

**HIGH COURT OF TRIPURA
AGARTALA**

WP(C) No.472 of 2023

M/s K.L.D. Creation Infrastructure Pvt. Ltd. through its Authorized Representative Mr. Awadhesh Kumar Roy, S/O: Rajeshwar Roy, having its registered office at F-134, Flat No.A-9 Jawahar Park Debli Road, Khanpur, New Delhi-110062.

..... Petitioner(s)

V E R S U S

1. Executive Director (Technical) National Highways and Infrastructure Development Corporation Ltd., Ministry of Road Transport and Highways, Government of India, 3rd Floor, PTI Building, 4 Parliament Street, New Delhi-110001.
2. NHIDCL through its Deputy General Manager (Project), having its Regional Office at 3rd Floor UD Bhawan, near Ravindra Bhawan, Shakuntala Road, Agartala, Tripura 799001.
3. Lion Engineering Consultants Pvt. Ltd. through its Team Leader, having office at near Tripura Gramin Bank, P.O. Resham Bagan, Agartala Tripura-799008.
4. The Union of India, Represented by: Secretary, (RT & H), Ministry of Road Transport & Highways, Transport Bhawan, 1, Parliament Street, New Delhi, 110001.

..... Respondent(s)

For Petitioner(s)	:	Mr. Devansh Mishra, Advocate.
For Respondent(s)	:	Mr. Bidyut Majumder, Dy. SGI. Mr. S. Ghosh, Advocate. Mr. Kohinoor N. Bhattacharjee, Advocate
Date of hearing & Judgment	:	7th August, 2023.
Whether fit for reporting	:	YES

**HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH
HON'BLE MR. JUSTICE T. AMARNATH GOUD**

JUDGMENT & ORDER (ORAL)

Heard Mr. Devansh Mishra, learned counsel appearing for the petitioner. Also heard Mr. S. Ghosh, learned counsel appearing for respondents No.1 and 2 as well as Mr. Kohinoor N Bhattacharjee, learned counsel

appearing for respondent No.3 and Mr. Bidyut Majumder, learned Dy. SGI appearing for respondent No.4.

[2] Writ petitioner, being the successful tenderer, entered into agreement dated 24.05.2021 (Annexure-3) with the National Highways and Infrastructure Development Corporation Ltd. for execution of the following work:

“Rehabilitation and up-gradation of road from design km 19.300 to km 31.300 (Total length:12.000 km) of Agartala-Khowai section on NH 108 B to two lane with paved shoulder in the state of Tripura on EPC basis (Package-II).”

[3] As per the terms of the agreement, the date of commencement of work was 08.06.2021 and date of its scheduled completion was 06.12.2022. As per the case of the writ petitioner, the execution of the work encountered certain impediments which led to delay in its timely completion. Petitioner took a plea that the Right of Way had not been provided free from encumbrance; mobilization of men and machinery by the agency could not take place in time due to the adverse weather conditions such as excessive rains and outbreak of a pandemic during execution of the project. Petitioner has referred to Annexure-4 series, which are correspondences written by the petitioner indicating the delay not attributable to the contractor. The Regional Officer, Agartala, NHIDCL had issued a letter on 24.02.2022 indicating the intention to terminate the petitioner EPC contractor for his defaults under articles 23.1.(i)(c), 23.1.i(e) and 23.1.i(p) of the contract agreement. The EPC contractor had submitted its representation on 09.03.2022 which is Annexure-6 to the writ petition indicating that there were some serious health issues with the Managing Director of the company which

badly affected the progress of the project. They had tried to achieve the financial progress of the work programme according to article 10.1(iii) of the contract agreement but could not be achieved. As per them, the physical progress of work up to 28.02.2022 was 5.4% of the contract amount but it could not be converted in financial progress because stage payment statement had not been submitted and approved by the Authority Engineer till date.

