got GADs prepared for the ROBs, which provided for concrete structures, and submitted the same for approval to the Railways. However, after the contract for execution of the project was awarded to the Concessionaire and the parties had entered into the Concession Agreement, the Railways revised their Guidelines for Construction of

Standard Arrangement Composite Girders. The same was also confirmed by the Railway Board Policy Circular issued on 28.06.2010. Thereafter, the same was also confirmed by NHAI in their Policy Circular No. 72/2011 dated 20.06.2011. The Concessionaire claimed that the above circulars laid down a completely new method and protocol for construction purposes and envisaged adopting of steel structures for ROB. According to the Concessionaire, this changed the fundamental specification for construction of the ROB in question. The Concessionaire was compelled to accept the same and build ROB as per the changed specifications.

6. The Concessionaire claimed that the extra cost for construction of the ROB with the changed specifications was required to be paid by NHAI. It estimated the additional cost of ROB at ₹65,46,82,355/-. However, NHAI determined the same at ₹26,70,61,924/-. The Concessionaire claimed that NHAI had not worked out the additional cost as a result of COS in accordance with the Concession Agreement. It claimed that in terms of Article 16 of the Concession Agreement, it was entitled to the cost of construction of the ROB as per the changed specifications less the total cost of execution of ROB with the specifications as contemplated under Schedule B of the Concession Agreement.

7. While the disputes were festering between the parties, it was agreed that Concessionaire would proceed with the execution of the works and would be paid an additional cost as estimated by NHAI. Pursuant to the said agreement, NHAI paid a sum of ₹25,13,84,057/-.

According to learned counsel appearing for the NHAI, the parties had arrived at a settlement in terms of which, NHAI was liable to pay only a sum of ₹26,70,61,924/- to the Concessionaire for construction of the ROBs. The Concessionaire disputes the same and states that in terms of the understanding, it had agreed to proceed with the construction of ROBs on payment of the amount of ₹26,70,61,924/- as estimated by NHAI. However, that was only as an interim measure and without prejudice to its claim that the additional amount was to be computed in accordance with the method agreed under Article 16 of the Concession Agreement. NHAI disputed the above and claimed that although the settlement was final, the Concessionaire had repudiated the same.

8. The parties entered into a Supplementary Agreement dated 07.01.2015, whereby they agreed to refer the disputes to arbitration under the aegis of the “Society for Affordable Redressal of Disputes” (SAROD). In terms of the Regulations/Byelaws of SAROD, the Arbitral Tribunal of three members was constituted to adjudicate the claims and the counter claims of the parties.

9. Before the Arbitral Tribunal, the Concessionaire raised claims aggregating ₹119,84,64,131/- in addition to interest and the costs of the Arbitral proceedings.

10. NHAI made a counter claim of ₹25,13,84,057/- being the amount paid to the Concessionaire on account of construction of the ROBs.

11. Before the Arbitral Tribunal, NHAI contended that it was not obliged to make any payment for construction of the ROBs to the Concessionaire as the Concession Agreement was an all inclusive contract and the specifications regarding ROBs were disclosed to be tentative. It was contended that since ROBs fall within the scope of works, any change in the specifications of the ROBs would not constitute a COS under the Concession Agreement and thus, would not necessitate any variation in the payment due to the Concessionaire. NHAI Claimed that the additional payment of ₹25,13,84,057/- paid by it to the Concessionaire was liable to be refunded and accordingly, NHAI raised a counter claim for the said amount.

12. The Arbitral Tribunal considered the dispute and has held in favour of the Concessionaire. It accepted the Concessionaire's claim that the change in the specifications of the ROBs constituted a COS, which would necessitate determining the additional cost payable to the Concessionaire.

