



\$~37

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Decided on: 10.05.2022

+

FAO(OS) (COMM) 115/2022 & CM APPLs. 22351-22354/2022

NATIONAL HIGHWAYS
AUTHORITY OF INDIA

..... Appellant

Through: Mr. Manish K. Bishnoi, Ms.
Pallavi Singh and Mr. Nirmal
Prasad, Advocates.

versus

PCL STICCO JV

..... Respondent

Through: Dr. Amit George, Mr. Swaroop
George, Mr. Piyo Harold
Jaimon, Mr. Rayadurgam
Bharat and Mr. Amol Acharya,
Advocates.**CORAM:****HON'BLE MR. JUSTICE NAJMI WAZIRI****HON'BLE MS. JUSTICE SWARANA KANTA SHARMA****NAJMI WAZRI, J. (ORAL)**

The hearing has been conducted through hybrid mode (physical and virtual hearing).

1. This appeal under s.37(1)(c) of the Arbitration & Conciliation Act, 1996 ('the Act') impugns the order dated 23.03.2022 passed by the learned Single Judge in O.M.P. (COMM) No.77/2016, dismissing the appellant's petition under s.34 of the Act which had impugned an arbitral award dated 15.12.2015, passed by a three-member Arbitral Tribunal. The respondent's claims were allowed, the appellant was directed to pay monies relating to an



Agreement for “*Widening to 4/6 lanes and strengthening of existing 2- Lane Carriageway of NH-5 in the State of Orissa from km 284.00 to km 338.00 (Ganjam-Sunkhala) Contract Package OR-VII*”.

2. The grounds for challenge in this appeal are that albeit the learned Arbitral Tribunal found that the Contractor/Claimant/ (respondent herein), admittedly did not have the financial wherewithal to continue with the aforesaid project and had indeed, abandoned the project site, the Tribunal did not consider the contractor at fault. The appellant says that the logical sequitur to the admitted financial inability and other incapacity of the respondent would have been, that the respondent be “expelled” from the contract and there be no case for foreclosure, but the award has not done so.
3. The learned counsel for the appellant refers to para 72 of the Award which has held as under:

“...72. It is obviously clear that the execution of work was rendered almost impossible by various omissions and innumerable inaction on the part of respondent from the inception. That apart, the respondent had confiscated the machineries and equipment stationed on the site despite there being no valid cause for such a confiscatory action of the respondent.

The respondent placed reliance on the ruling of Delhi High Court 2011 (Vol. III) Arbitration law report pg. 26 (Delhi) in C.K. Engineers vs. Delhi Development Authority. It was brought to our notice that said single Judge judgment had been subsequently reversed by the Division bench in C.K. Engineers vs. Delhi Development Authority reported in 2013 (vol. 137) DRJ 152. Per



contra the claimant placed reliance upon Ex. CD-11, wherein in identical circumstances another independent arbitral tribunal held that identical termination under clause 63.1 is illegal and compensation was awarded under the various heads. The said award has been affirmed by the Delhi High Court by a single Judge as well as by Division: bench. On the findings recorded by Arbitral Tribunal constituted by u/s G.S. Tawarmalani , S.C. Vasudeva and I.M. Singh between the same parties, it has since been affirmed by the higher forums, has been rightly relied upon by the claimant. Hence on an overall consideration of the entire facts, innumerable documents, correspondences exchanged between the parties, the innumerable omissions on the part of respondent leads us to an irresistible conclusion that expulsion cannot be sustained at all on facts & is illegal and the consequences as claimed by the claimant deserve to be sustained. We must however keep in mind while deciding on the claims that the claimant had, by its own admission, become financially so weak that it had become well-nigh impossible for it to continue with the work at an acceptable pace and that it had itself requested for an amicable foreclosure of the contract. While we hold that the expulsion was unjustified and illegal, the claimant was also not in a position to continue with the work without substantial financial support. The best, fair and equitable course in the circumstances, for both the parties, would have been an amicable foreclosure of the contract. On the above finding, we proceed further and analyse various claims advanced in the present Arbitration, although we are inclined to award to the claimant only what is due to it as its own in terms of the contract...

(Emphasis supplied)

4. He further contends that it was not open for the learned Arbitral Tribunal to pass any order under s.28 (2) of the Act insofar as the



parties had not expressly authorised it to decide the matter *ex aequo et bono* or as an *amiable compositeur* (according to right and good/amiable solution).

