

(2021) 03 DEL CK 0311

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 127 Of 2021,
Miscellaneous Application No. 4106, 4107 Of 2021

National Highways Authority Of India

APPELLANT

Vs

M/S. C.P. Rama Rao [Proprietor]

RESPONDENT

Date of Decision : 23-03-2021

Acts Referred:

Constitution Of India, 1950 — Article 13(3)
Arbitration And Conciliation Act, 1996 — Section 34, 34(2), 34(2A)
Arbitration Act, 1940 — Section 30, 33

Citation : (2021) 03 DEL CK 0311

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Saurabh Banerjee, Ram Babu, Angad Mehta

Final Decision : Dismissed

Judgement

Vibhu Bakhru, J

1. The petitioner (hereinafter 'NHAH') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter the 'A&C Act'), inter alia, impugning the Arbitral Award dated 12.12.2020 (hereinafter the 'impugned award') passed by the Arbitral Tribunal comprising of a Sole Arbitrator.

2. The impugned award was rendered in respect of disputes that had arisen between the parties in relation to an agreement dated 30.07.2016 (hereinafter the 'Contract Agreement') entered into between the parties for "Collection of user fee of Vemapadu Fee Plaza at Km. 795.498 for Ankaapalli to Tuni Section from Km. 358.00 to Km. 272.00 (New Chainage from Km. 830.525 to Km. 741.255) of NH-5 in the State of Andhra Pradesh" (hereinafter the 'project').

3. On 17.06.2016, NHAH invited tenders by issuing a Request for Proposal (RFP) in respect of work relating to collection of User Fee at Vemapadu Toll Plaza located at Km. 795.498 on the stretch extending from Km. 830.525 to Km. 741.255 on

National Highway No.5 (now renamed as National Highway No.16) in the State of Andhra Pradesh.

4. On 21.07.2016, the respondent submitted the financial bid for the aforesaid work. He was declared the highest bidder and NHAH issued a Letter of Acceptance. Thereafter, on 30.07.2016, the parties entered into a Contract Agreement, whereby the respondent was granted the concession for collecting User Fee at Vempadu Toll Plaza for a period of one year with effect from 08:00:00 hours on 01.08.2016 to 07:59:59 hours on 01.08.2017. In terms of the Contract Agreement, the respondent was required to pay Rs. 2,24,40,274/- per week to NHAH. The said payment was exclusive of any TCS or any taxes or service charges as applicable.

5. In terms of Clause 19 of the Contract Agreement, the respondent was liable to pay penalty at the rate of 0.2% per day for initial one month delay and at the rate of 0.5% per day for further delay beyond one month in remittance of the agreed amount. In terms of Clause 17(b)(i) of the Contract Agreement, the respondent also furnished the following performance security: (i) cross DD, Pay order in the sum of Rs. 9,75,09,000/- and (ii) bank guarantee being BG No. 24/2016 dated 30.07.2016 in the sum of Rs. 9,75,09,000/- issued by Indian Bank.

6. The Government of India rolled out the Goods of Services Tax (GST) with effect from 01.07.2017. The said levy subsumed all indirect taxes.

7. The respondent claimed that in view of the uncertainty surrounding the implementation of GST, there was a rapid decline in the movement of traffic and it adversely affected the collection of tolls. The respondent brought this to the notice of NHAH by its letter dated 05.07.2017.

8. The respondent informed NHAH that he had incurred a loss of Rs. 52,62,228/- on account of reduction in collection of tolls for the period 28.06.2017 to 05.07.2017. According to the respondent, the said communication was received by the Project Director (PD) and was submitted to the Regional Office (RO) for assessment. Thereafter, the respondent sent another letter dated 08.07.2017, tabulating the loss incurred by him for the period from 28.06.2017 to 07.07.2017 at Rs. 62,89,975/-. This was also followed by another letter dated 12.07.2017 whereby the respondent quantified the loss for the period from 28.06.2017 to 11.07.2017 at Rs. 85,21,924/-. The respondent also sent letters claiming loss on account of demonetization and of high value currency notes and unprecedented floods.

9. Finally, on 08.08.2017, the respondent sent a letter quantifying its loss for the period 28.06.2017 to 04.08.2017 at Rs. 2,39,28,340/-. The respondent claimed as a shortfall in remittances at Rs. 1,31,73,252/-.

10. On 07.04.2018, the concerned PD sent a letter to the RO, providing a detailed analysis of its determination of loss suffered by the respondent for the

period from 01.07.2017 to 04.08.2017 at Rs. 1,03,88,126/- on account of implementation of GST.

