

(2021) 02 DEL CK 0172

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 455 Of 2020,
Miscellaneous Application No. 7355 Of 2020

National Highways Authority Of India

APPELLANT

Vs

M/S BSCPL Godhra Tollways Limited

RESPONDENT

Date of Decision : 17-02-2021

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 34, 34(2), 34(2A)

Citation : (2021) 02 DEL CK 0172

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Viplav Sharma, Dr. Amit George, Mukesh Kumar, Amol Acharya,
Meenakshi Sood

Final Decision : Dismissed

Judgement

'''

Vibhu Bakhru, J",'''

1. National Highway Authority of India (hereafter "NHA") has filed the present petition impugning the arbitral award dated 27.11.2019,,,

(hereafter "the impugned award") rendered by the Arbitral Tribunal comprising of three members. The impugned award was rendered in respect,,,

of disputes that had arisen between NHA and M/s BSCPL Godhra Tollways Limited (hereafter "the Concessionaire") in respect of the,,,

Concession Agreement dated 25.02.2010 (hereafter "the Concession Agreement"),,,

2. M/s BSCPL Infrastructure Ltd., a company incorporated under the Companies Act, 1956 submitted a Request For Proposal (RFP) in respect of",,,

"Contract for Four Laning of Godhra to Gujarat/ Madhya Pradesh Border

Section of NH-59 from Km 129.300 to Km. 215.900 in the State of, , ,
Gujarat on Design, Build, Finance, Operate and Transfer (DBFOT) basis under
NHDP â?? IIIâ? (hereafter â??the Projectâ?). By a letter of intent" , , ,
dated 01.01.2010 (LOA), NHA I accepted the proposal, quoting a premium of Rs.
7.83 crores, submitted by BSCPL Infrastructure Ltd. It was further" , , ,
agreed that the concession period would be for twenty-seven years including the
construction period of nine hundred and ten days from the , , ,
â??Appointed Dateâ?. In terms of the RFP Document, BSCPL Infrastructure Ltd.
was required to incorporate a Special Purpose Vehicle (SPV) for" , , ,
the purposes of the Project. Pursuant to the said LOA, BSCPL Infrastructure Ltd.
incorporated the respondent company (the Concessionaire) as the" , , ,
SPV. The Concessionaire entered into the Concession Agreement on
25.02.2010. , , ,
3. The Appointed Date for commencement of the work was fixed at 01.03.2011
and the construction of the Project was agreed to be completed , , ,
within a period of nine hundred and ten days, that is, on or before 26.08.2013.
The execution of the contract was delayed and the time for completion" , , ,
of the Project was extended. NHA I accepted the first Provisional Commercial
Operation Date (PCOD) for 78.271 kms on 31.10.2013 and the second , , ,
PCOD for 7.196 kms on 25.09.2015. The Completion Certificate was issued on
29.06.2016 upon completion of the remaining works. , , ,
4. Disputes arose between the parties in connection with the construction of
Road Over Bridges (ROBs). The Contract provided for the construction , , ,
of five ROBs. However, with mutual agreement, the Concession Agreement was
modified to include construction of only four ROBs. Admittedly, the" , , ,
specification of the ROBs as indicated in the Concession Agreement were
changed. The Concessionaire claimed that the same resulted in a Change , , ,
of Scope (hereafter â??COSâ?)and in terms of the Concession Agreement, it was
entitled to additional cost. According to the Concessionaire, the" , , ,
additional costs were to be determined on the basis of actual costs incurred in
construction of the ROBâ?s, less costs as envisaged for construction of" , , ,
ROBâ?s as per the specifications stipulated in Concession Agreement. The said
disputes could not be resolved amicably and were referred to , , ,
arbitration. , , ,

