



**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**



D.B. Civil Miscellaneous Appeal No. 2537/2020

State Of Rajasthan, Through Principal Secretary, Public Works
Department, Rajasthan, Jaipur.

----Appellant

Versus

1. M/s Atlanta Ltd., Having Its Registered Office At 101, Shri
Amba Shanti Chamber, In Front Of Hotel Leela, Andheri
Kurli Road, Mumbai- Andheri (East) Mumbai-400059

----Respondent-Claimant

2. Government Of India, Through Director General Road
Development Ministry Of Shipping, Road, Transport And
Highways, Transport Bhawan, 1, Parliamentary Street,
New Delhi- 110001, Through Officer-In-Charge, Executive
Engineer, Public Works Department (National Highways)
Division-Pali Rajasthan.

----Proforma-Respondent

For Appellant(s) : Mr. Rajesh Maharshi, Adv.with
Mr. Lakshya Sharma, Adv.
For Respondent(s) : Mr. N.K. Maloo, Sr. Adv.assisted by
Mr. Pratyush Sharma, Mr. Hansh
Pratap Singh, Adv.

**HON'BLE MR. JUSTICE PANKAJ BHANDARI
HON'BLE MR. JUSTICE PRAVEER BHATNAGAR**

Judgment

Reserved on :: **30/09/2024**

Pronounced on :: **25/10/2024**

(Per Pankaj Bhandari, J)

1. Appellant has preferred this appeal under Section 37 of
the Arbitration and Conciliation Act, 1996 (for short 'the Act')
aggrieved by Order dated 17.06.2019 passed by Commercial
Court No.3, Jaipur, whereby the objections filed by the appellant



under Section 34 of the Act was dismissed and the Award dated 07.09.2014 passed by Arbitral Tribunal was confirmed.

2. It is contended by Mr. Rajesh Maharshi, counsel appearing for the appellant that a Build, Operate and Transfer (BOT) Agreement was entered into between the appellant and the respondent. The total period of the Agreement was 11 years and 8 months, which included the construction period of 18 months. The period for collection of the toll was till 15.05.2008. It is contended that the respondent initially filed a claim which was allowed. In the earlier award, Arbitral Tribunal has extended the concession period till 31.07.2010. It is argued that in the present award, compensation has been given for termination of the concession period on 15.05.2008 and compensation has been awarded for period 15.05.2008 to 30.11.2008 and that the present award is overlapping with the earlier award.

3. It is also contended that the respondent filed a writ petition before the High Court which was dismissed and this fact was not brought to the notice of the arbitrator and it was for the first time, when the appellant was drafting the appeal under Section 37 of the Act, that this came to the notice of the appellant. It is further contended that since the claimant-respondent has concealed a material fact, which tantamounts to grave misconduct on the part of the respondent and, therefore, the award requires to be dismissed on this ground alone.

4. Counsel for the appellant has placed reliance on M/S Unibros Vs. All India Radio **2023 INSC 931**; K.V. George Vs. Secretary to Government, Water and Power Department, Trivanandrum and Anr. **(1989) 4 SCC 595**.





5. Mr. N.K. Mallo, Sr. Adv., counsel for the respondent has opposed the appeal. It is contended that new grounds cannot be taken in appeal under Section 37 of the Act. It is contended that the fact that the writ was dismissed was neither taken before the arbitrator nor before the Commercial Court in application moved under Section 34 of the Act and the appellant cannot now raise a new ground in an application filed under Section 37 of the Act. It is also contended that the writ was dismissed on ground of alternative remedy and only a passing observation was made by the High Court which is not binding on the Arbitral Tribunal as it has no effect and thus the same cannot be termed as falling within the definition of *res judicata*. Counsel for the respondent has placed before the Court the definition of 'however'.

