



2025:DHC:1018



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

% Reserved on : 17.01.2025
Pronounced on : 18.02.2025

+ **O.M.P. (COMM) 21/2025 & I.A. Nos. 840-41/2025**

MAHAKALESHWAR INFRATECH PVT. LTDPetitioner

Through: Ms. Suvir Sharma, Ms. Anushka
Nayyar, Mr. Shiv Azad Sharma, Mr.
Syed Meesam Asghar and Mr.
Charchit Talwar, Advocates.

versus

CHIEF ENGINEER, NATIONAL HIGHWAYS, UPPWD.....Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

1. The present petitions have been filed raising objections under Section 34 of the Arbitration & Conciliation Act, 1996 (hereafter, the "A&C Act") against the Arbitral Award dated 23.09.2024 (hereafter, the "impugned award") delivered by the Arbitral Tribunal comprising of Sole Arbitrator (hereafter, "AT") with respect to dismissal of petitioner/claimant's (hereafter, "the Claimant") Claims No. 2, 5 and 6.

2. The impugned award came to be delivered in the context of Contract Agreement dated 11.04.2018 (hereafter, the "Contract") which came to be executed in consequence of a Public Tender invited by the respondent for the project of "REHABILITATION AND UPGRADATION OF KULPAHAR-MAHOBHA SECTION (KM 133.520 to 158.040) OF NH-76 & NH-86 (5.360 KM.) IN THE STATE OF UTTAR PRADESH TO TWO LANE WITH PAVED SHOULDER UNDER EPC MODE."



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The Claimant was declared as the successful bidder and awarded the project vide Letter of Acceptance dated 04.04.2018. The Contract was entered into on 11.04.2018 for a contract value of Rs. 94,50,00,000/- (hereafter, "Contract Price"). The Schedule Completion Period was of 550 days from the declaration of Appointed Date which was declared as 20.08.2019. The scheduled completion date was 20.02.2021. One Extension of Time (hereafter, "EOT") was granted for a period of 90 days and the date for completion of the project was revised to be 21.05.2021. The Provisional Completion Certificate (hereafter, "PCC") was issued w.e.f. 11.05.2021.

DISPUTES BEFORE THE ARBITRAL TRIBUNAL

3. The Claimant approached the AT and filed seven claims. However, since the present objections have been restricted to dismissal of Claims No. 2, 5 and 6, the discussions hereon would be revolving around these claims. The Claimant urged that there was a delay both in the Appointed Date as well as on account of respondent's failure in providing complete Right of Way (hereafter, "ROW") free from encumbrances and encroachments. Claim No.2 related to unrealized cost of overheads, idling of plants, machinery and manpower on account of prolongation of the period of the Project. While Claim No.5 was seeking loss of bonus for early completion of the Project, vide Claim No. 6 the Claimant sought maintenance cost of the Performance Bank Guarantee and Additional Performance Bank Guarantee for the time the project was delayed. The respondent resisted the claims by denying that it was responsible for the delay in the project.

IMPUGNED AWARD

4. AT framed Point of Determinations (hereafter, "POD") and while discussing POD No.(ii) noted that the delay of 466 days in declaration of the



Appointed Date was directly a result of the respondent's inability to provide ROW to the Claimant, and awarded Rs. 3,94,32,995/- as damages to the Claimant. Insofar as delay of 80 days i.e., from 20.02.2021 to 11.05.2021 in completion of the project is concerned, AT returned a finding that it was totally attributable to the Covid-19 pandemic, as a 90-day EOT was granted on only this account. The same was held to be a non-political Force Majeure event for which neither party could claim damages from the other.

5. **Claim No.2/POD No.(iii)** : AT rejected the claim by observing that the Claimant was already compensated for the delay in Appointed Date and the delay in execution of the project was attributable to Force Majeure due to Covid-19 pandemic.

6. **Claim No.5/POD No. (vi)**: AT partly allowed the claim for bonus by noting that since the all the test reports had been supplied to the respondent by 09.04.2021, the PCC should have been issued within 10 days, i.e., by 19.04.2021, which was deemed to be the date of issuance of PCC. The Claimant was found to be entitled to bonus for the period between 19.04.2021 and 21.05.2021 i.e., 32 days.

7. **Claim No.6/POD No. (vii)**: The claim seeking maintenance costs of the Performance Bank Guarantee was disallowed as the Claimant was already compensated for 466 days of delay in declaration of the Appointed Date and other delay on account of Covid-19 pandemic.

