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* **IN THE HIGH COURT OF DELHI AT NEW DELHI***Judgment pronounced on: 20.12.2023*+ **FAO(OS) (COMM) 154/2019****REENGUS SIKAR EXPRESSWAY LTD.** ... Appellant

Versus

NATIONAL HIGHWAY AUTHORITY OF INDIA

... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Sandeep Sethi, Sr. Advocate with Mr Prashant Pakhiddey, Mr Manav Gill, Ms Lakshmi Dwivedi and Mr B. Sequiera, Advocates

For the Respondent : Ms Rohini Dey with Mr S. Ravishankar and Ms Yamunah N., Advocates.

CORAM:**HON'BLE MR JUSTICE RAJIV SHAKDHER****HON'BLE MS JUSTICE TARA VITASTA GANJU****[Physical Court Hearing/ Hybrid Hearing]****JUDGMENT****TARA VITASTA GANJU, J.:**

1. The challenge in the present Appeal is to a judgment dated 11.04.2019 passed by the learned Single Judge [hereinafter referred to as "Impugned Judgment"] whereby the Petition under Section 34 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as "Act"] has been partially allowed.



2. The parties executed a Concession Agreement dated 26.04.2011 [hereinafter referred to as “Agreement”] for construction, laning, design, built, finance, operate and transfer of Reengus Sikar Highway [hereinafter referred to as “Project”]. The Appellant completed the Project in about 260 days [8.5 months] before the scheduled completion date. Disputes arose between the parties as the Appellant raised several claims including a claim for bonus under Article 28.1 of the Agreement and a claim for the first annuity payment to be calculated in accordance with Article 27.2.2 of the Agreement.

3. The disputes were referred to arbitration of a panel of three Arbitrators [hereinafter referred to as the ‘Arbitral Tribunal’]. The Appellant made a total number of 21 claims before the Arbitral Tribunal. By an Award dated 05.07.2018 [hereinafter referred to as “Award”], the Arbitral Tribunal awarded a sum of Rs.76,39,42,353/- to be paid by the Respondent to the Appellant. Future interest at the rate of 12% p.a. was also awarded to the Appellant, if the payment was not made within three months from the date of the Award.

3.1 As part of the Award, the Arbitral Tribunal held that the Appellant was entitled to payment of annuity under Claim Nos. 6 and 7 of the Appellant and awarded Rs.26,74,39,956/- towards Claim No. 6 and interest under Claim No. 7 at the rate of 9% in favour of the Appellant.

4. Being aggrieved by the Award, the Respondent filed a Petition under Section 34 of the Act. By the Impugned Judgment, the learned Single Judge while upholding the Award, set aside Claim Nos. 6 and 7 of the Appellant which has led to the filing of the present Appeal.



4.1 In addition, the Impugned Judgment modified/rejected the following Claims:

- (i) Claim Nos.14 and 16 were modified with the no objection of the Respondent;
- (ii) A challenge to Claim No.12 was rejected by the Impugned Judgment;
- (iii) Claim No.15 as awarded to the Appellant was set aside by the Impugned Judgement;
- (iv) Since challenge to Claim No.12 was rejected, the challenge in Claim No.21, which is interest on Claim No.12, was also rejected; and
- (v) Claim No.19 which was the award of interest of Claim No.14 was also modified and it was directed that the Respondent would be entitled to the interest at the rate awarded by the Arbitral Tribunal, however, on the modified amount of Rs.1,16,76,000/-.

4.2 The learned Single Judge held that the interpretation of Article 27.2.2 of the Agreement was completely perverse and that in the name of interpretation, the Award has re-written the contract between the parties. Thus, the Section 34 Petition filed by the Respondent partly succeeded.

5. This led to the filing of the present Appeal. The Appellant in prayer (a) of the Appeal has, however, stated that challenge in this Appeal has been limited to Claims Nos. 6 and 7 only, which were set aside by the Impugned Judgment.

6. The issue before this Court is whether the learned Single Judge has exceeded its jurisdiction by partially setting aside the Award, including, with respect to Claim Nos.6 and 7 of the Appellant.



7. The Appellant has contended that the interpretation given by the learned Single Judge is that the Concessionaire/Appellant was only entitled to bonus for six months under Article 28.1 of the Agreement and not to the annuity for the first payment under Article 27 of the Agreement.

7.1 It was, however, contended by the Appellant that bonus under Article 28 of the Agreement and annuity under Article 27 of the Agreement are not connected. While bonus is the incentive for achieving early completion of the project, annuity is the consideration in lieu of the construction and operation and maintenance of the Project. Article 27.2.2 of the Agreement contemplates a proportionate increase in the first annuity payment to compensate for the increase in the maintenance obligation, not to disincentivise the Concessionaire/Appellant from obtaining early completion.