6. It is contended that the claim made before the present Arbitral Tribunal was not overlapping with the earlier claim, as in the present claim, amount was claimed under different heads on account of non-collection of toll due to stay by the Court on account of bank guarantee retained by the appellant and in lieu of the amount which was paid to the railways. It is argued that the said amount was not claimed before the first Arbitral Tribunal. It is contended that in the first award, demand for escalation in the project cost was the only issue and there was no other claim, whereas in the second award, the claim were under different heads, which were not earlier claimed by the respondent. It is contended that before the present Arbitral Tribunal, compensation was sought to the tune of Rs.6,11,74,451/- for loss incurred on account of taking over the facility wrongfully and illegally on 15.05.2008 in breach of express extension till 30.11.2008.



7. Counsel for the respondent contends that scope under Section 34 is limited. In this regard, he has placed reliance on Dolphin Drilling Ltd. Vs. Oil and Natural Gas Corporation **(2010) 3 SCC 267**; Rashida Haroon Kupurade Vs. Divisional Manager, Oriental Insurance Company Ltd. & Ors. **(2010) 3 SCC 271**; Dayao and Others Vs. State of UP & Ors. **AIR 1961 SC 1457**; Madho Singh and Ors. Vs. Moni Singh (Dead) by Lrs. & Ors. **(2004) 12 SCC 214**; State of Maharashtra Vs. Hindustan Construction Company Ltd. **(2010) 4 SCC 518**; UHL Power Company Ltd. Vs. State of Himachal Pradesh **(2022) 4 SCC 116**; Associated Builders Vs. Delhi Development Authority **(2015) 3 SCC 49**; Samudram Vs. State of Karnataka & Anr **(2024) 3 SCC 623**; MMTC Vs. Vedanta Ltd. **(2019) 4 SCC 163**.

8. We have considered the contentions and have carefully perused the pleading of the parties; the record of the Arbitral Tribunal and the order passed by the High Court in S.B. Civil Writ Petition No.3065/2008; the earlier award passed by the First Arbitral Tribunal and the impugned award passed by the Arbitral Tribunal.

9. The admitted facts are that the tripartite concessionaire agreement was signed on 24.07.1996. The concession period was for 140 months and the fees was to be collected by the respondent up to 15.05.2008. The first arbitration award was published on 23.02.2008 and a compensation of Rs1,58,14,000/- on account of escalation in project cost during construction period and repair cost during the maintenance period was awarded. It was also made clear in the award that if the notification extending the concession period up to 31.07.2010 is not issued, then the





payment is to be made with interest @ 20%. Thus, in the earlier award, there was a direction to the appellant to issue notification extending the concession period up to 31.07.2010 and if the said notification is not issued, the appellant were directed to pay to the claimant Rs.15.814 million with interest @ 20%.

10. The first award was passed on 23.02.2008. It is evident that the respondent No.1 filed S.B. Civil Writ Petition No.3065/2008 with a prayer that the respondent No.1 may be allowed to operate the toll until the approved extended period. It was also prayed that the issuance of fresh notification with regard to extended concessional period up to 31.07.2010 be issued. The respondent No.1 did not disclose before the Arbitral Tribunal the filing of the writ petition and the order passed thereupon. This fact was not known to the appellant and, therefore, they did not raise the ground with regard to the dismissal of the writ petition filed by respondent No.1 before the Arbitral Tribunal and Commercial Court. It is for the first time that the decision passed by the High Court in writ petition preferred by the respondent has been made a ground in the appeal filed under Section 37 of the Act. The writ petition filed by the respondent No.1 was dismissed on 15.10.2008 and the High Court held that the Steering Group has no jurisdiction to extend the concession period because it is specifically stated that the concession period shall mean the period approved by the Government. The Court concluded that no direction can be given to the appellant for issuing any revised notification as per the recommendation of the Steering Group for extension of the concession period. However, while dismissing the writ petition, the Court made it clear that if any dispute arises, the



respondent is required to take recourse to the provisions of Clause 9.1 of the tri-partite agreement and to raise dispute before the Arbitral Tribunal.

