

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

+ **OMP No.56/2010**

29th January, 2010.

NATIONAL HIHWAYS AUTHORITY OF INDIA ...Petitioner

Through: Mr. Sandeep Sethi, Sr. Advocate with
Mr. Sumit Gahlawat, Advocate.

VERSUS

ANDHRA EXPRESSWAY LIMITED ...Respondent

Through: Mr. Sameer Parekh, Advocate with
Ms. Sonail Basu Parekh, Advocate
and Mr. Sumit Lall, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

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JUDGMENT (ORAL)

VALMIKI J.MEHTA, J

I.A. No.1050/2010 (Exemption) in O.M.P. No.56/2010

Exemption is allowed subject to all just exceptions.

I.A. is disposed of.

I.A. No.1051/2010 (Condonation of delay) in O.M.P. No.56/2010

For the reasons stated in the application, delay in re-filing the petition is condoned.

I.A. is disposed of.

O.M.P. No.56/2010

1. By this petition under Section 34 of Arbitration and Conciliation Act, 1996, the petitioner challenges the Award of a three member Arbitration Tribunal dated 14.9.09. The Award in question deals with only one issue viz the entitlement of the respondent/contractor to claim bonus for early completion of the contracted work. The Arbitrators have upheld the entitlement of the respondent to claim bonus on the basis of the Provisional Certificate issued by the petitioner. The contract was originally scheduled to be completed before a particular date, however, on account of force majeure conditions of the site not being made available to the petitioner and which therefore could not be handed to the respondent, the parties entered into a Supplementary Agreement on 12.5.05. The Award decides the interpretation concerning Clauses 3 and 7 of this Agreement, besides others.

2. Before I turn to the clauses of the Supplementary Agreement, it is necessary to advert to certain clauses of the main contract between the parties and the same are as under:

“ “COD” means the commercial operations date of the Project which shall be the date on which the Independent Engineer has issued the Provisional Certificate or the Completion Certificate in accordance with the provisions of Article 5.4.”

“8.1 Annuity Subject to the provisions of this Agreement and in consideration of the concessionaire accepting the Concession and undertaking to perform and discharge its obligations in accordance with the terms, conditions and covenants set forth in this Agreement. NHAI agrees and undertakes to pay to the Concessionaire, on each Annuity Payment Date, the sum of Rs.279.12 Million (the Annuity).

8.2 Payment of Annuity

(a) Subject to the provisions of Article 8 and any other applicable provisions of this Agreement, NHAI shall make Payment of Annuity to the Concessionaire on each Annuity Payment Date.

(b) NHAI shall as security for payment of Annuity, provide to the Concessionaire an irrevocable, revolving Letter of Credit from a Scheduled Bank in India for a sum equal to 279.12 Million throughout the Operations Period. Such Letter of Credit shall be established within 30 days from the expected date of COD as intimated by the Concessionaire.

Subject to the provisions of Article 8 and any other applicable provisions of this Agreement, NHAI shall make Payment of Annuity to the Concessionaire on each Annuity Payment Date.

8.3 Bonus/Reduction in Annuity

(a) The Concessionaire shall either receive bonus for early completion of the Project (the Bonus) or incur reduction in the Annuity for delayed completion of the Project (the Reduction) as the case may be.

(b) For the purpose of this Article 8.3, each Annuity Payment Period shall be deemed to be a period of 180 calendar days.

(c) The Bonus or Reduction as the case may be shall be computed as under:

(i) If COD is achieved prior to first Annuity Payment Date:

$$B \text{ or } R = [(SPCD - COD) + X] * A / 180$$

(ii) If COD is achieved between two Annuity Payment Dates:

$$B \text{ or } R = [(PAPD - COD) + X] * A / 180$$

Where

A = Annuity,

B = Bonus,

PAPD = Previous Annuity Payment Date.

R = Reduction

SPCD = Scheduled Project Completion Date.

X = As determined by the Independent Engineer, the aggregate number of days of delay caused by:

(i) delay in delivery of the Project Site or any part thereof by NHAI.

(ii) suspension of Construction Works or part thereof by NHAI or the – Independent Engineer, for reasons not attributable to the Concessionaire.

(iii) Change of Scope Order pursuant to Article 7.