[4] The petitioner further stated that they had reviewed their project site properly and planned for all manpower, equipments and material procurement to speed up the progress of work according to requirement of contract agreement and had committed to achieve the financial progress in accordance with schedule-J and revised work programme. They had also submitted a tabular chart containing the strength of manpower, equipments which are mobilized to work in a schedule timeframe. They had also taken a plea that after elapse of 50% of time of contract period, the complete length of Right of Way (ROW) has not been handed over. In view of these facts and the reference of review meeting of Managing Director, NHIDCL, they had set their target for the month of March as 10% and for April-10% to be achieved. Total financial progress up to 30.04.2022 of 20% was committed to be achieved. This letter was considered by the respondent authorities. The General Manager (P) by letter dated 26.04.2022 (Annexure-5) had conveyed its intention to grant opportunity to the contractor to achieve the commitment made for minimum 20% physical progress up to 30.04.2022 as per the representation of the contractor and the review meeting held on 03.03.2022. The Assistant Engineer was asked to review the work progress of the contractor on 01.05.2022 and provide recommendation for further action of declaring the contractor 'non-performer' in case the progress of the

work is not achieved as committed by the contractor. Therefore, it was recommended by the AE that the competent authority may provide an opportunity to contractor to achieve the progress as per commitment made instead of issuing termination notice. It was further indicated that the action for declaration of the contractor as 'non-performer' shall be initiated by the AE in case the contractor fails to achieve the committed progress.

[5] It seems that desired progress had not been achieved thereafter and despite total 19 extensions of time granted during course of the contract, petitioner made a request for extension of time up to 31.07.2023 vide letter dated 14.02.2023 (Annexure-7). In this background, the letter dated 14.03.2023 (Annexure-8) which accepted the request of the petitioner for extension of time for completion of the work up to 31.07.2023 assumes significance. The letter dated 14.03.2023 (Annexure-8) is quoted hereunder:

“NHIDCL/PMU-Tel/A-K/(Pkg-II)/25(1)/2021-22/Voll-II/2069

Date:14.03.2023

To,

The Team Leader
Lion Engineering Consultants Pvt. Ltd.
C/O-Mr. Milan Ch. Das, 1st Floor,
Near Tripura Gramin Bank,
Reshambagan, Agartala
email ID: lecagartala-khowai@liongroup.in

Sub:- Rehabilitation and up-gradation of road from Km 19.300 Km to Km 31.300 (Total length=12.000 Km) of Agartala-Khowai (Pkg-II) section of NH-108B to two lanes with paved shoulders in the state of Tripura on EPC mode-Extension of Time-Reg.

Ref: i) HQ, NHIDCL Letter No-NHIDCL/Tripura/NH-108B/Agt-Khowai/P(2)/2019/986 dated 07.03.2023.

ii) RO Office Letter No-NHIDCL/RO-Agt/W/T/Agt-Khowai (Pkg-II) (NH-108B)/315/850 dated 11.03.2023.

Sir,

Please refer to the above-mentioned letter vide which approval of shifting of milestone has been conveyed with Revised completion Date as 31.07.2023 (101 days up to 17.03.2023 without LD and balance 136 days up to 31.07.2023 with LD).

2. In this regard, it is requested to take further necessary action as per the provisions of the Contract Agreement.

Yours Sincerely
Sd/-
R K Tindwal
General Manager (P)”

[6] Petitioner is aggrieved as by the impugned notice dated 18.07.2023 (Annexure-9), the agreement has been terminated invoking clause 23.1 of the contract agreement. Petitioner has been asked to vacate the site within 15 days and handover all related documents and records to the Authority in accordance to clause 23.4 of the contract agreement. Steps have also been initiated for encashment of bank guarantee submitted against performance security by the petitioner vide letter dated 26.07.2023 (Annexure-10) issued by the respondent-NHIDCL to the HDFC Bank Ltd.