7.2 It was further contended by the Appellant that the Impugned Judgment has failed to recognise that applying the formula for the initial annuity payment solely to clause (c) would make the distinct provisions in clause (a) and (b) of Article 27.2.2 redundant.

7.3 In a nutshell, the Appellant has contended that the learned Single Judge exceeded his authority under Section 34 of the Act by replacing the plausible interpretation of Article 27.2.2 of the Agreement, with his own interpretation, which is not permissible in law.

8. The Respondent, on the other hand, submitted that the learned Single Judge did not agree with the interpretation given by the Arbitral Tribunal for the several reasons including that; Article 27.2 of the Agreement requires no interpretation as it is explicit; the only benefit available to the Appellant is the bonus payment under Article 28.1.1 of the Agreement; and since the Arbitral



Tribunal had in the name of interpretation re-written the Agreement, the interpretation could not be sustained.

8.1 It was further contended by the Respondent that Articles 27.1.1 and Article 28.1.2 of the Agreement, which provide for the bonus for early completion of the Project, were completely ignored by the Award.

8.2 The Respondent averred that Article 27.1.1 and Article 27.2.1 of the Agreement are non-obstante clauses which state '*subject to the provisions of Article 27 and Article 28 of the Agreement*' and since, the Arbitral Tribunal had already granted payment of bonus as the reward for early completion of the Project in the sum of Rs.18,77,22,277/-, under Claim No.1, no additional amounts under Claim Nos. 6 and 7 were due to be paid.

8.3 It was, thus, contended by the Respondent that a conjoint reading of Article 27.2.2 of the Agreement provides that whether the Appellant achieves completion early or otherwise, what it gets is bonus under Article 28.1.1 of the Agreement and nothing else and that this Article was correctly interpreted by the learned Single Judge to disallow Claims 6 and 7 of the Appellant.

9. In order to better appreciate the contentions of the parties, it is necessary to set out Claim Nos.1, 6 and 7 of the Appellant:

Claim No.	Description of Claim	Amount (in Rs.)
Claim No.1	Loss of Bonus under Article 28.1 of Agreement	18,77,22,277/-
Claim No.6	Payment of Annuity for 260 days from 14.12.2013 to 31.08.2014	26,74,39,956/-



Claim No.7	Interest on delay in payment of Additional First Annuity amount of Rs.26,74,39,956/- under Claim No.6	
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9.1 Claim No. 1 of the Appellant was the claim for loss of bonus under Article 28.1 of the Agreement. A claim in the sum of Rs.18,77,22,277/- was made by the Appellant.

9.2 Article 28.1 and 28.1.2 of the Agreement are reproduced below:

“28.1 Bonus in Annuity on account of early Project Completion

28.1.1 In case the Concessionaire achieves COD prior to the Scheduled Four Laning Date then shall it shall be entitled to receive from the Authority a bonus for early completion of the Project (the "Bonus"). Such Bonus shall be paid along with the first Annuity payment on the first Annuity Payment Date. For avoidance of doubt, it is agreed that the COD achieved on issue of Provisional Certificate would not qualify for payment of Bonus. Bonus would be payable only when Completion certificate is issued before the Scheduled four lane date in terms of Clause 14.2 of the Agreement.

28.1.2 The Bonus for such early completion shall be the product of Average Daily Annuity and the number of days by which the COD preceded the Scheduled Four Laning Date or six months, whichever is lesser.

[Emphasis is ours]

9.3 The Award under Claim No.1 sets out in details the reasons for such Award. After examining the pleadings and documents produced, the Award held that despite several delays caused by the Respondent which include; ‘*delay in fixing the appointed date*’; ‘*delay in receipt of stage-II forest clearance for tree cutting resulting in delay in handing over hindrance free work site in existing ROW*’; ‘*delay in handing over hindrance free work site for Palsana bypass*’; and ‘*delay in issue and deliberate deferment of effective*



date of provisional certificate', the Appellant completed the Project by 14.12.2013, approximately 8.5 months ahead of Schedule.

9.4 The Award further held that the Appellant was prevented from earning bonus on account of various breaches to the Agreement attributable to the Respondent.