(iv) stoppage of the Construction Works or part thereof on account of the Concessionaire allowing access and use of Project Site for public purposes pursuant to Article 3.2(d).

(v) Force Majeure Event which is a Political Event or Other Event,

(vi) NHAI Event of Default.

(d) If the resultant figure arrived at pursuant to computation made in accordance with the preceding sub-article is positive, the same shall be the amount of Bonus payable to the Concessionaire and if negative, the same shall be the amount of Reduction.

(e) The Bonus shall be paid or Reduction shall be effected on the first Annuity Payment Date occurring after COD.

(f) Notwithstanding anything inconsistent contained anywhere in this Agreement, NHAI's obligation to pay Annuity shall arise subject to and only upon occurrence of COD."

Schedule J of the Agreement provides monthly annuity payment commencing from 30.5.2005 at 279.12 million per month and ending on 30.11.2019.

3. It is not in dispute between the parties that a Provisional Certificate as envisaged under the definition of 'COD' was issued by the petitioner in favour of the respondent. The object of issuing of this Provisional Certificate, as envisaged in the relevant definitional clause, is for the purpose that non-completion of certain minor items (punch list items), which are such in nature that they do not prevent the commercial operation of the toll road which is constructed by the respondent, should not deny the appropriate bonus or timely annuity payment to the respondent/contractor. Accordingly, on the issue of the Provisional Certificate, various consequences as contemplated in the Agreement flow. If the Agreement is completed within the scheduled time, then annuity becomes payable without

any deduction therefrom for liquidated damages. Also further, if on the date the Provisional Certificate is issued, the work is completed much ahead of the completion date, then, the respondent becomes entitled to bonus. Even the bonus payment is proportionately pro rated to the different earlier stages of completion of the contract, meaning thereby earlier the completion greater the bonus to the contractor.

4. Therefore, ordinarily when a Provisional Certificate is issued, then, except for the punch list items, no major items of work remain. In the facts of the present case, however, it transpired that besides the punch list items there were other major items which could not be completed by the respondent but, it was not the respondent who was to be blamed for this, because the admitted position is that the petitioner could not supply the site to the respondent for completion of the balance portion of the major works and those works could not be said to be Punch List items. This position is an admitted position and the same appears from the following paragraphs of the Supplementary Agreement dated 12.5.05:

“**AND WHEREAS** apart from the items in the Punch List, there are certain other project facilities/items within the defined scope of Concession Agreement which, on account of reasons beyond the control of either party to the Contract Agreement could not be completed before CoD. In the circumstances both the parties consider it necessary to further enter into a Supplementary Agreement to provide for various situations which were not foreseen by the parties at

the time of signing the original Contract Agreement dt. 30/10/2001.”

5. Because of the existence of default on the part of the petitioner in failing to supply the complete site to the respondent for completion of the work, the respondent would have been entitled not only to extension of time but also bonus at a higher rate, although the work was completed beyond the scheduled date. The higher rate for bonus would be because the bonus payment would be taken as from an earlier date and not from the extended date of completion, and which date had to be extended, not because of any fault of the contractor, but because of force majeure conditions which is the admitted position in the Supplementary Agreement. The Supplementary Agreement was thus intended to take care of the above position, besides other issues.

6. At this stage, it is necessary to refer to certain clauses of the Supplementary Agreement dated 12.5.05. These clauses are Clause 1, 2, 3 and 7, and same are reproduced hereunder:

“1. That the provisions made herein in this Supplementary Agreement shall have overriding effect over the provisions contained in the Contract Agreement dt. 30/10/2001 and in the event of any conflict between the provisions of the main Agreement and the Supplementary Agreement, the provisions of the Supplementary Agreement will prevail and the provisions of the main Agreement shall be deemed to have been amended or modified to that extent.

2. That in the event, the conflict between the provisions of the main Agreement and the Supplementary Agreement cannot be reconciled even by giving overriding effect to the provisions of the Supplementary Agreement, the decision of the Chairman of NHAI shall be final and binding in respect of such matters as are provided for in the Supplementary Agreement and such decision will not be arbitrable and to this limited extent of said matters, the arbitration clause contained in the main Agreement will be deemed to have been excluded.

