

**(2019) 05 DEL CK 0228**

**In the Delhi High Court**

**Case No :** Original Miscellaneous Petition (COMM) No. 41 Of 2019

National Highways Authority Of India

APPELLANT

Vs

PNC-BEL (JV)

RESPONDENT

**Date of Decision :** 24-05-2019

**Acts Referred:**

Arbitration And Conciliation Act, 1996 — Section 18, 28(3), 31(3), 34, 34(2A), 34(2)(a) (iii), 48, 48(2)(b)(ii)

**Citation :** (2019) 05 DEL CK 0228

**Hon'ble Judges :** Navin Chawla, J

**Bench :** Single Bench

**Advocate :** Ramesh Kumar, Siddharth Pandey, Isha Bansal, Manoj K Singh, Nilava Bandyopadhyay, Rahul Pandey, Adhip Roy

**Final Decision :** Dismissed

## Judgement

Navin Chawla, J

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed challenging the Arbitral Award dated 20.09.2018 passed by the Arbitral Tribunal adjudicating the disputes that have arisen between the parties in relation to the Agreement dated 04.02.2005, executed between the parties for the Project for Widening and Strengthening of National Highway No. 24 from Km 93.00 to Km 149.25 to four lane standards (Garhmukteshwar to Moradabad) & ROB at Km 181 of NH-24 and Bridges on NH-87 in Uttar Pradesh (Package-II).

2. The Contract Price was of Rs. 221,42,18,567/-. The date of commencement of work was 31.03.2005 and the date for scheduled completion of work was 30.09.2007.

3. Admittedly, the work with respect to Widening and Strengthening of NH-24 from Km 93.00 to Km 149.25, that is, a total of 56.25 Km, to four lanes standard was completed by the respondent on 15.07.2009, that is, after delay of 22

months from the scheduled completion date. As far as the ROB work is concerned, the same was completed on 10.10.2012, that is, after a delay of almost 45 months.

4. The primary dispute between the parties was the claim of the respondent for the extension of time for completion of the work and consequential damages suffered by it. The respondent claimed that the delay in execution of the work was caused for failure of the petitioner to give unhindered and un-obstructed possession of the site for road work and structures.

5. The Arbitral Tribunal found that the respondent has been able to substantiate this claim. The Arbitral Tribunal observed that the stretch of forest land from 93 Km to 104.7 Km, that is, roughly 11.7 Km, was not handed over to the respondent and the alignment was changed after a lapse of four months from the start date. As an interim measure, pending decision on 10 meter wide plantation strip, order was given to commence work in the aforesaid stretch vide letter dated 20.09.2007, that is, almost towards the date of completion.

6. The Arbitral Tribunal further observed that in the same stretch, work on Left Hand Side (LHS) could not proceed for being a part of the Hastinapur Wild Life Sanctuary. Similar situation persisted in the stretch between 106-107 Km, wherein the petitioner changed the alignment after almost 17 months from the start date, that is, on 12.08.2006. The Arbitral Tribunal agreed with the submission of the respondent that such change in the alignment at the belated stage is akin to not handing over the stretch until the later date. The Tribunal further found that even in the stretch between 117-118 Km, the road work in the section of approaches for the proposed overpass structure could be taken up only around March 2007, that is, after the deletion of structure was communicated.

7. The Tribunal further found that as regards structures, drawings were issued with a delay of 51 days to 687 days. With respect to road stretch, delay of 38 days was found for the first 10 Km, delay of 108 days for the second stretch of 5 Km, delay of 187 days for stretch of Km 117-122 and 64 days for road stretch from Km 148-149.25. Similar instances of delay were also found in the approval given to the drawing of bearings for bridges and crash barriers.

8. The Tribunal further agreed with the submission of the respondent that the responsibility of examining and certifying the monthly statement was on the Engineer and the Contract provides for a strict time frame for making payments of the Interim Payment Certificates (IPCs). The Tribunal found that there was delay in payment of the IPCs thereby making the petitioner guilty of breach of contractual terms.

9. The Arbitral Tribunal further found that the Engineer alongwith the petitioner had a collective responsibility of ensuring expeditious execution of the work prescribed under the Contract. In doing so, they also had the responsibility to ensure grant of Extension of Time (EOT) in a timely manner. In the present case EOT, though granted, was substantially delayed, causing further delay in

completion of the work.

10. The Tribunal for the above reasons found the petitioner guilty of causing delay in the execution of the work.

11. The learned counsel for the petitioner submits that in reaching the above conclusion the Arbitral Tribunal has failed to consider the effect of Clause 110.1 of the Technical Specifications of Contract and Clause 21 of the Contract Data. He submits that in terms of these Clauses, it was the responsibility of the respondent to coordinate with the service provider/concerned authority for cutting of trees, shifting of utilities, removal of encroachments etc. The respondent had failed to discharge this responsibility and therefore, could not have claimed that the petitioner was in default for allegedly not giving unhindered access to the site. He further submits that in terms of Clause 110.6 of the Technical Specifications of Contract, it had clearly been stipulated that for coordinating the work of cutting of trees, shifting of utilities, removal of encroachments etc., the respondent shall be paid a lump sum amount per Kilometer of the section. This payment would be deemed to cover all coordination work plus any risk associated with delay in tree cutting, shifting of utilities, removal of encroachments etc. The petitioner has admittedly made this payment to the respondent and therefore, even assuming that there was some delay in removal of such hindrances, the claim of the respondent for further damages was not maintainable.

