

(2017) 11 DEL CK 0597

In the Delhi High Court

Case No : First Appeal From Order (OS) (COMM) No. 157 Of 2017

National Highways Authority Of India

APPELLANT

Vs

EMAS Expresway Private Limited

RESPONDENT

Date of Decision : 08-11-2017

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 31(7), 34, 37
Indian Contract Act, 1872 — Section 55

Citation : (2017) 11 DEL CK 0597

Hon'ble Judges : S. Ravindra Bhat, J; Sanjeev Sachdeva, J

Bench : Division Bench

Advocate : Arun Batta

Final Decision : Dismissed

Judgement

Claim No., Brief of claim, Amount in Rs. In Crore,,

,, "Claimed by the

Respondent

Concessionaire (in

Rs)", "By Majority Award

(in Rs)", "By Minority Award

(In Rs)

1, "EPC

Contractor's

prolongation costs", "Rs. 3,90,99,636/-", "3,52,97,431/-", 0

2, "Concessionaire's

Prolongation costs", "Rs. 1,06,30,100/-", "1,03,88,674/-", 0

3,"Additional Cost
arising from Change
in law","Rs. 15,42,36,720/-","13,37,82,038/-","6,52,70,424/-
4,(i) Financing Cost,"Rs.8,57,74,880/-",0,0
5,"Interest on amounts
of Claims No.1 to 4","Interest @ 13.5%
p.a. from the date of
cause of action","Claim No. 1 & 2
5,26,19,086 Claim
No.3 11,83,58,173
(Interest @ 13.5%
pa upto date of
Award)","5,69,04,713 (interest
only for claim 3)
6,"Reimbursement of
Electricity Charges
and Cost of Diese
for standby
Generation Sets
supplied during
operation period of
the Project Facilities
Electricity Charges
and the supply of
Diesel Electricity
Charges -For the
period Oct 2005 to
Dec 2007- Rs.
13,626,630/- (a) For
the period 1-1-2008

to 31-7-2008-

Rs.3,564,656 (b) Cost
of Diesel â?" For the
period June 2005 to
Dec 2007 â?

383,178/- (c) â?" For
the period 1- 1-2008
to 31-7- 2008 â?

Rs.211,841 (d) Plus
interest", "1,77,86,305 Plus
Interest @ 18% per
lannum from the
respective dates of
payment of the Bills
for Electricity
Charges and the
supply of Diesel to
the date of
reimbursement.", "1,77,86,305 Plus
interest 1,63,12,221
(Interest @ 13.5%
pa up to date of
Award)", Nil
7, "Refund of Rs.
12,69,000 deducted
from 1 st Annuity
payment plus interest", "12,69,000 Plus
interest @ 18% pa
from 02.09.2005", "12,69,000 Plus
interest 14,27,311

(interest @ 13.5% pa
upto date of Award)", "12,69,000 Plus
interest 14,27,311

(interest @ 13.5% pa
upto date of Award)

Total,,, "38,72,40,239/-", "12,48,71,448/-

variation in the prolongation costs in the report submitted by both the parties,
the 10% additional sum included in the certificate issued by M/s Krag 7",,,,

Associates was found to be not justified and rejected. On this basis he said, an
amount of Rs.3,52,97,431/- was allowed.",,,,

13. Claim No.2 pertaining to Concessionaire's claim relating prolongation costs
to the tune of Rs. 1,03,88,674/- was found to have been certified",,,,

by M/s K.L. Chatrath & Co. and accordingly the Arbitral Tribunal allowed the said
claim in favour of the respondent. The impugned order notices that,,,,

the appellant has not been able to substantiate that the finding recorded by the
Arbitral Tribunal is contrary to the evidence on record or perverse. On,,,,

this ground learned Single Judge declined to interfere with the award in respect
of Claim Nos. 1 & 2.,,,,

14. With regard to additional costs arising from change in law, the impugned
order held as under:-",,,,

29. Turning to Claim No.3 which was for additional cost arising from change in
law whereby the revised figure claim came to Rs.,,,,

154,236,720/-, the majority AT has discussed the relevant Article 11 as well as
Articles 11.1, 11.2 and 11.3 which provide for",,,,

reimbursement. The majority AT found that the Respondent had claimed
reimbursement of additional cost in accordance with Article 11.2.,,,,

The majority also examined the certificate dated 12th August, 2008 and affidavit
dated 29th June, 2009 of M/s Krag & Associates. The",,,,

affidavit of Mr Abhijit Ghosh and the above certificate formed part of the
evidence.,,,,