[7] In the aforesaid chronology of dates and events, Mr. Devansh Mishra, learned counsel for the writ petitioner has in particular invited the attention of this Court to clause 23.1. The relevant clauses of which are extracted hereunder:

“23.1 Termination for Contractor Default

(i) Save as otherwise provided in this Agreement, in the event that any of the defaults specified below shall have occurred, and the Contractor fails to cure the default within the Cure Period set forth below, or where no Cure Period is specified, then within a Cure Period of 60 (sixty) days, the Contractor shall be deemed to be in default of this Agreement (the “**Contractor Default**”), unless the default has occurred solely as a result of any breach of this Agreement by the Authority or due to Force Majeure. The defaults referred to herein shall include:

XXXX XXXX XXXX XXXX

(c) the Contractor does not achieve the latest outstanding Project Milestone due in accordance with the provisions of Schedule-J, subject to any Time Extension, and continues to be in default for 45 (forty five) days;

XXXX XXXX XXXX XXXX

(e) the Contractor fails to proceed with the Works in accordance with the provisions of Clause 10.1 or stops Works and/or the Maintenance for 30 (thirty) days without reflecting the same in the current

programme and such stoppage has not been authorised by the Authority’s Engineer;

(f) the Project Completion Date does not occur within the period specified in Schedule-J for the Scheduled Completion Date, or any extension thereof;

XXXX XXXX XXXX XXXX

(p) the Contractor has failed to fulfil any obligation, for which failure Termination has been specified in this Agreement; or

(q) the Contractor commits a default in complying with any other provision of this Agreement if such a default causes a Material Adverse Effect on the Project or on the Authority.

XXXX XXXX XXXX XXXX

(ii) Without prejudice to any other rights or remedies which the Authority may have under this Agreement, upon occurrence of a Contractor Default, the Authority shall be entitled to terminate this Agreement by issuing a Termination Notice to the Contractor; provided that before issuing the Termination Notice, the Authority shall by a notice inform the Contractor of its intention to issue such Termination Notice and grant 15 (fifteen) days to the Contractor to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice.

(iii) The following shall apply in respect of cure of any of the defaults and/ or breaches of the Agreement:

- (a) The Cure Period shall commence from the date of the notice by the Authority to the Contractor asking the latter to cure the breach or default specified in such notice;
- (b) The Cure Period provided in the Agreement shall not relieve the Contractor from liability for Damages caused by its breach or default;
- (c) The Cure Period shall not in any way be extended by any period of suspension under the Agreement;
- (d) If the cure of any breach by the Contractor requires any reasonable action by the Contractor that must be approved by the Authority hereunder the applicable Cure Period (and any liability of the Contractor for damages incurred) shall be extended by the period taken by the Authority to accord its required approval.

(iv) After termination of this Agreement for Contractor Default, the Authority may complete the Works and/or arrange for any other entities to do so. The Authority and these entities may then use any Materials, Plant and equipment, Contractor’s documents and other design documents made by or on behalf of the Contractor.”

[8] Learned counsel for the petitioner has assailed the impugned termination notice primarily on the ground of violation of principles of natural justice and non compliance of the terms of the agreement as contained in clause 23.1. It is submitted that the petitioner's request for extension of time to complete the scheduled work was granted vide letter dated 14.03.2023 (Annexure-8) with the scheduled date of completion as 31.07.2023. During this cure period, the impugned termination order has been issued which is in teeth of clause 23.1.(i). As such, the requirement of prior notice before termination has not been met and petitioner has been denied opportunity to submit his representation as to the alleged causes of non completion of the work within the extended time limit. It is submitted that if the impugned termination notice is set aside and the matter is remitted to the respondent-NHIDCL to consider the representation of the petitioner afresh, he would be in a position to explain the reasons for delay and also indicate the time schedule within which the work is to be completed. Learned counsel for the writ petitioner also submits that the petitioner not only to be blamed for the delay as the Right of Way was not granted free from encumbrance for a very long time.

[9] Learned counsel for the respondents No.1 and 2 has strongly opposed the prayer. Learned counsel for the respondents No.3 and 4 also have opposed the prayer. They have sought to take us to the chronology of the facts and events as are borne from the records of the writ petition itself to show that petitioner despite having granted sufficient opportunity has not been able to adhere to its own projected timeline for completion of the scheduled project which is a prestigious public project of road under the NHIDCL.

