

(2018) 03 DEL CK 0490

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 574 Of 2016,
Miscellaneous Application No. 15736 Of 2016

Eagle Infra India Ltd

APPELLANT

Vs

National Highway Authority Of India

RESPONDENT

Date of Decision : 21-03-2018

Acts Referred:

National Highways Fee (Determination Of Rates And Collection) Rules, 2008 — Rule 6
Arbitration And Conciliation Act, 1996 — Section 34
Indian Contract Act, 1872 — Section 73
National Highway Act, 1956 — Section 7
National Highways Authority of India Act, 1988 — Section 16

Citation : (2018) 03 DEL CK 0490

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Anish Dayal, Rupam Sharma, Preety Makkar, Abhimanyu Garg,
Gunjan Sinha Jain, Mukesh Kumar

Final Decision : Dismissed

Judgement

Vibhu Bakhru, J

1. The petitioner (hereafter "EIIL") has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter "the Act") impugning an arbitral award dated 01.09.2016 (hereafter "the impugned award") passed by the Arbitral Tribunal comprising of the sole arbitrator Mr M.K. Aggarwal (hereafter "the Arbitral Tribunal").

2. The controversy between the parties relates to the petitioner's claim of Rs. 26,58,26,689/- on account of revenue loss allegedly suffered by EIIL. The Arbitral Tribunal has, inter alia, rejected the said claim by the impugned award and this has led EIIL to file the present petition.

Factual Background

3. The respondent (hereafter "NHAI") issued a Notice Inviting Tender (NIT) in the year 2012-13 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 279/000) of Sunakhala to Bhubaneshwar section of NH-5 in the state of Odisha". EIIL submitted its bid of an annual remittance amount of Rs. 35,45,00,000/- (Rupees thirty five crores and forty five lakhs). Pursuant to the aforesaid NIT, EIIL's bid was accepted and NHAI issued a Letter of Acceptance (LoA) dated 07.03.2013.

4. Thereafter, the parties entered into the Concession Agreement dated 08.03.2013 (hereafter "the Agreement"). The term of the Agreement was 12 months ? that is, from 09.03.2013 to 08.03.2014 ? which was further extendable by a period of three months. NHAI also issued a Work Order dated 08.03.2013.

5. The contract entails the management of toll plaza and collection of applicable user fee (toll) from various users in terms of the applicable notification dated 14.12.2012 issued by the Central Government. EIIL claims that it mobilized sufficient resources for execution of the activities involved; however, it faced numerous difficulties, road blocks and disturbances, which were beyond its control. EIIL claims that within four days of commencing the collection of the user fee at the Toll Plaza in question, there was a disturbance from the local population. EIIL states that it had sent a letter dated 14.03.2013 alleging that the NHAI had suppressed material facts. In this letter, EIIL claimed that making of lower payments by the users of the highway is contrary to the Gazette Notification specifying the rates of fees and is a force majeure event under Section 25 (b)(i) of the Agreement.

6. This was followed by further letters dated 17.04.2013, 22.04.2013 and 27.04.2013, whereby EIIL highlighted the loss being suffered by it. On 06.05.2013, EIIL sent a letter reporting a loss of Rs. 1,04,55,295/- during the period 09.03.2013 to 31.03.2013.

7. EIIL also sent letters dated 22.04.2013 and 27.04.2013 to the District Collector, Khurda to resolve the issues. EIIL further sent a letter dated 21.08.2013 to the Chief Secretary, Government of Odisha seeking assistance and resolution of the disputes.

8. EIIL claims that it had also sought police assistance for enforcement of the Gazette Notification as the users were refusing to pay the notified user fee. EIIL claims that the police authorities also expressed their helplessness and called upon EIIL to charge user fees at reduced rates to avoid any law and order problem. EIIL continued to submit its claim on account of the revenue loss claimed to have been suffered by it due to non-payment of user fee by vehicles plying on the Project Highway.

9. On 29.11.2014, EIIL submitted a letter claiming that it had suffered a revenue loss of Rs. 18,00,86,380/- excluding interest on account of non-payment or payment at reduced rates by users plying vehicles on the project highway. By a

letter dated 24.12.2014, the NHAI rejected EIIL's claim as being contractually untenable.

10. EIIL invoked the arbitration clause by a letter dated 18.02.2015 and the disputes so raised were referred to the Arbitral Tribunal.

