



2024:DHC:9673



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

Date of decision: 19th NOVEMBER, 2024

IN THE MATTER OF:

+ **O.M.P. (COMM) 269/2018**

NATIONAL HIGHWAYS AUTHORITY OF INDIAPetitioner

Through: Ms. Madhu Sweta, Mr. Yash Kapoor,
Advocates.

versus

ORIENTAL PATHWAYS(AGRA) PVT. LTD.Respondent

Through: Mr. Anil K. Airi, Sr. Advocate with
Mr. Ravi Krishan Chandna, Mrs.
Bindiya Logawney, Mr. Mudit
Ruhella, Mr. Vishal Tyagi and Mr.
Shayuk Kumar, Advocates.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT (ORAL)

1. The Petitioner/National Highways Authority of India has approached this Court by filing the instant petition under Section 34 of the Arbitration & Conciliation Act, 1996 challenging an Award dated 16.01.2018 passed by the Arbitral Tribunal consisting of three Arbitrators who are engineers and who were appointed to adjudicate upon the disputes which have arisen between the parties.
2. It is stated that the Respondent was awarded a contract for improvement, operation and maintenance including strengthening and widening of existing 2 lane road to 4 lane road dual carriageway from Km.



2024:DHC:9673



17.756- Km. 62.295 of NH-11 (Agra-Bharatpur Section) in the States of Uttar Pradesh and Rajasthan on Built, Operate and Transfer (BOT) basis.

3. The facts as stated by the Petitioner indicate that a Concession Agreement was entered into between the parties on 10.03.2006. It is stated that the Appointed Date, i.e., the date of commencement as per the Concession Agreement was 06.09.2006. The construction of the Project Highway was completed on 09.07.2009. It is stated that the Final Completion Certificate was issued to the Respondent on 03.02.2010 and the Respondent was to operate the road for a period of 20 years upto 05.09.2026.

4. A perusal of the facts as stated by the Petitioner herein reveals that M/s LEA Associates was appointed as an Independent Consultant (Independent Consultant) for a period of three years. It is stated that the Consultant had given a report regarding certain deficiencies in the nature and manner of the performance by the Respondent/Concessionaire under the Concessionaire Agreement and under various clauses of the contract certain monies were sought to be deducted/recovered by the Petitioner/NHAI from the Respondent/Concessionaire from the escrow account which was to be maintained by the Concessionaire under the terms of the agreement.

5. This action of the NHAI was disputed by the Respondent, resulting in appointment of an Arbitral Tribunal. The Arbitral Tribunal by the impugned Award has held that the Petitioner herein is not entitled to recover a sum of Rs. 6,29,07,685/-. The said claim is under two heads; i) Rs. 3,34,88,748/- under deficiency on account of compulsory afforestation and ii) a sum of Rs.2,94,18,937/- on account of periodic maintenance.

6. The principal contention of the learned Counsel for the NHAI is that



2024:DHC:9673



the Tribunal has gone beyond the terms of the agreement entered into between the parties and that the claim has been even over and above the dispute referred to the arbitration.

7. *Per contra*, learned Senior Counsel for the Respondent supports the Award to contend that the Arbitrator has meticulously gone into the entire correspondence and has come to a conclusion that the findings given by the Consultant is completely arbitrary.

8. Learned Counsel for the Petitioner very fairly states that he has no dispute as far as the findings regarding compulsory afforestation is concerned and is restricting his case only to the denial of damages on account of routine and periodic maintenance.

9. The case of the Petitioner is that the Respondent had not maintained/repared the Highway in accordance with the Contract and, therefore, they are not entitled to recover the damages whereas the case of the Respondent is that they were maintaining the highway in accordance with the Contract and as per the manual and, therefore, the damages could not have been levied.

10. At this juncture, it is pertinent to mention that the damages had been levied on the basis of the report of IC. The Respondent had challenged the appointment of the IC. The Tribunal came to the conclusion that the appointment of IC was not in accordance with the agreement entered into between the parties. Despite the said finding, the Tribunal went ahead to analyze the report of the IC to ascertain as to whether there was any justification in coming to the conclusion that the Petitioner has suffered any damages or not.

