



\$~A-3

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ FAO(OS) (COMM) 27/2021 & C.M.No.6354/2021

NATIONAL HIGHWAYS AUTHORITY OF INDIA Appellant

Through: Ms.Neetica Sharma, Advocate.

versus

PUNJAB NATIONAL BANK & ANR.

..... Respondents

**Through: Mr.Raghvendra M. Bajaj with
Ms.Yashika Sarvaria and Mr.Samaj
Aggarwal, Advocates for R-1/PNB.
Mr.Samar Singh Kachwaha with
Ms.Tara Shahani, Ms.Akanksha
Mohan and Ms.Aanya Saluja,
Advocates for R-2.**

%

Date of Decision: 10th August, 2023

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE MINI PUSHKARNA

J U D G M E N T

MANMOHAN, J: (ORAL)

1. Present appeal has been filed, by the appellant-National Highway Authority of India (in short 'NHAI'), seeking to set aside the judgment and order dated 04th January, 2021 passed by a learned Single Judge of this Court in OMP (COMM) No.442/2020, whereby the Appellant's petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short



‘Act, 1996’) challenging the second Arbitral Award dated 24th March, 2020 was dismissed.

2. Learned counsel for the appellant-NHAI submits that the Arbitral Tribunal in the impugned award has ‘wandered outside the relief sought’ and dealt with the matters pending in the first arbitration *inter se* between the parties, which amounts to a patent illegality.

3. She further submits that the learned Single Judge has erred in holding that pendency of the first arbitration award would have no bearing on the issue of bank guarantee as the said bank guarantee was never furnished by the concessionaire / Jetpur Somnath Tollways Pvt. Ltd. (‘JSTPL’) to secure the claim of the appellant-NHAI. She contends that there is a clear finding to this effect by another learned Single Judge of this Court in an earlier proceeding filed under Section 9 of the Act, 1996. The relevant portion of the order passed in the earlier petition filed under Section 9 of the Act, 1996 by the learned Single Judge is reproduced hereinbelow:-

“106. *In view of the above:*

- (i) *JETPUR is directed to furnish an unconditional and irrevocable Bank Guarantee, in favour of NHAI, undertaking to pay to NHAI an amount not exceeding Rs.348.604 Crores [i.e. 90% of 640.86 = 576.774 (minus) 222.03 {already paid} (minus) 6.14 {agreed to be payable by NHAI} = 348.604]; and*
- (ii) *On deposit of the Bank Guarantee, NHAI shall forthwith OMP 221/2017 & 227/2017 Page 36 ot 36 deposit in the Escrow Account the sum of Rs.354.744 Crores (i.e. 348.604 + 6.14); and*
- (iii) *The encashment of the Bank Guarantee shall be subject to the final award of the Arbitral Tribunal; and*
- (iv) *JETPUR shall keep the bank guarantee alive for upto a period of four months after the making of the final award by the Arbitration Tribunal; and*
- (v) *Parties shall comply with the provisions of Section 9(2) of the Act”*



4. She also challenges the directions given by the Arbitral Tribunal to pay *pendent lite* and future interest @ 9 per cent (simple interest) per annum on the ground that the appellant-NHAI had made the payment in accordance with the order of the Supreme Court dated 05th January, 2018, which had directed the appellant-NHAI to pay a sum of Rs.348.604 crore within a period of six months. She contends that as the appellant-NHAI had made the payment on 29th January, 2018 i.e. within the prescribed time period of six months, the award of interest by the Arbitral Tribunal was patently illegal.

5. Having perused the paper book, this Court finds that both the Arbitral Tribunal as well as the learned Single Judge have rejected the aforesaid submissions advanced by the learned counsel for appellant-NHAI. The relevant portions of the Arbitral Award and the order passed by the learned Single Judge are reproduced hereinbelow:-

A. Relevant portion of the Arbitral Award dated 24th March, 2020

“68.2 Claim No.(b):AT in its order dt. 01.07.2019, on the Respondent No.2’s application filed u/s 16(3) of the Act had framed the following issues in respect of this claim.