30. It was concluded by majority AT, that the Respondent had fulfilled its
obligations and followed the procedure under Article 11.3(a) &",,,,

(b). It was also found that no discussion was held by NHAI or the Concessionaire
along with the IE on the subject pursuant to Clause 11.3.,,,,

(b) for certification by IE and determination of the additional cost to borne by the Respondent. The majority AT found that the large number,,,,

of vouchers submitted could hardly be doubted.,,,,

31. Under Article 11.1, taxes and levies if any payable in an accounting year and the increase in expenditure had to be borne by the",,,,

Respondent. The remaining was to be compensated by NHA. However, any increase in cost to the EPC Contractor/Concessionaire on",,,,

transportation of stone due to change in law could not be accepted. Therefore, the amount of Rs.1,48,88,267 was ""not found to be",,,,

admissible"". The majority AT also discussed the increase in the minimum wages and accepted the recommendation for reduction of 25% of",,,,

the said amount of Rs. 17,55,704/-. Ultimately, it was found that as against a sum of Rs.15,42,36,718, the amount awarded the Respondent a",,,,

sum of Rs.13,37,82,038/-."",,,,

32. The challenge to the majority Award is basically on the same grounds urged before it by the NHA. The Court is unable to be persuaded,,,,

to interfere with the impugned Award insofar as it has allowed Claim No.3.â???,,,,

15. We do not find any infirmity with the view taken by the learned Single Judge and find no reason to interfere with the impugned award, insofar as it",,,,

allows Claim No.3.,,,,

16. Claim No.4, pertaining to financing cost, has been rejected by the Arbitral Tribunal unanimously. Learned Single Judge has not found any reason to",,,,

interfere with the said finding. The said finding is not even impugned by the respondent. Accordingly, the same is not interfered with.",,,,

17. With regard to claim of interest claim under Claim No.5, it is noticed that the Arbitral Tribunal has referred to Article 19.2 and Section 31(7) of the",,,,

Act and has gone by the prime lending rate fixed by the Reserve Bank of India. 2% above the prime lending rate was considered by the Arbitral,,,,

Tribunal to be reasonable, consequently holding that effective rate of interest to be 13.5% p.a. As noticed above, the Arbitral Tribunal is unanimous",,,,

with regard to the rate of interest. We find no reason to interfere with the same.,,,,

18. With regard to Claim No.6 i.e. for reimbursement of electricity charges and cost of diesel for standby generator sets supplied during operation,,,,

period of the project facilities, the Arbitral Tribunal after considering the

correspondence between the parties at some length has held the respondent",,,,,
entitled to reimbursement on account of electricity charges and cost of diesel for
operation of the project facilities. We find no reason to interfere with,,,,,
the impugned order declining to interfere with the said finding of the Arbitral
Tribunal. Further, the said finding is purely factual in nature not",,,,,
warranting any interference.,,,,,

19. With regard to Claim No.7 for refund of the deduction made by the appellant
from the first annuity payment, the Arbitral Tribunal has held that the",,,,,
same was without any justification and not as per the terms of the Concession
Agreement. No clause was pointed out in the Concession Agreement,,,,,
for any appropriation by the appellant from the annuity payment. There is also
no term for any reduction from the amount payable or any imposition of,,,,,
penalty, token or otherwise. The Arbitral Tribunal found the said deduction was
beyond the scope of the Concession Agreement. The finding is purely",,,,,
factual and does not warrant any interference in exercise of powers under
Sections 34 or 37 of the Act.,,,,,

20. It is noticed that the findings rendered by the Arbitral Tribunal, which are
impugned by the appellant, are purely factual in nature. The",,,,,
interpretation to the various clauses as noticed hereinabove is a plausible
interpretation rendered by the majority Arbitral Tribunal not warranting any,,,,,
interference.,,,,,

21. The Court in exercise of powers under Section 34 does sit as a Court of
Appeal and is not required to re-appreciate the entire evidence.,,,,,

22. In view of the above, we find no infirmity with the factual findings returned
by the Arbitral Tribunal and its interpretation of the terms & conditions",,,,,
of the Concession Agreement. We find no infirmity with the view taken by the
learned Single Judge in the impugned order and no reason to interfere,,,,,
with the impugned award.,,,,,

23. In view of the above, the appeal is dismissed, however in the facts of the
case, without any costs.",,,,,