(2017) 12 DEL CK 0058

In the Delhi High Court

Case No : 1666 of 2014

Union of India APPELLANT

Vs

Ashoka-DSC Katni Bye-Pass Road Project Pvt Ltd. RESPONDENT

Date of Decision : 22-12-2017

Acts Referred:

National Highways Act, 1956, Section 7, Section 8A - Fees for services or benefits rendered on national highways - Power of Central Government to enter into agreements for development and mainten

Citation : (2017) 12 DEL CK 0058

Hon'ble Judges : Yogesh Khanna

Bench : SINGLE BENCH

Advocate : Jaswinder Singh, Jay Savla, Jasdeep Singh Dhillon, Rajpal Singh

Judgement

1. The learned counsel for the Union of India says-while issuing notice on 23.12.2014 on this petition this Court restricted its notice to claims no. 1(a), 1(c) and 4 and no notice was issued for claim no. 3. This order was challenged in FAO (OS) No. 230/2015 and the Division Bench directed this Court to decide if the notice be issued in respect of the claim no. 3 or not, hence request to issue notice on claim No. 3. 2. The learned counsel for the petitioner submits on 06.01.2001 the notice inviting tender for construction, operation and maintenance of Katni bypass on BOT basis was issued. On 18.07.2001 the pre-bid meeting with pre-qualified bidders, including the respondent was held. On 12/13.09.2001 the bids were submitted by bidders including the respondent. The letter of acceptance was issued on 04.06.2002 in favour of the respondent. On 19.08.2002 a Concession Agreement was executed between the petitioner and the respondent. On 01.01.2003 the Government of India appointed M/S C.V. Kand, Bhopal as an independent engineer. The stipulated last date handing over of the encumbrance free site to the respondent was within 30 days from the date of signing of agreement that is 17.09.2002, but the formal possession of the site was handed over on 17.02.2003. However, it is alleged by the petitioner that the

respondent could not start work was due to alleged internal disputes with its JV partner - M/s. D.S. Constructions Ltd. The correspondence went on between the parties; the clearances were sought from various authorities and the independent engineer on 23.09.2005 recommended 18 months Extension of Time from the date of receipt of GAD for ROB from Railways. On 17.11.2005, the Steering Group Committee confirmed Extension of 18 months in the concession period and directed the concession period was to commence from 17.11.2005 including the construction period. Later on 15.12.2007 the provisional completion certificate was issued by Independent Engineer with punch list of works for rectification of deficiencies and on 20.02.2008 a Notification for toll collection up to 16.09.2014 was issued by Government of India and such toll collection commenced on 23.02.2008. However on 21.12.2008 the extension of time was finally agreed upto 25.12.2007. 3. The learned counsel for the petitioner however contends in any case the formal possession of the premises was handed over on to the respondent on 17.02.2003 and thus 12 year''s concession period was to end on 16.02.2015 but despite the learned Arbitral Tribunal in claim no. 3 held the 12 year period had to commence from 20.02.2008 and shall end on 19.02.2020, hence is challenged in this petition. 4. To appreciate the contention of the learned counsel for the petitioner it would be appropriate to note as to how the Arbitral Tribunal has dealt with these aspects. "14.0 Observations of the AT on Claim no. 3: 14.1 The AT observed that this Claim is for altering the notification dated 22.02.2008 providing for operation period till 16.09.2014 only (Exh.C-77). The AT noted that there is a foot note providing for modification in case of grant of extension of the implementation period. It is observed that the present notification provides for an operation period equal to 12 years minus the period from the original commencement date till actual date of notification, completely ignoring the fact that the commencement date was revised on account of delays for reasons attributable to the respondent. The steering group on the recommendation of the IE had decided to reckon the commencement date as 15.11.2007. It, by implication, extended the Schedule Project completion date as well as Concession period in terms of the mandate of the Article 15.5(b) of the CA. A period of more than 6 years has elapsed but the G.O.I. has not given effect to its own foot note of the aforesaid notification. 14.2 That AT moreover, noted that there is some miss-match between the Definition of the Concession period saying it 12 months(years) including implementation period and the accepted financial bid vides Schedule-H, Appendix ''B'', CSD at page no. 334-335 of the CA providing the operation period of 12 year commencing from the COD. 14.3 The Respondent relied upon the ''definition'' of the ''Concession Period'' in the RFP and Article of the CA but did not explain the effect of Appendix ''B'', Schedule ''H'', clarification in the CSD at page no. 334-335 and the accepted financial bid at page 373 of the CA. 14.4 the AT observed that the Concession period defined in the Article 2.1 and referring to Articles 2.1 & 2.2 means that the ''Concession Period'' starts from the ''commencement date'' and ends after the ''operation period''. The CA provides implementation period as 1.5 years after the commencement date. The CA also provides the operation period of 12 years from, the COD. In case of early completion the Concession period will end earlier than 13.5 years. On the other hand if the completion is delayed then the Concession period would have to be extended with, reference to the actual date of completion. Of course the compensation for delay is to be regulated under the other stipulations of the CA. The mention of grant of concession for 12 years in Article 2.2 is prima facie superfluous. 14.5 The AT observed that the CSD at page no. 334- 335 clearly mandates that the operation period is 12 years. The CSD over rides any contrary provisions, elsewhere in the CA. The bid of the Claimant would have been surely declared as non-responsive, if the bidder had at its level worked out the total toll collection for 10.5 years on the basis of Concession period of 12 years as including implementation period of 1.5 years refer para no. 3.1 & 3.2 at page no. 36 of the CA. 14.6 The AT observed that there is no stipulation in the CA regarding any additional operation period in-case of early completion by way of bonus. The CA provides for imposition of liquidated damages for delays attributable to the concessionaire but without adversely affecting the operation [Period of 12 years- Article 9.2 (c). 14.7 The above view of AT is further-strengthened by the fact that the accepted financial bid commencing from-page 373 of the CA, clearly indicates that the operation period is 12 years from COD and not from Commencement date. The 12 years'' operation period is in addition to and separate period of implementation of 1.5 Years. The accepted financial bid is the foundation of any contract. It is the final word in such matters. In view of the above observations it can be conclusively said that the argument of the Claimant''s Counsel that the ''operation period'' of 12 months was sacrosanct, is completely correct and. the intention of the parties as per accepted bid was clearly for an operation period of 12 years from the COD irrespective of early or delayed completion." 5. The learned counsel for the petitioner argues the grant of 12 years by the Arbitral Tribunal from the commercial operation date are against the terms of the contract. 6. To appreciate the facts, I need to refer to various clauses of Concession Agreement viz.: ""COD" means the commercial operations date of the Project which shall be the date on which the Independent Engineer has issued the Completion Certificate or the Provisional Certificate upon completion of construction of the Project and which shall, subject to the provisions of this Agreement, be not later than........... "Commencement Date" means the date on which the physical possession of the Project Site is delivered by GOI to the Concessionaire, which shall not be later than 30 days from the date of this Agreement." xxx "2.2 Concession Period The Concession hereby granted is for a period of 12 (Twelve) years nil months and nil days commencing from the Commencement Date (Concession Period) during which the Concessionaire is authorized to implement the Project and to operate Project Facility in accordance with the provisions hereof. Provided that (a) in the event of the Concession being extended by GOI beyond the said period of 12 years (Twelve Years) nil months and nil days in accordance with the provisions of this Agreement, the Concession Period shall include the period/aggregate period by which the Concession is so extended, and (b) in the event of Termination, the Concession Period shall mean and be limited to the period commencing from the

