

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

% Judgment delivered on: 11.12.2014

+ **OMP 1565/2014**

**NATIONAL HIGHWAYS AUTHORITY
OF INDIA**

..... PETITIONER

Versus

M/S. NIRMAL BOT LTD.

..... RESPONDENT

Advocates who appeared in this case:

For the Petitioner : Mr. Karunesh Tandon, Advocate

For the Respondent: Mr. Dayan Krishnan, Sr. Advocate with Mr. Rishi Agrawala and Ms. Malavika Lal, Advocates

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER,,J

1. This is a petition preferred under Section 34 of the Arbitration and Conciliation Act, 1996 (in short the Act) whereby, a challenge has been laid to the award dated 14.08.2014, passed by the learned arbitrator.

2. The three member arbitral tribunal unanimously ruled in favour of the respondent that it was entitled to "bonus" in terms of the contract executed between the parties herein, on account of expedited execution of the work entrusted under the contract. On this score, the respondent has been awarded a sum of Rs.13,22,22,222/- with interest at the rate of 6% p.a. from 29.04.2010 when, the bonus, became due till the date of the award.

2.1 Apart from the above, cost in the sum of Rs.1 Lakh have also been awarded in favour of the respondent. The respondent has been directed to pay the awarded amount referred to above within two months from the date

of the award, failing which, interest at the rate of 18% p.a. would run from the date of the award till payment.

3. In order to adjudicate upon the petition, the following facts are required to be noticed :-

3.1 The parties herein entered into a concession agreement dated 04.05.2007 (in short the contract). The contract required the respondent to construct : a road from kilometre 278 to kilometre 308, on the Hyderabad-Nagpur Section, referred to as package APA, in the State of Andhra Pradesh, as a part of NH-7 stretch of NHDP Phase-II (hereafter referred to as the work in issue). The respondent, was to execute the work in issue, on Built Operate and Transfer (Annuity) Basis (in short BOT).

3.2 The duration of the contract was 24 months. The date of commencement was fixed as 30.10.2007, while the date of completion was frozen as 29.10.2009.

3.3 The respondent claimed that it had achieved completion of the work in issue, on 22.07.2009, which was, 100 days prior to the scheduled completion date.

3.4 Admittedly, under the contract, there is a provision for appointment of an independent consultant. The said independent consultant issued a provisional completion certificate on 21.08.2009 wherein, the date of completion of the work in issue was indicated as : 22.07.2009.

3.5 Evidently, the highway was opened by the petitioner for traffic and consequently, put to commercial use. Resultantly, toll was collected from commuters with effect from 21.08.2009, upon publication of the relevant toll notification, in the Gazette of India.

3.6 Thus far, there was no dispute between the parties. The dispute arose after the respondent had furnished a letter dated 03.08.2009, to the

petitioner, whereunder, it had apparently undertaken to complete what are referred to as '*punch list*' items, within 120 days of the date of the completion of the project. According to the petitioner, the punch list items were completed in 252 days as against 120 days, and therefore, the respondent was not entitled to bonus, as claimed and, consequently, the interest awarded by the arbitral tribunal.

4. Based on the aforesaid broad facts, Mr. Tandon, who appeared for the petitioner argued that the arbitral tribunal had rendered an award which was liable to be set aside on the following grounds :-

(i) The arbitral tribunal had failed to take into account the scope of the project as provided in clause 2.1 of the contract. It was contended that the scope of the project involved not only the design, engineering, financing, procurement and construction, operation and maintenance of the section of the highway involved under the contract i.e., the work in issue, but also included fulfilment of all other obligations undertaken by the respondent under the contract.

(i)(a) The contention was that in calculation of the bonus, all obligations undertaken by the respondent had to be taken into account which, included, the liquidation of punch list items.

(ii) The Commercial Operation Date (in short COD) had no connection with completion of project. In this behalf, reference was made to clause 2 of the contract. The arbitral tribunal's observation, that COD had to be achieved before the first annuity payment date, was thus, an incorrect conclusion.

(iii) The punch list items were not completed within 120 days but were completed in 252 days, and hence, the project completion date would be : 03.10.2010 which, necessarily meant, that no bonus was to be paid to the

respondent. Early completion of the project was thus, fundamental to disbursement of bonus to the respondent.

