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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 09.01.2024*

+ **FAO(OS) (COMM) 3/2024**

**THE NATIONAL HIGHWAYS AUTHORITY
OF INDIA**

..... Appellant

Through: Mr Manish K. Bishnoi with Mr
Hitesh Lodwal, Advocates.

versus

**M/S D.S. TOLL ROAD PVT. LTD. THROUGH
DIRECTOR/MANAGING DIRECTOR**

..... Respondent

Through: Mr Jayant Mehta, Senior
Advocate with Mr Ankur
Kashyap, Mr Hasan Murtaza,
Ms Bushra Waseem, Mr
Sameer Sharma and Mr
Purushartha Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MS. JUSTICE TARA VITASTA GANJU

VIBHU BAKHRU, J.

1. The appellant, National Highways Authority of India (hereafter 'NHAI') has filed the present intra court appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act') impugning a judgement dated 19.09.2023 (hereafter 'the impugned judgement'), whereby the learned Single Judge has rejected NHAI's application being O.M.P. (COMM.) 546/2016 captioned *National Highways Authority of India v. D.S. Toll Roads Private Limited*. NHAI had filed the said application under Section 34 of the A&C Act, impugning an arbitral award dated 07.07.2016 (hereafter 'the impugned award').

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By: DUSHYANT
RAWAL
Signing Date: 18.01.2024



2. The impugned award was rendered by an arbitral tribunal (hereafter '**the Arbitral Tribunal**') comprising of three members, in the context of the disputes that had arisen in connection with Concession Agreement dated 30.01.2006 (hereafter '**the Concession Agreement**') and Supplementary Agreement dated 06.03.2014 (the aforesaid agreements are hereafter collectively referred to as '**the Agreement**').

FACTUAL CONTEXT

3. On 27.05.2005, NHAI issued a notice inviting tenders for 'Design, Construction, Development, Finance, Operation and Management of Km. 375.275 (start of proposed flyover at Dindigul Bypass) to Km. 426.6 (Samayanallore) on NH-7 in the State of Tamil Nadu on build, operate and transfer (BOT) basis'.

4. NHAI states that in response to the said notice, Reliance Energy Limited submitted its bid, which was found to be competent and most economical. Accordingly, on 30.09.2005, the said company was declared as a successful bidder and NHAI issued a letter of acceptance of the bid.

5. On 09.11.2005, the said company informed NHAI that it had incorporated the respondent (hereafter '**DTRL**') as a Special Purpose Vehicle for executing the Project.

6. Thereafter, the parties entered into the Concession Agreement. In terms of the said Agreement, DTRL was required to complete the



work within a period of thirty months from the date of the Notice to Proceed and the concession period was agreed as twenty years from the Appointed Date. In terms of the Concession Agreement, the stipulated date for the commencement of the Project was 29.07.2006; the scheduled Project Completion Date was 29.01.2009; and the scheduled Commercial Operation Date (COD) was 30.01.2009.

7. The Project was delayed. The Provisional Completion Certificate under Clause 16.5 of the Concession Agreement was issued on 27.09.2009. Accordingly, DTRL commenced the commercial operation of the Project road with effect from 28.09.2009, that is, after a delay of almost eight months from the COD.

8. According to DTRL, the delay was on account of failure on part of NHAI to provide the site free from encumbrances/hindrances within the time stipulated under the Concession Agreement. DTRL also claimed that there was a delay in release of positive grant of ₹31 crores and accordingly, claimed interest for the period of delay.

9. The Engineer did not recommend extension of the COD or the completion date. By a letter dated 28.05.2010, the Engineer recommended payment of compensation of ₹38,15,360/- for the delay in handing over of site and further recommended that DTRL be paid weekly damages for delay in issuance of the COD quantified at ₹99,22,500/-.

10. DTRL raised disputes and issued a letter dated 05.12.2013 invoking the Arbitration Agreement. Thereafter, the Arbitral Tribunal



was constituted.