ROBs as originally envisaged. In terms of the Concession Agreement,",,, NHAH was obliged to secure the approval of the Railway Authorities for the General Arrangement Drawing (GAD) and was required to provide the,,, same to the Concessionaire. NHAH got GADs prepared for the ROBs, which provided for concrete structures, and submitted the same for approval to",,, the Railways. However, after the contract for execution of the project was awarded to the Concessionaire and the parties had entered into the",,, Concession Agreement, the Railways revised their Guidelines for Construction of Standard Arrangement Composite Girders. The same was also",,, confirmed by the Railway Board Policy Circular issued on 28.06.2010. Thereafter, the same was also confirmed by NHAH in their Policy Circular No.",,, 72/2011 dated 20.06.2011. The Concessionaire claimed that the above circulars laid down a completely new method and protocol for construction,,, purposes and envisaged adopting of steel structures for ROBs. According to the Concessionaire, this changed the fundamental specification for",,, construction of the ROBs in question. The Concessionaire was compelled to accept the same and build ROBs as per the changed specifications.,,,, 6. The Concessionaire claimed that the extra cost for construction of the ROBs with the changed specifications was required to be paid by NHAH. It,,, estimated the additional cost of ROBs at Rs. 65,46,82,355/-.",,, However, NHAH determined the same at Rs. 26,70,61,924/-. The Concessionaire claimed that NHAH had not worked out the additional cost as a",,, result of COS in accordance with the Concession Agreement. It claimed that in terms of Article 16 of the Concession Agreement, it was entitled to",,, the cost of construction of the ROBs as per the changed specifications less the total cost of execution of ROB with the specifications as contemplated,,, under Schedule B of the Concession Agreement.,,,, 7. While the disputes were festering between the parties, it was agreed that Concessionaire would proceed with the execution of the works and would",,, be paid an additional cost as estimated by NHAH. Pursuant to the said agreement, NHAH paid a sum of Rs. 25,13,84,057/-. According to learned",,, counsel appearing for the NHAH, the parties had arrived at a settlement in terms of which, NHAH was liable to pay only a sum of Rs. 26,70,61,924/- to",,, the Concessionaire for construction of the ROBs. The Concessionaire disputes the same and states that in terms of the understanding, it had agreed to",,,

proceed with the construction of ROBs on payment of the amount of Rs. 26,70,61,924/- as estimated by NHAI. However, that was only as an interim",,,

measure and without prejudice to its claim that the additional amount was to be computed in accordance with the method agreed under Article 16 of,,,

the Concession Agreement. NHAI disputed the above and claimed that although the settlement was final, the Concessionaire had repudiated the",,,

same.,,,

8. The parties entered into a Supplementary Agreement dated 07.01.2015, whereby they agreed to refer the disputes to arbitration under the aegis of",,,

the "Society for Affordable Redressal of Disputes" (SAROD). In terms of the Regulations/Byelaws of SAROD, the Arbitral Tribunal of three",,,

members was constituted to adjudicate the claims and the counter claims of the parties.,,,

9. Before the Arbitral Tribunal, the Concessionaire raised claims aggregating Rs. 119,84,64,131/- in addition to interest and the costs of the Arbitral",,,

proceedings.,,,

10. NHAI made a counter claim of Rs. 25,13,84,057/- being the amount paid to the Concessionaire on account of construction of the ROBs.",,,

11. Before the Arbitral Tribunal, NHAI contended that it was not obliged to make any payment for construction of the ROBs to the Concessionaire as",,,

the Concession Agreement was an all inclusive contract and the specifications regarding ROBs were disclosed to be tentative. It was contended that",,,

since ROBs fall within the scope of works, any change in the specifications of the ROBs would not constitute a COS under the Concession",,,

Agreement and thus, would not necessitate any variation in the payment due to the Concessionaire. NHAI Claimed that the additional payment of Rs.",,,

25,13,84,057/- paid by it to the Concessionaire was liable to be refunded and accordingly, NHAI raised a counter claim for the said amount.",,,

12. The Arbitral Tribunal considered the dispute and has held in favour of the Concessionaire. It accepted the Concessionaire's claim that the",,,

change in the specifications of the ROBs constituted a COS, which would necessitate determining the additional cost payable to the Concessionaire.",,,

13. A tabular statement of the claims made by the Concessionaire and the amount awarded against the same, is set out below:",,,

S. NO.,Description,Claim Amount (Rs.),Amount Awarded (Rs.)

(i),"Difference in the Whole Cost of four ROB incurred/to be incurred as per approved GAD and that of the original scope defined in Schedule-B, less Rs.26,70,61,924/ additional cost already paid by Petitioner Authority.","s38,76,20.432/-
-","28,22,25,302/-

(ii),"Additional Railway Centage charges due to the increased scope of work / cost incurred/ to be incurred during the whole of Concession period.","25,24,79,091/-","Nil

(iii),"Loss of Toll Revenue as on 31.05.2015 due to delay in executing the change of scope works of 4 ROBs","22,48,47,154/-","Nil