11. The discussion in Paragraph 3.17 to 3.22 of the Award reads as



2024:DHC:9673



under:-

“3.17 In respect of Periodic Maintenance, AT observes that in accordance with Clause 3.3.7 of schedule L, the activity of periodic maintenance shall be carried out as required and at least once in every 5th year (from COD) and also in the last concession period. The periodic maintenance activities shall include profile corrective course of overlaid with the periodic renewal of the wearing course of the road pavement. In accordance with the provisions, the Periodic maintenance was due by July 2014. AT noted that a joint pavement survey of pavement distress was conducted by the Claimant and IC and a joint report was submitted vide letter OSE/AGRA-BOT/2014/7215 dated 15th February 2014 (page 3608-3609, C/43, CD-19). Pending approval of that joint survey report, micro surfacing work was started from 18th February 2014 by the Claimant with the approval of the Respondent and IC, which was communicated vide letter OSE/AGRA-BOT/2014/7218 dated 18 February 2014 (page 3613, C/43, CD-19). Further a detailed proposal of pavement treatment and a program was submitted by Claimant vide letter OSE/AGRA-BOT/2014/7230 dated 5th March 2014 and OSE/AGRA-BOT/2014/7236 dated 12th March 2014 respectively (page 3627, 6/43, CD-19 and 4422-4424, C/47, CD-23). The program was approved by IC vide letter LASA/Highway/O&M/73397/Agra-Bharatpur/2014/04-1138 dated 02/04/2014 (page-36 of Claim statement). Overlay of pavement with BC mix up to 40mm thick was commenced way before expiry of 5 years from COD i.e. before 9th July 2014 (refer letter OSE/AGRA-BOT/2013/7174 dt 09.12.2013). OSE/AGRA-BOT/2014/7259 dt 05.05.2014, OSE/AGRA BOT/2014/7261 dt. 08.05.2014, OSE/AGRA-BOT/2014/7265 di. 13.05.2014, OSE/AGRA-BOT/2014/7267 dt. 14.05.2014 (total progress update), OSE/AGRA-BOT/2014/7276 dt.

Signature Not Verified

Digitally Signed By: HARIOM
SINGH KIRMOJIYA
Signing Date: 11.12.2024
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O.M.P. (COMM) 269/2018

Page 4 of 15



2024:DHC:9673



28.05.2014 (Micro surfacing), OSE/AGRA-BOT/2014/7277 dt. 28.05.2014(BC work), OSE/AGRA-BOT/2014/7284 dt. 12.06.2014 and OSE/AGRA-BOT/2014/7298 dt. 21.07.2014 (detailed progress update) and OSE/AGRA BOT/2014/7315A dt. 22.09.2014. Work of Periodic maintenance work was completed on 15/10/2014 (refer OSE/AGRA-BOT/2014/7339 dt. 07.11.2014, (page-38 of claim statement). AT noted that the reasoning given by IC towards continued levy of damages on periodic maintenance works with an interpretation that the Periodic maintenance works needs to be completed by 9th July 2014 i.e. the date of 5th year from the date of COD. However, AT could not find any such provisions in CA that works towards periodic maintenance are to be completed within the fifth year period. Instead Claimant has started the process, joint inspection etc. in February 2014, commenced the micro surfacing work (part of the work specification) in Feb 2014, approval obtained for BC surfacing on 02/04/2014 and works towards surfacing work with bituminous cuentrete (BC) started before July 2014 and completed by 15.10.2014. AT could not find any default of the Claimant on the aspect of Periodic Maintenance and therefore levy of damages towards this item is not justified and needs reversal.

3.18 AT has gone through voluminous documents C/28 to c / 49 whereby the Concessionaire has submitted to the Respondent that they have not only rectified the defects brought out by the IC but they of their own are attending to the defects occurring in the Project highway from time to time. The Concessionaire has made the submission with facts and figures including the photos in support of the repairs carried out by them. The Respondent has not contested these submissions so made by the Concessionaire.