12. I am unable to agree with the submission made by the learned counsel for the petitioner. As noted hereinabove, the Arbitral Tribunal has not passed its Award merely on the ground that there were certain hindrances in the form of trees and other public utilities on the site.

The Arbitral Tribunal found that there were delays in form of re-alignment being ordered over a period of time; delay in making payments of IPCs; delay in grant of EOT in a timely manner and so on. Therefore, even assuming that the petitioner is right in its submission that delay in removal of trees, shifting of utilities, removal of encroachments etc. is attributable to the respondent, this alone would not make the respondent guilty of causing delay in the execution of the work. The same would also not be sufficient to interfere with the award.

13. As far as the delay in making payment of the IPCs and the delay in grant of EOT is concerned, learned counsel for the petitioner submits that the respondent apart from placing chart of such dates, had not filed any evidence in support of its claim. He submits that filing of a mere chart cannot substitute substantial evidence required to prove such delay.

14. I am again unable to agree with the submission made by the learned counsel for the petitioner. It is not contended by the petitioner that the dates given in the chart by the respondent were in any manner incorrect or put in dispute before the Arbitral Tribunal. Once the dates and the correspondences mentioned in the chart are accepted, it is only a matter of inference whether there was any delay

based on the admitted dates and the correspondences mentioned in the said chart. The inference drawn by the Arbitrator based on such dates has not been shown to be incorrect.

15. The learned counsel for the petitioner further submits that, in any case, it was for the petitioner to have further proved that due to delay in making payment of IPCs as also grant of EOT, there was consequential delay in execution of the work. He submits that infact, the execution of the work in the present case was delayed for various reasons attributable to the respondent itself as would be evident from the Monthly Progress Report. He further submits that the respondent was a Joint Venture (JV) of M/s PNC Infratech Ltd. (PNC) and M/s Bhageeratha Engineering Ltd. (BEL). BEL walked out of the said project leading to financial constraints for the respondent due to which the work ultimately suffered.

16. I do not find any merit in the submission of the learned counsel for the petitioner. The Arbitral Tribunal has considered the above submission of the petitioner and stated that the Monthly Progress Reports, infact, record the contrary. As far as the exit of BEL is concerned, the Arbitral Tribunal placed reliance on the JV Agreement which inter alia provided that PNC would be the lead partner incharge of the work and incase one of the partners commits non-performance of its responsibility under the JV, the other partner shall take over the burden of the performance of the defaulting partner and perform the work in accordance with the Contract signed with the employee/petitioner. The JV Agreement was part of the Contract document between the parties.

17. The learned counsel for the petitioner submits that the audited accounts produced by the respondent were not of the JV but only of PNC. In my view, the same can have no effect as long as the audited accounts would have to show the expenditure incurred by the respondent on the particular project. I, therefore, find no merit in the said objection of the petitioner.

18. The learned counsel for the petitioner next contended that the respondent had executed a Supplementary Agreement dated 30.10.2009 and also submitted an undertaking on 18.01.2013 not to claim any prolongation cost for the work. He submits that in view of these documents, the claim of the respondent was not maintainable.

19. I am unable to agree with the submission made by the learned counsel for the petitioner. As noted hereinabove, the work in question involved different components, one being the Widening and Strengthening of NH-24, while the other being the construction of ROB. A reading of the Supplementary Agreement clearly shows that it was in relation to only the ROB and not for the work of Widening and Strengthening of NH-24, which work had already been completed on 15.07.2009. Even the undertaking given by the petitioner was confined only to that component of the work.

20. The Arbitral Tribunal has also considered the alleged Supplementary

Agreement and the undertaking and has held as under:-

"5.86 As regards PNC's submission that Undertaking was only with respect to ROB works, NHAI contends that the same is not justified as neither the Undertaking nor any valid or cogent evidence in this regard provide for the same. However, we disagree with NHAI on this count as a bare perusal of the said Undertaking clearly indicates that it was only meant for grant of EoT for ROB and its approaches up to 10.10.2012. In fact, there is nothing in the Undertaking to even remotely suggest that it was intended to extend to anything beyond ROB and its approaches."

21. The learned counsel for the petitioner further submits that the respondent had been unable to lead any evidence in support of its claim for damages. Damages have been awarded in favour of the respondent merely by applying the Emden Formula, which for lack of evidence, could not have been applied. Further placing reliance on the finding of the Arbitral Tribunal on the claim of the respondent for bonus, he submits that the Arbitral Tribunal, while rejecting this claim of the respondent, has recorded that from the pleadings and material placed on record it could not be established that the work would have definitely been completed within 24 months even if there was no delay on part of the petitioner.