11. The contention of counsel for the respondent that the dismissal of the writ petition on 15.10.2008 would not have any impact on the award passed by the Arbitral Tribunal as the High Court while dismissing the writ petition used the word 'however' and permitted the respondent to rake recourse to the provisions of Clause 9.1 and raise the dispute before the Arbitral Tribunal cannot be accepted for the very reason that by a reasoned order, the High Court held that directions cannot be given to the appellant for issuing any revised notification and that the Steering Group has no jurisdiction to extend the concession period since the extension of concession period could be approved only by the Government. As far as this finding with regard to the concession period is concerned, the same had attained finality because the respondent had not challenged the order passed by the High Court. It is true that the High Court permitted the respondent to raise the dispute before the Arbitrator but the Arbitral Tribunal could not have awarded compensation for not extending the concession period as the Steering Group was not authorised to extend the concession period as held by the High Court.

12. Be that as it may, we are of the considered view that it was the bounden duty of the respondent to apprise the Arbitral Tribunal about the dismissal of the writ petition. Non disclosure of the same, tantamounts to grave misconduct on part of the respondent.



13. We are also of the view that use of the word 'however' does not mean that the decision that Steering Group had no jurisdiction to extend the concession period becomes redundant. The Arbitral Tribunal held that the decision of the Steering Group for extension of concession is binding on the parties. The same being contrary to the judgment passed by High Court in Writ filed by the claimant/ respondent is patently illegal.

14. To see as to whether the awards are overlapping, it would be relevant to quote the two awards. In the first award, the arbitrators held and directed the respondent to issue notification extending the concession period up to 31.07.2010. The Tribunal further directed that in case the notification extending the concession period up to 31.07.2010 is not issued and the claimant for the said or any other reason is not allowed to collect toll as directed, the appellant shall pay to the claimant the award sum of Rs.15.814 million with interest @ 20%.

15. In the present award, the Arbitral Tribunal has come to the conclusion that the Steering Group had extended the period up to 30.11.2008 and the taking over of the project on 15.05.2008 was in violation of the extension of the concession period by the Steering Group. The Arbitral Tribunal has awarded Rs.6,11,74,451/- against taking over of the toll collection by the appellant in May, 2008 and in not extending the period up to 30.11.2008. The Arbitral Tribunal has also awarded interest @ 20% on Rs.5,84,81,312/- from 01.12.2008 till the date of award. The Arbitral Tribunal has also awarded Rs.80 lac on account of taking over of the facility on 15.05.2008 by the respondent considering the same to be illegal.



16. We are of the considered view that the present award is clearly overlapping with the earlier award as in the earlier award, the concession period was extended up to 31.07.2010 and in case the period was not extended, respondent was to be paid a compensation to the tune of Rs.15.184 million with interest @ 20%. In the present claim also, for non extension of the period from 15.05.2008 to 30.11.2008, further sum has been awarded which is clearly overlapping with the earlier award. Since in the earlier award, the claimant was given claim till 31.07.2010, the Arbitral Tribunal in the present award could not have given further claim for the overlapping period.

17. We are of the considered view that the respondent has committed grave error in not producing the order of the High Court vide which the writ petition was dismissed as in that order, it was clearly held by the High Court that the concession period cannot be extended on the basis of the report of the Steering Group and it is for the State to issue a notification in this regard. The award was thus, patently illegal and opposed to public policy and was in utter violation of the order of the High Court which had attained finality. We are also of the considered view that non-raising of the above ground by the appellant before the Arbitral Tribunal and the Commercial Court will not be of any consequence as it was the bounden duty of the claimant to place the order passed in the writ jurisdiction before the Arbitral Tribunal and before the Commercial Court and concealing the same and obtaining award treating the concession period as extended upto 30.11.2008 patently illegal and opposed to public policy. Thus, the award cannot be sustained.



18. The judgments cited by counsel for the Respondent with regard to scope of Section 34 and Section 37 of the Act cannot be applied to the facts of this case as a judgment passed by the High Court in Writ Petition filed by the claimant having direct bearing on the claim was concealed by the claimant.

19. Accordingly, the appeal under Section 37 of the Act is allowed. The order dated 17.06.2019 passed by the learned Commercial Court No.3, Jaipur and the impugned award dated 07.09.2014 passed by the Arbitral Tribunal are hereby quashed and set aside.

20. Pending applications, if any, stand disposed.

(PRAVEER BHATNAGAR),J

(PANKAJ BHANDARI),J

CHANDAN/