



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

+ **O.M.P. (COMM.) 546/2016 & I.A.15029/2016**

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Reserved on: 16/08/2023

Pronounced on: 19/09/2023

IN THE MATTER OF:

NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Petitioner

Through: Mr.S.Nanda Kumar, Ms.Deepika Nanda  
Kumar and Mr.Anand Murthi Rao,  
Advocates

versus

D S TOLL ROADS PVT. LTD. .... Respondent

Through: Mr. Jayant Mehta, Sr. Adv. with Mr.Ankur  
Kashyap, Mr.Hasan Murtaza, Ms.Bushra  
Waseem and Mr.Aman Bajaj, Advocates.

**CORAM:**

**HON'BLE MR. JUSTICE MANOJ KUMAR OHRI**

### **JUDGMENT**

1. By way of present petition filed under Section 34 of the Arbitration & Conciliation Act, 1996 (hereafter, '*the A&C Act*'), the Petitioner-National Highways Authority of India (hereafter, '*NHAI*') has laid challenge to the award dated 07.07.2016 (hereafter, '*the Arbitral Award*') passed by the Arbitral Tribunal comprising of Shri Surjeet Singh (Presiding Arbitrator), Shri S.S. Agarwal and Shri Arun Kumar Sinha (hereafter, collectively referred to as '*the AT*'). The dissenting Award was passed by Shri Arun Kumar Sinha.

2. The Arbitral Award was rendered in the context of the disputes



arising out of Concession Agreement dated 30.01.2006 (and Supplementary Agreement dated 06.03.2014) (hereafter, '*the Agreement*') whereby the Respondent (hereafter, '*the Contractor*') was awarded the work of "*Design, Construction, Development, Finance, Operation and Maintenance of Km. 373.275 (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*". The stipulated dates for commencement and completion of the project were 29.07.2006 and 29.01.2009 respectively. However, the actual commercial operation date was 28.09.2009.

3. The Contractor vide its Statement of Claims (hereafter, the '*SOC*') raised 6 claims. The summary of claims awarded is extracted hereunder:-

<u>Claim Amount</u>	<u>Amount Granted</u>
Claim No.1: Rs. 29,60,96,730/- towards compensation for additional expenses on account of extended stay of Plant and Machinery at site on account of extended construction period	Rs. 14,05,55,257/-
Claim No.2: Rs. 2,33,40,479/- towards compensation for additional increase in cost of input materials incurred due to extended construction period	Rs. 1,98,39,409/-
Claim No.3: Rs. 9,06,45,316/- towards compensation for loss of opportunity and profits due to extended period of construction	Rs.90,64,532/-
Claim No.4: Rs. 27,87,00,000/- towards compensation for loss of revenue due to delay in COD	Rs.24,38,62,500/-
Claim No.5: Rs.12,63,63,315/- towards compensation	Rs.5,62,22,103/-



for additional overhead cost incurred due to the extended construction period	
Claim No.6: Rs.1,01,83,538/- towards compensation due to delay in release of promised grant	Rs.1,01,83,539/-

4. Apart from the above-mentioned claims, the AT also awarded interest @ 2% above the SBI PLR on all the claims as well as interest @ 12% from date of award till realization (if the same is not paid within 60 days from date of award).

5. Per contra, NHAI in its Statement of Defence (hereafter, the 'SOD') denied the claim for additional costs/damages/losses on account of prolongation on the ground that "*there is no clause in the concession agreement which provides safeguard to either of the parties for their defaults*". It further denied all the allegations levelled by the Contractor and stated that there were delays on the part of the Contractor also.

6. In the present proceedings Mr. Nanda Kumar, learned counsel for NHAI has restricted his submission to the extent that the AT had failed to appreciate that sub-clauses 13.5.1 and 13.5.2 of the Agreement were applicable, while considering the question of damages in case of delay in handing over the Right of Way-Additional Right of Way. The AT erred in addressing the issue by applying sub-clause 31.2 of the Agreement read with Section 55 and 73 of the Indian Contract Act (hereafter, '*the Contract Act*'). He contended that in terms of the Agreement, any default in handing over the site was required to be compensated in terms of sub-clauses 13.5.1 and 13.5.2.

7. Mr Jayant Mehta, learned Senior Counsel for the Contractor disputes



these submissions and contends that there was a delay of 241 days in handing over the site by the NHAI. The delay was rightly held to be attributable to NHAI.

8. The liability of NHAI to compensate the Contractor for damages on account of delay in handing over the site, is not disputed. The only question that arises for consideration is whether sub-clauses 13.5.1 and 13.5.2 would apply or whether sub-clause 31.2 read with Section 55 and 73 of the Contract Act would apply. No other contention has been raised and only the quantum of damages has been questioned.

9. To appreciate the rival contentions, it is deemed expedient to reproduce the relevant extract of the impugned award:

*“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 percent)”.*

*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.”*

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.

12. The scope of interference under section 34 of the Act is limited. The arbitral tribunal is the final adjudicating authority in respect of the disputes between the parties, as well as the interpretation of the agreement between them. No interference with the arbitral award would be warranted unless the Court finds that the view is patently illegal or perverse. The Court is not meant to act as court of first appeal, and cannot supplant its view over that of the arbitral tribunal. In MMTC Ltd. vs Vedanta Ltd.<sup>1</sup>, Supreme Court has explained the same in the following words:

*“11. As far as Section 34 is concerned, the position is well settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal*

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<sup>1</sup> (2019) 4 SCC 163



*position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the “fundamental policy of Indian law” would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury reasonableness. Furthermore, “patent illegality” itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.*

*12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See Associate Builders v. DDA. Also see ONGC Ltd. v. Saw Pipes Ltd.; Hindustan Zinc Ltd. v. Friends Coal Carbonisation; and McDermott International Inc. v. Burn Standard Co. Ltd.)*

*13. It is relevant to note that after the 2015 Amendment to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 of Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2-A) has been inserted in Section 34, which provides that in*



*case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappraisal of evidence.”*

13. In the present case, the view taken by the AT is clearly a plausible one and needs no interference by this court. The aforesaid conclusion is further strengthened by the fact that the aforesaid clauses also came up for consideration before a Coordinate Bench of this Court in National Highways Authority of India v. N.K. Toll Road Ltd.<sup>2</sup>. The Court, in similar facts and circumstances, upheld the applicability of sub-clause 31.2 of the agreement. The objection filed under Section 34 were dismissed and further, the challenge by way of appeal under Section 37 of the A&C Act being FAO(OS)(COMM.)113/2017 also came to be dismissed vide order dated 26.07.2023.

14. In view of the above, this Court finds no merit in the objection. Consequently, the petition is dismissed alongwith pending application, with no order as to costs.

**(MANOJ KUMAR OHRI)  
JUDGE**

**SEPTEMBER 19, 2023/ga**

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<sup>2</sup> 2017 SCC OnLine Del 7663