3.19 The Concessionaire argues that IC has been making the cost estimates for computing the damages arbitrarily. The Concessionaire has objected to the method of evaluation adopted by the IC. The Concessionaire has brought out that IC assumed and considered that the balance work from Jan 2011 to July 2011 would be same as that of month of July 2011 in spite of the fact that they had been submitting the compliance reports from Jan 2011 to July 2011. This proves the wrongfulness of the assumptions made by the IC in preparation of the cost estimates for repairs of defects (page 593 of C / 29) .

3.20 AT has gone through all the reports of IC recommending damages to be recovered from the Concessionaire for default in operation and maintenance (C/27, C/30, C/32, C/34, C/40, C/42, C/46). In respect of the allegations of arbitrary provisions made by the IC in its reports, AT finds that -

1. The same estimated cost of repairs such as Rs. 8,13,168.55, Rs. 12,54,017.18, Rs. 7,64,324.00 and Rs. 9,86,333.83 have been taken continuously for 10-months from Jan 2011 to Oct 2011 saying that cost estimate for Oct 2011 has been considered for the preceding months. This is a clear statement by the IC himself that whatever cost estimates were worked out by them for Oct 2011, the same cost figures have been applied for working out damages for preceding months starting from Jan 2011. Also the rate analysis shows that IC has worked out rates for estimating damages by including escalations as per WPI for Oct 2011 and applied the same rates to previous months (page 329 of C/27) which is evidently wrong.

2. Cost estimates for repairs of concrete pavement distresses was worked out on the basis of defects in



2024:DHC:9673



March 2012 as Rs. 12,84,847.81 and the same cost figure has been assumed for the month of Nov 2011, Dec 2011, Jan 2012 and Feb 2012.

3. Similarly, the estimated cost worked out in Mar 2012 for other sub- groups of the repairs with cost estimate figure of Rs. 8,43,999.18 and Rs. 5,77,149.83 was arbitrarily used for the month of Jan 2012 and Feb 2012 also.

4. A cost estimate of Rs. 7,64,324.00 relating to flexible payment as worked out on the basis of inspection in June 2012 was arbitrarily used for Nov 2011, Dec 2011, Jan 2012, Feb 2012, Mar 2012, April 2012, May 2012, July 2012 and Aug 2012.

5. Record further shows that a cost estimate figure of Rs. 4,07,70,354.42 has been used in as many as 09 months from Sep 2012 to May 2013 for working out the damages.

6. It is further gathered from the record that a cost estimate figure of Rs.1,96,91,445.00 has been continuously used for the months from Sep 2012 to Mar 2013.

7. The record also shows that the IC has also arbitrarily provided for the quantities of repairs to be carried out. For example -

a) For rain cuts in shoulders in Km 51, 50, 38, 22, 25, 26, 30, 32, 46, 47 and 48, the same dimension of the rain cuts i.e 2.0 x 1.5 x 0.3 has been taken which on the face of it is not practically possible (page 279 of C/27).

b) Similarly, shoulder settlement at different locations in Km 42, 45 and 47 has been taken of the same size i.e



2024:DHC:9673



20.00 x 3.00 x 0.20 which again is not practically possible (page 921 of C/30).

c) Further, Rank vegetation of the same size ie 50 x 10 has been taken in Km 55,27 and 30 (page 923 of C/30) which again is not believable in realistic terms.

d) Still further, heaps of Garbage / Construction material on shoulders / within ROW in Km 54, 62, 58, 57, 19 and 22, have been taken of the same size ile 3.0 x 7.0 which again appears to be arbitrary provision (page 278 of C/27)

3.21 From the above facts on record, we find substance in the allegation of the Concessionaire that cost estimates made by the IC for working out the damages are arbitrary. The Respondent has claimed damages on basis of such estimates based on arbitrariness.