Statement of Claim

11. EIIL filed its Statement of Claims before the Arbitral Tribunal. It claimed that it had collected Toll from 09.03.2013 to 24.04.2014 and during this period, there were local disturbances from local people. It claimed that from 09.03.2013 onwards, local disturbances from local people increased day-by-day, as their demand was to pay only Rs. 25/- for truck/bus and Rs. 15/- for an LCU or exempt them from paying user fee as per earlier practice. EIIL stated that the private commercial and passenger buses registered with the District were not paying user fee. Further, buses owned by members of Private Odisha Bus Owner's Association were also not paying any user fee. All attempts of EIIL to convince the said users to pay toll, according to the notification issued by the Central Government, were unsuccessful. EIIL also claimed that the users were threatening to damage the Toll Plaza in question.

12. According to EIIL, 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."

13. EIIL claimed that it approached the State Administration, the Chief Secretary, Government of Odisha, Project Director-Project Implementation Unit, NHAI, Chief General Manager, NHAI, as well as various users and office bearers of Odisha Bus Owners Association and Khordha Truck Malika Sangh, to persuade them to ensure that the user fee as notified is paid by all the users. However, EIIL faced stiff resistance and the users failed to comply with the notification issued by the Central Government.

14. EIIL also stated that it had sought help of the police authorities to deal with the agitating people who were resisting payment of toll and had also staged a Dharna at the Toll Plaza. However, the police authorities advised EIIL to reduce the rates of user fees to avoid any law and order problem.

15. EIIL alleged that the NHAI was in breach of the Agreement, as it had

suppressed vital information regarding the practice of collection of user fees at rates lower than those prescribed. EIIL claimed that this information was in the knowledge of the NHAI but had not been disclosed to the bidders. EIIL claimed that it had notified the NHAI regarding various issues being faced by EIIL in collection of user fees resulting in huge losses, but the NHAI had failed to take adequate measures to resolve the critical issues and this constituted a default on the part of the NHAI.

16. EIIL claimed that the NHAI was duty bound to ensure proper implementation of the Government Notification regarding collection of user fees as well as maintaining law and order. EIIL asserted that the NHAI, as a principal employer, was under "implied duty to ensure collection of user fees" as prescribed in the notification issued by Central Government.

17. EIIL further claimed that NHAI was "under implied obligation" to provide peaceful and encumbrance free atmosphere for EIIL to fulfill its obligation of collection of user fees. EIIL claimed that the NHAI had failed to fulfill its obligation to provide such atmosphere causing loss of revenue to EIIL to reasons not attributable to EIIL and, therefore, EIIL was entitled to recover the loss of revenue from the NHAI.

18. EIIL quantified its claim on account of loss of revenue resulting from users not paying the prescribed user fees at Rs. 26,58,26,689/-. EIIL also claimed interest at the rate of 24% per annum compounded annually from due date to the date of filing the Statement of Claims in addition to pendent elite interests at the rate of 24% per annum and post award interest at the rate of 18% per annum. EIIL also claimed a sum of Rs. 10 lakhs as cost of arbitration.

Submissions

19. Mr Anish Dayal, the learned counsel appearing for EIIL advanced contentions, essentially, on four fronts. First, he contended that the Arbitral Tribunal had grossly erred in rejecting EIIL's claim on the ground that EIIL ought to have terminated the Agreement instead of raising claims after the contract was over. He submitted that if EIIL had terminated the Agreement, the NHAI would not only have encashed the Performance Bank Guarantees furnished by EIIL, but would have also recovered damages in addition to blacklisting EIIL. He earnestly contended that EIIL could not be faulted for continuing to perform the contract while pursuing with its claims.

20. Second, he contended that there was ample evidence on record that EIIL had suffered damages on account of users not paying the prescribed user fees and, therefore, EIIL had discharged the burden of proof for establishing the quantum of damages as required under Section 73 of the Indian Contract Act, 1872.

21. Third, he submitted that the NHAI was the Principal Employer and EIIL was only performing the function of managing the collection of user fees and, therefore, EIIL could not be held responsible for short collection of user fees,

which was due to reasons beyond its control. He submitted that there was ample evidence to indicate that EIIL had done everything possible for ensuring that user fees at the prescribed rate is collected; however, it could not collect the same due to unprecedented resistance from users. He referred to the provisions of Section 7 of the National Highway Act, 1956 and contended that the user fee being collected was levied by the Central Government and was to be collected in accordance with the Rules. He referred to Rule 6 of the National Highways Fee (Determination of Rates and Collection) Rules, 2008, which provided that the "the fee levied under the Rules would be collected by the Central Government or the executing authority or the concessionaire". He submitted that in terms of Section 16 of the National Highways Authority of India Act, 1988, the NHAI was charged with the function of collecting fees on behalf of the Central Government, and the Agreement entered into between EIIL and the NHAI was in order to discharge the said function. He submitted that in this view, the ultimate responsibility for the collection of user fees rested with the NHAI and, therefore, any loss on account of non-collection of such fees would also have to be borne by the NHAI. He also referred to Clause 22 of the Agreement, which expressly provides that the representative of the NHAI would have the overall authority to control and supervise the work of collection of user fees carried on by EIIL.