22. I am unable to agree with the submission made by the learned counsel for the petitioner. The Arbitral Tribunal has rejected a similar argument of the petitioner in paragraph 5.101 and 5.102 of the Arbitral Award holding as under:-

"5.101 NHAI has also put forth contentions concerning the alleged lack of proof adduced by PNC to establish the veracity of the claimed amount. However, after considering the material placed on record, we find NHAI's contentions to be bereft of any merit. In our analysis, the amount claimed by PNC in the present claim was backed by credible oral and documentary evidence. In our considered opinion, the pleadings and the evidence placed on record by PNC, adequately complement each other and conclusively establishes the loss likely to result if there is a breach of contract and PNC fails to perform the contract within the agreed time. Despite critically examining the evidence led by PNC, we could not identify any infirmity or variance in it. In fact, all ingredients of the principle to award compensation have been satisfied in this claim. We also find NHAI's objection as regards audited accounts to be simply misleading and self-serving as the extract of the audited balance sheets for the relevant years substantiating the actual overheads incurred were indeed placed on record by PNC's witness apart from also giving NHAI the opportunity to inspect the documents.

5.102 NHAI's objection to reliance on Emden Formula also remained merely suggestive and inconclusive. Undisputedly, the said formula has received judicial recognition and approval the world over and simply deeming it notional does not in any way help NHAI refute the present claim. PNC has also relied on very credible and persuasive authorities to substantiate the reasonableness of the

amount claimed and in our evaluation, the same deserves to be allowed in entirety. Therefore, we allow the present sub-claim as regards compensation for loss of overheads and profits. However, the aforementioned claim being awarded is restricted to Net Loss incurred at the end of 24 months i.e. Serial No. 6 of Claim Chart and Net loss incurred in the extended period i.e. Serial No. 12 of Claim Chart only, which amounts to Rs.54,28,76,972.00/- (mentioned under Serial No. 13 of Claim Chart). Accordingly, the amounts mentioned thereafter, permitting to period of ROB works, for a total amount of Rs. 29,25,797.00/-, are hereby rejected."

23. The Arbitral Tribunal has thereafter granted damages for reduced productivity of machinery and equipment based on the Standard Data Book for determining the hire charges for the duration of machinery/equipment deputed at the work.

24. As held by the Supreme Court in *Associate Builders vs. Delhi Development Authority*, (2015) 3 SCC 49, once the damages have been ascertained by the Arbitral Tribunal applying a particular method/formula, it cannot be interfered with by the Court merely because it would have preferred another method for such determination.

25. In a recent judgment in *Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI)*, 2019 SCC OnLine SC 677, the Supreme Court has held as under:-

"35. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paragraphs 18 and 27 of *Associate Builders (supra)*, i.e., the fundamental policy of Indian law would be relegated to the "Renusagar" understanding of this expression. This would necessarily mean that the *Western Geco (supra)* expansion has been done away with. In short, *Western Geco (supra)*, as explained in paragraphs 28 and 29 of *Associate Builders (supra)*, would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of *Associate Builders (supra)*.

36. It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice".

This again would be in line with paragraphs 36 to 39 of *Associate Builders (supra)*, as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

37. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco (supra), as understood in Associate Builders (supra), and paragraphs 28 and 29 in particular, is now done away with.

38. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

39. Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

40. To elucidate, paragraph 42.1 of Associate Builders (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of Associate Builders (supra), however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act that would certainly amount to a patent illegality on the face of the award.

41. The change made in Section 28(3) by the Amendment Act really follows what is stated in paragraphs 42.3 to 45 in Associate Builders (supra), namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would;

in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2A)."

26. It is lastly contended by the learned counsel for the petitioner that even while determining issue no. 3, which was for settlement of final accounts, the Arbitral Tribunal has failed to appreciate that the finding of the Engineer on the rates and the measurements of the work was final and therefore, such claim could not have been awarded in favour of the respondent.

27. I am unable to agree with the submission made by the learned counsel for

the petitioner. In paragraph 6.46, the Arbitral Tribunal notes that the Engineer had certified the rates and submitted the same for approval on 13.03.2012 with respect to ten non-BOQ items. However, payment was released only for item nos. 1, 2, 3, 5, 7, 9 and 10. No explanation was given for non release of payment for non-BOQ item nos. 4, 6 and 8. The Arbitral Tribunal has therefore, awarded release of payment with respect to item nos. 4, 6 and 8 in favour of the respondent. Award of such amount, therefore, cannot be questioned by the petitioner.

28. In view of the above, I find no merit in the present petition. The same is dismissed, with no order as to cost.

29. The petitioner in compliance with the order dated 25.01.2019 passed by this Court had deposited the awarded amount in this Court. Subject to any other order being passed by a Competent Court, the deposited amount alongwith interest accrued thereon be released in favour of the respondent after a period of eight weeks from today.