



2023:DHC:7361



\$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI*****Date of decision: 09.10.2023***+ O.M.P. (COMM) 281/2023, I.A. 14129/2023 (stay) & I.A. 14130/2023
(delay of 84 days in re-filing)**NATIONAL HIGHWAYS AUTHORITY OF INDIA**

..... Petitioner

Through: Ms.Madhu Sweta & Ms.Astha Dhawan,
Adv.

versus

M/S PCL SUNCON JV

..... Respondent

Through: Mr.Harsha Peechara, Mr.Arjun D Singh &
Mr.Lothingbemi T Lotha, Adv.**CORAM:****HON'BLE MS. JUSTICE REKHA PALLI****REKHA PALLI, J (ORAL)**

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (the Act) seeks to assail the award dated 30.01.2023 passed by the three-member Arbitral Tribunal. Vide the impugned award, the learned Tribunal while rejecting the counter claims of the petitioner, has awarded a sum of Rs.46,30,98,962 in favour of the respondent along with future interest @ 12% p.a.
2. Before dealing with the submissions of learned counsel for the petitioner, it may be appropriate to note the brief factual matrix necessary for adjudication of the present petition.
3. The petitioner is an autonomous body constituted under the National

Signature Not Verified

Digitally Signed
By: GARIMA MADAN
Signing Date: 11.10.2023
11:50:43**O.M.P. (COMM) 281/2023****Page 1 of 15**



Highways Authority of India Act, 1988 and has been set up as a Central Authority to develop, maintain and manage the National Highways entrusted to it by the Government of India. The respondent, on the other hand, is a joint venture registered under the Indian Companies Act, 1956 engaged in the business of construction.

4. The dispute in the present case arose from a 'Contract Agreement' dated 28.03.2002 entered into between the parties for "four laning and strengthening of the existing two-lane highway from km 317 to km 65 of NH-2 in the states of Uttar Pradesh and Bihar". As per the terms of the agreement, the project was to commence on 31.03.2002 and was to be completed within a period of 36 months. Consequently, the stipulated date of completion was fixed as 30.03.2005.
5. The work of the project was, however, inordinately delayed and the same was completed on 20.12.2010, for which delay, both parties sought claims against each other. While the work was still ongoing, the petitioner, through an order passed by the Engineer-in-Chief on 19.06.2008, levied liquidated damages of Rs.2,50,00,000/- on the respondent. Consequently, disputes between the parties arising out of the agreement dated 20.12.2010 were referred to a three-member Arbitral Tribunal.
6. Before the learned Tribunal, the respondent, besides raising a claim for interest and damages, raised the three claims whereas the petitioner raised five counter claims. For the sake of convenience, the claims and counter claims raised by the parties before the learned Tribunal may be noted in the following tabulation:



2023:DHC:7361



Claim No.	Claimed on account of	Claim Amount (Rs.)
1(a)UnderDispute No.13	Overstay / overheads Charges	57.84 Crores
1(b)UnderDispute No. 13	Waiver of LD imposed by the Petitioner and refund of LD deducted from IPC.	2.5 Crore
1(c)UnderDispute No.14	Rehabilitation of Bridge 58/1	40,04,000/-
2(a) &2(b)	Past and Pendente Lite Interest on the amount and at the rate as pleaded.	Amount not Computed
3	Cost of Arbitration	Rs. 10,00,000/-
Total		Rs.60,84,04,000/-

Counter Claim No.	Claimed on account of	Claim Amount (Rs.)
1	Loss due to Short recovery of LD	37,15,00,000/-
2.	1. Loss of Toll revenue from 20.07.2006 to 17.05.2008 for total 76 km 2. Loss of Toll revenue from 18.05.2008 to 20.12.2010 for 19	60,55,04,379/- 24,59,03,042/-
3.	1. Past Interest @12% p.a. Compounded Monthly for	76,49,18,500/-