11. The respondent claimed that the roll out of GST and other events fall within the scope of 'force majeure events' under the Contract Agreement and accordingly, the respondent sought payment of compensation and/or waiver of part of the remittance from NHAH. The said communications were also accompanied by analysis and data which, according to the respondent, established the loss incurred by him.

12. The respondent claimed that the introduction of GST to subsume all existing indirect taxes constituted a change in law. The respondent further asserted that the same had a material effect on his obligations under the Contract Agreement and therefore, constituted a force majeure event in terms of sub-clause (v) of Clause 25(b) of the Contract Agreement.

13. The loss suffered by the respondent was verified by two separate and independent PDs and both PDs calculated and tabulated the difference between the agreed and actual remittance and accordingly, recommended the release of the amounts under the Force Majeure clause of the Contract Agreement. PD (Shri J. Ch. Venkataratnam) determined the loss occasioned to the respondent for the period from 01.07.2017 to 04.08.2017 as Rs. 1,03,88,126/- while PD (A. Srinavas Rao) independently determined the loss at the same amount.

14. NHAH in its letter dated 20.01.2019 to the PD, rejected the respondent's claim on the ground that "the variation in the traffic comparing to July 2016 to July 2017 is only 1.362% which is very nominal and hence does not qualify for Force Majeure...". Thereafter, a learned Sole Arbitrator was appointed by this Court on 26.09.2019. The parties referred the disputes to the Arbitral Tribunal and the arbitral proceedings culminated in the impugned award.

15. The Respondent filed its Statement of Claims and claimed the following: (i) to declare the period from 01.07.2017 to 04.08.2017 as a Force Majeure event under Clause 25 of the Toll Agreement; (ii) waiver of payment of Rs. 1,03,88,126/-; (iii) release of Performance Security Bank Guarantee No. 24/2016 dated 30.07.2016 as executed from time to time; (iv) Expenses of Rs. 41,64,750/- for locking of Performance Security Bank Guarantee No. 24/2016 dated 30.07.2016 with effect from 01.08.2017 till the date of filing of the Statement of Claim (that is, 24.09.2019) as well as the actual cost of renewal of Performance Security Bank Guarantee No. 24/2016 dated 30.07.2016 till the actual date of release; (v) refund of both Performance Bank Guarantees of Rs. 9,75,09,000/- [Rs. 5,00,000 + Rs. 4,75,09,000] deposited with NHAH along with interest at 18% per annum with effect from 30.08.2017; (vi) Interest of Rs. 1,85,35,3444/- towards interest paid by the respondent towards overdraft of Rs. 7,25,00,000/-; and (vii) cost(s) of the arbitration proceedings.

16. The Arbitral Tribunal considered the rival contentions. It held that the introduction of GST was a new legislation approved by both houses of the

Parliament of India and NHAI itself had, in a circular dated 16.03.2018, accepted the introduction of GST as a 'change in law'. It further held that in terms of Clause 25(b) of the Contract Agreement, only that 'change in law' which has a 'material adverse effect' on the obligations of the parties can be treated as a force majeure event and an estimated loss of Rs. 1,03,88,126/-, as assessed by the PD, cannot be considered as immaterial.

17. The Arbitral Tribunal further held that the respondent was entitled to return of the two performance securities after termination of the Contract Agreement and NHAI was obligated to release the same within a period of thirty days from the date of termination of the contract. Accordingly, the Contract closed on 04.08.2017 and thus, the respondent was entitled to the same by 04.09.2017. Accordingly, the Arbitral Tribunal also awarded a sum of Rs. 41,64,750/- on account of expenses incurred on keeping the Bank Guarantees alive and the same was also not disputed by NHAI.

18. The Arbitral Tribunal also awarded interest at 8% per annum with effect from 04.09.2017 till the date of the award and if the same was not paid within three months, then future interest at 8% per annum from the date of the Arbitral Award till the date of payment.

19. A tabular statement summarising the award as set out in the impugned award is reproduced below:

SI. No.

Claim No.

Claim Amount

Amount Awarded (In Rs.)

1.

Claim No. 1

Declaration

The period from 01.07.2017 to 04.08.2017 is declared as Force Majeure period.

2.

Claim No. 2

Rs. 1,09,45,140/-

Payment of Rs. 1,03,88,126/- waived off from the remittances due.

3.

Claim No. 3

Rs. 9,75,09,000/-

BG for Rs. 9,75,09,000/- to be released in favour of Claimant

4.