Commencement Date and ending with the Termination." xxx Ambiguities "1.2.3 In case of ambiguities or discrepancies within this Agreement, the following shall apply: (i) between two Articles of this Agreement, the provisions of specific Articles relevant to the issue under consideration shall prevail over those in other Articles; (ii) between the Articles and the Schedules, the Articles shall prevail;" STEERING GROUP 7.1 Constitution GOI shall through an office Order, constitute a Steering Group comprising of a representative each of the GOI, STG and the Concessionaire within 60 days of this Agreement. "7.2 Functions The Steering Group shall hold meetings at least once every three months to review the progress during the Implementation Period, and every six months during the Operations Period. The Steering Group shall carry out such functions and exercise such powers as are prescribed/conferred under this Agreement." 7. It is argued in the event of a conflict between a Schedule and an Article, the Article is to be given effect to and hence the Arbitral Tribunal went wrong in relying upon Schedule-H to grant 12 years from the date of operation rather than to apply clause 2.2 above. 8. The Schedule-H read as under:

Year of Operation													
Year	"0"	1	2	3	4	5	6	7	8	9	10	11	12
Initial Investment (1)													
Toll Revenue (2)													
O & M Expenses (3)													
Total Expenses (5=2+3+4)													
Cashflow (2-1-5)													
Internal Rate of Return (%)													