It is a settled law that every State Instrumentality, like NHAI, has to be just and fair even in the operation of contracts as laid down by the Hon'ble Supreme Court in its judgments: Ramana Dayaram Shetty Vs International Airport Authority of India AIR 1979 SC 1628 and also in Shrilekha Vidyarthi Vs State of U.P AIR 1991 SC 537.

Claiming damages based on such arbitrary estimates is unjust and not tenable in law. Thus, the Respondent is not entitled to recover Rs. 2,94,18,937/- from the Concessionaire against Periodic & Routine maintenance.

3.22 In view of examination of the dispute as above, AT is of the considered opinion that both in law as well as on facts, the Respondent is not entitled to recover Rs.3,34,88,748/- nor Rs. 2,94,18,937/- totaling to Rs. 6,29,07,685/- from the Concessionaire."



2024:DHC:9673



12. A perusal of the award indicates that the three member Tribunal, which consisted of technical persons who are well versed in their fields held that it could not find any default on the part of the Respondent/Claimant on the aspect of periodic maintenance. The Tribunal further held that the Petitioner has not contested the claim of the Respondent when the Respondent had not only rectified the defects brought out by the IC but they of their own are attending to the defects occurring in the Project highway from time to time. The Tribunal, after meticulously going through the recommendation of the IC came to the conclusion that the recommendation of the IC is completely arbitrary.

13. Learned Counsel for the Petitioner contends that the damages payable by either party have been set forth in the contract agreement which has been ignored by the Tribunal. Learned Counsel for the Petitioner argued that the contractual provision has been given a complete go-by which is contrary to the law laid down by the Apex Court in Construction & Design Services v. DDA, (2015) 14 SCC 263.

14. Per contra, learned Counsel for the Respondent contends that re-appreciation of facts is outside the scope of Section 34 of the Arbitration Act and that the Courts while deciding an application under Section 34 of the Arbitration Act, cannot sit as a Court of appeal and re-appreciate evidence.

15. Heard the Counsels for the parties and perused the material on record.

16. A perusal of the award indicates that the Tribunal has meticulously gone into all the documents and the conclusion arrived at by the Tribunal that the IC had worked out the cost estimates up to 2011 and have applied the same figures for the preceding months starting from January, 2011 and



2024:DHC:9673



the same is wrong. The IC has also come to the conclusion that rate analysis shows that IC has worked out rates for estimating the damages by including escalations as per Wholesale Price Index for October, 2011 and applied the same rates to previous months which is evidently wrong. The Tribunal has held that the cost estimate for repairs for concrete pavement distresses was worked out on the basis of defects in March 2012 and the same cost figure has been assumed for the months of November 2011, December 2011, January 2012 & February, 2012 and, therefore, the conclusion arrived at by the IC is completely erroneous. The Tribunal held that same exercise has been done for estimated exercise for other sub-groups of the repairs which have been worked out for the year March, 2012 and has been applied for previous years of January 2012 and February, 2012.

17. It is well settled that if there is some evidence which can be acted and relied upon howsoever compendious it may be, the conclusions cannot be termed as perverse and it must clearly be understood that when a court is applying the “public policy” test to an arbitral award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has to necessarily pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. (Refer: Associate Builders v. DDA, (2015) 3 SCC 49).

18. The grounds on which an Award can be set aside has been enumerated by the Apex Court in a number of judgments. Recently, the Apex Court in OPG Power Generation Private Limited v. Enxio Power Cooling Solutions India Private Limited & Anr., 2024 SCC OnLine SC 2600, has observed as under:-



"60. Sub-section (2-A) of Section 34 of the 1996 Act, which was inserted by 2015 Amendment, provides that an arbitral award not arising out of international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is visited by patent illegality appearing on the face of the award. The proviso to subsection (2-A) states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence. In Saw Pipes (supra), while dealing with the phrase 'public policy of India' as used in Section 34, this court took the view that the concept of public policy connotes some matter which concerns public good and public interest. If the award, on the face of it, patently violates statutory provisions, it cannot be said to be in public interest. Thus, an award could also be set aside if it is patently illegal. It was, however, clarified that illegality must go to the root of the matter and if the illegality is of trivial nature, it cannot be held that award is against public policy.