Claim No. 4

Rs. 41,64,750/-

Rs. 41,64,750/-

5.

Claim No. 5

Rs. 9,75,09,000/- Plus interest @ 18% pa

Rs. 8,33,77,524/- plus simple interest @ 8% p.a w.e.f 04.09.2017 till date of Award. If amount not paid within 3 months of award future interest @ 8% p.a from date of award till date of payment

6.

Claim No. 6

Rs. 1,85,35,344/-

Nil

7.

Claim No. 7

Interest as Due

Claim withdrawn

8.

Claim No. 8

Arbitration Cost

Rs. 15,00,000/-

Submissions

20. Mr Saurabh Banerjee learned counsel appearing for NHAH has assailed the impugned award, essentially, on four fronts. First, he submitted that the Arbitral Tribunal had grossly erred in ignoring Clause (h) of the Contract Agreement whereby the respondent was obliged to remit a sum of Rs. 2,24,40,274/- per week. The said amount was calculated on the basis of the bid of Rs. 1,17,00,99,999/- submitted by the respondent. He pointed out that Clause (h) also expressly provided that "the amount quoted above shall be exclusive of TCS. Any tax and service charges as applicable shall be borne by the bidder over and above the quoted amount". He submitted that since the respondent was required

to bear all taxes, it was not open for the respondent to avoid any payment on account of change in the indirect taxes regime.

21. Second, he submitted that the introduction of GST could not be considered as a 'change in law' as contemplated under Clause 25(b)(v) of the Contract Agreement. He submitted that GST was only a simplified method of levy and collection of indirect taxes and had replaced the multitude of indirect taxes. The same could thus not be considered as any change in law that affect the Contract Agreement or any of the obligations of the parties therein. Third, he submitted that Sub-clause (v) of Clause 25(b) of the Contract Agreement referred to a material adverse effect and the said expression was required to be interpreted in light of its meaning in Sub-clause (ii) of Clause 25(b) of the Contract Agreement. He submitted that Sub-clause (ii) of Clause 25(b) had explained the import of the expression "material adverse impact", to mean a complete blockade of road and since that was not the case, the respondent could not claim the introduction of GST as a force majeure event. He relied on the decision of this Court in National Highway Authority of India v. TGV Projects and Investments Private Limited: O.M.P. (COMM.) 445/2017, decided on 24.05.2018, whereby this Court had accepted that floods or earthquake would not constitute a force majeure event unless the same had resulted in a complete blockade of road and accordingly, had set aside the arbitral award impugned in that case. He submitted that the said decision was also upheld by the decision of the Division Bench of this Court in TGV Projects & Investments Pvt. Ltd. 'v. National Highways Authority of India: FAO(OS)(COMM) 244/2018, decided on 11.12.2018. Fourth, he submitted that the Arbitral Tribunal had erred in referring the internal communication issued by the General Manager, NHA to all other Regional Offices. He submitted that the letter dated 16.03.2018 was a mere internal communication and the respondent cannot claim any sustenance on its basis.

Reasons

22. At the outset, it would be relevant to refer to Clause 25 of the Contract Agreement, which is the heart of the controversy in the present case. Sub-clause (b) of Clause 25 of the Contract Agreement is set out below:

"25. (b) FORCE MAJEURE EVENT:

Except as stated in Clause (a) above, Force Majeure event means an event or circumstances or a combination of events and circumstances referred to in this clause which are beyond the reasonable control of the Party or Parties to this Contract and which party could not have prevented or reasonably overcome with the exercise of its reasonable skill and care in relation to performance of its obligations pursuant to this Contract and which are of the nature, without limitation of those described below:

(i) Publicly declared strike by registered and recognised association of Transporters exceeding 7 days. The date of going on strike and withdrawal or start of movement of traffic will be inclusive for the purpose of calculation of 7

days under this clause.

(ii) Floods/Earthquake having materially adverse impact i.e. complete blockade of road.

(iii) Act of war, invasion, armed conflict or act of foreign enemy, unexpected call up of armed forces, blockade, embargo, revolution, riot sabotage, terrorism or act of such threat, or any other political or social event having material adverse impact on the performance of obligations of the parties thereof.

(iv) Expropriation, acquisition, confiscation or nationalisation of the User Fee collection

(v) Any change in law which has a material adverse effect on the obligation of the parties hereto.

(vi) Any decision or order of a court or tribunal, which has a material adverse effect on the performance of obligations of the parties to this Contract.