ARBITRAL PROCEEDING

11. DTRL filed a Statement of Claim before the Arbitral Tribunal raising claims aggregating to ₹82,53,29,379/-. A tabular statement setting out the brief details of the claims as set out in the impugned award, is reproduced below:

“1.	Compensation for additional expenses incurred on account of stay of Plant and Equipment at site on account of extended construction period:	Rs. 29,60,96,730/-
2.	Compensation for additional increase in costs of input materials during the extended period:	Rs. 2,33,40,479/-
3.	Compensation for loss of opportunity and profits due to the prolongation of the construction period:	Rs. 9,06,45,316/-
4.	Compensation for loss of revenue due to delay in COD:	Rs.27,87,00,000/-
5.	Compensation for additional Overhead costs due to the extended construction period:	Rs.12,63,63,315/-
6.	Compensation due to delay in release of promised grant:	Rs.1,01,83,538/-
	TOTAL:	Rs.82,53,29,379/-”

12. DTRL claimed that delay in execution of the works was on account of the following events:

- “a. Delay in handing over of existing ROW to the Claimant.
- b. Delay in handing over of additional ROW for 4-laning



of the Project Highway.

- c. Delay in handing over of additional ROW for service road construction.
- d. Delay in payment of compensation and consequent removal of existing structures, trees and utilities in the additional land required for 4-laning of the Project Highway.
- e. Non-availability of additional land for utility shifting.
- f. Disruption to work due to agitation by local people.
- g. Delay due to Non-Political Force Majeure [Rainfall, Strike etc].
- h. Delay in providing necessary approval and certification by the Respondent including delays due to Change of Scope work.”¹

13. NHAI disputed that DTRL was entitled to additional costs or damage or losses on account of the prolongation of works, principally, on the ground that that no such amounts were payable under the Agreement. NHAI also alleged that DTRL was deficient in performing its obligations.

IMPUGNED AWARD

14. The Arbitral Tribunal considered the disputes between the parties. It found that there were inordinate delays on the part of NHAI in acquiring of land and the proceedings for acquisition of land had continued even after the scheduled Project Completion Date. The Arbitral Tribunal concluded that “*as a consequence of the defaults of*

¹ Paragraph 3.6 of the Statement of Claim



the Respondents (NHAI), there was delay of 241 days in the issuance of the COD". The Arbitral Tribunal noted that there were other reasons for delay, including delay in payment of compensation for removal of structures and shifting of utilities. However, the main reason was the non-availability of the land/additional land for four-laning, service road and shifting of utilities.

15. The Engineer had also recommended that compensation be paid to DTRL but quantified the same on the basis of sub-clauses 13.5.1 and 13.5.2 of the Concession Agreement. Sub-clause 13.5.1 of the Concession Agreement provides for compensation at the rate of ₹1000 per month per thousand square meters for failure on part of NHAI to make available the existing ROW before the stipulated date. Further, the said sub-clause provides for increased compensation of ₹2000 per month after the COD. Similarly, sub-clause 13.5.2 of the Concession Agreement provides a compensation for delay in making available additional ROW. However, the Arbitral Tribunal did not accept that the compensation payable to DTRL was limited to the amounts as stipulated in sub-clauses 13.5.1 and 13.5.2 of the Concession Agreement.

16. The Arbitral Tribunal examined sub-clause 31.2 of the Concession Agreement and sub-clauses 13.5.1 and 13.5.2 of the Concession Agreement and held that the said sub-clauses were required to be read harmoniously. The Arbitral Tribunal held that in the given facts, the compensation payable to DTRL could not be limited to the amounts as stipulated under sub-clauses 13.5.1 and



13.5.2 of the Concession Agreement.

17. The Arbitral Tribunal proceeded to examine the claims made by DTRL under various heads and partially allowed the same. The operative part of the impugned award reads as under:

“29. On the basis of our discussion and findings supra, and in view of difference of opinion between Shri Surjeet Singh & Shri S.S. Agarwal on the one hand and Shri Arun Kumar Sinha on the other, we award by majority to the Claimant against the Respondent as below:

1. A sum of Rs.14,05,55,257/- towards its claim No.1 relating to the stay of plant & equipment at site during the extended period; along with interest at 2% above the SBI PLR from the date of COD to the date of award.
2. A sum of Rs.1,98,39,409/- along with interest at 2% above the SBI PLR from the date of COD to the date of award towards its claim No.2 relating to additional expense incurred on materials during the extended period.
3. A sum of Rs.90,64,532/- along with interest at 2% above the SBI PLR from the date of COD to the date of award towards claim No.3 relating to loss of opportunity / profit because of prolongation of the construction period.
4. A sum of Rs.24,38,62,500/- along with interest @ 2% above the SBI PLR from a date 8 months after the COD to the date of award towards claim No.4 relating to loss of revenue because of delayed COD.
5. A sum of Rs. 5,62,22,103/- along with interest @ 2% above the SBI PLR from the date of the COD to the date of award towards claim No.5 as compensation for overheads during the extended period.