(iv) The arbitral tribunal failed to note that the non-completion of the punch list items was clearly attributable to the respondent, and that, the finding to the contrary was perverse.

5. Having heard the submissions of Mr. Tandon and perused the record, the undisputed facts, which emerge from the record, are:

(i). that the schedule date of the completion of the project was 29.10.2009;

(ii). the respondent was issued a provisional certificate, by the independent consultant, which showed the commercial date of completion of the project as : 22.07.2009;

(iii). this certificate was issued by the independent consultant under the cover of its letter on 12.08.2009;

(iv). commercial operations were commenced and toll fee was collected, from commuters, with effect from 21.08.2009;

(v). undoubtedly, the respondent was required to liquidate the punch list items within 120 days, in respect of which, according to the petitioner, an undertaking had been given by the respondent on 13.08.2009.

5.1 In this broad background, the arbitral tribunal considered the matter from the following angles:-

(a). firstly, as to whether the payment of bonus under clause 6.2 was, dependent on the completion of work adverted to in the punch list;

(b). secondly, whether the delay in completion of the punch list items was attributable to the respondent;

(c). thirdly, whether the so called undertaking given by the respondent vide letter dated 03.08.2009 was, valid and binding on the respondent; and

(d) lastly, delay is beyond 120 days in liquidation of the punch list items, would disentitle the respondent from claiming bonus.

6. Before I proceed further, it may be important to detail out as to what are considered as : punch list items. The punch list items are, accordingly, culled out below. I may only note that Mr. Tandon, was at ad idem, with the court, that the punch list items, as extracted below, exhausted the list:

- “(i). Plantation of avenue trees along the edge of the RoW and other landscaping works within RoW.
- (ii). Completion of works on provision of unlined roadside drains.
- (iii). Lining of roadside drains in identified stretches.
- (iv). Construction of rest areas, as approved.
- (v). Completion of fending works of RoW.
- (vi). Turfing on embankment slopes in identified sections.
- (vii). Pointing to stone Masonry Works in identified Cross Drainage structures.
- (viii). Stone Pitching at identified locations..”

6.1 A perusal of the aforementioned items, would show, that quite clearly, the punch list items, could not come in the way of commencement of commercial operations by the petitioner, which in fact, were commenced on 21.08.2009.

6.2 Mr. Tandon, however, argued that, this by itself would not entitle the respondent to bonus as the project, which was the entirety of the work in issue, was not completed by the respondent, within the prescribed time.

6.3 Therefore, one has to examine: whether the reasoning of the arbitral tribunal is a plausible reasoning, which logically flows from the material and evidence placed before it.

6.4 In so far as the first issue is concerned, the arbitral tribunal has returned a finding of fact that the independent consultant had fixed the commercial date of operations from 16.07.2009 though, the provisional

certificate indicated the said date as: 22.07.2009; a discrepancy for which no reasons were given by the petitioner.

6.5 Notwithstanding the above, on a construction of clause 6.2 and 16.5, the arbitral tribunal came to the conclusion that the petitioner was not empowered to withhold payment of bonus, on account of pendency of work under the punch list items, over which, the respondent had no control.

6.6 According to the arbitral tribunal, there was no provision in clause 16.5, which would, have disentitled the respondent from claiming bonus if, as contended by the petitioner, punch list items were not completed within 120 days. On a reading of clause 16.5, it came to the conclusion that the petitioner had various remedies available with it, none of which empowered it to withhold the bonus.

6.7 In my opinion, it is a plausible view for the reason that clause 16.5 which, speaks about issuance of a provisional certificate, and also, adverts to punch list items, delineates the remedies available to the petitioner in case punch list items are not liquidated within 120 days of the date of issue of the provisional certificate. The remedies provided therein include: termination; the right to have the punch list items completed by a third party at the risk and cost of the concessionaire (i.e., the petitioner herein), and to recover the loss; the power to levy penalty equal to 200% of the cost incurred by the petitioner in completion of punch list items subject to a minimum penalty of Rs.10 Lakhs, which, incidentally, the petitioner is entitled to directly recover from the escrow account.