“Whether the Claimant is entitled and Respondent No.1/NHAI liable to pay 90% of the Debt Due towards Termination Payment in respect of which the Claimant has received payment pursuant to a Bank Guarantee submitted by Respondent No.2/JSTPL and consequential reliefs”

68.3 The calculations submitted by the Respondent No.1 with regard to the calculations of Debt Due were not correct as noted hereinabove as well as by Hon’ble High Court of Delhi (Division Bench) in its order dt. 31.10.2017.

68.4 The Respondent No.1 is not entitled to affect any recoveries from the 90% Debt Due amount payable to the Respondent No.2. The sum of 90% Debt Due belonged to the Claimant in accordance with various provisions of Escrow Agreement and Substitution Agreement. As such the Respondent No.1 could not have effected any recovery from this sum which it has done qua the Respondent No.2. These recoveries are yet to be ascertained and determined by any Competent Forum in accordance with law, before they can be enforced against the Respondent No.2. The Respondent No.1 has to get these recoveries



adjudicated in accordance with Article 44 of CA. Even the Respondent No.1 was conscious of this fact that these recoveries, if any, have to be made from the Respondent No.2, as such the calculations of the Debt Due and the proposed recoveries was sent by the Respondent No.1 to Respondent No.2 and only a copy of the same had been endorsed to the Claimant for information.

68.5 In view of the findings as recorded hereinabove, that AT holds that the Claimant is entitled and the Respondent No.1 is liable to pay 90% of Debt Due amount towards termination payment as decided in the meeting dt. 05.09.2016 amongst all the stakeholders in the presence of Chairman, NHA and also in accordance with various contractual provisions. The first part of the issue as framed is decided accordingly.

68.6(a) As noted hereinabove, the Respondent No.1 had released the balance amount of 90% Debt Due on furnishing of the BG by the Respondent No.2. It was informed that this BG is kept alive by the Respondent No.2 during the current arbitral proceeding in accordance with the orders of Hon'ble High Court and Supreme Court.

(b) The Hon'ble High Court in para 37 of its order dt. 31.10.2017 had noted that "the bank guarantee is subject to final award of the arbitral tribunal." The Hon'ble Supreme Court in its order dt. 05.01.2018 had observed as below:

(i) The findings by the High Court with regard to encashment of bank guarantee is affirmed.

.....

(iv) The amount shall be kept in the Escrow Account as directed by the High Court

(C) With regard to the later part of the aforesaid issue of consequential reliefs and Respondent No.2's prayer made vide its submission dt. 09.01.2019, there appears to be no reason, in view of the AT's decision in respect of the first part of the issue, to keep the aforesaid BG by the Respondent No.1 or to keep the same alive by the Respondent No.2 beyond a period of 4 months after making the final award by AT (refer para 106(iv) of Hon'ble High Court's order dt. 31.07.2017 – Ann C-46, pg. 2445-2480 of CD-11)

68.7 Issue as framed by AT in its order dt. 01.07.2019 is decided accordingly.

68.8 The claim is decided in favour of the Claimant and as against the Respondent No.1. The Claimant is entitled and the Respondent No.1 is liable to pay 90% of Debt Due amount towards termination payment. In view of this award, there appears to be no reason to keep the aforesaid BG by the Respondent No.1 or to keep the BG alive by the Respondent No.2....



XXX

XXX

XXX

76.3 In this case, the details of Debt Due were furnished by the Claimant to the Respondent No.1 on 16.11.2016. As such, the Claimant has noted the date of cause of action as 17.11.2016. However, the Claimant's claim for payment of interest on the 100 % Debt Due cannot be entertained as the Claimant in its claim no.(a) itself has prayed for the award of 100 % Debt Due depending on the outcome of another Arbitration. The Claimant, in the legal notice dt.20.04.2017 (Ann. C-40, pg.974-980 of CD-4) had also claimed interest on the sum of 90% Debt Due and that too @9.75% only. Thus, award of interest on the amount of 90 % Debt Due i.e. Rs. 576.77 crs. only can be allowed for the pre-date-of-award period. AT is of the opinion that award of interest @9 % p.a. simple shall meet the ends of justice. AT accordingly awards interest for pre-date-of-award period from 05.12.2016 to the date of award @9% p.a. simple only as below.

