

(2012) 09 DEL CK 0045
In the Delhi High Court
Case No : FAO (OS) 451 of 2012

National Highways Authority of India	Vs	APPELLANT
Oriental Structural Engineers Pvt. Ltd.		RESPONDENT

Date of Decision : 18-09-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Limitation Act, 1963 — Section 14

Citation : (2012) 4 ARBLR 380

Hon'ble Judges : Vipin Sanghi, J; Sanjay Kishan Kaul, J

Bench : Division Bench

Advocate : Padma Priya and Ms. Meenakshi Sood, for the Appellant;

Final Decision : Dismissed

Judgement

Vipin Sanghi, J.

C.M. No. 16430/2012 (for exemption)

Exemption allowed, subject to all just exceptions.

FAO (OS) 451/2012 and C.M. No. 16428/2012 (for stay) & 16429/2012 (for condonation of 153 days delay in filing the appeal)

1. The appellant National Highways Authority of India (NHAI) in the present belated appeal (delayed by 153 days), assails the order dated 02.03.2012 passed in O.M.P. No. 635/2011 by the learned Single Judge dismissing the objections preferred u/s 34 of the Arbitration & Conciliation Act, 1996 (the Act) to the arbitral award dated 25.04.2011. The disputes arose between the parties under the contract agreement dated 04.11.2004 relating to the work of Allahabad Bye pass Project-Construction of Road from 198.00 Km. to 242.708 Km. The learned Single Judge has noted that the challenge to the award was primarily made in respect of Claims No. 1 & 3, i.e., the claim for payment of additional cost caused by subsequent notification increasing sales-tax on fuels

from 2.5% to 5% and the claim for payment of additional cost caused by subsequent notification increasing royalty on soil, sand and boulders, which were allowed by the Arbitral Tribunal, apart from the grant of interest. The learned Single Judge has observed that these issues are covered by Division Bench judgments of this Court in National Highways Authority of India Vs. ITD Cementation India Ltd., , and M/s OSE-GIL J.V. Vs. National Highways Authority of India, FAO (OS) 347/2010 decided on 09.02.2011. The learned Single Judge rejected the appellant's submission that the Court should await the decision of the Supreme Court in Special Leave Petitions preferred by the NHAI against the aforesaid decisions of the Division Bench, being SLP (Civil) No. 21466/2011 titled National Highways Authority of India & Another Vs. M/s OSC-GIL J.V. and SLP (Civil) No. 9799/2010 titled National Highways Authority of India Vs. ITD Cementation Limited, wherein leave has been granted by the Supreme Court.

2. The learned Single Judge has also rejected the submission of the appellant founded upon the Supreme Court decision in Union of India (UOI) and Others Vs. West Coast Paper Mills Ltd. and Another, , to contend that this Court should, in view of the pendency of the Special Leave Petition, defer the hearing of the objection petitions to await the decision in the said Special Leave Petitions by observing that similar request had been declined by the Division Bench of this Court in the appeal of M/s OSE-GIL J.V.

3. We may note that the appellant had also raised a challenge to the order dated 10.09.2008 passed by the Arbitral Tribunal, rejecting the three applications moved by the appellant u/s 16(1) and 16(2) of the Act. However, no submission has been made by the appellant before us assailing the rejection of the said objection by the learned Single Judge.

4. The submission of Learned Counsel for the appellant to explain the delay in filing the appeal is that against the impugned order the appellant has bona fide preferred a SLP before the Supreme Court since the relevant issues are pending before the Supreme Court in the aforesaid Special Leave Petitions, and even earlier the Supreme Court had entertained Special Leave Petitions directly against the decisions of the learned Single Judge of this Court in view of the identity of the issues. It is submitted that the SLP had been preferred within the period of limitation. It is submitted that the said SLP was, however, not entertained by the Supreme Court as the Supreme Court was of the view that the appellant should exhaust the appellate remedy before this Court. Consequently, the SLP was withdrawn by the appellant on 30.07.2012 with liberty to approach this Court. It is submitted that the delay has been occasioned for the aforesaid reason.

