

(2019) 08 DEL CK 0418

In the Delhi High Court

Case No : First Appeal From Order(OS) (COMM) No. 115 Of 2018

Eagle Infra India Limited

APPELLANT

Vs

National Highway Authority Of India

RESPONDENT

Date of Decision : 05-08-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 34, 37

Citation : (2019) 08 DEL CK 0418

Hon'ble Judges : G.S. Sistani, J; Jyoti Singh, J

Bench : Division Bench

Advocate : Joy Basu, Nina Nariman, Bhaskar Vali, Tuhin, Abhishek, Kanak Bose, Soumya Priyadarshinee

Final Decision : Dismissed

Judgement

G.S. Sistani, J

1. Dismissal of objections filed in O.M.P. (C) 574/2016 under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') by which an Award dated 1.9.2016 was impugned has led to the filing of the present appeal under Section 37 of the Act.

2. The respondent issued a Notice Inviting Tender (NIT) dated 23.01.2013, inviting bids for collection of user fees at Gangapada Toll Plaza located at km 397/310 (new at km 301/700) for the section from km 337/010 to km 402/010 (new at km 362/000 to 279/222) of Sunakhala to Bhubaneshwar section of NH-5 in the State of Odisha.

The appellant/ contractor submitted its bid for an annual remittance amount of Rs.35,45,00,000/-, which was accepted and a Letter of Acceptance (LoA) was issued by the NHAI (National Highway Authority of India) dated 7.3.2013. A concession agreement (hereinafter 'the Agreement') was then entered into between the parties on 8.3.2013 for a period of 12 months, i.e. from 9.3.2013 to 8.3.2014, which was further extendable for the period of 3 months. The

respondent also issued work order dated 08.03.2013. As per the agreement, the appellant was entitled to the management of toll plaza and collection of user toll fee in accordance with the applicable notification dated 14.12.2012.

3. It is the case of the appellant that from the inception of the implementation of the agreement, the appellant faced various difficulties/disturbances and was prevented from collecting the toll by the locals, more particularly the transporters of the area. Due to this, the appellant sent various letters dated 14.03.2013, 17.04.2013, 22.04.2013 and 27.04.2013 highlighting the disturbances and the losses being suffered by them. The appellant raised a claim of Rs.26,58,26,689/- on account of revenue loss suffered by them. The said claim was rejected by the Arbitrator. According to the statement of claim the users were demanding the following concessions in the user fee:-

"a) Rs.15/- instead of Rs.50/- as prescribed in the notification for Light Commercial Vehicles registered within the District.

b) Rs. 25/- instead of Rs.100/- as prescribed in the notification for Local Trucks/ buses.

c) Rs.200/- instead of Rs.1875/- as prescribed in the notification for monthly pass for Commercial Vehicles such as car, Jeep, Van, etc.

d) Rs.1000/- instead of rs.6655/- as prescribed in the notification for monthly pass for School Buses."

4. The consistent stand of the appellant has been that in view of the stiff and consistent opposition and protest from the Orissa Bus Owner's Association and the Khordha Truck Malika Sangh, the appellant faced stiff resistance while the NHAH was a passive spectator despite the fact that the contract provided that the overall control and management was in the hands of the respondent. It is also the consistent stand of the appellant that the appellant sought repeated police assistance to deal with the agitation and dharna at the toll plaza. The police in turn did not provide the necessary protection and instead advised the appellant to reduce the rates for the users to avoid the law and order problem. It is strongly urged before us that the NHAH was duly informed every week about the losses being suffered by the appellant. Attention of the Court is drawn to a chart, which is placed on record in support of the submission so made. While relying on various clauses of the agreement, more particularly Clauses 22(a), (b) and 23(e), Mr. Joy Basu, learned senior counsel for the appellant, has further contended that the representative of the respondent had the overall authority to control and supervise the work of collection of user fee, which was to be carried out by the appellant, and to ensure that collection of the user fee is carried out smoothly, efficiently and without any hindrance. Mr. Basu on the basis of these clauses contends that it was the obligation of the respondent to ensure that the strike (dharna) and obstruction in payment of the toll fees by the locals was addressed and an appropriate remedy is provided to the appellant to ensure that he was able to collect the toll and fulfil his obligations as per the terms of the

contract.