9.5 The Award, thus, held that Article 28.1 of the Agreement cannot be read against the Appellant and that the Appellant is entitled to full bonus amount of one annuity towards Claim 1 since it had completed the work six months prior to the date of scheduled completion as follows:

“
xvii. *In view of the above deliberations, the Tribunal holds that the claimant is entitled to full bonus being equal to the amount of one Annuity, i.e., Rs.18,77,22,277 and accordingly, the Tribunal awards a sum of Rs.18,77,22,277 towards claim No. 1.*”

10. Article 27 of the Agreement provides that the Appellant is entitled to annuities under the Agreement for a period of 15 years after the commercial operations date of the Agreement. The payment of the first annuity, however, was not fixed in the Agreement and is linked to the date commercial operations commenced.

10.1 There is no dispute between the parties that the date of commencement of commercial operations or the commercial operation date was 14.12.2013.

11. Article 27.1 of the Agreement provides that on achieving the commercial operation date, the Respondent shall make annuity payment to the Appellant on the date as set forth in Schedule M to the Agreement in the annuity amount of Rs.18,77,22,277/-. Schedule M to the Agreement sets out the annuity payment with a date scheduled for each annuity payment.



11.1 Article 27.1 of the Agreement, however, is subject to the other provisions of the Agreement and reads as follows:

“27.1 Annuity

*27.1.1 Subject to the provisions of this Agreement, the **Concessionaire upon achieving COD for the Project Highway and in consideration of the Concessionaire accepting the Concession and undertaking to perform and discharge its obligations in accordance with the terms, condition and covenants set forth in this Agreement, Authority agrees and undertakes to pay to the Concessionaire, for each Annuity Payment Period, on each Annuity Payment Date as set forth in Schedule M - Annuity Payment Schedule, the sum of Rs. Eighteen Crore and Seventy Seven Lakhs Twenty Two Thousand Two Hundred and Seventy Seven (the "Annuity")** as set forth in its Bid.*

27.1.2 In case, the Concessionaire achieves COD pursuant to provisions of the Clause 14.3.2 of this Agreement then it would be entitled for 90% of the Annuity payment till the Completion Certificate is issued as per the provisions of the Clause 14.2 of this Agreement.”

[Emphasis is ours]

11.2 Article 27.2 of the Agreement sets forth how the payment of annuity is to be calculated and that the annuities will not exceed 29 payments. Article 27.2.2(b) of the Agreement provides for when the first annuity shall be payable in the case of an early completion. It states that the first annuity payment date, in the case of an early completion shall be six months after the schedule four lane date, the scheduled completion date.

11.3 Article 27.2 is extracted below:

“

27.2 Payment of Annuity

*27.2.1 Subject to the provisions of this Article 27 and Article 28 and any other applicable provisions of this Agreement, Authority shall make payment of Annuity to the Concessionaire on each Annuity Payment Date. **For avoidance of doubt the number of such Annuities shall not exceed 29 over the Concession Period and will commence from COD.***

27.2.2 The first Annuity Payment Date shall be the date:



(a) Six months after COD, in case COD is achieved on Scheduled four lane date

(b) Six months after Scheduled four lane date, In case COD is achieved before Scheduled four lane date.

(c) of the next Annuity Payment as per Schedule M, in case COD is achieved after Scheduled four lane date. For avoidance of doubt it is agreed that the first Annuity Payment shall be the product of Average daily Annuity and the number of days between the COD and the first Annuity Payment date.

Each Annuity payment period shall be deemed to be a period of 6 (six) calendar months from the preceding Annuity Payment date subject to provision of Clause 27.2.2(c).

27.2.3 Notwithstanding anything contrary contained to anywhere in *this Agreement*, Authority's obligation to pay Annuity shall arise subject to and only upon occurrence of COD."

[Emphasis is ours]

12. The Award has interpreted Article 27.2.2 and Article 27.2.3 to hold that the annuity has to be computed based on Article 27.2.2(c) of the Agreement. The relevant extract is below:

".....a. That the Claimant has claimed Additional Annuity of 260 days, i.e. from 14.12.2013 to 31.08.2014. The computations are based on the COD as 14.12.2013 and first annuity payment date as 28.02.2015 which is 6 months after SPCD 31.08.2014 [Article 27, Clause 27.2.2 (b)]. The Claimant has computed [CD-III, p.376] daily annuity based on [Article 27, Clause 27.2.2 (c)] one annuity payment as ₹18,77,22,277/181 days = ₹10,37,139.65 for 260 days = ₹26,96,56,310/- [Claimed ₹26,74,39,956/-]. In terms of the Claimant's statement, the first annuity payment date is six months after the SPCD (31.08.2014) when the COD (14.12.2013) is received before the SPCD [Clause 27.2.2 (b)], and that the SPCD is 31.08.2014 the first annuity can be paid after 31.08.2014, i.e. it becomes due only after 28.02.2015. The Claimant has submitted the invoices for the payment of the first annuity on 30.03.2015. The PC/COD is awarded in the Claim No.1 (supra) as 14.12.2013 and the SPCD is considered as 31.08.2014. The CA clearly stipulates payment of Annuity as below:

27.2

27.2.1.....