6. A sum of Rs.1,01,83,539/- towards interest on the delayed payment of equity support grant.
7. The amounts awarded in S. No. 1 to 6 above may be paid within a period of 60 days from today, failing which the Claimant would also be entitled to interest @ 12% p.a. on the amounts awarded inclusive of interest, from the date of award till realization.
8. The Respondent has not paid its share of the fee (except Rs.2,00,000/-) to each Arbitrator, which has also been paid by the Claimant. We award additionally on this count a sum of Rs.59,25,000/- to the Claimant along with 12% p.a. interest from 10th February 2016 till realization. There shall be no further order as to costs.”

IMPUGNED JUDGEMENT

18. NHAI filed an application for setting aside the impugned award [O.M.P. (COMM) 546/2016] on several grounds. However, subsequently, the learned counsel confined the challenge on the limited ground that the compensation awarded was in excess of the amounts as stipulated under sub-clauses 13.5.1 and 13.5.2 of the Concession Agreement. It was contended on behalf of NHAI that the Arbitral Tribunal had erred in awarding compensation on the basis of the sub-clause 31.2 of the Concession Agreement as the damages payable for delay in handing over Right of Way (**ROW**) and additional ROW were required to be computed on the basis of the amounts as stipulated under sub-clauses 13.5.1 and 13.5.2 of the Concession Agreement.

19. The learned Single Judge examined the Arbitral Tribunal's reasoning in the impugned award and rejected NHAI's challenge. The



Court held as under:

“10. A reading of sub-clause 13.5.2 would show that the sums to be awarded as damages against the failure of NHAI to make available the Additional Right of Way would fall within the domain of the said clause only if the provisional completion certificate was not delayed or affected as a consequence of delay/non-fulfilment of reciprocal promise by the NHAI.

11. In the considered opinion of this court, the damages awarded by the AT are in conformity of the aforesaid sub-clauses. It is the second proviso to sub-clause 13.5.2 which would need to be considered and thus, the computation of damages would be in accordance with sub-clause 31.2.”²

20. The learned Single Judge further held that the view expressed by the Arbitral Tribunal was a plausible one. The learned Single Judge referred to an earlier decision of this Court in *National Highway Authority of India v. N.K. Toll Road Ltd.*³, whereby the Court had declined to interfere with the arbitral award, which was premised on a similar interpretation of the similarly worded sub-clauses of the Concession Agreement.

21. Accordingly, NHAI’s application was rejected by the impugned judgement. Aggrieved by the same, NHAI has preferred the present appeal.

Submissions

22. Mr. Manish K. Bishnoi, learned counsel appearing for NHAI submitted that the learned Single Judge had mis-interpreted sub-

² Paragraph no. 10 and 11 of the impugned judgement

³ 2017 SCC OnLine Del 7663



clauses 13.5.1, 13.5.2 and 31.2 of the Concession Agreement. He submitted that a plain reading of the said sub-clauses indicated that the parties had agreed that the compensation for providing access to the ROW and additional ROW would be compensated by payment of the amounts as stipulated in sub-clauses 13.5.1 and 13.5.2 of the Concession Agreement. He submitted that the proviso to the said clauses expressly provided that the Completion Certificate or the Provisional Completion Certificate would not be affected or delayed as a consequence of the work continuing on parts of ROW that were handed over belatedly, for which compensation was provided under sub-clauses 13.5.1 and 13.5.2 of the Concession Agreement. He submitted that the Arbitral Tribunal, as well as the learned Single Judge, had grossly erred in interpreting the said sub-clauses to mean that sub-clauses 13.5.1 and 13.5.2 of the Concession Agreement would be inapplicable where delay has resulted in delay of the COD.

23. In addition to the above, Mr Bishnoi also assailed the impugned award on three other grounds. First, he submitted that the Arbitral Tribunal had grossly erred in determining the amount payable in respect of claim no.1 (claim for compensation for additional expenses incurred on account of stay of plant and equipment at site on account of extended construction period) without any evidence to support such quantification. He submitted that the Arbitral Tribunal had adopted the cost of plant and equipment as 20% of the cost of the Project without any cogent material available and without affording an opportunity to NHAI to contest the same. Second, he submitted that the Arbitral



Tribunal had grossly erred in awarding damages against claim no.3 (compensation for loss of opportunity and profits due to prolongation of construction period) despite observing that DTRL had not submitted adequate proof for such loss. Lastly, he submitted that the Arbitral Tribunal had erred in awarding compensation for loss of revenue (claim no. 4) on the basis of the financial model of the Project, which was submitted at the initial stages, *inter alia*, for achieving financial closure.