5. Mr. Basu contends that the appellant, as per the agreement had undertaken to abide by all the instructions issued by the authority from time to time on operational matters. Counsel further contends that the effect and implication of this clause was that the respondents were supervising the operations and having regard to the fact that the appellant since the first day had brought to the notice of the respondent, the obstruction and its inability to collect the toll in terms of the contract. Thus, the respondent was bound by the terms of the agreement to either modify the terms of payment or to provide protection with the aid and assistance of the State Government and the local police to the appellant.

6. Mr. Basu also contends that the findings of the Arbitrator and highlighting the fact that a pre-inspection was carried out has not been examined in its correct perspective for the reason that the appellant was only permitted to inspect the site from a distance of 500 metres and thus the appellant could not have assessed the exact position at site and the appellant cannot be blamed for not being able to access the precise area of the toll plaza. Mr. Basu also contends that the Arbitrator and the learned Single Judge have erred in observing that NHAH had no obligation to ensure that users pay the prescribed fees and that the appellant could have terminated or abandoned the contract. Mr. Basu contends that the terms of the contract were extremely stringent and in case the appellant terminated or abandoned the contract, it could have resulted in serious consequences, both present and for future, as it could lead to blacklisting and other sanctions on the contractor. As far as termination is concerned, Mr. Basu contends that as per the terms of the contract only the respondent had the right to terminate the contract, however, despite his repeated letters informing the respondent about the hardship being faced by him and the near impossibility to comply with the terms of the contract the respondent did not perform its obligation in terms of the contract. Reliance is placed on Clause 35 of the Contract to show that the contract could only be terminated by the respondent. As far as abandonment of the contract is concerned reliance is placed on Clause 33 to show that in case of abandonment of the contract the authority had the right to forfeit the performance security furnished by the contractor. It is also submitted by Mr. Basu, learned senior counsel appearing for the appellant that the respondents were well aware about the agitation, the resistance of the transporter's association and the fact that the problem had been simmering much prior to the notice inviting tender and the handing over of the site to the appellant. Reliance is placed on a communication of 13.9.2012, which Mr. Basu submits would speak for itself to show that the said government had written to the respondent regarding the communication of the Chief Secretary, Government of Odisha, to the respondent regarding exemption of toll fee for stage carriage buses in the State of Odisha, more particularly, para 3 which reads as under:-

"3.Regarding exemption of toll fee to stage carriage buses which are commercial vehicles, I would like to bring to your notice that NHAH has no authority to

provide such exemption or discounts, beyond what is prescribed under the Toll Fee Rules, 2008 (Amended) notified by Govt. of India. These Rules provide for 50% concession to such local commercial vehicles which are registered in the district where toll plaza is located and which are not plying under National Permit. This may cover a magnitude of local stage carriage buses."

7. It is submitted that knowing and being fully aware about the unrest at the toll plaza, this was suppressed and the appellant was forced into entering into an agreement knowing it fully well that it would be impossible to perform. Mr. Basu has also highlighted before us that the maintenance of law and order was the responsibility of the State and the police and thus the losses suffered by the appellant should have been allowed by the Arbitrator as the law and order could not have been maintained by the contractor. It is contended that the Award is perverse in nature as despite a categorical finding in para 12 of the Award that there was no administrative failure on the part of the claimant/appellant recognizing that maintenance of law and order is the responsibility of the state and that the appellant had informed the respondent about the public unrest and the resistance of the local persons in payment of toll yet the relief so claimed was denied. In support of his submission that once the Arbitrator had reached a conclusion as noticed hereinabove and having failed to draw an inference, which should have been drawn and the same having resulted in miscarriage of justice, this Court would be well within its right to set aside the Award. Reliance is placed on paras 39 and 40 in the case of Oil and Natural Gas Corporation Limited Vs. Western Geco International Limited, (2014) 9 SCC 263 and para 24 of the judgment in the case of Madhya Pradesh Power Generation Company Limited and Another Vs. Ansaldo Energia Spa and Another, (2018) 16 SCC 661. In support of his submission that the terms of the agreement were noted by the Arbitrator reliance is placed on the case titled as Associate Builders Vs. DDA (2015) 3 SCC 49 paras 28 and 42. For his submission that the contract is to be read as a whole and the same should make commercial sense the observations made in para 29 in Satya Developers Private Limited and Ors. Vs. Pearey Lal Bhawan Association and Ors. 225 (2015) DLT 377 have been relied upon. Reliance is also placed on ONGC Limited Vs. Garware Shipping Corporation Limited (2017) 13 SCC 434 paras 13 and 30 and Union of India and Anr. Vs. Sanghu Chakra Hotels P. Ltd. and Anr. (2008) 152 DLT 651 para 20.