77 With regard to post-award period, Sec.31(7)(b) of the Act, 1996 provides that unless the award otherwise directs the sum directed to be paid by an arbitral award shall carry interest @2% p.a. higher than the current rate of interest prevalent on the date of award for the period from the date of the award to the date of payment. The Claimant has claimed this interest @18% p.a. However, this interest has to be granted keeping in view the aforesaid statutory provision. These days the current rate of interest is around @7% p.a. on bank deposits accordingly, AT holds that the Claimant is entitled for the grant of future interest @9% p.a. simple in accordance with amended section 31(7)(b) of the Act. Accordingly, AT awards interest on the aforesaid amount of Rs.42.96 Cr @9% p.a. (simple) for the period from the date of award till the date of actual payment to the Claimant. This amount of interest for post-award period shall be paid in addition to the aforesaid total sum of Rs.42.96 Cr.”

B. Relevant portion of the order dated 4th January, 2021 passed by the learned Single Judge

“31.2.8 The attempt, by NHAI, to link the Bank Guarantee for ₹ 348.604 crores, furnished by JST, to the inter se dispute between NHAI and JST regarding the breach of the Concession Agreement and liabilities that arose as a consequence thereof is, in my view, completely misguided. This submission was advanced by Ms. Maninder Acharya, learned Senior Counsel for NHAI, and is also reflected in the “Note on Arguments”, filed by NHAI, which asserts that “the issue with regard to the Bank Guarantee is between Petitioner/NHAI and Respondent No 2/Concessionaire”. This, in my view, is incorrect. To repeat, the “issue with regard to the Bank Guarantee” had nothing to do with the dispute between NHAI and JST. That dispute, which constitutes the subject matter of the first arbitral proceeding, relates to breach of the Concession Agreement. Regardless of such breach, or of whether the breach was



attributable to NHAI or to JST, the termination of the Concession Agreement resulted in liability, on the part of NHAI, to deposit, forthwith, 90% of the Debt Due, into the Escrow Account. The entitlement, of PNB, to withdraw the said amount, also followed as an inevitable sequitur thereto. No requirement of continuing the Bank Guarantee, furnished by JST as a security against the deposit by NHAI into the Escrow Account could, conceivably, remain thereafter. It is, therefore, not correct on the part of NHAI to contend that the issue with regard to the Bank Guarantee was between NHAI and JST.

xxx

xxx

xxx

31.2.15 It has been further urged, by NHAI, that the learned Arbitral Tribunal placed reliance on the judgement, dated 31st May, 2017 supra, of the learned Single Judge, which was in contravention of the directions issued by the Supreme Court. Ms. Acharya points out that the Supreme Court had specifically proscribed the learned Arbitral Tribunal from relying, in the arbitration proceedings, on the findings recorded by the learned Single Judge and the Division Bench of the merits of the claim. Undoubtedly, the Supreme Court did so direct. I am not, however, in agreement with Ms. Acharya in her contention that the learned Arbitral Tribunal has relied on the findings of the learned Single Judge or of the Division Bench. A holistic reading of the impugned Award reveals that the learned Arbitral Tribunal has arrived at its own conclusion regarding the final findings recorded by it. The reasoning and analysis, by the learned Arbitral Tribunal, for arriving at its findings regarding Claim No. (b) of PNB, are to be found in as many as 17 sub-paras [numbered (a) to (q)] of para 66 and, thereafter, in paras 68.1 to 68.8, of the impugned Award. Paras 68.6 (c) and 68.8 already stands reproduced in para 31.2.6 supra. For ready reference, paras 66 (e), (i) and (p), and paras 68.3 to 68.5, which are self-speaking, may also be reproduced, thus:

“66. From the above contractual provision reproduced hereinabove as well as the correspondence exchanged between the parties the following points emerged:

(e) The Claimant, after issuance of the termination notice on 10.11.2016 by Respondent No. 1 had intimated the amount of Debt Due as on 10.11.2016 amounting to Rs. 640,85,99,733/- vide their letter dated 16.11.2016. The 90% of this amount, as calculated hereinabove, comes to ₹ 576.77 crores. The Respondent No. 1 was just required to pay an amount of ₹ 576.77 crores to the Claimant by 25.11.2016/05.12.2016 (as noted hereinabove).