13. A tabular statement of the claims made by the Concessionaire and the amount awarded against the same, is set out below:

S. NO.	Description	Claim Amount (Rs.)	Amount Awarded (Rs.)
(i)	Difference in the Whole Cost of four ROBs incurred/to be incurred as per approved GAD and	38,76,20.432/-	28,22,25,302/-

	that of the original scope defined in Schedule-B, less Rs.26,70,61,924/- additional cost already paid by Petitioner Authority.		
(ii)	Additional Railway Centage charges due to the increased scope of work / cost incurred/ to be incurred during the whole of Concession period.	25,24,79,091/-	Nil
(iii)	Loss of Toll Revenue as on 31.05.2015 due to delay in executing the change of scope works of 4 ROB's	22,48,47,154/-	Nil
(iv)	Additional Costs incurred as on 31.03.2015 in executing COS works beyond Original Scheduled Completion Date	30,39,56,438/-	Nil
(v)	Interest as on 31.03.2015 due to non-payment of 20% COS advance as per Article 16.3 of CA	2,95,61,016/-	2,14,88,995/-
(vi)	Interest on Claims No. 1 to 5		10,79,77,142/-

(vii)	Cost of Arbitration		17,09,000/-
	Total	119,84,64,131/-	41,34,00,439/-

14. The counter claim made by NHAI for refund of the additional amount paid towards construction of ROB's was rejected.

15. Before considering the rival contentions, it is relevant to take note of the reasons that persuaded the Arbitral Tribunal to accept the Concessionaire's claim for additional cost for construction of the ROB's. The Arbitral Tribunal did not accept the Concessionaire's contention that any change in the specifications of the ROB's would amount to a SOC the work to be executed. It noted that the scope of the project was described in Article 2.1 of the Concession Agreement and there is no dispute that work was to be executed as per the specification set out in Schedule B of the Concession Agreement. However, the Concession Agreement also included a specific provision relating to construction of ROB's and it was expressly provided, under Clause 4.12 of Schedule B, that *"the proposed span arrangements were tentative and subject to change as per availability of Railway boundaries /requirement of Railways"*.

16. The Arbitral Tribunal held that Article 2.1 of the Concession Agreement, which defined the scope of work could not be read in isolation but in conjunction with Schedule B of the Concession Agreement. Thus, the span arrangements regarding ROB's were subject to change and that, by itself, would not lead to the conclusion

that there was a 'Change of Scope' of the contract. Therefore, the Concessionaire was expected to factor in its bid, some additional cost on account of possible changes in the specification of ROBs.

17. Having observed the above, the Arbitral Tribunal also observed that in this case, the specifications of the ROBs were completely changed. The findings of the Arbitral Tribunal in this regard are set out below:

“(c) In regard to the policy circular of Railway Board being for General guidelines only and not binding, the Claimant has stated that the very fact that Respondent did consider that these circulars are mandatory is borne out by the specific actions of Respondent in instructing their own consulting Engineer to modify the GADs submitted by them earlier in the light of the Railway circular of 15-04-2010/28-06-2010. A reference to R-9 of Respondent at Page. 14, Para 8 reveals that the Respondent has specifically instructed SWK to follow RDSO norms and submit revised GADs.”

18. In view of the above finding, the Arbitral Tribunal held that the change in the specification of ROBs would amount to a 'Change of Scope' of the contract.

19. The Arbitral Tribunal also referred to NHAI's response to a Query (Query No. 54), which was raised at the pre-bidding stage in regard to Clause 4.12 of Annexure 1 of Schedule B of the Concession Agreement. A clarification was sought as to who would bear the extra cost on account of change in the span arrangement made by the Railways. NHAI had responded by clarifying that “*NHAI will supply*

approved GADs of all ROBs to the Concessionaire as per detailed in line with the details provided in Schedule – B”.

20. The Arbitral Tribunal observed that the said clarification was evasive but it clearly confirmed that the approved GADs were more or less in line with the details provided in Schedule B.

21. In view of the above, the Arbitral Tribunal concluded as under:-

“149. The AT has examined these objections in the light of counter arguments advanced by the Claimant.