8. Learned counsel for the respondent has opposed this petition. Strong reliance is placed on the terms of the Request For Proposal (RFP) para 2.3.1 which we reproduce below:-

"2.3.1. Bidders are encouraged to submit their respective Bids after visiting the Project site and ascertaining for themselves the site conditions, traffic, locations, surroundings, climate, availability of power, applicable laws and regulations, and any other matter considered relevant to them."

9. Counsel contends that para 2.3.1 of the RFP provides that the bidders should submit their respective bids after visiting the project site and inspecting the site

location, traffic conditions etc. Thus, the appellant cannot take shelter under the wings of the submissions that he was not aware about the conditions at site or that inspection was carried out 500 meters away from the site.

10. Learned counsel for the respondent has also highlighted the fact that the appellant is no stranger to this trade and has been engaged in the business of toll fee collection since the year 2011 as per his own statement. She contends that during the cross-examination the appellant admitted that from the year 2011 it has operated more than 100 toll plazas and five in the state of Odisha. He was also aware of the fact that there is some resistance for payment of toll fee. Questions 6 to 11 are reproduced below:-

"Q6. Can you state as to from which year the Claimant Company is engaged in the business of Toll Fee collection?

Ans. Since 2011.

Q7. How many Toll Plazas has the Claimant been operating from the year 2011 till date?

Ans. More than 100.

Q8. Of the 100 Toll Plazas, how many were in the state of Odisha?

Ans. 5 (Five).

9. How many Toll Plazas are still in operations in the state of Odisha by the Claimant as on date?

Ans. Only one.

Q10. Do all road users pay the toll fee, or do some of them resist the toll fee payment?

Ans. Yes, some of them resist.

11. If they resist, does the Claimant let them go without making payment of the Toll Fee?

Ans. Not exactly."

11. Attention of the Court is also drawn to the response to Question no. 23 to highlight the fact that the appellant did not seek change of location of toll plaza at any time. The said Question 23 reads as under:-

"Q23. It is correct that the Claimant did not seek change of location of Gangapada Toll Plaza at any time?

Ans. Yes."

12. It is further contended by the learned counsel for the respondent that clause with regard to supervision of the site has been misread. It is contended that the supervision was only to the extent to ensure that there is no harassment to the

users of the national highway and to ensure that the site is being managed properly with enough manpower and not with regard to collection, which was completely in the domain of the contractor.

13. Another factor that has been highlighted by learned counsel for the respondent is that the force majeure clause was not only invoked, but the respondent had taken a sympathetic view in the matter. Attention of the Court is drawn to a notice in this regard dated 14.3.2013 and to para 23 of the reply to the statement of defence to show that Rs.2,51,16,036/- were in fact paid and received by the appellant and thus no further amount could in any case be claimed by the appellant for the same benefit which stand paid and received.

14. We have heard the learned counsels for the parties and have carefully examined the Arbitral Award, the order passed by the learned Single Judge, the terms of the agreement and the rival contentions of the learned counsels appearing in the matter.

15. Two basic submissions have been made by Mr. Basu, learned counsel for the appellant. The first contention is that the appellant was prevented from collection of toll on account of the local persons, particularly transporters of the area. It has also been submitted that maintenance of law and order falls in the domain of the State Government however no assistance was provided to ensure that the appellant was not prevented from collecting the toll. Mr. Basu has highlighted that the appellant suffered continuous losses, which were repeatedly brought to the notice of the respondent but no aid, help or assistance was provided in any manner. It has also been submitted by Mr. Basu that the overall supervision and control was of the respondent. Reliance has been placed by counsel for the appellant on the terms of the contract.

16. Mr. Basu has also contended before us that the contractor could not inspect the site in question as the site was examined from a distance of 500 meters and thus the appellant was not in a position to assess it, and, thus, could not anticipate that he would be prevented from collection of the toll.