[10] We have considered the submissions of learned counsel for the parties and taken note of the relevant documents placed on record and also the terms of the agreement. Relevant clauses of Clause 23.1 have been quoted hereinabove. From a perusal of the letter dated 26.04.2022 (Annexure-5), it appears that the respondent-NHIDCL undertook a review of the physical progress of the work and the representation of the contractor for extension of time to complete the work at least 20% up to 30.04.2022. This was preceded by the notice dated 24.02.2022 (not annexed) which was an intention to termination notice invoking clause 23.1.i(c), 23.1.i(e) and 23.1.i(p) of the contract agreement. In substance therefore, it is apparent from perusal of the instant letter itself that on account of delay in execution of the work which had a schedule completion period of 18 months from 08.06.2021 till 06.12.2022, petitioner was served with a notice of an intention to termination notice as way back as 24.02.2022. In fact, on the request of the petitioner, he was granted suitable time to cure the defects in terms of clause 23.1. However, it further appears from perusal of the subsequent letter dated 14.03.2023 (Annexure-8) that though the petitioner had not been able to execute the work as per the commitment made but taking into consideration its representation for extension of time vide letter dated 14.02.2023, it was granted further extension with a revised completion date up to 31.07.2023 (101 days up to 17.03.2023 without LD and balance 136 days up to 31.07.2023 with LD). The letter dated 14.03.2023 indicated that the team leader i.e. respondent No.3 was requested to take further necessary action as per the provisions of the contract agreement. The impugned termination letter dated 18.07.2023 is comprehensive in nature and contains the narration of the entire sequence of dates and events right from

the stage of execution of the work agreement on 24.05.2021 till the issuance of the impugned termination letter. A mere perusal of some of the paragraphs of this letter would show as to how the progress of the work has been affected despite sufficient extension of time. Para 23 with its tabular chart, Para 26, Para 29, Para 36 and Para 39 to Para 42 are also extracted hereunder to give a bird's eye view of the tardy progress of the execution of the work and also the compliance of the intention to termination notice on the part of the respondent-NHIDCL before proceeding to terminate the agreement in question.

“23. **WHEREAS**, the issue of slow progress of work has been discussed in several meetings. Despite close monitoring of the physical progress of work by PMU/AE, there is no endearment of contractor to the work, resulting in merely 0.4% progress of the work during the last four months. The month wise progress of the work since appointed date till date is tabulated below:

S.N.	Month	Progress in Particular Month	Physical Progress	Financial Progress
1.	June-2021			
2.	July-2021	0.09%	0.09%	0.00%
3.	Aug-2021	0.03%	0.12%	0.00%
4.	Sept-2021	0.10%	0.22%	0.00%
5.	Oct-2021	0.28%	0.50%	0.00%
6.	Nov-2021	0.46%	0.96%	0.00%
7.	Dec-2021	0.46%	1.42%	0.00%
8.	Jan-2022	0.46%	1.88%	0.00%
9.	Feb-2022	1.13%	3.01%	0.00%
10.	March-2022	0.99%	4.00%	1.80%
11.	April-2022	0.93%	4.93%	1.80%
12.	May-2022	0.37%	5.30%	2.44%
13.	June-2022	0.00%	5.30%	2.44%
14.	July-2022	0.00%	5.30%	2.44%
15.	Aug-2022	0.24%	5.54%	2.44%
16.	Sep-2022	0.21%	5.75%	2.44%
17.	Oct-2022	0.05%	5.80%	2.44%

18.	Nov-2022	0.25%	6.05%	2.44%
19.	Dec-2022	1.25%	7.30%	3.94%
20.	Jan-2023	0.80%	8.10%	3.94%
21.	Feb-2023	0.00%	8.10%	5.90%
22.	Mar-2023	0.00%	8.10%	5.90%
23.	April-2023	0.00%	8.10%	5.90%
24.	May-2023	0.40%	8.50%	5.90%

26. **WHEREAS**, total physical progress achieved by EPC contractor till date is only 8.10% although 100% ROW was handed over to the EPC contractor on Appointed Date of the project.