Reasons and Conclusion

24. At the outset, it is material to note that NHAI had confined the challenge to the impugned award before the learned Single Judge to a singular ground – that the compensation awarded by the Arbitral Tribunal was contrary to sub-clauses 13.5.1 and 13.5.2 of the Concession Agreement. According to NHAI, the Arbitral Tribunal's interpretation of the sub-clauses is *ex facie* erroneous and not a plausible view.

25. This is expressly noted by the learned Single Judge in paragraph 6 of the impugned judgement. However, before this Court Mr. Bishnoi had sought to raise other grounds of challenge as well, which were not canvassed or pressed before the learned Single Judge.

26. As noted hereinbefore, the Arbitral Tribunal had rejected NHAI's contention that the compensation payable to DTRL for the inordinate delay was confined to the amounts as stipulated under sub-clauses 13.5.1 and 13.5.2 of the Concession Agreement. The Arbitral



Tribunal's conclusion was premised on the interpretation of the said sub-clauses as well as sub-clause 31.2 of the Concession Agreement. The said sub-clauses are set out below:

“13.5.1 Existing right of way

Existing right of way shall be made available to the Concessionaire pursuant hereto by NHAI free from all Encumbrances and without the Concessionaire being required to make any payment to NHAI on account of any costs, expenses and charges for the use of such Sites for the duration of the Concession Period save and except as otherwise expressly provided in this Agreement. NHAI shall procure for the Concessionaire access to the entire existing right of way for construction of main carriageway, free of Encumbrances, on or before the Appointed Date. Provided, however, that if NHAI does not enable such access to any part or parts of the existing right of way for any reason other than a Force Majeure Event or breach of this Agreement by the Concessionaire, NHAI shall pay to the Concessionaire Damages at the rate of Rs. 1,000 (Rupees one thousand) per month per 1,000 (one thousand) sq. meters or part thereof if such area is required by the Concessionaire for Construction Works. Such Damages shall be raised to Rs.2,000 (Rupees two thousand) per month after COD if such area is essential for the smooth and efficient operation of the Project Highway. Provided further that the Completion Certificate or the Provisional Certificate, as the case may be, for the Project Highway shall not be affected or delayed as a consequence of such parts of the existing right of way remaining under construction after the Scheduled Project Completion Date.

13.5.2 Additional right of way

Additional right of way for construction of main carriageway shall be made available to the Concessionaire as per the handing over schedule mentioned herein free from all encumbrance and



without the Concessionaire being required to make any payment to NHAI on account of any costs, expenses and charges for the use of such additional right of way for the duration of the Concession Period. 50% (fifty percent) of Additional Right of way for construction of main carriageway on or before 6 (six) months from the Appointed Date, balance 50% (fifty percent) of the Additional right of way for construction of main carriageway on or before 12 (twelve) months from the Appointed Date. Additional right of ways for service roads and other facilities shall be handed over to the Concessionaire on or before 18 (eighteen) months from the Appointed Date. On or after the Appointed Date, the Concessionaire shall commence, undertake and complete all Construction Works on the Project Highway in accordance with this Agreement. Provided, however, that if NHAI does not enable such access to any part or parts of the Additional right of way for any reason other than a Force Majeure Event or breach of this Agreement by the Concessionaire as per the schedule mentioned herein, NHAI shall pay to the Concessionaire Damages at the rate of Rs. 1,000 (Rupees one thousand) per month per 1,000 (one thousand) sq. meters or part thereof if such area is required by the Concessionaire for Construction Works. Such Damages shall be raised to Rs. 2,000 (Rupees two thousand) per month after COD if such area is essential for the smooth and efficient operation of the Project Highway. Provided further that the Completion Certificate or the Provisional Certificate, as the case may be, for the Project Highway shall not be affected or delayed as a consequence of such parts of the existing right of way remaining under construction after the Scheduled Project Completion Date.

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- 31.2 In the event of NHAI being in material default of this Agreement and such default is cured before Termination, NHAI shall pay to the Concessionaire as compensation, all direct additional costs suffered or incurred by the Concessionaire arising out of such



material default by NHAI, in one lumpsum within 30 (thirty) days of receiving the demand or at NHAI's option in 3 (three) equal semi-annual installments with interest @ SBI PLR plus 2% (two per cent).”