(a) We consider that a contract is governed by the conditions of contract and the AT has to adjudicate within the four corners of the contract agreement. The contract lays down certain obligations of both the parties. The responsibility of obtaining GAD approval lay on the Respondent in terms of Article 4.1.2 (d) (conditions precedent). The Respondent having confirmed in pre bid meeting that the GADs will be in line with the details provided in schedule B has taken this responsibility upon his shoulders. Therefore, the question of this contract being different from the conventional contracts or that the Concessionaire is placed at a much higher pedestal and therefore he was expected to do works which are not so stated in this contract, is of no relevance.

(b) Though the Concessionaire would have carried out his own studies but the same is of no consequence in view of the clarifications given in pre-bid meeting. As already stated, the answer to query no 54 is very unambiguous and leaves no

room for doubt to confirm that even though, the Approved GADs were to be supplied later, the same will be more or less same as per the details provided in Schedule B and therefore the bidder would have estimated the costs accordingly while bidding regardless of his own due diligence in the matter. In this connection, the reliance placed by Respondent on the Article 8.1 of Disclaimer is also of no significance and has no relevance or application in the face of specific and unambiguous clarification provided by the Respondent.

(c) Such large scale changes in the approved GAD from those details provided in schedule B and confirmed in query no 54, would, in our considered opinion, entitle the Concessionaire to additional cost by way of COS, from the Respondent.”

22. Mr Viplav Sharma, learned counsel appearing for NHAI assailed the impugned award, essentially, on two grounds. First, he submitted that the conclusion of the Arbitral Tribunal that there was a COS in the contract requiring the parties to follow the procedure under Article 16 of the Concession Agreement, is wholly contrary to the terms of the Concession Agreement and, therefore, the impugned award was liable to be set aside. He referred to Clause 1.2(f) of the Concession Agreement which defined the term “construction” in an expansive and inclusive manner. He also referred to Clauses 1.2.3 and 1.2.4 of the Concession Agreement. Clause 1.2.3 expressly excluded the rule of construction that required any ambiguity in a contract to be interpreted against the party who is responsible for drafting the same. And, Clause 1.2.4 provided that all words and expressions used in the

Concession Agreement would bear their ordinary English meaning. He submitted that Clause 2.1 of the Concession Agreement which defined the Scope of the Project ought to have been considered keeping the aforesaid agreed principles of interpretation in mind. But the Arbitral Tribunal had erred in not doing so.

23. He pointed out that in terms of Clause 1 of Schedule B of the Concession Agreement, the development of the Project Highway would also include construction of the Project Highway as described in Schedule B and in Schedule C to the Concession Agreement. The expression “construction” would necessarily have to be interpreted in an expansive manner. He submitted that if interpreted in the aforesaid context, the ‘Scope of the Project’ would include the construction of the ROBs with the change in the specifications as the said work would, notwithstanding the extensive changes in the specifications, continue to be described as construction of ROBs. He further contended that Sub-clause (i) of Clause 4.12 of Schedule B of the Concession Agreement also clarified that the specifications of ROBs were tentative and were subject to change.

24. Next, he submitted that there was a settlement between the parties with regard to the costs to be paid and the Concessionaire agreed to accept an additional cost of ₹26,70,61,924/- on account of change in specifications of the ROBs. Therefore, the Concessionaire could not raise any further claims in that regard.

25. Before addressing the aforesaid contentions, it is relevant to refer to certain Clauses of the Concession Agreement. Clause 2.1 of the Concession Agreement defines the scope of the project as under:

“2.1 Scope of the Project

The scope of the Project (the “**Scope of the Project**”) shall mean and include, during the Concession Period:

- (a) construction of the Project Highway on the Site set forth in Schedule-A and as specified in Schedule-B together with provision of Project Facilities as specified in Schedule-C, and in conformity with the Specifications and Standards set forth in Schedule-D;
- (b) operation and maintenance of the Project Highway in accordance with the provisions of this Agreement; and
- (c) performance and fulfilment of all other obligations of the Concessionaire in accordance with the provisions of this Agreement and matters incidental thereto or necessary for the performance of any or all of the obligations of the Concessionaire under this Agreement.”