5. He also refers to communications with the Contractor/respondent wherein the latter was directed by the Independent Engineer to complete the project. This issue has been adequately dealt with in the impugned order, *inter alia*, as under:

“...22. It is clear from the impugned award that the Arbitral Tribunal had examined the disputes between the parties in the context of various provisions of the Contract. It was found that NHAI was in flagrant violation of some of its obligations under the Contract and this was one of the principal reason for the Arbitral Tribunal to hold NHAI’s action under Sub-clause 63.1 of the GCC to be illegal.

23. Mr Kapoor’s contention that the question regarding EOT was wholly irrelevant for examining the dispute regarding NHAI’s exercise of its contractual rights under Sub-clause 63.1 of the GCC, is unmerited. Clearly, the right of the respondent and the corresponding obligation of NHAI, to grant EOT in the given circumstances is relevant for determining whether NHAI’s action under Clause 63 of the GCC was valid or wrongful. If the respondent was entitled to EOT on account of prolongation of the works resulting due to various hindrances and breach on the part of NHAI to perform its reciprocal obligations, NHAI’s action of expelling the respondent on account of slow progress, would be unsustainable.

24. In the aforesaid context, the Arbitral Tribunal had found that NHAI’s action in withholding or delaying grant of EOT was contrary to the terms of Clause 44 of the GCC. Sub-clause 44.1 of the GCC provided for grant of EOT for reasons not attributable to the respondent. In



addition, in terms of the said clause, the Engineer was required to not only examine the question of EOT but also determine the additional costs, if any, required to be paid to the respondent resulting from certain delays.

25. In the present case, the Arbitral Tribunal found that the delays had arisen on various grounds attributable to NHAI including delay in handing over of the sites and substantial change in the design. The Arbitral Tribunal had referred to a letter dated 14.08.2004, which had set out a table indicating the reasons for the delays, which were attributable to NHAI or beyond the control of the respondent.

26. The Arbitral Tribunal also found that the Engineer/NHAI had delayed processing the applications for EOT. Although NHAI had consented to EOT up to 30.06.2006, it had imposed an arbitrary condition that the respondent would not be entitled to consequential compensation under Sub-clause 42.2(b) of the GCC. The Arbitral Tribunal found that imposition of such a condition was in breach of the contractual provisions and was patently illegal.

27. The respondent had applied for EOT by its letter dated 13.06.2006 and, the Engineer had recommended EOT till 31.12.2007. However, NHAI had failed and neglected to take a decision on the same and the issue of EOT remained pending with NHAI. The Arbitral Tribunal noted that the in its letters seeking EOT – which was recommended by the Engineer – the respondent had set out various reasons for the delay including certain hindrances that were continuing as on that date. It was pointed out that works at various places were stopped on account of unpaid compensation for acquisition of land. In addition, acquisition of certain land was yet to be verified by the surveyor of the Revenue Department. This was specifically noted by the Arbitral Tribunal in the impugned award, and the Arbitral Tribunal had found



that grant of EOT was justified. Notwithstanding the same, NHAI had not granted approval for the same.

28. Mr Kapoor's contention that the Arbitral Tribunal had not considered the events during the year 2006 to 2008, is unmerited. A plain reading of the impugned award indicates that the Arbitral tribunal had considered the question of delay even during the said period.

29. The respondent had, by its letter dated 05.06.2007, once again requested for EOT till 31.12.2008 and had submitted a revised program for completion of the works. However, this request was not recommended by the Engineer. In the circumstances, the respondent had made a representation for amicably closing the Contract. However, that request also remained pending till 03.04.2008.

30. The respondent had protested against the action of NHAI of expelling the respondent under Sub-clause 63.1 of the GCC by its letter dated 11.04.2008. The Arbitral Tribunal had found merit in the respondent's contention that no case was made out for expelling the respondent under Sub-clause 63.1 of the GCC in view of the following aspects highlighted in the letter dated 11.04.2008:

“(i) Failure to hand over sites encumbrance free on dates stipulated in agreed conditions of the contract.

(ii) No compensation for increase in cost of input, which was phenomenal, was granted by employer on account of prolonged delay in handing over of site, which was to the extent of more than 84 months as against the contract period of 32 months and still there are stretches which have not yet been handed over. Thus the contract which is frustrated by the employer, NHAI was also requested for foreclosure of the contract but no action was taken for a considerable number of months.