22. Lastly, Mr Anish Dayal also contended that the resistance being faced by EIIL in collecting the user fees amounted to a force majeure event. However, he subsequently withdrew the said contention as, concededly, this was not canvassed by EIIL before the Arbitral Tribunal.

Reasons and Conclusions

23. The contention, that the NHAI has breached the Agreement, is wholly unsustainable. There was no obligation on the part of the NHAI to ensure that the users of the Project Highway pay the prescribed fees. NHAI was authorized to collect the user fees levied by the Central Government for services and benefits rendered in terms of Section 7 the National Highways Act, 1956 read with The National Highways Fee (Determination of Rates and Collection) Rules, 2008. NIT, as well as the Agreement, makes it explicitly clear that the bids invited were "in lieu of transferring Central Government's user fee collection rights" for the Project Highway. Thus, the Agreement between the parties was essentially for transferring the right to collect user fees. EIIL was entitled to appropriate the entire user fees collected from the users in lieu of the consideration as agreed under the Agreement.

24. The contention, that the NHAI had breached the Agreement by not ensuring a proper environment for collection of user fees, is also unmerited. The Arbitral Tribunal had found that although there is a possibility that EIIL suffered losses but that was a part of the management of the Toll Plaza, and no part of such losses can be attributed to the NHAI. This Court finds no infirmity with the aforesaid finding. The Arbitral Tribunal had further noted that the terms and conditions as specified in the tender documents required EIIL to satisfy itself with

regard to the site, volume of traffic, diversion of traffic, availability of power, climate, conditions of road and any other matter considered relevant and, therefore, EIIL could not attribute any default on the part of the NHAI. Mr Anish Dayal contended that there was no possibility for EIIL to have become aware of the resistance to payment of user fee that would have been offered by users and, therefore, the Arbitral Tribunal had grossly erred in holding that EIIL was responsible for satisfying itself in this regard prior to the submission of bids. This contention is also unpersuasive. Clearly, EIIL could have made necessary enquiries and made an assessment as to any possible resistance on the part of the users to pay the user fee. Having stated the above, it is necessary to observe that EIIL had rested its case on breach of the Agreement on the part of the NHAI. This, clearly, is not established in this case, and the decision of the Arbitral Tribunal in rejecting the claims made by EIIL cannot be interfered with.

25. The contention, that the responsibility for shortfall in collection of user fees rested with the NHAI as EIIL was only a contractor for the purposes of managing the collection of fee, is also unsustainable. EIIL had submitted its bid for acquiring rights to collect the User Fee. In terms of the Agreement, EIIL was not required to account to the NHAI for any user fees collected in excess of the bid amount. Thus, EIIL was entitled to appropriate the entire user fees collected in lieu of the consideration offered by EIIL. It is also apparent that the attendant risks were also to be borne by EIIL.

26. The observations made by the Arbitral Tribunal that EIIL could have walked out of the contract rather than continued suffering losses at an appropriate time must be read in its context. The Arbitral

Tribunal was of the view that the NHAI ought to have intervened when it was informed about non-cooperation by the local police. If, EIIL had referred the dispute to arbitration at that stage, directions for such intervention may have been possible. It appears to this Court that the Arbitral Tribunal was of the view that the grievance of the petitioner could have been addressed at that stage; however, after completion of the contract, no relief could be granted to the petitioner given that the NHAI could not be held to be in breach of the contract. These observations made by the Arbitral Tribunal are not central to the dispute. The Arbitral Tribunal had returned a categorical finding that EIIL may have suffered losses but that was a part of the management of the Toll Plaza and the same could not be attributed to the NHAI. Thus, the relief as claimed for by EIIL could not be granted.

27. In view of the above, this Court finds no ground to interfere with the impugned award in these proceedings. The petition is, accordingly, dismissed. The pending application also stands disposed of. The parties are left to bear their own costs.