27.2.2.....

27.2.3.....



b. A conjoint reading of Clause 27.2.2(c) & Clause 27.2.3 shows that the 'Authority's obligation to pay Annuity shall arise subject to and only upon occurrence of COD' and 'For avoidance of doubt it is agreed that the First Annuity Payment shall be the product of Average daily Annuity and the number of days between the COD and the first Annuity Payment date.' Thus, the Claimant is also entitled for payment of annuity for the period of 260 days i.e. from 14.12.2013 (COD) to 31.08.2014 (SPCD). The annuity for the period from 14.12.2013 (COD) to 31.08.2014 (SPCD) is to be treated as part of the 1st annuity and not as not 'additional' annuity. Therefore, there would be no case of any additional annuity over and above 29.

Under the circumstances the Respondent's defence that 'Since the contract does not have any provision for additional annuity, claim 6 of the claimant must be rejected' cannot be accepted.

c. The Tribunal, therefore, decides that the Claimant is entitled to annuity for the period from 14.12.2013 (COD) to 31.08.2014 (SPCD) as claimed and the claim stands accepted. The Tribunal, accordingly, awards Rs.26,74,39,956/- towards this Claim. "

[Emphasis is ours]

12.1 Interpreting Article 27.2.2(b) and (c) and 27.2.3 of the Agreement, the Arbitral Tribunal held that the Appellant is entitled to Claim No. 6 which is for payment of annuity for a period of 260 days from the commercial operation date [14.12.2013] to the date of scheduled completion [31.08.2014] and such annuity is to be treated as first annuity payment and awarded Rs.26,74,39,956/- to the Appellant towards its Claim No. 6 along with interest thereon (Claim No. 7).

13. The Impugned Judgment however, while relying on Article 27.2.2 and 27.2.3 of the Agreement has held, that in case the commercial operation date is achieved before the scheduled completion date, the first annuity payment will be made six months after the scheduled completion date in terms of Article 27.2.2(b) of the Agreement and that the only benefit of an early completion is bonus under Article 28.1 of the Agreement.



14. Thus the learned Single Judge has held that the interpretation put by the Arbitral Tribunal is completely perverse and cannot be sustained and set aside Claim No.6 and the interest thereon (Claim No. 7), in the following manner:

“8. I cannot agree with the above interpretation of the Arbitral Tribunal. Infact, Clause 27.2 of the Concession Agreement required no interpretation as it is explicit. Clause 27.2.2 clearly states that if COD and the SPCD coincide the first Annuity Payment Date shall be six months after the COD; if the COD is achieved before SPCD, the first Annuity Payment Date shall be six months after SPCD; however, if the COD is achieved after SPCD, the first Annuity Payment Date shall be the next annuity payment date as per schedule ‘M’.

9. Schedule ‘M’ of the Concession Agreement gives the Annuity Payment Date and the Annuity Amount.

10. As under Clause 27.2.1 (c), in case COD is achieved after SPCD, the first Annuity Payment Date has been prescribed to be the next Annuity Payment Date as per Schedule ‘M’, a further clarification was required as to how the amount of Annuity has to be calculated. It is only for clarifying this aspect that clause 27.2.2 (c) stipulates as under:

11. This addition has no co-relation with Clause 27.2.2 (b) of the Concession Agreement. In case, the COD is achieved before the SPCD, Clause 27.2.2 (b) clearly and only states that the first Annuity Payment Date shall be six months after the Scheduled Four Lane date, that is SPCD, and nothing further. The only benefit to the respondent if COD is achieved before SPCD is in form of a Bonus under Clause 28.1.1 of the Concession Agreement.

12. Though, it is true that where the Arbitral Tribunal interprets a term of an Agreement, the Courts are not to interfere in such interpretation only because they would prefer another interpretation to the contractual terms, in the present case, the interpretation put forward by the Arbitral Tribunal for Clause 27.2.2 of the Agreement is, in my opinion, completely perverse and against a plain reading of the contractual terms and therefore, cannot be sustained. In the name of interpretation, the Arbitral Tribunal has re-written the contract between the parties, which is certainly not permissible:

i) Rajasthan State Mines and Minerals Ltd. v. Eastern Engineering Enterprises and Anr. (1999) 9 SCC 283.

ii) Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL) and Anr. (2018) 11 SCC 508.