"Initial Investment" means the cost of construction of the facility, including all reasonable overheads, preliminary and pre-operative expenses in relation thereto, estimated by the Concessionaire. For the purpose of Cashflow Projections the entire Initial Investment would be deemed to have been made on COD."Year "0" means the year of the COD." 9. Now I come to minutes of meeting of the Steering Group. The minutes dated 24.12.2008 are as under : "It was brought before the Steering Group that the pending issues in the project related to extension of time, issue of completion certificate, poor maintenance of the project road and the concessionaire request for substitution agreement. These were discussed and brief notes of the discussions are as follows: 1) Extension of time: In the minutes of the meeting held on 17-11-2005- extension of time by 18 months due to delay in approval of R.O.B. by Railway had been accepted by the Steering Group. This was subsequently withdrawn in the minutes of the meeting held, on 16th and 17th July 2007 on the grounds that the concessionaire had not agreed to withdraw his claims. The concessionaire of the view that the Extension of time and the claims should de-linked and that EOT was admissible to him and recommended by the Independent Engineer. After deliberations it was agreed to grant E.O.T. by 18 months i.e. up to 16-05-2007. It was however decided that no claim would arise out of this extension as per Concession Agreement except extension of concession period. Subsequently another proposal of Extension of time by six months had been recommended by I.E. on account of delay in rising of the HT/LT lines by 5.50 m or more above the road top level. The HT Lines were raised and completed in June 2007 and I.E. had recommended E.O.T. for six months for construction after this date i.e. up to 15th December 2007. The actual date of substantial completion was 15-12-2007. Extension of time up to 15-12-2007 was agreed to subject to same condition as above." 10. The constitution of the Steering Committee and its power to take decisions is not disputed by petitioner. In para H of its petition the petitioner says so viz., "H) Because the Arbitral Tribunal failed to consider that representative of the respondent was also a permanent member of the Steering Group Committee and all decisions taken by the said Committee were unanimous and cannot be said to be unilaterally taken by the petitioner. Thus, the observations made by the Arbitral Tribunal in para 9 of the impugned award questioning the validity of the decisions taken by the Steering Group is unjustified, contrary to the contractual provisions and misconceived." 11. I may also refer to a notification dated 20.02.2008 issued by Ministry of Shipping, Road Transport and Highways, Government of India which is as under:- "S.O.383 (E)- In exercise of powers conferred by Sections 7 and 8A of the National Highways Act, 1956 (48 of 1956) the Central Government hereby notifies that there shall be levied and paid fees on mechanical vehicles for the use of Katni Bypass on N.H.7 in the State of Madhya Pradesh (hereinafter referred as Katni Bypass) at the rates specified in M/s Ashoka-DSC Katni Bypass road private limited having its registered office at ? River View Ashoka Stambh Nashik-422002, Maharashtra to build operate and transfer the Katni Bypass and for service provided by it hereby authorize the said M/s Ashoka-DSC Katni Bypass road private limited or its authorized legal representative, successor or assignee to collect and retain fees at the rates specified in the said Schedule from 20th February, 2008 to the last day of the concession period that is 16th September, 2014. Schedule xxxx Notes: (i) In the event of grant of extension in Concession period, the last day of Concession period will be modified. (ii) No toll fee is leviable on motorcycles, scooters or any other two wheelers. " 12. Thus considering all the clauses of the agreement and notification above I am of the view that Arbitral Tribunal was right in saying there exists a discrepancy in some clauses of the Concession Agreement as the definition of concession period limits the period to 12 years from the commencement date during which the contractor is to implement the Project and Operate the project facility but whereas the Concession Agreement differentiate between the Implementation Period and the Operational period viz. 1.5 years and 12 years. The financial bid, including Schedule H (supra) provides 12 years operational period from COD which period starts after the implementation period (here 1.5 years initially). The Steering Committee, of which petitioner was a part thereof, admittedly granted extension of time till 15.12.2007 for implementation and hence the government ought to have included such extension of time in its notification dated 20.03.2018. Even otherwise it is not the case of anyone that time of contract could not have been extended in any circumstance under the Concession Agreement. In-fact one such option is Article 15.5 (b) noted under:- "15.5 Effect of Force Majeure Event. (a) xxxx (b) Where the Force Majeure Event occurs before COD, the dates set forth in the Project Completion Schedule, and the Concession Period shall be extended by the period for which such Force Majeure Event shall subsist. (c) xxxx (d) xxxx" 13. Hence the period given in notification dated 20.02.2008 issued qua the Concession Agreement dated 19.08.2002 which empowers the respondent to build, operate and transfer the Katni bypass and authorize the respondent to collect and retain fees at the rates specified in the said schedule was rightly extended by the Arbitral Tribunal from 20.02.2008 to twelve years instead of up-till 16.09.2014 as noted in the notification dated 20.02.2008. This was done in view of Note 1 to the said notification which further empower extension of the concession period and modification of the last day of the concession period. Admittedly it was the Steering Committee which had granted the extensions and the Arbitral Tribunal only read such extensions in the notification, hence no fault can be found in the view taken by the Arbitral Tribunal qua claim No. 3 and the grant of Claim no. 3 is not in contravention of any of the terms of the Concession Agreement. 14. In view of above, no notice is required to be issued qua claim no. 3. The objections relating to claim no. 3 are dismissed. To come up for arguments on remaining objections on 09.03.2018.