(i) The Respondent No. 1 had communicated the Respondent No. 2 about their own calculations with regard to sum of 90% Debt Due.



These calculations were not according to the contractual provision. As such, the calculations done by the Respondent No. 1 were uncalled for and deserve rejection. AT holds that the calculations done by the Claimant for the sum of ₹ 576.77 crores as 90% of Debt Due are correct and have to be applied.

(p) This action of the Respondent No. 1 to make alleged recoveries, which had neither been ascertained nor determined nor agreed by the Respondent No. 2 was not justified. If the Respondent No. 1 had any grievance and claims against the Respondent No. 2, they could have invoked the Dispute Resolution Mechanism as per Article 44 of CA. In the absence of this, the recovery of any amount from the 90% Debt Due was clearly in breach of Clause 3.2(d) of Escrow Agreement as well as the agreement agreed amongst all the parties on 05.09.2016. Even otherwise, as per various terms and conditions of CA, Escrow Agreement and Substitution Agreement this amount of 90% Debt Due towards termination payments belonged to the Claimant and as such any recovery by the Respondent No. 1 towards any dispute claim with Respondent No. 2 was not permissible to be made.

68.3 The calculations submitted by the Respondent No. 1 with regard to the calculations of Debt Due were not correct as noted hereinabove as well as by Hon'ble High Court of Delhi (Division Bench) in its order dated 31.10.2017.

68.4 The Respondent No. 1 is not entitled to effect any recoveries from the 90% Debt Due amount payable to the Respondent No. 2. The sum of 90% Debt Due belonged to the Claimant in accordance with various provisions of Escrow Agreement and Substitution Agreement. As such the Respondent No. 1 could not have effected any recovery from this sum which it has done, the Respondent No. 2. These recoveries are yet to be asserted that determined by any Competent Forum in accordance with law, before they can be enforced against the Respondent No. 2. The Respondent No. 1 has to get these recoveries adjudicated in accordance with Article 44 of CA. Even the Respondent No. 1 was conscious of the fact that these recoveries if any, have to be made from the Respondent No. 2, as such the calculations of the Debt Due and the proposed recoveries were sent by the Respondent No. 1 2 Respondent No. 2 and only a copy of the same had been endorsed to the Claimant for information.”

(Emphasis supplied)



These, quite obviously, are findings of the learned Arbitral Tribunal, and not mere echoes of the views expressed by the learned Single Judge and the Division Bench. The mere reference, by the learned Arbitral Tribunal, to the fact that the Division Bench had also taken a similar view, does not amount to “reliance”, by the learned Arbitral Tribunal, on the judgement of the Division Bench. In fact, in para 68.5 of the impugned Award, the learned Arbitral Tribunal goes on to “hold” that PNB was entitled, and NHAI was liable to pay 90% of the Debt Due towards termination payment, “in view of the findings as recorded hereinabove” – not, significantly, in view of the findings recorded by the learned Single Judge, or by the Division Bench, of this Court. It cannot, therefore, be said that the learned Arbitral Tribunal proceeded in defiance of the directions of the Supreme Court.

xxx

xxx

xxx

31.3.3 Section 31(7)(a) of the 1996 Act empowers the Arbitral Tribunal to include, in the sum for which the award is made, interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made. The learned Tribunal has held, in the present case, that the cause of action arose, in favour of PNB, on 17th November, 2016, and this finding has not been traversed by NHAI. Section 31(7)(a), therefore, empowered the learned Arbitral Tribunal to award interest, to PNB, from 17th November, 2016 till the date of making of the award. No jurisdictional error can, therefore, be said to have been committed by the learned Arbitral Tribunal in doing so. The learned Arbitral Tribunal has computed interest, on the entire quantum of 90% of the Debt Due, from 5th December, 2016 till 26th March, 2017 and, thereafter, on ₹ 354.77 crores (being the amount remaining unpaid after 5th December, 2016) till the date of the award, i.e. pre-arbitral and pendente lite interest. No occasion arises for this Court to interfere with such computation either.