26. Undisputedly, the Scope of the Project includes construction of the Project Highway on the sites as set forth in Schedule A and Schedule B of the Concession Agreement. It is not the Concessionaire’s case that construction of the ROBs does not fall within the scope of the Project. There is also no dispute that the expression ‘construction’ must be read as defined under Clause 1.2(f) of the Concession Agreement which reads as under:

“(f) references to “construction” or “building” include, unless the context otherwise requires, investigation, design, developing, engineering, procurement, delivery, transportation, installation, processing, fabrication, testing, commissioning and other activities incidental to the construction, and “construct” or “build” shall be construed accordingly;”

27. It is also relevant to note that it is not in dispute that specifications of the ROBs as set out in Schedule B, were extensively changed. The Arbitral Tribunal had found that there were large scale changes made in the approved GADs inasmuch as, the GADs required pile foundations instead of open foundations as envisaged in Schedule B of the Concession Agreement; steel girders were required to be provided instead of RCC T-beam in the superstructure; and the spans and their number were also changed. The Arbitral Tribunal noted that such extensive changes in the basic parameters also resulted in a change in other parameters as well; thus, resulting in complete change in design, methodology as well as materials.

28. The findings of the Arbitral Tribunal in this regard are not disputed by NHAI. However, Mr Sharma contends that notwithstanding the extensive changes, the same would not result in any change in the Scope of the Project as contemplated under the Concession Agreement and the decision of the Arbitral Tribunal to hold otherwise is contrary to the terms of the Concession Agreement.

29. Clause 4.12 of Schedule B of the Concession Agreement, which is relied upon on behalf of NHAI, reads as under:

“4.12 ROB/RUB

Details of ROB/RUBs to be provided are given at Appendix BXIV. Following points shall be taken care of:

- i). The proposed span arrangements of the ROB's are tentative and subject to change as per availability of railway boundaries/ requirement of the railways.
- ii). ROB shall be designed, constructed and maintained as per the requirements of Railway authorities. The construction plans shall be prepared in consultation with the concerned railway authority.
- iii). The ROB's shall be constructed and maintained by the concessionaire under supervision of the Railways.
- iv). All expenditure related to construction, maintenance and supervision of ROB (except P&E charges) shall be borne by the Concessionaire.
- v). During construction, the existing level crossings shall be widened to 12 metres or two separate level crossings of 7 metres each shall be provided.”

30. A plain reading of the sub-clause (i) of Clause 4.12 of Schedule B to the Concession Agreement does indicate that span arrangements of the ROB's were tentative and would be subject to change. However, it is difficult to accept that the said clause also contemplated fundamental changes in specification that completely altered the design, materials and the method of construction of the ROB's. Sub-clause (i) of Clause 4.12 of Schedule B provided some flexibility to

NHAI but it is apparent that the variation in the specifications contemplated did not permit a complete change in the design and materials. The variations contemplated would necessarily have to be in broad conformity with the template as set out in Schedule B. It is also relevant to note that Sub-clause (i) referred to only span arrangements and did not refer to any other fundamental structural changes in the ROB.s.

31. Article 16 of the Concession Agreement contains provisions regarding COS and must be read bearing the aforesaid in mind. Clause 16.1 provides for the COS. The relevant extract of the said Clause 16 are set out below:

“16.1 Change of Scope

16.1.1 The Authority may, notwithstanding anything to the contrary contained in this Agreement, require the provision of additional works and services which are not included in the Scope of the Project as contemplated by this Agreement (the **“Change of Scope”**). Any such Change of Scope shall be made in accordance with the provisions of this Article 16 and the costs thereof shall be expended by the Concessionaire and reimbursed to it by the Authority in accordance with Clause 16.3.

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16.1.3 Any works or services which are provided under and in accordance with this Article 16 shall form part of the Project Highway and the provisions of this Agreement shall

apply *mutatis mutandis* to such works or services.

