

Interesting example of applying the set aside grounds : Delhi High Court

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GVK Jaipur Expressway Private Limited v. National Highway Authority of India

Court: Delhi High Court | **Case Number:** OMP (COMM) 377/2020 | **Citation:** 2021 SCC OnLine Del 4851 | **Bench:** Vibhu Bakhru J | **Date:** 29 October 2021

A recent decision of a single-judge bench of the Delhi High Court is a noteworthy example of applying the set-aside grounds.

The arbitral award (majority opinion) under challenge pivoted on the interpretation of one clause of the contract (Clause 18.1). The court completely disagreed with the majority’s interpretation. But it said that that by itself may not make the award amenable to challenge because the court is not required to re-adjudicate the disputes and supplant its view over that of the tribunal unless it is hit by public policy or patent illegality on the face of the award.

There was, however, another clause (Clause 18.4) on which the respondent in the arbitration had relied but which the majority did not consider at all. Accordingly, the court found that not dealing with a principal contention made the award unreasoned and set it aside.

A. Background

The parties had a concession agreement for widening a section of the NH-8 in Rajasthan from 2 lanes to 6 lanes. Under the agreement, the petitioner was responsible for constructing the 6 lanes, operation and maintenance of the project.

Later, 4 additional lanes had to be constructed for decongestion of traffic at the toll plazas. The petitioner claimed payment for the construction of the additional lanes. NHAI defended the claim asserting that the construction of the additional toll lanes squarely fell under the obligations of the petitioner relating to operation & maintenance of the project. Thus, it said, the petitioner was not entitled to additional payment.

Accordingly, the issue was if the construction of the additional lanes was within the scope of work under the contract.

The tribunal, by a majority, interpreted the words in Clause 18.1 of the contract “modify, repair or otherwise make improvements to the project highway.....for permitting safe, smooth and uninterrupted flow of traffic during normal operating conditions” to include construction of additional lanes.

The award was challenged on the ground of patent illegality. The petitioner contended that the award was contrary to terms of the contract, particularly Clause 18.4, which provided that “maintenance shall not include the extension of any existing pavement, bridges, structures and *other civil works* unless part of the project.” (emphasis by court)

B. The court’s decision

Justice Bakhru disagreed with the arbitral tribunal’s interpretation of Clause 18.1. He said, “this Court is unable to concur with the aforesaid interpretation. The words “*modify, repair or otherwise make*

improvements to the project highway” cannot be read to include construction of additional lanes. He further said that “the logical sequitur of the Arbitral Tribunal’s interpretation of the aforesaid words in Clause 18.1 is that the concessionaire would also be required to broaden the highway if the volume of the traffic increased beyond its capacity. The import of the aforesaid words is certainly not as wide so as to include additional construction.”

However, he noted, “notwithstanding that this Court does not concur with the view of the Arbitral Tribunal with regard to interpretation of Clause 18.1 of the Concession Agreement, the same may not be amenable to challenge under Section 34 of the A & C Act.”

But, he said the “issue is not limited to interpretation of Clause 18.1 of the Concession Agreement, solely on which the impugned award, essentially, rests.” The petitioner had also relied on Clause 18.4 and contended that any civil works were specifically excluded from the purview of maintenance of the project.

The court found that the majority award had not considered the effect of Clause 18.4 at all. Since it was a principal contention, the court concluded that the award must be construed to be unreasoned. It noted: “Section 31(3) of the A&C Act requires that an arbitral award must state reasons upon which it has been based. The said requirement must be read in a meaningful manner. In an adversarial system of litigation, the reasons for a decision must necessarily take into account the relevant rival contentions. Thus, the question whether construction of additional lanes and toll booths fall within the scope of the Concession Agreement was required to be addressed in the light of the contentions advanced by both parties. However, the Arbitral Tribunal has completely ignored the petitioner's contention regarding the interpretation of Clause 18.4 of the Concession Agreement.”

Bakhru J concurred with the minority view noting that it had considered all relevant aspects of the agreement.

The award was set aside as contrary to the expressed terms of the contract. The court noted that the petitioner was at liberty to seek a reference of the disputes to arbitration.

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