3. That in consideration of the following items, having been de-linked by the NHAI from the CoD requirement, the Concessionaire shall not claim additional time, additional annuity or bonus for the delays like delay in delivery of the sites, stoppages of construction works by villagers etc., and that they shall complete all the remaining works with due expedition as per provisions and as and when the site is made available after the CoD issue of Provisional Certificate.

(a) The project facilities in the reach from Km 261.000 to Km 263.700 in Kathipudi Village. This reach on the main Carriageways shall be completed by the Concessionaire within 25 days from the agreed date of COD. (Service Roads and remaining facilities in this reach shall be completed as 'Punch List' item).

(b) Right Hand Side 2-Lane carriageway from vehicular underpass at Km 292.412 to Km 293.250 including construction of ROB at Km 292.900.

(c) BC layer from Km 292.412 to Km 293.250 on the Left carriageway.

(d) The rectification of service roads with adjoining facilities such as lighting and walkways and works beyond the road shoulders including pedestrian guardrails at locations specified in the Concession Agreement.

7. That the Concessionaire shall not claim additional time for the purpose of additional Annuity/Bonus for the execution of items defined in Paras 4 to 6"

7. Mr. Sethi, Senior counsel, placed great stress on Clauses 3 and

7 of the Supplementary Agreement to contend and canvass that not only the

bonus would not become payable to the respondent merely because Provisional Certificate had been issued and in fact what was penned down in the agreement was also a denial of additional annuity and additional bonus. Meaning thereby what Mr. Sethi contended is that the original bonus itself as envisaged in the contract became non payable because certain works, which were not Punch List items had still to be completed and such clauses 3 and 7, therefore, disentitled the contractor for the bonus payment for early completion based on issue of the Provisional Certificate.

8. I am unable to agree with the arguments of Mr. Sethi. Firstly, in a commercial contract such as the present, on the commencement of the toll road, pursuant to the issuance of a Provisional Certificate, the petitioner starts earning toll from the road built by the respondent. When a road is built earlier than the scheduled date and toll also is collected earlier, and surely, if the petitioner starts earning from an earlier date there has to be a corresponding benefit to the respondent also. It is for that reason that bonus is given to the contractor for early completion. It may be noted that the contractor only gets bonus and it is not as if the date of annuity payment as mentioned in Schedule of the contract gets accelerated to an earlier date of the Provisional Certificate. Accordingly, since the petitioner takes commercial benefit from an early operation of the road it gives bonus to the

contractor for early completion. After all, had the construction of the road been delayed on account of the respondent, then, in such circumstances not only bonus would not be payable to the respondent, but also the monthly annuity payment would have been deducted by a particular percentage/amount towards liquidated damages

9. In view of the aforesaid facts, the Award gives the following findings. These findings are contained succinctly in para 12 to 16 of the Award and which are reproduced hereunder:

“12. It was in the alternative, submitted by the learned counsel for the respondent that the provisional completion certificate was issued subject to the terms and conditions of the supplementary agreement and therefore, the claimant cannot claim bonus in view of Article 3 of the Supplementary Agreement. We have already quoted earlier the said provision. It debars the claimant from claiming additional time, additional annuity or bonus for the delays. This is not a case where bonus is claimed on the ground of delay. The claimant is claiming bonus because it completed the work before the scheduled project completion date. As can be seen from the sheet containing bonus calculation submitted by the claimant (Annexure L) against the ‘x’ factor the claimant has mentioned nil and thus nothing is claimed on the basis of ‘x’ factor.

13. Article-5.4 of the main contract which deals with project implementation, provides that if the tests are successful and all parts of the project facilities can be safely and reliably opened for commercial operations the Independent Engineer shall issue Completion Certificate. It further provides that if certain works or things forming part of construction work are not completed, Independent Engineer may issue provisional certificate, if after the tests the Independent Engineer determines that the project facilities can be safely and reliably opened for commercial operations but has to attach herewith a punch list containing uncompleted items. Sub-Article (viii) thereof specifies time for completion of those items. It

also provides for a remedy if those items are not completed within that time. NHAI can get such items completed at the risk and cost of the concessionaire.

14. The project was to be deemed as complete and open to traffic only when the Provisional Certificate or the Completion Certificate or the Completion Certificate was issued by the Independent Engineer in accordance with the provisions of the Concession Agreement. Article-5.4(x) thereof provides that in case COD is different from SPCD, the provisions of Article 8.3 shall apply.