(vii) Suspension of traffic on the said section of National Highway/said bridge or any part thereof, exceeding 15 (fifteen) days at a stretch.

(viii) Any event or circumstances of a nature analogous to the foregoing.

Either party to this Contract shall be entitled to suspend or excuse performance of his obligations, including remittance of instalments by the Contractor to the Authority for the period of continuance of the Force Majeure event, under this Contract to the extent that such performance is impeded by an event of Force Majeure prevailing continuously for more than 7 (seven) days at a time (or continuously for more than 3 (three) days at a time in case of no user fee collection at all at the toll plaza) for reasons not attributable to the Contractor."

23. The principal controversy before the Arbitral Tribunal related to the respondent's claim that the introduction of GST had led to an uncertainty and a sharp reduction in traffic resulting in a lower collection of 'User Fee'. The respondent claimed that the introduction of GST to replace other indirect taxes constituted a 'change in law' as contemplated under Sub-clause (v) of Clause 25(b) of the Contract Agreement. The same had a material adverse effect, as was evident from the sharp reduction in the toll collection and therefore, the respondent was entitled to claim remission in his payment obligation.

24. Although NHA had stoutly contested the claim that the introduction of GST constituted a change in law, however, the Arbitral Tribunal did not accept the same. The Arbitral Tribunal referred to Article 13(3) of the Constitution of India which defines the expression "Law" to include any ordinance, order, by law, rule regulation, notification, custom or usages having in the territory of India the force of law. Considering the wide definition of the term "Law", the Arbitral Tribunal held that the notification issued by the Government of India on 28.06.2017 providing for imposition of GST for the first time in India, constituted a change in law.

25. The Arbitral Tribunal held that even though GST encompasses the existing taxes and dues, it was not possible to immediately ascertain the impact in a general manner and there was uncertainty and doubts in the minds of suppliers/manufactures of goods resulting in deferring of transportation of products. The Tribunal noted that this was also accepted by NHAI as was evident from the circular dated 16.03.2018. The contents of the said circular are relevant and are set out below:

"NHA/13013/CO/17-18/CB/GST/114535 Date:

16.03.2018

To

All ROs.

Subject: Relief to User fee Collection Contractors on Public Funded Projects at the toll plazas on NHs on account of implementation of GST.

Sir,

Various representation have been received from various Toll Contractors at Public Funded plazas regarding loss in traffic and its impact on toll revenue collection, if any, due to implementation of Goods and Services Tax (GST) by Government of India w.e.f. 01.07.2017. AICUP and some other fee collection agencies have requested to consider their representation under Force Majeure Clause 25 (b) (v) of the Contract Agreement:

"Any change in law which has a material adverse effect on the obligation of the parties hereto."

2. In this regard, although promulgation of GST w.e.f. 01.07.2017 appears to be a change in law, however, its material effect could not be proved as the claims submitted by AICUF regarding reduction in traffic of commercial vehicles after implementation of GST are of generic nature without any project specific inputs. Further, their claims regarding reduction in tollable traffic due to implementation of GST had only limited/short term effect on toll revenue.

3. Accordingly, the Competent Authority has decided that such cases may be dealt by concerned RO on case to case basis as per applicable contract provisions after due verifications of facts regarding reduction in traffic due to implementation of GST w.e.f. 01.07.2017 with delegated powers of ROs.

Yours faithfully

General Manager (CO)"

26. The Arbitral Tribunal held that the said letter also clearly indicated that NHAI had accepted that the introduction of GST had resulted in a 'change in law'.

27. This Court concurs with the said view. Plainly, it cannot be disputed that enactment of the statute imposing GST brought into force a new tax regime and the contention that the same did not amount to any change in law is wholly unmerited.

28. Having stated the above, the principal controversy to be addressed was whether the said change in law had a material adverse effect on the obligation of the parties.

29. The Arbitral Tribunal accepted that with the implementation of GST, traffic movement reduced sharply and thereby affected toll collection and consequently, remittance to NHAI.

30. Undeniably, the said event had been duly notified to NHAI. The Arbitral Tribunal also noted that NHAI had not disputed the said claim at the material time. It was also noticed that two independent PDs had evaluated the said claim and had also made their recommendations. The Tribunal further held that the question - whether the introduction of GST had any material adverse effect - could be determined by assessing the impact of the said change on the respondent's ability to discharge his obligations under the Agreement. The PDs had assessed the loss during the period from 01.07.2017 to 04.08.2017 at Rs. 1,03,88,126/-. The Arbitral Tribunal held that the said amount could not be considered as immaterial and therefore, concluded that a force majeure event, as contemplated under Sub-clause (v) of Clause 25(b) of the Contract Agreement, had occurred.