6.8 To be noted, since the remedies provided in clause 16.5, according to the petitioner, were not exhaustive, it was perhaps contended before the arbitral tribunal, and also, before this court, that bonus payable on the first date of annuity payment, could also be withheld. The arbitral tribunal,

however, did not find any such limitation and / or provision under clause 6.2, and thus, ruled otherwise.

6.9 However, as is evident from the record, the arbitral tribunal also returned its findings with respect to other issues, which I have adverted to above, such as: attributability for delay in liquidation of punch list items, the effect of the contents of letter dated 03.08.2009, and lastly, whether delay beyond 120 days in liquidation of punch list items would result in denial.

7. In this context, the arbitral tribunal has returned a finding of fact that the respondent vide its letter dated 09.11.2009, had written to the independent consultant, that it had completed the work adverted to in the punch list items.

7.1 The arbitral tribunal further records that this claim of the petitioner was accepted by none other than the independent consultant vide letter dated 16.11.2009, with the caveat, that those items in the punch list which, could not be completed were relatable to “non-handing over of land”, on account of resistance by persons residing in the area, and that, in respect of these works, the respondent had undertaken to reach resolution, within a maximum period of three months. The letter of the independent consultant concluded, with a recommendation, that a completion certificate should be issued to the respondent under clause 16.5 of the contract, with effect from 16.11.2009.

7.2 The arbitral tribunal has further recorded that both the Project Director and the Chief General Manager of the petitioner, had sustained the view of the independent consultant taken vide its letter dated 16.11.2009, in their separate communications dated 17.11.2009 and 23.11.2009.

7.3 The arbitral tribunal notes, that the, independent consultant, the Project Director and the Chief General Manager of the petitioner vide their

letters dated 07.10.2010, 11.10.2010 and 19.10.2010, recommended the release of bonus in the sum of Rs.13,22,22,222/-.

7.4 According to the tribunal, it was only on 23.06.2011, based on the decision of the variation committee, an about turn, so to say, was taken by the petitioner, to the effect that, since work qua punch list items got completed beyond the prescribed period of 120 days, the respondent was not entitled to bonus. The arbitral tribunal has observed that the decision of the variation committee could not bind the respondent for two reasons. One, that it was not constituted in terms of the contract obtaining between the parties; and second, that the variation committee took its decision without affording any opportunity to the respondent.

7.5 Based on the appreciation of the material before it, the arbitral tribunal came to the conclusion that the delay in completion of the punch list items beyond 120 days was “solely attributable to the petitioner.”

7.6 In so far the impact of letter dated 03.08.2009 was concerned, it would be seen, as noticed by the arbitral tribunal, it was dependent upon the site being made available free of encumbrance. The arbitral tribunal having found, that the delay, was attributable to the petitioner (as was also noticed by the independent consultant and the Project Director), it came to the conclusion, that bonus could not be withheld, based on the said letter.

7.7 In my view, the findings returned by the tribunal cannot held to be perverse, especially in the circumstances that petitioner’s own Project Director and Chief General Manager supported the view taken and recommendation made by the independent consultant.

7.8 The arbitral tribunal, also appears to have, come to the conclusion that the letter dated 03.08.2009, cannot amend the terms of the contract. For this purpose, reference was made to clause 1.1 and 44.4 of the contract. The

view taken by the arbitral tribunal, in this behalf, is that, the provisions of letter dated 03.08.2009, cannot amend the provisions of clause 16.5 of the contract, and thus, was not binding.

7.9 The sum and substance of this line of reasoning of the arbitral tribunal was that the petitioner had failed to fulfil its part of the obligation, which was, to make available the land, and having failed to honour its obligations, it could not withhold the payment of bonus to the respondent, on the ground that there was delay in liquidation of punch list items.

8. In my view, having regard to the record and the reasoning of the arbitral tribunal, no interference is called for with the above. The argument of Mr. Tandon that completion of the punch list items which was part of the project i.e., the work assigned to the respondent to enable it to claim bonus, could certainly not have been withheld if, for no other reason but for the reason that, the delay, in liquidating the punch list items, was attributable to the petitioner.

9. For the aforementioned reasons, I find no merit in the petition. The same is accordingly dismissed. Parties shall, however, bear their own costs.

RAJIV SHAKDHER, J

DECEMBER 11, 2014

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