29. **WHEREAS**, NHIDCL vide letter at ref. (ii) issued a CURE PERIOD Notice to the EPC contractor in pursuance of clause 23.1.(i) of article 23 of the Contract Agreement to cure the defaults mentioned within cure period of 60 (sixty) days from date of issuance of the notice but no positive action in this regard has been taken by the EPC contractor.

36. **WHEREAS**, after the lapse 60 days CURE PERIOD, notice for intention to termination of the contract as per 23.1 (ii) of the Contract Agreement was issued to the EPC contractor on 24.02.2022 vide letter ref. (xvi) due to poor progress of work, poor mobilization of men, materials, machinery & non-achievement of milestones.

39. **WHEREAS**, Extension of Time was also granted to the contractor for completing the project till 31.07.2023, but contractor showed no interest in completion of the project and could achieve merely 5.90% progress till date.

40. **WHEREAS**, as on date, the EPC contractor has even failed to achieve milestone-I even after granting extension of time.

41. **WHEREAS**, after passing of about more than 23 months since the date of commencement of work, the EPC contractor could achieve only 8.50% physical progress and 5.90% financial progress as on date. Now, the present pace of progress seems that it is not possible by the contractor, to complete the project even after granting extension of time. Clearly, in absence of satisfactory performance of the EPC contractor and lack of proper construction planning, deployment of machinery & manpower and reluctant behavior of EPC Contractor, all the Project Milestones are not achieved even within the extended dates.

42. **WHEREAS**, in the light of aforesaid facts and circumstances, non-exhaustive fundamental breach, in view of the contractor's persistent & sustained gross default in fulfilling contractual obligations, leading to a material adverse effect on the project, the Authority has now after giving sufficient time to cure the defaults and extending all possible support to the contractor and after observing no improvement in the non-professional attitude of the contractor, the Authority has left with no other option but to terminate the contract with M/s KLD Creation

Infrastructure Private Limited forthwith in accordance with clause 23.1 of the contract agreement with immediate effect. The contract is hereby terminated with immediate effect.”

[11] A consideration of the aforesaid chronology of facts and events and the documents and as an upshot of the aforesaid discussions, therefore, negates the plea taken by the writ petitioner that the respondent-NHIDCL had failed to comply with the mandatory pre-termination notice under clause 23.1 before terminating the agreement in question. The first intention to termination notice in fact dates back to 24.02.2022. Thereafter, the petitioner has got repeated extension to show physical progress of the work and finally the last extension was granted by letter dated 14.03.2023 for scheduled completion of the work by 31.07.2023. After review of the progress of the work which was only 8.10%, the respondent-NHIDCL has chosen to terminate the contract. As such, the plea raised by the petitioner regarding non compliance of the terms of the Agreement i.e. clause 23.1 and violation of Principles of Natural Justice is not tenable in law or on facts.

[12] Let it be made clear that we are not examining the merits of the grounds of termination. The challenge is primarily confined to the compliance of intention to termination notice under clause 23.1 and alleged violation of principles of natural justice. It has been brought to our notice that clause 26 contains a dispute redressal mechanism which also provides for conciliation and clause 26.3 contains the arbitration clause. As such, the parties have an alternate dispute resolution mechanism which the petitioner is free to invoke. Let it be also made clear that no observations made hereinabove shall be treated

as comments on the merits of the termination of the agreement in any such proceedings that the parties may invoke.

[13] On consideration of the entire facts and circumstances and for the reasons discussed hereinabove, we do not find that the plea is substantiated from the materials on record. As such, the writ petition fails and is accordingly dismissed.

Pending application(s), if any, also stands disposed of.

(T. AMARNATH GOUD), J

(APARESH KUMAR SINGH), CJ