31. It is well settled that the view of the Arbitral Tribunal is a plausible view. It is also necessary to bear in mind that the question as to the interpretation of the contract falls squarely within the jurisdiction of the Arbitral Tribunal and its decision cannot be interfered with, unless it is found to be patently illegal on the basis of the record or otherwise falls foul of the fundamental policy of Indian law. I need not elaborate on this well settled proposition of law and reference to the observations made by the Supreme Court in *State of U.P. vs. Allied Constructions*, (2003) 7 SCC 396, extracted below, would suffice:

"4. Any award made by an arbitrator can be set aside only if one or the other term specified in Sections 30 and 33 of the Arbitration Act, 1940 is attracted. It is not a case where it can be said that the arbitrator has misconducted the proceedings. It was within his jurisdiction to interpret clause 47 of the agreement having regard to the fact-situation obtaining therein. It is submitted that an award made by an arbitrator may be wrong either on law or on fact and error of law on the face of it could not nullify an award. The award is a speaking one. The arbitrator has assigned sufficient and cogent reasons in support thereof. Interpretation of a contract, it is trite, is a matter for the arbitrator to determine (see *Sudarsan Trading Co. v. Govt. of Kerala* [(1989) 2 SCC 38 : AIR 1989 SC 890]). Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained

in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law. An error apparent on the face of the records would not imply closer scrutiny of the merits of documents and materials on record. Once it is found that the view of the arbitrator is a plausible one, the court will refrain itself from interfering (see *U.P. SEB v. Searsole Chemicals Ltd.* [(2001) 3 SCC 397] and *Ispat Engg. & Foundry Works v. Steel Authority of India Ltd.* [(2001) 6 SCC 347])."

32. In *Mcdermott International v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181, the Supreme Court held as under:

"112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See *Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission* [(2003) 8 SCC 593 : 2003 Supp (4) SCR 561] and *D.D. Sharma v. Union of India* [(2004) 5 SCC 325] .]

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."

[Also see: *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran*, (2012) 5 SCC 306.]

33. The learned counsel for the respondent had also referred to the decision of a Coordinate Bench of this Court in *National Highways Authority of India v. Sahakar Global Limited: O.M.P. (COMM) 486/2020*, decided on 29.09.2020, whereby the learned arbitrator had rejected the challenge to a similar Arbitral Award. This Court had referred to NHAI's letter dated 16.03.2018 and held that there was no reason to deprive the respondent therein of the declaration accepting the implementation of GST as 'a change in law'. The Court had also considered whether the reduction in traffic as a result of implementation of GST falls within Clause 25(b)(v) of the Contract Agreement.

34. This Court is not required to examine the merits of the aforesaid view. Suffice it to state that it is a plausible view and therefore, warrants no interference under Section 34 of the A&C Act.

35. The contention that a material adverse effect as contemplated under Sub-clause (v) of Clause 25(b) of the Contract Agreement must be read as a complete blockade of the road as contemplated under Clause 25(b)(ii) of the Contract Agreement, is also unmerited. The scope of the two Sub-clauses - Sub-clause (ii) and Sub-clause (v) of Clause 25(b) - are different. Sub-clause (ii) relates to a force majeure event caused by flood/earthquake and a material adverse impact of a flood/earthquake would be one that results in a complete blockade of road. No such qualification is provided under Sub-clause (v) in respect of a material adverse effect resulting from any change in law. Therefore, it would not be apposite to restrict the import of Sub-clause (v) to only such changes in law which would result in a complete blockade of the road.

36. As noticed above, the question of interpretation falls within the jurisdiction of an Arbitral Tribunal and can be interfered with only on limited grounds as set out in Section 34(2)/(2A) of the A&C Act.

37. The contention that the Arbitral Tribunal had erred in proceeding on the basis that the letter dated 16.03.2018 issued by NHAI was a Circular, is without any merit. The said letter had been issued to all ROs (Regional Offices) and therefore, was intended for wider circulation. There is no error in referring to the said letter as a circular. It was, clearly, meant to provide general instructions to the ROs. This Court had also considered the import of the said letter in *National Highways Authority of India v. Sahakar Global Limited* (supra) and had declined to interfere with the award impugned therein.

38. In view of the above, this Court finds no ground to interfere with the impugned award. The petition is, accordingly, dismissed. All pending applications are also disposed of.