Signature Not Verified

Digitally Signed
By: GARIMA MADAN
Signing Date: 11.10.2023
11:50:43

O.M.P. (COMM) 281/2023**Page 3 of 15**



	20.07.2006 to 30.11.2015 of 37.15 Crore as per Clause 60.8(b) of COPA 2. Past Interest @ 12% p.a. Compounded Monthly for	175,30,47,880
4.	Pendentelite Interest	@ 18% p.a. compounded monthly
5.	Future Interest	@ 18% p.a
6.	Cost of Arbitration	15,00,000/-

7. Vide the impugned award, the learned Tribunal has rejected all the counter claims of the petitioner and has awarded a sum of Rs.46,30,98,962/- in favour of the respondent, along with future interest @ 12% per annum. While awarding the sum of Rs.46,30,98,962/- in favour of the respondent, the learned Tribunal has allowed respondent's claim for a sum of Rs.22,49,00,000/- towards overstay and overheads charges for the delay in completion of the project and has also directed the petitioner to refund the sum of Rs.2,50,00,000 recovered by it as liquidated damage from the respondent. The Tribunal has also awarded a sum of Rs.20,42,36,462/- towards past and *pendente lite* interest @ 9% per annum.
8. Being aggrieved, the petitioner has approached this Court by way of the present petition assailing the impugned award.
9. In support of the petition, learned counsel for the petitioner while not denying that there was a delay in handing over the sites to the respondent leading to delay in completion of the project, begins by urging that the



Tribunal erred in awarding the sum of Rs.22,49,00,000/- towards overstay and overhead charges even though, no contemporary records had been provided as was required under clause 53.2 of the General Conditions of Contract (GCC). She contends that the learned Tribunal failed to appreciate that the claim of the respondent towards overstay and overhead charges was completely unsubstantiated as no reliance could be placed on the unverified Auditor/third party reports, which were required to be verified by the petitioner's engineer to qualify as contemporary records in terms of clause 53.4 of the GCC.

10. She next submits that similarly the direction to refund the liquidated damages imposed on the respondent by the petitioner vide letter dated 19.06.2008 was also wholly perverse as the learned Tribunal failed to appreciate that liquidated damages were imposed solely due to the respondent's poor performance and repeated defaults during the extended period. Furthermore, while awarding interest, the learned Tribunal also failed to appreciate that the petitioner could not be directed to pay interest for the period between 2018 and 2021, when the arbitration proceedings were terminated due to the respondent's own action. She therefore prays that the impugned award be set aside.

11. Before dealing with the three grounds on which the petitioner seeks to assail the impugned award, I may refer to the decision in *Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1* wherein the Apex Court has once again reiterated that the scope of interference with the arbitral award under section 34 of the Act is extremely limited. The Court while examining the findings in the arbitral award does not act as an appellate



authority and, therefore, cannot re-assess or re-appreciate the evidence led before the Arbitral Tribunal. Consequently, if the findings of the arbitral tribunal are based on a possible view of the matter, no interference is called for. In this regard, it may be useful to refer to para 24 and 25 of this decision, which read as under.

“24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.

25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.”

12. Having noted the contours of the limited jurisdiction being exercised by this Court under Section 34 of the Act, I may now deal with the grounds raised by the petitioner.



13.As noted hereinabove, the first plea of the petitioner is that the Tribunal while awarding the sum of Rs.22,49,00,000/- has erred in relying on the unverified Auditors report filed by the respondent, which it has been contended could not be treated as contemporary record in terms of clause 53.2 and 53.4 of the GCC. In order to appreciate this plea, it would be appropriate to note the relevant findings of the learned Tribunal in respect of this claim, as contained in para nos. 39.3 and 39.4 of the award. The same read as under:-

“39.3 Analysis and Findings of AT

a) Having regard to all the relevant facts and circumstances, contract provisions, arguments of the parties and legal provisions, the AT has already held hereinabove that the claimant is entitled to compensation for loss of overheads due to prolongation of the contract. The only question remains as to what would be the reasonable amount of compensation.