As far as the submission made by learned counsel for the appellant that the appellant could not inspect the site is concerned, we find no force in the same in view of Clause 2.3.1 of the RPF makes it abundantly clear that the bidders should submit their respective bids after visiting their project site. This clause further goes on to clarify that the bidder must ascertain for himself the site conditions, traffic, locations, surroundings, climate, availability of power, applicable laws and regulations and any other matter considered relevant to them. Therefore, having regard to Clause 2.3.1. of the RPF, in our view, the contractor-appellant cannot be permitted to raise any objection with regard to resistance by the local transporters in regard to collection of toll. Secondly, the Court cannot lose track of the fact as is evident upon reading questions no.6 to 11 and the answers extracted in para 7 above that the appellant-company has been engaged in the business of toll fee collection since the year 2011 and have operated more than

100 toll plazas including 5 in Odisha. Answer to question no.10 would make it clear that the resistance by the public to payment of toll fee was also not a new feature, which the appellant could not have anticipated.

17. While Mr. Basu has highlighted the implication of termination of the contract or abandoning the contract, there is absolutely no explanation as to why the appellant did not seek change of location at any time. For the above reasons, the judgments, sought to be relied upon by Mr. Basu would not apply to the facts of the present case.

18. We find force in the submission made by learned counsel for the respondents that as per Clause 22(a) and (b) the obligation of the respondent was to ensure that the toll plaza was being managed effectively and without any hindrance and harassment to the users of National Highway Authority and not with regard to the financial aspects of the matter. Clause 22(a) and (b) are to be read along with Clause 21, which is reproduced below:

"21. OPERATIONAL TRANSPARENCY:

The Contractor shall be solely responsible for efficient and transparent working and management of User Fee collection at all points of time."

19. The contractor had made a firm bid and the respondent was to receive an amount irrespective of whether the contractor earned a higher revenue and thus in case there was loss of revenue the same could not have been indemnified by the respondent. While relying on Clause 23(e) learned counsel has strenuously urged before us that the same would show the existence of participation by the respondent and once the issue of obstruction was repeatedly brought to the notice of the respondent, it was for the respondent to take up the matter with the State Government and ensure that there was smooth movement of traffic. We are unable to agree with this submission of the learned counsel for the appellant as such a clause was also to be read to ensure that commuters do not face any hardship and not that the respondent was to participate in the day to day collection.

20. Lord Diplock in the *Duport Steel v Sirs* case (1980) defined the rule as where the words are plain and unambiguous, it is not then for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they consider the consequences for doing so would be inexpedient, or even unjust or immoral [Also see: *Fisher vs. Bell*].

21. The Apex Court in the case of *M. Arul Jothi and Anr vs. Lajja Bal and Anr.* reported at (2000) 3 SCC 723, wherein the Court in paragraph 10 held as under:-

"....Once parties enter into a contract then every word stated therein has to be given its due meaning which reveals the rights and obligations between the parties. No part of the agreement or words used therein could be said to be redundant."

22. Given the said clauses and the law in place, the onus was on the appellant to collect the user toll fee efficiently and the respondent cannot be held liable for the disruption as all the facts were within the knowledge of the appellant. The appellant is a well-established contractor having operated more than 100 toll plaza sites, including 5 in Odisha itself.

23. Moreover, this Court cannot lose track of the fact that the force majeure clause was invoked, a legal notice was issued, the respondent took a sympathetic view of the matter and an amount of Rs.2,51,16,036/- was released in favour of the appellant which was duly accepted without any protest or demur.

24. The law is well settled that the scope of judicial scrutiny and interference by an appellate court under Section 37 of the Act is narrower than while deciding a petition under Section 34 of the Act. It is well settled that findings of fact as well as of law of the Arbitrator/Arbitral Tribunal are ordinarily not amenable to interference either under Section 34 or Section 37 of the Act.

25. This Court in the matter of M/s. L.G. Electronics India (P) Ltd. v. Dinesh Kalra, FAO(OS)(COMM).86/2016, held that the scope of interference is constrained to cases where the Tribunal has made a finding which is either contrary to the terms of the contract between the parties, or ex facie, a perverse finding. It is only in those cases that interference is absolutely necessary. The Arbitrator /Tribunal is the final arbitrator on facts as well as on law, and even errors, factual and legal, which stop short of perversity, do not merit interference under Section 37 and Section 34 of the Act.

26. Having regard to the law laid down by this Court as well as the Apex Court in number of decisions rendered and applying the law laid down, to the facts of the present case, we do not find any merit in the appeal. Accordingly, the present appeal stands dismissed.