27. The Arbitral Tribunal had considered the aforesaid clauses of the Concession Agreement and had concluded that the same are required to be read in a harmonious manner. The relevant extract of the impugned award is set out below:

“12. Sub-clause 13.5.1 provides for a predetermined compensation @ Rs.1000/- per month for 1000 sqm or part thereof in case of failure of the Respondent making available the Existing right of way on or before the stipulated date. The compensation would be raised to Rs.2000/- per month after the COD. Similar is the provision in sub-clause 13.5.2 in respect of additional right of way. The very language of the sub-clauses (specially the provision of doubling of the damages after COD) implies that these compensations are applicable only in cases where the provisional Completion Certificate and the COD is not affected or delayed for want of completion of the work on these stretches of land. To make the matter amply clear, a proviso has been added to both these clauses as below:

“Provided further that the Completion Certificate or the Provisional Certificate, as the case may be, for the Project Highway shall not be affected or delayed as a consequence of such parts of the existing right of way remaining under construction after the Scheduled Project Completion Date.”

Explicitly, therefore, these sub-clauses were included in the Concession Agreement for such minor defaults which did not affect or delay the issue of the Provisional Completion Certificate for want of work on such land remaining incomplete. We do not find



these sub-clauses applicable to the present case before us where the provisional completion certificate and the COD was adversely affected and delayed.

13. There is another stipulation in the Concession Agreement which we find apt to the present case before us. Sub-clause 31.2 of the Concession Agreement specifies payment of compensation for material breach by the respondent, which we reproduce below:

“31.2 In the event of NHAI being in material default of this Agreement and such default is cured before Termination, NHAI shall pay to the Concessionaire as compensation, all direct additional costs suffered or incurred by the Concessionaire arising out of such material default by NHAI, in one lumpsum within 30 (thirty) days of receiving the demand or at NHAI’s option in 3 (three) equal semi-annual installments with interest @ SBI PLR plus 2% (two per cent).”

14. Not only a clause in the Concession Agreement has to be read in its entirety but also no clause in a contract can be read in isolation. Reading sub-clauses 13.5.1 & 13.5.2 in their entirety (including the proviso) and sub clause 31.2, we come to the conclusion that compensation only as per sub-clause 31.2 is admissible for the material default by the Respondent, when the COD was affected and delayed. Neither the proviso in sub-clauses 13.5.1 & 13.5.2 can be ignored, nor can the stipulations in sub-clause 31.2 be ignored.
15. We are required in arbitration to act according to the substantive law of the land, which in this case is the Indian Contract Act. The Claimant has cited section 53/54/55/73 of the Indian Contract Act for compensation on account of the defaults of the Respondent NHAI. The compensation and losses claimed by the Claimant arose directly & naturally in the usual course of things, from the material breach by



the Respondent NHAI and it is, therefore, entitled to be duly compensated.”

28. The contention that sub-clauses 13.5.1 and 13.5.2 of the Concession Agreement are required to be interpreted in the manner as canvassed by NHAI, is not insubstantial. However, the scope of examination under Section 34 of the A&C Act is limited. The Court is not required to re-adjudicate the disputes. It cannot supplant its view in place of that of the Arbitral Tribunal. It is settled law that the Arbitral Tribunal is the final adjudicator of disputes. In *M.S.K. Projects IJV Ltd. v. State of Rajasthan*⁴, the Supreme Court had authoritatively held that the question as to interpretation of the contract falls squarely within the jurisdiction of the arbitral tribunal. It observed as under:

“17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error...”

29. The Court can set aside an arbitral award only if it finds that the same is vitiated by patent illegality on the face of the record. In *Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation Limited*⁵, the Supreme Court had explained the scope of interference on the ground of patent illegality as under:

“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

⁴ (2011) 10 SCC 573

⁵ (2022) 1 SCC 131



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”.”

30. In the present case, we are unable to accept that the Arbitral Tribunal’s interpretation of sub-clauses 13.5.1, 13.5.2 and 31.2 of the Concession Agreement is not a possible view. We reject the contention that the Arbitral Tribunal’s interpretation of the aforesaid sub-clauses is one that no reasonable person could accept.

31. Mr. Bishnoi conceded that in *National Highway Authority of India v. N.K. Toll Road Ltd.* (*supra*), the Court had rejected the challenge to an arbitral award, which rested on an interpretation of sub-clauses 13.5.1, 13.5.2 and 31.2 of the Concession Agreement as accepted by the Arbitral Tribunal. The Coordinate Bench of this Court had rejected NHAI’s challenge to the said decision by an order dated



26.07.2023 passed in *FAO(OS)(COMM) 113/2017* captioned *National Highways Authority of India v. N.K. Toll Road Ltd.* NHAI had preferred a Special Leave Petition (being SLP(C) No.23840/2023) before the Supreme Court, which was also rejected by an order dated 10.11.2023. The Supreme Court had observed that no case of interference was made out in exercise of jurisdiction under Article 136 of the Constitution of India.