SUBMISSIONS BEFORE THIS COURT

8. On behalf of the Claimant, it was contended that the claim for unrealized cost of overheads, idling cost and expenses incurred in the maintenance of bank guarantees are completely separate claims from the claim for compensation for the delay in declaration of the Appointed Date



and the AT has erred in denying the former claims on the basis that the latter claim has been awarded. It is submitted that there is a fundamental difference in the delay in declaration of the Appointed Date and the undue prolongation of the project on accounts of various delays on part of the respondent. Reference is made to the decision of a Co-ordinate Bench of this Court in National Highways Authority of India v. Ashoka Buildcon Ltd.¹ It is further submitted that the AT failed to examine all the relevant documents submitted by the petitioner in support of his claims and the evidence put forth in this regard has been ignored and, thus the impugned award needs to be set aside. In support of the submission, reliance is placed on National Highway Authority of India v. MS Ssangyong Engineering & Construction Co. Ltd.²

9. It is next submitted that the AT erroneously held that the delay in the execution of project was caused only due to Covid-19 Pandemic. It is contended that respondent had grossly failed in providing the requisite ROW as stipulated under the Contract Agreement as only 79 % (Seventy Nine Percent) of the total length was provided till the Appointed Date. It is submitted that the grant of EOT cannot be solely attributed to the Covid-19 pandemic as the same was also due to delay in land acquisition and other reasons. Reliance is placed on letters dated 02.08.2021 and 08.09.2021 wherein Claimant had requested the respondent for withdrawal of work under Clause 8.3.3 (Damages for Delay in Handing Over of Site) of the Contract. Moreover, it is contended that the respondent also failed to obtain the requisite permits from the forest department, further contributing to the

¹ National Highways Authority of India v. Ashoka Buildcon Ltd., reported as 2023 SCC OnLine Del 5658

² Highway Authority of India v. MS Ssangyong Engineering & Construction Co. Ltd.,² reported as 2024 SCC OnLine Del 2767.



delay.

10. With respect to Claim No.5, it is submitted that the said claim has been insufficiently granted by the Arbitrator for only 32 days by arbitrarily taking the starting date to be 19.04.2021 while all the test reports required for grant of PCC already stood submitted on 09.04.2021. It is submitted that the bonus should have been computed for a period of 42 days instead of 32 days.

11. For Claim No. 6, it is contended that though the Bank Guarantee had been duly submitted within the prescribed time frame, the Claimant was compelled to extend the same for an additional period, solely due to delays on account of the respondent, incurring additional costs and expenses.

12. Lastly, it is submitted that the AT failed to maintain consonance in the Impugned Award with another similar award dated 17.10.2023 involving the same parties, identical claims and identical projects.

DISCUSSION AND CONCLUSION

13. The scope of interference by Courts under Section 34 of the A&C Act is very limited. Coming to the facts of the present case, the claims raised by the Claimant pertained to the elongation of the project period, which-according to the Claimant, led to cost overheads under various heads, claimed by it. Claimant has claimed damages suffered due to delay in declaration of Appointed Date under Clause 28.1 by the respondent and the other part pertains to the delays that occurred in the period after Appointed Date till the completion of works.

14. AT had framed POD (ii) and (iii), which pertained to the consequences of the delay in the declaration of Appointed Date and consequences due to prolongation of the contract, respectively.



15. AT while deciding POD No (ii) has awarded a sum of Rs. 3,94,32,995/- to the Claimant by rejecting the respondent's plea that there was no delay in declaration of the Appointed Date, since the same was done within 30 days of the time when the respondent secured the ROW to the project site, which according to the respondent was in terms of Article 28.1 of the Contract. AT interpreted Article 28.1 read with Article 4.1.3(a), wherein the respondent was mandated to handover no less than 90 % per cent of the site within 30 days of the furnishing of the performance security by the Claimant, which was furnished on 21.04.2018.

16. AT looked at Article 8, and concluded there was a mandate to handover site with Right of Way (ROW), failing which respondent was obligated to pay damages calculated at the rate specified in Article 8.3.

17. AT interpreted the relevant articles, and concluded that there was a delay of 446 days in the declaration of the Appointed Date, which was done on 20.08.2019, as against a date not later than 30 days, from the date of the signing of the agreement, which was signed on 11.04.2018, originally contemplated in the Contract. Consequently, AT awarded a sum of Rs. 3,94,32,995/-, as damages calculated to the formula laid down in Article 8.3.1.