(iii) *Instead, employer advised the claimant to go to DRB. DRB's recommendation for cost compensation has also not been accepted by employer but arbitration has been invoked.*

(iv) *No extension of time granted by employer beyond 30.6.2006 though Engineer subsequently has recommended EOT up to 31.12.07, but the funds to the extent of about Rs. 4 crores of work which had already been executed, were not released by the Engineer."*

31. It is clear from the above that the decision of the Arbitral Tribunal that NHAI's recourse to Sub-clause 63.1 of the GCC was wrongful in view of its failure to not comply with the other provisions of the Contract, including, by keeping the decision regarding EOT pending for an inordinately long period, is informed by reason.

32. Mr Kapoor, learned counsel appearing for the petitioner, had invited this Court to re-examine and re-appreciate the factual aspects of this controversy as according to him the conclusions of the Arbitral Tribunal were erroneous. However, given the limited scope of examination under Section 34 of the A&C Act, it is not permissible for this Court to re-adjudicate the disputes. It is clear that the conclusions of the Arbitral Tribunal are based on material available on record and this Court is unable to accept that the view expressed by the Arbitral Tribunal is not a plausible one.

33. The Arbitral Tribunal held that expulsion of a contractor under Clause 63 of the GCC was required to be for a legitimate cause. In the present case, the Arbitral Tribunal had found that NHAI's action to do so was unjustified. The Arbitral Tribunal was of the view that such action was not permissible where the backlog or shortfall in performance was on account of justifiable causes, including for reasons attributable to NHAI. The Arbitral Tribunal had evaluated the factual



circumstances and had concluded that in this case, the delay in completion of the works was attributable to various reasons beyond the control of the respondent and included those attributable to NHAI. This Court finds no ground to review the said conclusion on the anvil of standards of Section 34(2A) or Section 34(2)(b)(ii) of the A&C Act.

34. It was submitted on behalf of NHAI that one of the claims made by the respondent regarding illegal occupation of the site – which was premised on the assertion that the expulsion under Sub-clause 63.1 of the GCC was illegal – was not allowed by the Arbitral Tribunal. It was contended that the reasons stated by the Arbitral Tribunal for rejecting the said claim of the respondent is inconsistent with its view that expulsion of the respondent under Sub-clause 63.1 of the GCC was illegal. It was contended that in one sense the Arbitral Tribunal had accepted the action of NHAI under Clause 63 of the GCC as legal and therefore, its decision to hold the same as illegal in respect of another claim, was inconsistent.

35. The aforesaid contention is also unpersuasive. The Arbitral Tribunal had examined the factual circumstances and was of the view that it was not apposite to award compensation to the respondent for NHAI taking over the works. This conclusion was based on the findings that (i) there was an inordinate delay in completion of the works; (ii) the financial condition of the respondent had deteriorated; and, (iii) the respondent had voluntarily offered to foreclose the Contract at the material time. This Court does not find that the approach of the Arbitral Tribunal is patently illegal or one that vitiates the impugned award.

36. It is also relevant to bear in mind that for an arbitral award to be set aside on the ground of patent illegality, the illegality must strike to the root of the matter. In Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro



Rail Corporation Ltd.: 2021 SCC OnLine SC 695, the Supreme Court had explained the ground of patent illegality as under:

“25. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression ‘patent illegality’. Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression ‘patent illegality’. What is prohibited is for courts to re-appreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression ‘patent illegality’.”

37. In this case, the Arbitral Tribunal had found that in the given circumstances, NHAI’s actions to expel the respondent from the site was unjustified. The Arbitral Tribunal has merely awarded the value of the works executed by the respondent; a reasonable value for assets



that were taken over by NHAI; and the compensation for funds recovered by encashment of the Bank Guarantee.

6. All the issues have been duly dealt with in the impugned order, in particular the appellant's contentions that the findings of the learned Arbitral Tribunal apropos the lack of financial wherewithal, which constrained the claimant/respondent/contractor from carrying-on and/or from completing the project. Apropos the financial constraints brought about upon the contractor (respondent herein), the Arbitral Tribunal has observed, *inter alia*, as under:

"...f) Under these five heads substantial sums remained due and payable to the claimant and the refusal to make due payments to the claimant as well as non-payment by the respondent has resulted in detriment to the cash flow and entire financial road map for executing the subject work has derailed. The refusal to pay the amounts which have accrued, due under the above five heads either after passing of the award or confirmation thereof by the Courts would conclusively establish that the respondent committed breach and persistent breach of contract by not paying the amounts which have accrued due to the claimant. The amount due is substantial under the five heads, has resulted in cash crunch to the claimant and this totally disabled the claimant from proceeding with the work. The respondent would have at least released substantial portion of the amount under five heads either after getting bank guarantee or subject to ultimate result of proceedings, which the respondent has turned down and the resultant position being the financial resources of the claimant stand drained and it is a dead lock situation created by persistent failure of respondent and the attitude of the respondent speaks for itself..."