(iv),"Additional Costs incurred as on 31.03.2015 in executing COS works beyond Original Scheduled Completion Date","30,39,56,438/-
l","Nil

(v),"Interest as on 31.03.2015 due to non-payment of 20% COS advance as per Article 16.3 of CA","2,95,61,016/-
r","2,14,88,995/-

(vi),Interest on Claims No. 1 to 5,,,"10,79,77,142/-

(vii),Cost of Arbitration,,,"17,09,000/-
,Total,"119,84,64,131/-","41,34,00,439/-

contract, is of no relevance.",,,

(b) Though the Concessionaire would have carried out his own studies but the same is of no consequence in view of the clarifications given in pre-bid,,, meeting. As already stated, the answer to query no 54 is very unambiguous and leaves no room for doubt to confirm that even though, the Approved",,,

GADs were to be supplied later, the same will be more or less same as per the details provided in Schedule B and therefore the bidder would have",,,

estimated the costs accordingly while bidding regardless of his own due diligence in the matter. In this connection, the reliance placed by Respondent",,,

on the Article 8.1 of Disclaimer is also of no significance and has no relevance or application in the face of specific and unambiguous clarification,,,

provided by the Respondent.,,,

(c) Such large scale changes in the approved GAD from those details provided in schedule B and confirmed in query no 54, would, in our considered",,,

opinion, entitle the Concessionaire to additional cost by way of COS, from the Respondent.â??",,,

22. Mr Viplav Sharma, learned counsel appearing for NHA assailed the impugned award, essentially, on two grounds. First, he submitted that the",,,

conclusion of the Arbitral Tribunal that there was a COS in the contract requiring the parties to follow the procedure under Article 16 of the",,,

Concession Agreement, is wholly contrary to the terms of the Concession Agreement and, therefore, the impugned award was liable to be set aside.",,,

He referred to Clause 1.2(f) of the Concession Agreement which defined the term â??constructionâ? in an expansive and inclusive manner. He also,,,

referred to Clauses 1.2.3 and 1.2.4 of the Concession Agreement. Clause 1.2.3 expressly excluded the rule of construction that required any,,,

ambiguity in a contract to be interpreted against the party who is responsible for drafting the same. And, Clause 1.2.4 provided that all words and",,,

expressions used in the Concession Agreement would bear their ordinary English meaning. He submitted that Clause 2.1 of the Concession,,,

Agreement which defined the Scope of the Project ought to have been considered keeping the aforesaid agreed principles of interpretation in mind.,,,

But the Arbitral Tribunal had erred in not doing so.,,,

23. He pointed out that in terms of Clause 1 of Schedule B of the Concession Agreement, the development of the Project Highway would also include",,,

construction of the Project Highway as described in Schedule B and in Schedule C to the Concession Agreement. The expression â??constructionâ?,,,

would necessarily have to be interpreted in an expansive manner. He submitted that if interpreted in the aforesaid context, the â??Scope of the",,,

Projectâ? would include the construction of the ROBs with the change in the

specifications as the said work would, notwithstanding the extensive",,,
changes in the specifications, continue to be described as construction of ROBs.
He further contended that Sub-clause (i) of Clause 4.12 of Schedule",,,

B of the Concession Agreement also clarified that the specifications of ROBs were tentative and were subject to change.,,,

24. Next, he submitted that there was a settlement between the parties with regard to the costs to be paid and the Concessionaire agreed to accept an",,,
additional cost of Rs. 26,70,61,924/- on account of change in specifications of the ROBs. Therefore, the Concessionaire could not raise any further",,,
claims in that regard.,,,

25. Before addressing the aforesaid contentions, it is relevant to refer to certain Clauses of the Concession Agreement. Clause 2.1 of the Concession",,,

Agreement defines the scope of the project as under:,,,

â??2.1 Scope of the Project,,,

The scope of the Project (the â??Scope of the Projectâ??) shall mean and include, during the Concession Period:",,,

(a) construction of the Project Highway on the Site set forth in Schedule-A and as specified in Schedule-B together with provision of Project Facilities,,,

as specified in Schedule-C, and in conformity with the Specifications and Standards set forth in Schedule-D;",",,

(b) operation and maintenance of the Project Highway in accordance with the provisions of this Agreement; and,,,

(c) performance and fulfilment of all other obligations of the Concessionaire in accordance with the provisions of this Agreement and matters,,,

incidental thereto or necessary for the performance of any or all of the obligations of the Concessionaire under this Agreement.â??",,,