18. It is noted, in terms of Serial No.6 of the Contract-Bond, the works had to be completed within a period of 550 days from the Appointed Date. Meaning, Appointed Date being 20.08.2019, the scheduled date of completion fell on 20.02.2021. The work was actually completed with a delay of 80 days on 11.05.2021.

19. Claimant has already been fully compensated for 466 days delay in the declaration of Appointed Date. However, as far as delay of 80 days in



the completion of work is concerned, Claimant was granted EOT of 90 days in terms of office memorandum (OM) dated 03.06.2020 issued by the Highways Division of the Ministry of Road Transport & Highways. The Claimant is resenting the grant of EOT without monetary compensation.

20. AT has concluded that the period between 20.02.2021 to 11.05.2021 was Covid affected and was a non-political Force Majeure event in terms of Article 21.1 and 21.2, with no corresponding obligation on the respondent to compensate the Claimant for this event. Apparently, AT, after examining the documents, including claimant's all communications qua ROW, ruled out that the delay was on account of non-Covid reasons, thereby rejecting the claimant's assertion.

21. AT has looked at the correspondence, i.e., letter dated 15.12.2020, whereby the Claimant had sought EOT of 242 days of which 65 days had been claimed on account of Covid impact. AT also noticed a letter dated 28.12.2020 written by the Claimant, whereby it revised its EOT claim to 182 days (from 242 days which was earlier sought) of which 132 days, between 21.03.2020 and 31.07.2020, was towards Covid induced delay and 50 days were put to ROW issues.

22. AT has noticed in the impugned award that respondent approved the EOT only for Covid induced reasons and the non-Covid i.e., ROW issues alleged by the Claimant, were rejected by the respondent's engineer. Vide letter dated 07.04.2021, the Claimant was informed of the 90 days of Covid related EOT approved by the respondent.

23. All of 80 days of delay stood absorbed in the EOT granted by the respondent. Since under Article 21.6.1.(a) the delay on account of Force Majeure event is non-compensable, the AT has rightly concluded that no



compensation could be claimed.

24. Claimant's claim of losses due to prolongation of the contract, which is the subject matter of POD No. (i) and (ii), has been reasonably adjudicated by the AT following the contractual terms. The AT has awarded composite compensation for all kinds of damages incurred on account of the delay in the Appointed Date, which would include claim No.2 and 6. Moreover, the delay of 80 days, in completion of works, has been held to be non- compensable, under Article 21.6.1.(a). AT has thus considered delays both pre and past Appointed Date and dealt with them in a different manner. The decision of the Co-ordinate Bench of this Court in National Highways Authority of India v. Ashoka Buildcon Ltd (Supra) is rooted in the facts of that case and in any case, merely distinguishes 'non commencement of work' and 'delay in carrying out the work' which does not run contrary to the present case.

25. In view thereof, it perplexes this court on what grounds-permissible under Section 34, the Claimant could possibly be aggrieved of the award in relation to dismissal of Claims No. 2 and 6. Claimant's challenge is only wishful, and not based on legal principles. This court is not permitted to have a second look at the disputes and supplant its own view on the view already taken by the AT. In any case, there is no second view, that this court has seen, in the facts of case, and the view adopted by the AT, seems to be the only plausible view.

26. In so far as Claim no.5 is concerned, the AT had noted that test reports were supplied to the respondent on 09.04.2021 and it is only subsequently that the PCC could have been issued. AT also noted that the petitioner had failed to bring on record evidence to show that any negligence



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could be attributed to the respondent in this respect. The contract does not specify the time period in which the PCC has to be issued, after receipts of all the requisite reports. It is obvious that supply of test reports would not lead to the grant of PCC immediately and the respondent would require some reasonable time to verify the reports. The AT applied its mind and came to the conclusion that 10 days would be a reasonable time to issue the PCC. This Court would not substitute its opinion for the opinion of the AT regarding what would be a reasonable time. It appears, on a full reading of the contract, that a reasonable period of time before the PCC is issued is a possible interpretation flowing from the contract and hence the award cannot be said to suffer from any perversity. Therefore, the contention on behalf of the claimant that the calculation of bonus should have been from 09.04.2021 holds no water.

27. The challenge laid by the claimant to the impugned award is, thus, outside the scope of the grounds on which challenge to an arbitral award is permissible under Section 34(2) or 34(2A) of the A&C Act.

28. The petition is unmerited and is, accordingly, dismissed.

MANOJ KUMAR OHRI
(JUDGE)

FEBRUARY 18, 2025/ry