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XXX

16.3 Payment for Change of Scope

16.3.1 Within 7 (seven) days of issuing a Change of Scope Order, the Authority shall make an advance payment to the Concessionaire in a sum equal to 20%(twenty per cent) of the cost of Change of Scope as agreed hereunder, and in the event of a Dispute, 20% (twenty per cent) of the cost assessed by the Independent Engineer. The Concessionaire shall, after commencement of work, present to the Authority bills for payment in respect of the works in progress or completed works, as the case may be, supported by such Documentation as is reasonably sufficient for the Authority to determine the accuracy thereof. Within 30 (thirty) days of receipt of such bills, the Authority shall disburse to the Concessionaire such amounts as are certified by the Independent Engineer as reasonable and after making a proportionate reduction for the advance payment made hereunder, and in the event of any Dispute, final adjustments thereto shall be made under and in accordance with the Dispute Resolution Procedure.

16.3.2 Notwithstanding anything to the contrary contained in Clause 16.3.1, all costs arising out of any Change of Scope Order issued during the Construction Period shall be borne by the Concessionaire, subject to an aggregate ceiling of 0.25% (zero point two

five per cent) of the Total Project Cost. Any costs in excess of the ceiling shall be reimbursed by the Authority in accordance with Clause 16.3.1. In the event that the total cost arising out of Change of Scope Orders (if any) issued prior to the Project Completion Date is less than 0.25%(zero point two five per cent) of the Total Project Cost, the difference thereof shall be credited by the Concessionaire to the Safety Fund within a period of 180 (one hundred and eighty) days of the Project Completion Date. For the avoidance of doubt, it is agreed that the aforesaid 0.25% (zero point two five per cent) of the Total Project Cost shall, to the extent borne by the Concessionaire, be deemed to form part of the actual capital cost of the Project.”

32. A plain reading of Clause 16.1.1 of the Concession Agreement indicates that the provision of additional works and services, which are not included in the Scope of the Project as contemplated under the Concession Agreement would constitute a COS. The Arbitral Tribunal concluded that in view of the expansive changes made to the specifications of the ROBs as specified under Schedule B, the same would fall outside the Scope of the Project as contemplated under the Concession Agreement.

33. As noticed above, the Scope of the Project included construction of Project Highway as set forth in Schedule A and as specified in Schedule B. Having concluded that there were extensive changes in the specifications of ROBs, the conclusion of the Arbitral

Tribunal that the same falls outside the Scope of the Project as defined under Clause 2.1(a) of the Concession Agreement cannot be faulted.

34. At this stage, it is relevant to note that the scope of examination under Section 34 of the A&C Act is limited to determining whether the arbitral award fails on any of the grounds as set out in Sub-sections (2) and (2A) of Section 34 of the A&C Act. This Court does not examine the arbitral award as a first appellate court and cannot supplant its opinion over that of the Arbitral Tribunal. In this case, it is clear that the findings of the Arbitral Tribunal are based on cogent reasons. This Court finds no flaw in the Arbitral Tribunal's interpretation of the Concession Agreement and it cannot by any stretch be stated to be patently illegal or contrary to the fundamental policy of Indian law. The interpretation of the Concession Agreement was well within the jurisdiction of the Arbitral Tribunal and warrants no interference by this Court.

35. Mr Sharma had initially argued that there was a settlement between the parties and NHAI was stopped from raising any claims. However, the said contention is, plainly, unsustainable. NHAI had filed a claim seeking refund of the amount paid under the said settlement and it had specifically pleaded as under

“10.4 The submissions and the proceeding of the Amicable Settlement, as per the settled law, cannot be held against the parties and the Learned Tribunal is requested to consider the proceedings of the Amicable Settlement as *non est*.”

36. It is also noticed from the letters issued by the concessionaire in particular, letters dated 02.04.2014 and 31.03.2014 that the concessionaire had accepted to proceed with the construction by receiving an amount of ₹26,70,61,924/- only as an interim measure and without prejudice to its claim.

37. In view of the above, this Court finds no reason to interfere with the impugned award. The present petition is unmerited and is, accordingly, dismissed.

38. The pending application is also disposed of.

FEBRUARY 17, 2021
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VIBHU BAKHRU, J