15. Article 8 of the contract provides for payment of Annuity to the concessionaire-claimant, in consideration of the Project work undertaken by it. On each annuity payment date NHAI has to pay Rs.279.12 million as annuity. Article 8.3 provides for payment of bonus for early completion of the project and reduction in annuity if completion of the Project is delayed. The Bonus or Reduction (B or R) is to be completed according to the formula mentioned in the clause (c) of that Article. According to that formula if COD is achieved prior to the first annuity date. $B \text{ or } R = [(SPCD - COD) \times X] / A / 180$. 'A' is annuity and 'X' is the aggregate number of days of delay determined by the Independent Engineer. It is not necessary to refer to the other parts of this clause. It may be stated that clause (e) thereof provides that bonus shall be paid or reduction shall be effected on the first Annuity Payment Date coming after COD.

16. This provision of the contract and the above formula make it clear that early completion of the Project i.e. SPCD-COD and positive 'X' factor because of delays mentioned in that provision would entitle the Concessionaire to get bonus. In this case bonus is not claimed on the basis that there were delays of the type entitling the Concessionaire to get the Bonus. It is claimed because the claimant/concessionaire was able to complete the project work before SPCD. As stated earlier the project work was successfully completed by the claimant over the site which were made available to it. It was not possible for the respondent to hand over other sites to the claimant. As the whole project work was not completed, the Independent Engineer could not have issued Completion Certificate, in absence of which the claimant would not have got his request for payment of Annuity processed by the Respondent and would have suffered financial difficulties. The Respondent would have incurred liability to extend time for completion of the Project

and also pay more bonus because of the delay which was likely to be caused. Thus a situation had arisen for both the parties to find some solution and as the Supplementary Agreement states it was decided to de-link the incomplete part and provide for it separately. Article-(iii) of the Supplementary Agreement if read carefully makes it clear that in consideration of de-linking the incomplete works from COD, the claimant gave up its right to claim additional time for the delays referred to in that Article and also the higher amount of bonus. It is a matter of fact that there was considerable delay of the type contemplated by Article (iii) and even when Provisional Certificate was granted, some obstructions and hindrances still existed. The claimant was not responsible for the delay and he could not have completed the work because of those obstructions and hindrances. That would have entitled the claimant to ask for extension of time and other consequential entitlements including more bonus. It was this benefit which the claimant gave up. It has not given up the right accrued to get bonus which had accrued earlier on early completion of the project work. In our opinion, this is the correct reading of that article and therefore the contention raised by the learned counsel Mr. Ramaswamy has to be rejected as misconceived as it is based upon misreading of that article.” (emphasis added)

10. While hearing objections under Section 34 of the Arbitration and Conciliation Act, 1996, this Court considers the Award from the point of view whether the same is violative of the law of the land i.e. whether the Award is illegal or the same is violative of the contractual provisions or the findings arrived at by the Arbitrator are so perverse that the same shocks the judicial conscience. Keeping in view the aforesaid parameters, I do not find any illegality or violation of the contractual provisions or any perversity by the Arbitration Tribunal. The interpretation put by the Arbitration Tribunal on the clauses of the Supplementary Agreement is a justified, equitable and

valid interpretation of the clauses of the Supplementary Agreement. In any case the interpretation is one plausible interpretation of a reasonable person, such interpretation cannot be interfered with while hearing objections to an Award under Section 34. In fact, I find the opposition of the petitioner to be very surprising because I cannot understand how the petitioner can claim commercial benefits from an earlier completion of the contract but deny the commercial benefits to the contractor for early completion viz the bonus payable for early completion. The scales of justice in commercial contracts of this nature, in my opinion, have been very evenly balanced by the Arbitrator and I do not find any fault whatsoever in the Award. In view of the aforesaid, the present petition is dismissed with costs of Rs.1 lac. While awarding costs, I have considered para 37 of the judgment of the Supreme Court in the case of *Salem Advocates Bar Association Vs. Union of India 2005(6) SCC 344* which requires that it is high time that Courts should start imposing actual costs in the matter. I have also considered the value of the works and the paying capacity of the parties while imposing costs. Therefore, in the facts and circumstances of the case, I have imposed costs.

11. The present petition is disposed of accordingly.

VALMIKI J. MEHTA, J

January 29, 2010

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