5. On merits, the submission of Learned Counsel for the appellant is that the learned Single Judge should have awaited the decision of the Supreme Court in the two Special Leave Petitions aforesaid and not dismissed the objection petition. Before us as well, reliance is placed by the appellant on the judgment of the Supreme Court in West Coast Paper Mills Limited (supra).

6. Having heard Learned Counsel for the appellant and considered the decision of the Supreme Court in *West Coast Paper Mills Limited (supra)*, we are of the view that there is no merit in the present appeal and, consequently, we do not consider it necessary to issue notice on the appellant's applications seeking condonation of delay. The question of our entertaining the application for stay of the impugned judgment, therefore, does not arise.

7. It is not in dispute that the Claims No. 1 & 3 allowed by the Arbitral Tribunal in favour of the respondent are totally covered by the judgments of the Division Bench in *ITD Cementation Limited (supra)* and *M/s OSE-GIL J.V. (supra)*. In fact, the aforesaid decision in *ITD Cementation Limited (supra)* has even subsequently been followed in *Larsen & Toubro Limited Vs. NHAI, FAO (OS) No. 345/2010* decided on 03.06.2011. In *OSE-GIL J.V. (supra)*, a similar argument was raised before the Division Bench and rejected by it. The Division Bench observed as follows:

At that stage, learned Senior Counsel, appearing for the Appellant had drawn our attention to the fact that notice had been issued in Special Leave to Petition against the Division Bench Judgment in *ITD Cementation India Ltd.* Nevertheless, on 29.11.2010 we passed the following Order in *FAO (OS) 140/2008:-*

We have noted that the questions which have arisen in this Appeal had also arisen before a Division Bench in *National Highway Authority of India vs- ITD Cementation India Ltd.* in *FAO (OS) 216/2007*. We are informed that the impugned Order follows this decision of the Division Bench, as the Learned Single Judge was bound to do. The contention is that since a SLP has been preferred against the decision in *FAO (OS) 216/2007*, this Court ought to adjourn proceedings to await a Judgment of Their Lordships in that Appeal. Mr. Nandrajog, learned Senior Counsel for the Appellant, states that Leave has been granted by the Hon'ble Supreme Court. We cannot subscribe to the submissions made by learned Senior Counsel for the Appellant. In our view the proper course is to decide the present Appeal on the parity of reasoning adopted by the Division Bench in *FAO (OS) 216/2007*. Taking any other approach would lead not only to multiplicity of proceedings but also to a legal anathema, which is, the likelihood of different views being expressed by coordinate Benches. Needless to state, the Appellant before us will not be precluded from filing a SLP before the Hon'ble Supreme Court. In such a situation, we are in no manner of doubt that both the SLPs will be heard together. That is, however, for Their Lordships to decide. The impugned Judgment is premised on *NHAI vs- ITD Cementation India Ltd.*, with which we respectfully concur. We also find no error in the impugned Judgment. In these circumstances, the Appeal is dismissed. Pending Application also stands dismissed.

8. Learned Counsel for the appellant has not even urged before us that the decision of the Division Bench in *ITD Cementation Limited (supra)* needs re-consideration by a larger bench of this Court and we find no reason to adopt that course of action. The decision in *ITD Cementation Limited (supra)* and *OSE-GIL*

J.V. (supra) being judgments of coordinate benches, we are bound by the same. So far as the decision in West Coast Paper Mills Limited (supra) is concerned, the reliance placed on the said decision appears to be wholly misplaced. That was a case dealing with the aspect of applicability of Section 14 of the Limitation Act. In that context, the Supreme Court observed that once an appeal is filed before it and the same is entertained, the judgment of the High Court or the Tribunal is in jeopardy. The subject matter of the lis unless determined by the last Court, cannot be said to have attained finality. Grant of stay of operation of the judgment may not be of much relevance once the Supreme Court grants special leave and decides to hear the matter on merits. The aforesaid proposition was invoked to hold that the provision contained in Section 14 of the Limitation Act was available to the respondent. In our view, the said principle cannot be invoked by the appellant to require this Court to stay its hands and not to proceed to dispose of the objection petition, or even this appeal, particularly when the issues raised by the appellant have attained finality insofar as this Court is concerned. Accordingly, we dismiss the aforesaid applications as well as the present appeal.