...



70. It is persuasively contended by the Learned Counsel for the claimant that the respondent who had committed series of breaches of contract has neither the legal nor the moral right or authority to terminate the contract when essentially the respondent was at fault to a great extent. Persistently it had become financially impossible for the claimant to continue with the work. The contract period as agreed to was 32 months while the respondent had admitted that up to 30.6.2006 the claimant was entitled to extension of time and for the prolongation of the contract by 18 more months, the claimant was not responsible. Had there been an extension of time by the respondent as recommended by the Engineer, the present situation for expulsion might not have arisen at all... ”

(emphasis supplied)

7. The issues raised by the appellant have been dealt with in the impugned order as well (para 30). It has also held that Rs.4 crores which was payable to the Contractor for the work already executed by the latter, was withheld by the NHAI, depriving the Contractor of legitimate and essential working capital and reducing it to a financial cripple and constraining it from carrying-out any further work. It is *ex-facie*, unfair of one party (NHA) to withhold legitimate payments of the other party but simultaneously expect only the other party (Contractor) to honour the latter's part of the contract. Timely payments as per an agreement only facilitates further work. The award found that it was not so ensured by NHAI.
8. The learned counsel for the respondent submits that this withholding of monies has been the subject matter of adjudication by this court in M/s. *National Highways Authority of*



India v. M/s PCL-STICO (JV) (2018) 252 DLT 572(DB), which *inter alia*, held as under:

“...13.3 We are of the opinion that no exception, whatsoever, can be taken, with the decision, of the learned Arbitral Tribunal, to allow the claims of the respondent. The fact that changes in design and alignment of the embankment took place, is not disputed. Neither it is disputed that, owing to the said changes, there was considerable increase in the amount of earth work required to be done by the respondent. The fact that the Kalikhote bypass was made available after the completion date is also admitted. The letter, dated 14th January, 2006, addressed to the Project Director of the respondent, made it clear that the rates stipulated in the BOQ were purely presumptive in nature, fixed without physical survey of the area solely on the basis of aerial survey drawings. We are entirely in agreement with the learned Single Judge that, in such circumstances, a new rate, for the excess work that was as a result of the above factors, required to be done by the respondent, was justified, and that such excess work could not be merely regarded as a “variation”. The learned Arbitral Tribunal, as well as the learned Single Judge have, in our view, correctly held that the claims of the respondent justified invocation of clause 52.2 of the GCC, rather than clause 52.1 thereof...”

9. The appellant next contends that: a) the grant of interest @ 10% per annum is on the higher side and b) the interest quantum now awarded has become more than the principal amount. These arguments have only to be made to be rejected because the contract itself contemplates the said rate of interest [in Clause 60.8 of the Condition of Particular Application (‘COPA’)]. The accumulation of interest with the passage of time, without any



fault of the respondent/claimant/contractor cannot be to the detriment of the claimant, whose claim has been pending for more than a decade now. The award has determined the monetary rights of the Contractor.

10. Lastly, the appellant contends that public monies are involved, therefore the matter be looked into afresh. Surely this cannot be a ground for issuing notice in the matter. The appellant has to show that the award is in conflict with the public policy of India or that it is vitiated by patent illegality appearing on the face of the award or comes in the narrow scope of judicial review. No such facet or error has been shown by the appellant to persuade the court even to issue notice. It is not for this court to re-appreciate the evidence in proceedings under s.37 of the Act.
11. The learned counsel for the respondent also draws the court's attention to the fact that the contract was awarded at a time when even physical survey of the land had not been done. The contract was given-out on mere estimations arrived at on the basis of "aerial survey" by person who flew over the area in an airplane.
12. There is no merit in this appeal, therefore, it is dismissed.

NAJMI WAZIRI, J

SWARANA KANTA SHARMA, J

MAY 10, 2022/rd