61. In Associate Builders (supra), this Court held that an award would be patently illegal, if it is contrary to:

- (a) substantive provisions of law of India;*
- (b) provisions of the 1996 Act; and*
- (c) terms of the contract.*

The Court clarified that if an award is contrary to the substantive provisions of law of India, in effect, it is in contravention of Section 28(1)(a) of the 1996 Act. Similarly, violating terms of the contract, in effect, is in contravention of Section 28(3) of the 1996 Act.

62. In Ssangyong (supra) this Court specifically dealt with the 2015 Amendment which inserted sub-section



2024:DHC:9673



(2-A) in Section 34 of the 1996 Act. It was held that “patent illegality appearing on the face of the award” refers to such illegality as goes to the root of matter, but which does not amount to mere erroneous application of law. It was also clarified that what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to ‘public policy’ or ‘public interest’, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality. Further, it was observed, reappreciation of evidence is not permissible under this category of challenge to an arbitral award.

63. Perversity as a ground for setting aside an arbitral award was recognized in *Western Geco* (supra). Therein it was observed that an arbitral decision must not be perverse or so irrational that no reasonable person would have arrived at the same. It was observed that if an award is perverse, it would be against the public policy of India.

64. In *Associate Builders* (supra) certain tests were laid down to determine whether a decision of an arbitral tribunal could be considered perverse. In this context, it was observed that where : (i) a finding is based on no evidence; or (ii) an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse. However, by way of a note of caution, it was observed that when a court applies these tests it does not act as a court of appeal and, consequently, errors of fact cannot be corrected. **Though, a possible view**



2024:DHC:9673



by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. It was also observed that an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on that score.

65. In Ssangyong (supra), which dealt with the legal position post 2015 amendment in Section 34 of the 1996 Act, it was observed that a decision which is perverse, while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. It was pointed out that an award based on no evidence, or which ignores vital evidence, would be perverse and thus patently illegal. It was also observed that a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence in as much as such decision is not based on evidence led by the parties, and therefore, would also have to be characterized as perverse.

66. The tests laid down in Associate Builders (supra) to determine perversity were followed in Ssyanyong (supra) and later approved by a three-Judge Bench of this Court in Patel Engineering Limited v. North Eastern Electric Power Corporation Limited.

67. In a recent three-Judge Bench decision of this Court in Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Pvt. Ltd. 2024 INSC 292, the ground of patent illegality/perversity was delineated in the following terms:



2024:DHC:9673



“40. In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at it; or the construction of the contract is such that no fair or reasonable person would take; Or, that the view of the arbitrator is not even a possible view. A finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside under the head of patent illegality. An award without reasons would suffer from patent illegality. The arbitrator commits a patent illegality by deciding a matter not within its jurisdiction or violating a fundamental principle of natural justice.”

68. The aforesaid judicial precedents make it clear that while exercising power under Section 34 of the 1996 Act the Court does not sit in appeal over the arbitral award. Interference with an arbitral award is only on limited grounds as set out in Section 34 of the 1996 Act. A possible view by the arbitrator on facts is to be respected as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. It is only when an arbitral award could be categorized as perverse, that on an error of fact an arbitral award may be set aside. Further, a mere erroneous application of the law or wrong appreciation of evidence by itself is not a ground to set aside an award as is clear from the provisions of subsection (2-A) of Section 34 of the 1996 Act.”

(emphasis supplied)

19. Applying the law laid down by the Apex Court to the facts of the present case where the Petitioner has not been able to point out as to why the



2024:DHC:9673



present case would come under Section 34 of the Arbitration Act which lays down the ground on which the award can be set aside, this Court is not inclined to interfere with the award. The Petitioner has not made out any case as to why the award is in conflict with the public policy of India or that there is a contravention of the fundamental Policy of Indian law and, therefore, the challenge to the award fails.

20. Accordingly, the petition is dismissed along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

NOVEMBER 19, 2024

hsk/Rahul