26. Undisputedly, the Scope of the Project includes construction of the Project Highway on the sites as set forth in Schedule A and Schedule B of the",,,

Concession Agreement. It is not the Concessionaire's case that construction of the ROBs does not fall within the scope of the Project. There is also,,,

no dispute that the expression â??constructionâ?? must be read as defined under Clause 1.2(f) of the Concession Agreement which reads as under:,,,

â??(f) references to â??constructionâ? or â??buildingâ? include, unless the context otherwise requires, investigation, design, developing, engineering,",,

procurement, delivery, transportation, installation, processing, fabrication,

testing, commissioning and other activities incidental to the construction, and",,,
"construct" or "build" shall be construed accordingly;,",,

27. It is also relevant to note that it is not in dispute that specifications of the ROB as set out in Schedule B, were extensively changed. The Arbitral",,,

Tribunal had found that there were large scale changes made in the approved GADs inasmuch as, the GADs required pile foundations instead of open",,,

foundations as envisaged in Schedule B of the Concession Agreement; steel girders were required to be provided instead of RCC T-beam in the",,,

superstructure; and the spans and their number were also changed. The Arbitral Tribunal noted that such extensive changes in the basic parameters",,,

also resulted in a change in other parameters as well; thus, resulting in complete change in design, methodology as well as materials.",,,

28. The findings of the Arbitral Tribunal in this regard are not disputed by NHAI. However, Mr Sharma contends that notwithstanding the extensive",,,

changes, the same would not result in any change in the Scope of the Project as contemplated under the Concession Agreement and the decision of",,,

the Arbitral Tribunal to hold otherwise is contrary to the terms of the Concession Agreement.,,,

29. Clause 4.12 of Schedule B of the Concession Agreement, which is relied upon on behalf of NHAI, reads as under:",,,

"4.12 ROB/RUB",,,

Details of ROB/RUBs to be provided are given at Appendix BXIV. Following points shall be taken care of:",,,

i). The proposed span arrangements of the ROB are tentative and subject to change as per availability of railway boundaries/ requirement of the",,,

railways.,,,

ii). ROB shall be designed, constructed and maintained as per the requirements of Railway authorities. The construction plans shall be prepared in",,,

consultation with the concerned railway authority.,,,

iii). The ROB's shall be constructed and maintained by the concessionaire under supervision of the Railways.,,,

iv) All expenditure related to construction, maintenance and supervision of ROB (except P&E charges) shall be borne by the Concessionaire.",,,

v) During construction, the existing level crossings shall be widened to 12 metres or two separate level crossings of 7 metres each shall be provided."",,,

30. A plain reading of the sub-clause (i) of Clause 4.12 of Schedule B to the Concession Agreement does indicate that span arrangements of the,,,

ROBs were tentative and would be subject to change. However, it is difficult to accept that the said clause also contemplated fundamental changes in",,,

specification that completely altered the design, materials and the method of construction of the ROBs. Sub-clause (i) of Clause 4.12 of Schedule B",,,

provided some flexibility to NHAI but it is apparent that the variation in the specifications contemplated did not permit a complete change in the design,,,

and materials. The variations contemplated would necessarily have to be in broad conformity with the template as set out in Schedule B. It is also,,,

relevant to note that Sub-clause (i) referred to only span arrangements and did not refer to any other fundamental structural changes in the ROBs.,,,

31. Article 16 of the Concession Agreement contains provisions regarding COS and must be read bearing the aforesaid in mind. Clause 16.1 provides,,,

for the COS. The relevant extract of the said Clause 16 are set out below:,,,

â??16.1 Change of Scope,,,

16.1.1 The Authority may, notwithstanding anything to the contrary contained in this Agreement, require the provision of additional works and services",,,

which are not included in the Scope of the Project as contemplated by this Agreement (the â??Change of Scopeâ?). Any such Change of Scope shall,,,

be made in accordance with the provisions of this Article 16 and the costs thereof shall be expended by the Concessionaire and reimbursed to it by the,,,