32. We find no infirmity with the learned Single Judge's view that the Arbitral Tribunal's interpretation is a plausible one.

33. In view of the above, the present appeal is liable to be dismissed.

34. As noted above, in addition to assailing the impugned judgement on the ground that the Arbitral Tribunal had misinterpreted the sub-clauses of the Concession Agreement, Mr Bishnoi had sought to assail the impugned judgement on other grounds as well. Clearly, NHAI is not entitled to challenge the impugned award on further grounds after having expressly confined its challenge to the singular ground before the learned Single Judge.

35. Having stated the above, we have also briefly examined the additional grounds as urged by Mr. Bishnoi. The contention that the compensation awarded against claim no.1 is without any material is, *ex facie*, erroneous. DTRL had claimed a sum of ₹29,60,96,730/- on the ground of additional expenses incurred for plant and equipment at site on account of the extended construction period. DTRL had also



produced a list of plant and machinery that was required to be maintained and had computed the compensation on the basis of the rates for such plant and machinery as stipulated in the data book of the Ministry of Road Transport and Highways and had further reduced the said rate by 40% to arrive at an hourly dry rate. Thus, it is clear that DTRL's claim was based on the material produced by it. However, the Arbitral Tribunal had reduced the compensation by restricting the cost of plant and equipment to 20% of the cost of Project and, accordingly, had computed the per day cost of the plant and equipment in proportion to the period of delay. The Arbitral Tribunal had reasoned that since DTRL was required to maintain the plant and machinery on site for a period of thirty months, the proportionate cost (on the basis that Plant and Machinery was 20% of the cost of Project) for a period of eight months could be worked out. This was further reduced by 15% as an allowance for possible mitigation for such losses. It is material to note that the Arbitral Tribunal had accepted DTRL's entitlement to such compensation, but had reduced the amount on the aforesaid basis. Mr. Bishnoi had submitted that he did not question the Arbitral Tribunal's decision regarding DTRL's entitlement to the compensation on account of plant and machinery for the extended period, but was questioning the manner in which the same was computed. It is apparent from the impugned award that the Arbitral Tribunal had worked out a method to reduce DTRL's claim, which was supported by sufficient material.

36. The Arbitral Tribunal had accepted that DTRL was entitled to



compensation for loss of opportunity and profits due to prolongation of the construction period. However, the Arbitral Tribunal did not accept DTRL's computation of the claimed amount of ₹9,06,45,316/-. The Arbitral Tribunal found that DTRL had not produced sufficient proof for establishing the quantum as claimed. Accordingly, the Tribunal awarded nominal damages. It is well-settled that where a party, which is entitled to compensation, is unable to establish the same, nominal damages can be awarded. It is also well-settled that nominal damages are not necessarily restricted to a token amount. In the present case, the Arbitral Tribunal had quantified the nominal damages to 1% of the amount as claimed. We are unable to accept that the impugned award in this regard is liable to be set aside in these proceedings.

37. Mr. Bishnoi's contention that the compensation awarded for loss of revenue during the period of delay (claim no.4) is without basis, is insubstantial. DTRL had claimed that a sum of ₹27,87,00,000/- as the loss of revenue suffered on account of the delay in completion of the works. Since the COD had been delayed by a period of eight months, DTRL was unable to collect the revenue for the period of delay. There is no cavil that the Arbitral Tribunal's decision that DTRL was entitled to compensation on this ground warrants no interference. However, Mr. Bishnoi had assailed the computation of the amount of compensation. According to him, the same was not based on any evidence. DTRL was required to establish that it would have earned the revenue as claimed by the commercial



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operation of the Project highway in question. DTRL had computed the claim on the basis of the financial model of the Project. There is no dispute that the said financial model had been submitted to NHAI at the initial stages. The viability of the Project and the bid submitted by DTRL was validated by the financial model submitted by it. Clearly, the financial model would be relevant material for quantifying the claim for loss of revenue. We are, thus, unable to accept that the compensation awarded by the Arbitral Tribunal is without any material.

38. In view of the above, the appeal is dismissed.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

JANUARY 9, 2024
RK

Signature Not Verified

Digitally Signed
By: DUSHYANT
RAWAL
Signing Date: 18.01.2024

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