13. I therefore, set aside the award of Claim no.6 which had been granted in favour of the respondent.

14. Claim no.7 of the respondent was towards interest on the amount that would be awarded on Claim no.6. As I have held that the respondent is not entitled to any amount under Claim no.6, consequentially the award of Claim no.7 in favour of the respondent is also set aside.”

15. Amongst the grounds provided in the Act for interference with Arbitral Award is patent illegality, which is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. [See: **PSA SICAL Terminals Pvt. Ltd. v Board of Trustees of V.O. Chidambranar Port Trust Tuticorin¹** and **MMTC Limited v. Vedanta Limited²**].

16. The Arbitrator examines the quality and quantity of evidence placed before him when he delivers his Arbitral Award and a view, which is possible on the facts as set forth by the Arbitrator must be relied upon. In **Delhi Airport Metro Express (P) Ltd. v. DMRC³**, the Supreme Court has held that the very object of the Act is that there should be minimal judicial interference with an Award. It is further held that the Arbitral Tribunal holds the final authority in both facts and law and contravention of law not linked to public policy is beyond the scope of judicial interference under “*patent illegality*”:

“28. This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by Courts while examining the validity of the arbitral awards. The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the Courts. **There is a disturbing tendency of Courts setting**

¹ 2021 SCC OnLine SC 508

²(2019) 4 SCC 163

³(2022) 1 SCC 131



aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.

29. 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 reappraise 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”.”

[Emphasis is ours]

17. Interpretation of a contract is a matter for an Arbitrator to determine. Even if such interpretation gives rise to an erroneous application of law, the Courts will generally not interfere, unless the error is palpably perverse or illegal and goes to the root of the matter. It is therefore to be seen whether the interpretation of first annuity and interest thereon is such that a fair minded or reasonable person could conclude as well, or if the interpretation by the



Arbitral Tribunal is patently illegal.

18. The Arbitral Tribunal has interpreted Article 27.2 and Article 28.1 of the Agreement to hold that payment of first annuity is due in addition to payment of bonus [under Article 28.1 of the Agreement] based on its interpretation of the Agreement. The learned Single Judge on the other hand has held that the only benefit for early completion is bonus under Article 28 of the Agreement and not annuity under Article 27 of the Agreement.

19. We are respectfully unable to agree with these findings of the learned Single Judge. As discussed above, Article 27.2.2(b) of the Agreement does provide for payment of first annuity in case the completion date is prior to the scheduled completion date. If we were to interpret that the initial annuity payment under Article 27.2.2 was only applicable to clause (c), it would render the separate provisions under sub-clause (a) and (b) of Article 27.2.2 otiose, as the first annuity payment date under both clause (a) and (b) of Article 27.2.2 would be the same i.e., 6 months after the scheduled completion date.

19.1 The Agreement thus, does contemplate payment of annuity early, subject to it not excluding 29 payments in all. The Arbitral Tribunal has given its interpretation to not exceed 29 payments.

20. We also find that the interpretation given by the Arbitral Tribunal is given after a detailed examination of the pleadings and evidence. The view taken by the Arbitral Tribunal in its interpretation does not ignore any vital evidence. Merely because another interpretation is possible is not a ground to set aside an Award or part thereof.



20.1 The Supreme Court in *Indian Oil Corpn. Ltd. v. Shree Ganesh Petroleum*⁴, had held that where the terms of a contract are capable of more than one interpretation, the Court cannot interfere with the Award only if the Court is of the opinion that another interpretation would have been a better one. Reliance is placed on the following extract of the *Indian Oil* case:

“45. The Court does not sit in appeal over the award made by an Arbitral Tribunal. The Court does not ordinarily interfere with interpretation made by the Arbitral Tribunal of a contractual provision, unless such interpretation is patently unreasonable or perverse. Where a contractual provision is ambiguous or is capable of being interpreted in more ways than one, the Court cannot interfere with the arbitral award, only because the Court is of the opinion that another possible interpretation would have been a better one.”

[Emphasis is ours]

21. Articles 27 and 28 of the Agreement when read together do provide for payment of both annuity and bonus. We find no reason to substitute the interpretation given by the Arbitral Tribunal.

22. The Appeal is accordingly allowed.

22.1 Since the prayers in the present Appeal have been restricted to setting aside paragraphs 8 to 14 of the Impugned Judgment, those paragraphs are set aside.

22.2 The findings of the Arbitral Tribunal under Claim Nos. 6 and 7 of the Award are restored.

⁴ (2022) 4 SCC 463



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22.3 There shall be no order as to costs.

(TARA VITASTA GANJU)
JUDGE

(RAJIV SHAKDHER)
JUDGE

DECEMBER 20, 2023/SA/r/yg