Authority in accordance with Clause 16.3.,,,

xxxx xxxx xxx,,,

16.1.3 Any works or services which are provided under and in accordance with this Article 16 shall form part of the Project Highway and the,,,

provisions of this Agreement shall apply mutatis mutandis to such works or services.,,,

xxxx xxxx xxx,,,

16.3 Payment for Change of Scope,,,

16.3.1 Within 7 (seven) days of issuing a Change of Scope Order, the Authority shall make an advance payment to the Concessionaire in a sum equal",,,

to 20%(twenty per cent) of the cost of Change of Scope as agreed hereunder, and in the event of a Dispute, 20% (twenty per cent) of the cost",,,

assessed by the Independent Engineer. The Concessionaire shall, after commencement of work, present to the Authority bills for payment in respect",,,
of the works in progress or completed works, as the case may be, supported by such Documentation as is reasonably sufficient for the Authority to",,,
determine the accuracy thereof. Within 30 (thirty) days of receipt of such bills, the Authority shall disburse to the Concessionaire such amounts as are",,,
certified by the Independent Engineer as reasonable and after making a proportionate reduction for the advance payment made hereunder, and in the",,,
event of any Dispute, final adjustments thereto shall be made under and in accordance with the Dispute Resolution Procedure.",,,

16.3.2 Notwithstanding anything to the contrary contained in Clause 16.3.1, all costs arising out of any Change of Scope Order issued during the",,,

Construction Period shall be borne by the Concessionaire, subject to an aggregate ceiling of 0.25% (zero point two five per cent) of the Total Project",,,

Cost. Any costs in excess of the ceiling shall be reimbursed by the Authority in accordance with Clause 16.3.1. In the event that the total cost arising",,,

out of Change of Scope Orders (if any) issued prior to the Project Completion Date is less than 0.25% (zero point two five per cent) of the Total",,,

Project Cost, the difference thereof shall be credited by the Concessionaire to the Safety Fund within a period of 180 (one hundred and eighty) days of",,,

the Project Completion Date. For the avoidance of doubt, it is agreed that the aforesaid 0.25% (zero point two five per cent) of the Total Project Cost",,,

shall, to the extent borne by the Concessionaire, be deemed to form part of the actual capital cost of the Project.â??",,,

32. A plain reading of Clause 16.1.1 of the Concession Agreement indicates that the provision of additional works and services, which are not included",,,

in the Scope of the Project as contemplated under the Concession Agreement would constitute a COS. The Arbitral Tribunal concluded that in view",,,

of the expansive changes made to the specifications of the ROBs as specified under Schedule B, the same would fall outside the Scope of the Project",,,

as contemplated under the Concession Agreement.,,,

33. As noticed above, the Scope of the Project included construction of Project Highway as set forth in Schedule A and as specified in Schedule B.",,,

Having concluded that there were extensive changes in the specifications of ROBs, the conclusion of the Arbitral Tribunal that the same falls outside",,,

the Scope of the Project as defined under Clause 2.1(a) of the Concession Agreement cannot be faulted.,,,

34. At this stage, it is relevant to note that the scope of examination under Section 34 of the A&C Act is limited to determining whether the arbitral",,,

award fails on any of the grounds as set out in Sub-sections (2) and (2A) of Section 34 of the A&C Act. This Court does not examine the arbitral,,,

award as a first appellate court and cannot supplant its opinion over that of the Arbitral Tribunal. In this case, it is clear that the findings of the Arbitral",,,

Tribunal are based on cogent reasons. This Court finds no flaw in the Arbitral Tribunal's interpretation of the Concession Agreement and it cannot,,,

by any stretch be stated to be patently illegal or contrary to the fundamental policy of Indian law. The interpretation of the Concession Agreement was,,,

well within the jurisdiction of the Arbitral Tribunal and warrants no interference by this Court.,,,

35. Mr Sharma had initially argued that there was a settlement between the parties and NHAH was stopped from raising any claims. However, the",,,

said contention is, plainly, unsustainable. NHAH had filed a claim seeking refund of the amount paid under the said settlement and it had specifically",,,

pleaded as under,,,

10.4 The submissions and the proceeding of the Amicable Settlement, as per the settled law, cannot be held against the parties and the Learned",,,

Tribunal is requested to consider the proceedings of the Amicable Settlement as non est.â?,,,

36. It is also noticed from the letters issued by the concessionaire in particular, letters dated 02.04.2014 and 31.03.2014 that the concessionaire had",,,

accepted to proceed with the construction by receiving an amount of Rs. 26,70,61,924/- only as an interim measure and without prejudice to its claim.",,,

37. In view of the above, this Court finds no reason to interfere with the impugned award. The present petition is unmerited and is, accordingly,",,,

dismissed.,,,

38. The pending application is also disposed of.,,,