b) The claimant as per its SOC had claimed 57.84 crore. Subsequently, the claimant amended the claim amount to Rs.51,83,70,421 on the basis of audited administrative expenses incurred from the year 2004-05 upto 2010-11 which were filed on affidavit dated 11.10.2017 of Mr. Rabindra Nath Tagore, Authorized Signatory of the claimant (CD-7). As per CD-7, the total amount of administrative expenses is Rs.55,78,16,843. However, the claimant has reduced this amount by reducing six months period from the FY 2004-2005 for one/third portion of work of Section-3 and has considered overstay of only 264 days for FY 2010- 2011 and has accordingly claimed only Rs.51,83,70,421.

c) No doubt, there is some merit in the contention of the respondent that administrative expenses as per CD-7 on which basis the claimant has computed the claim amount cannot be held as contemporary records under clause 53.4 of Contract



Agreement nor the certificate of CA submitted belatedly in these proceedings by the claimant in support of the administrative expenses furnished as per CD-7 can be accepted as primary evidence. The AT is however of the view that whether or not the administrative expenses on which basis the claimant has claimed its amended amount of claim is acceptable as credible evidence, it could be no body's case that the execution of work during the prolongation period did not involve overheads expenses which are un-disputably time related. It is therefore held that the claimant is entitled to reasonable compensation for having to bear unanticipated and unavoidable liability of the overheads expenses during the prolongation period.

d) Section 55 and Section 73 of the Indian Contract Act do not lay down any specific methodology for computation of the compensation for loss on account of breach committed by the other party. AT is therefore of the view that the methodology to be adopted should be such as sounds reasonable, logical and rational. The AT proceeds accordingly.

e) It is noted that the work has been executed as per MoRTH items of work and specifications. As per MoRTH Standard Data Book, overheads for the road project costing more than Rs.50 Cr as is the present case, is considered as 8% of contract price. Therefore, it would be fair and reasonable to work out the amount of compensation considering overheads factor as 8% of contract price f) Total contract price is Rs.396,47,78,901. As per MoRTH Standard data book, this amount includes overheads and contractor's profit @10%. The prime cost on which the overheads would apply is therefore = $\text{Rs.}396,47,78,901 \times (100/118.8) = \text{Rs.}333,73,55,977$.

g) The overheads expenses are time related. Accordingly, the overheads expenses per month as built in the contract price for the stipulated period can be considered as a basis for computation of compensation for the loss on account of overheads during the prolongation period. Thus, in cases, where the entire project has only one completion period, the



loss on account of overheads expenses during the extended period can be calculated in the manner give below.

h) If the prime cost of the project is 'A', the overheads expenses incorporated in the contract price for stipulated period 'T' would be = $0.08 \times A$ (say, 'B'). The overheads expenses incorporated in the contract price per month would accordingly be = UT (say, 'C'). Thus, the overheads expenses for the extended period 't' would be = $C \times t$.

i) In the present case however, the total project length was divided in to 3 Sections to be started from the same date, i.e., 31.03.2002 (Date of commencement of work) but with different stipulated periods of completion and admittedly, the different Sections were progressively completed on different dates. Finally, the entire work was completed on 20.12.2010. Hence, it is not feasible in this case to apply overheads per month as built in the contract price for the entire period of prolongation and considering prime cost for the entire project.

j) It is also a matter of record that none of the 3 sections was completed on a particular date in full. The work in 24.50 kms of section-1 was recorded as completed on 21.05.2006, the work in 24.00 kms of section-2 was recorded as completed on 28.02.2006, 19.05 km of section-3 was recorded as completed on 21.05.2006 (C-4, Page-100 of CD-2). The work in the remaining stretch of 8.62 kms was also completed on different dates. The work in the stretch of 8.31 kms was completed on 07.04.2010 (C-5, Page -103 of CD-2), whereas the work in the last stretch of 0.31 kms was completed on 20.12.2010 (C-6, Page-107 of CD-2).

k) Given the different actual dates of completion of the work in different stretches as brought out above and considering the fact that the overheads expenses are time related, the only feasible method to compute the loss would be to apportion the prime cost of the project to different stretches and work out the amount of overheads by taking into account the extent of delay in completion of the work in the relevant stretch of the road, the prime cost of the relevant stretch and overheads factor as 7%