31.3.4 Section 31(7)(b) provides that any sum, directed to be paid by the arbitral award, would carry interest at a rate 2% higher than the current interest rate prevalent on the date of the award, from the date of the award till the date of payment, unless otherwise directed in the award. In other words, this is a statutory dispensation, which is to ordinarily apply, unless and until the arbitral award directs to the contrary. The rule, therefore, is that the awarded amount would carry interest at 2% higher than the prevalent rate of interest, from the date of award till the date of payment, and the exception is where the arbitral award directs otherwise. NHAI has not been able to make out, in the present proceedings, in any case, as would merit extending, to it, the benefit of the exception, in preference to the rule. The award of interest, by the learned Arbitral Tribunal, from the date of award till the date of payment, @ 9% p.a., being 2% above the prevalent ordinary rate of interest on the date of passing of the impugned arbitral award does not, therefore, call for interference.”



6. It is settled law that once an Arbitral Award has been confirmed in an application filed under Section 34 of the Act, 1996 the appellate Court must be extremely cautious in disturbing concurrent findings of the fact and law as they are ordinarily not amenable to interference under Section 37 of the Act, 1996 (See: ***Mangalwar Filing Station vs. Indian Oil Corporation Limited & Ors., 2021 SCC OnLine Del 3646, MMTC Ltd. vs. Vedanta Ltd., (2019) 4 SCC 163***).

7. Consequently, the scope of interference in an appeal under Section 37 of the Act, 1996 is extremely limited.

8. In any event, this Court is of the view that the Arbitral Tribunal in the present case has neither 'wandered outside the relief sought for' nor dealt with the matters pending in the first arbitration.

9. From what has been placed on record, it is apparent that the matter in issue in the first arbitration *inter se* between the parties is whether the termination of the contract was on account of default of the appellant-NHAI and if so, whether the concessionaire / respondent no.2 is entitled to compensation and damages. Needless to state that it is the appellant-NHAI's case that the termination was not on account of its default but on account of concessionaire's / respondent no.2's default. Though the Arbitral Tribunal in the first award has held that the termination was on account of default of the appellant-NHAI, yet even if the petition filed by the appellant-NHAI under Section 34 of the Act, 1996 were to be allowed, then also the present award would not be interfered with, as according to Clause 37.3.1 even if the termination takes place on account of concessionaire's default, the appellant-NHAI has to pay an amount equivalent to 90% of the debt due less insurance cover to the Punjab National Bank (in short 'PNB').



10. Further, the appellant-NHAI's reliance on the order passed by the learned Single Judge as well as by the Apex Court under Section 9 of the Act, 1996 proceedings is misconceived, as the Arbitral Tribunal has rightly pointed out that furnishing of the bank guarantee was subject to the final award to be passed.

11. It is also pertinent to mention that the scope of Section 9 petition is quite different at the pre-award stage from the post-award stage. While under Section 9 (i) of the Act, 1996 the intent of the proceeding is to safeguard the subject matter of the dispute in the course of arbitral proceedings, under Section 9 (ii) (after an award is made) the intent is to protect / secure the property / goods for the benefit of the parties which seeks enforcement as it is a step in aid of enforcement. (See: ***Dirk India Private Limited vs. Maharashtra State Electricity Generation Company Limited, 2013 SCC OnLine Bom 481, Nussli Switzerland Ltd. vs. Organizing Committee Commonwealth Games, 2014 SCC OnLine Del 4834***).

12. Consequently, even if the appellant-NHAI were to succeed in the first arbitration proceedings *inter se* between the parties, then also the amount awarded in the impugned award would have to be paid by the appellant-NHAI to PNB.

13. As far as the award of interest is concerned, this Court finds that the Arbitral Tribunal has awarded interest @ 9% per annum being 2% above the prevalent ordinary rate of interest on the date of passing of the impugned arbitral award. Accordingly, the said direction is in consonance with the provisions contained in Act, 1996.



14. Consequently, the present appeal being bereft of merit is dismissed along with pending application and the interim order dated 26th August, 2021 is vacated.

MANMOHAN, J

MINI PUSHKARNA, J

AUGUST 10, 2023
KA/AS

Signature Not Verified

Digitally Signed By: ASWANT
SINGH RAWAT
Signing Date: 14.08.2023
19:31:16