(as claimed by the claimant) instead of 8% allowed as per MoRTHData Book. Accordingly, the amount of compensation on account of loss of overheads had been worked out in the Table below:

* * * * *

m) The overheads charges as calculated above are based on the original contract price as Rs.396,47,78,901. The respondent, as per its amended statement of defence has contended that the final contract price is Rs.427.62 Cr. and the same has not been denied by the claimant. The respondent has accordingly argued that it is implied that the claimant utilized a part of the overhead charges pertaining to the extended period by executing additional work. The AT agrees with the contention of the respondent and accordingly it is held that the overheads charges as calculated above has to be reduced in the proportion of the original contract price to the final contract price. The amount payable is accordingly = $26,95,21,045 \times (396,47,78,901/427,62,00,000) = \text{Rs.}24,98,92,744$.

n) AT is also of the view that being a prudent contractor, the claimant was required to mitigate its losses. Further, the overhead charges also include certain onetime expenditure and are thus not time related. It is therefore considered fair and reasonable to allow only 90% of the amount computed above towards loss of overheads i.e., Rs.22,49,03,469, say, 22,49,00,000.”

14.From a perusal of the aforesaid findings of the learned Tribunal, it is evident that the claim for overstay and overhead charges has not been allowed merely on the basis of the Auditor’s report furnished by the respondent. On the other hand, the Tribunal agreed with the petitioner that the documents i.e. administrative expenses and certificate of the



Auditor, could not be treated as contemporary documents under clause 53.4 of the GCC. The learned Tribunal however found that on account of gross delay in handing over various sites to the respondent, the claim of the respondent for fair compensation deserved to be allowed. Further, taking into account that Section 55 and Section 73 of the Indian Contract Act do not provide any specific methodology for computing compensation for losses incurred by a party on account of the breach committed by the other, the Tribunal proceeded to compute the quantum of compensation on the basis of the contract price already agreed upon between the parties. This approach adopted by the Tribunal cannot be said to be, in any manner, perverse or illegal. In my view, the learned Tribunal has, after considering the evidence led by the parties, given detailed reasons for awarding the sum Rs.22,49,00,000/- towards overstay and overhead charges with which findings no interference is called for.

15. Now, coming to the second plea of the petitioner that the tribunal has erred in directing refund of liquidated damages in favour of the respondent. In this regard, the findings of the learned Tribunal are contained in para 42 and 43 of the award and the same read as under:

42. Analysis and Findings of AT

42.1 Having regard to the entire relevant facts, contract provisions and the conduct of the parties, as well as legal position, the AT has already held hereinabove that the work was delayed entirely due to the reasons attributable to the respondent and that the respondent was in breach on several counts. In this view of the matter, the claimant is not liable to pay any Liquidated Damages under clause 47.1 of the contract



agreement.

43. Award

AT awards a sum of Rs.2,50,00,000 under claim No. 1(b) to be paid by the respondent to the claimant.

16. In my view, once the Tribunal found that the petitioner was responsible for the prolongation of the work on account of the delay in handing over the sites to the respondent, a necessary corollary thereof was that no liquidated damages could be imposed on the respondent on this ground. In these circumstances, the learned Tribunal was, in my view, justified in holding that the respondent could not be saddled with liquidated damages for causing delay in completion of the work. I, therefore, find no perversity or illegality in the directions issued by the Tribunal to the petitioner for refund of liquidated damages to the respondent.

17. Now coming to the final plea of the petitioner that the tribunal has erred in awarding *pendente lite* interest for the period between 2018 and 2021, during which the arbitration proceedings were terminated. The relevant findings of the Tribunal with respect to the award of interest as discussed in para 49.3 of the award, read as under:

“49.3 There is no such agreement between the parties that no interest will be paid on the award amount up to the date of award. The AT is therefore of the view that the claimant is entitled to reasonable interest on the award amount up to the date of award as the claimant was deprived of the opportunity to use the money due to it, to its benefit. Accordingly, the Arbitral Tribunal decides to award past and pendente lite interest as under:

a) The AT has awarded a sum of Rs.22,49,03,469 against Claim



No.1(a) under Dispute No.13 in favour of the claimant which is in the nature of damages. Having regard to the facts and circumstances of the case, the AT is of the view that it would be reasonable to award interest @9% p.a. (Simple) from the due date upto the date of award (30.01.2023). For the purpose of this claim, the due date has to be taken as the date on which the arbitration was invoked which date is 07.01.2015. However, the claimant has claimed interest from the date the AT was constituted which date is 02.07.2015. Accordingly, the claimant is held as entitled to pendente lite interest on this amount for the period from 02.07.2015 upto 30.01.2023, i.e., for 2769 days = $22,49,00,000 \times 2769 / 365 \times 0.09 = \text{Rs.}15,35,54,326 \text{ (X)}$.

b) The AT has also awarded a sum of Rs.2,50,00,000 under claim No.1(b). This amount had been recovered towards LD on 19.06.2008 by the respondent which the Tribunal has held as wrongful and illegal. Hence, the claimant is entitled to past as well as pendente lite interest on this amount for the period from 19.06.2008 upto 30.01.2023 (the date of award).

The claimant has claimed past interest as per clause 60.8(b) of COPA for period upto the date of constitution of the AT and for the period beyond this date, it has claimed pendente lite interest @18% p.a. till date of award.

As per clause 60.8(b) of COPA at Page — 248 of CA Part-1, read with Appendix to Bid at Page — 74 of CA Part-1, in the event of the failure of the Employer to make payment as per IPC within the specified time, the Employer shall pay to the contractor interest @12% p.a. compounded monthly.

As the recovery of Rs.2.5 crore was made by the respondent from the IPC, this recovery has to be construed as denial of admissible payment as per IPC for the work done by the claimant and accordingly the claimant is entitled to past interest as per clause 60.08(b) of COPA for the period from 19.06.2008 upto 02.07.2015 being the date of constitution of AT. The amount of interest is accordingly worked out as



Rs.3,36,12,959 (Y) as under:

Principal Amount	Rate of interest compounded monthly	Period		No. of days	Interest Amount
		Start date from	AT's constitution		
2,50,00,000	12%	19.06.2008	02.07.2015	2569	3,36,12,958
			No of month	86.6333	

The claimant has claimed pendente lite interest on Rs.2,50,00,000 from the date of constitution of the AT (02.07.2015) upto the date of award (30.01.2023) i.e., for 2769days @18% p.a. However, as decided above, the claimant is held as entitled to interest @9% p.a. which works out as under:

$$2,50,00,000 \times (2769/365) \times 0.09 = \text{Rs.}1,70,69,178 \text{ (Z).''}$$

18.From a perusal of the aforesaid findings of the learned Tribunal, it emerges that though the respondent had claimed past and *pendente lite* interest @18% p.a., the Tribunal has, after examining all relevant factors, awarded interest @ 9% p.a. only. While awarding interest, the Tribunal has taken into account that the respondent was deprived of utilizing the money payable to it for this entire period between 02.07.2015 to 30.01.2023. In my view, merely because the proceedings remained suspended for a part of this period, would not change the fact that the respondent was all along deprived of the opportunity to utilize the amount. This award of interest @ 9% p.a. as directed by the Tribunal was, therefore, only meant to compensate the



2023:DHC:7361



respondent for the loss of opportunity to use the money during this period between 02.07.2015 to 30.01.2023. I, therefore, find no reason to interfere with the award of past and *pendente lite* interest by the learned Tribunal.

19. In the light of the aforesaid, I find absolutely no reason to differ with the conclusions arrived at by the learned Arbitral Tribunal. There is neither any patent illegality nor any perversity in the impugned award warranting interference of this Court under section 34 of the Act. The petition being meritless is, along with all pending application, dismissed.

(REKHA PALLI)

JUDGE

OCTOBER 9, 2023

kk

Signature Not Verified

Digitally Signed
By: GARIMA MADAN
Signing Date: 11.10.2023
11:50:43

O.M.P. (COMM) 281/2023

Page 15 of 15