

GAHC010025762023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : I.A.(Civil)/311/2023

M/S GANNON DUNKERLY AND CO. LTD.
864, TOPSIA ROAD (SOUTH),
HAUTE STREET , (7 TH FLOOR)
KOLKATA, 700046, WEST BENGAL
REP. BY ITS AUTHORIZED SIGNATORY/ DEPUTY GENERAL MANAGER HR
AND ADMIN, ASHIS KUMAR PAL
S/O- PRANBALLAV PAL OF GANNON DUNKERLY AND CO. LTD, 864,
TOPSIA ROAD (SOUTH),
HAUTE STREET , (7TH FLOOR)
KOLKATA, 700046, WEST - BENGAL

VERSUS

THE UNION OF INDIA AND 4 ORS.
REPRESENTED BY THE SECRETARY TO THE GOVT. OF INDIA, MINISTRY
OF ROAD TRANSPORT AND HIGHWAYS, GOVT. OF INDIA, 3RD FLOOR, PTI
BUILDING AND PARLIAMENT STREET , NEW DELHI-110001

2:THE MANAGING DIRECTOR
NATIONAL HIGHWAYS AND INFRASTRUCTURE DEVELOPMENT
CORPORATION LIMITED (NHIDCL)
3RD FLOOR
PTI BUILDING AND PARLIAMENT STREET
NEW DELHI-110001

3:THE EXECUTIVE DIRECTOR(P)
NATIONAL HIGHWAYS AND INFRASTRUCTURE DEVELOPMENT
CORPORATION LIMITED (NHIDCL)
REGIONAL OFFICE
AMBARI
GUWAHATI
ASSAM

4:THE GENERAL MANAGER (P)
NATIONAL HIGHWAYS AND INFRASTRUCTURE DEVELOPMENT
CORPORATION LIMITED (NHIDCL)
PMU
JORHAT
ASSAM

5:THE TEAM LEADER
VOYANTS SOLUTIONS PVT. LTD
SITE OFFICE- WARD NO-2
NEAR DISTRICT SOCIAL WELFARE OFFICE
SIVASAGAR DHAL ALI

PO AND P.S- SIVASAGAR
DIST- SIVASAGAR
ASSAM

PIN-78564

Advocate for the Petitioner : MR. S K DEORI

Advocate for the Respondent : DY.S.G.I.

Linked Case : WP(C)/3689/2022

M/S GANNON DUNKERLY AND CO. LTD.
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PO AND P.S- SIVASAGAR
DIST- SIVASAGAR
ASSAM

PIN-785640

Advocate for : MR. S K DEORI
Advocate for : ASSTT.S.G.I. appearing for THE UNION OF INDIA AND 4 ORS.

**BEFORE
HONOURABLE MR. JUSTICE MANISH CHOUDHURY**

ORDER

Date : 13-02-2023

Heard Mr. D. Mazumdar, learned Senior Counsel assisted by Mr. S.K. Deori, learned counsel for the applicant-petitioner and Mr. P.J. Saikia, learned Senior Counsel assisted by Mr. R.K. Talukdar, learned counsel appearing for the respondent-opposite party nos. 1, 2, 3 & 4.

2. Pursuant to a Notice Inviting Tender [NIT] issued by the National Highways and Infrastructure Development Corporation Limited [NHIDCL], the petitioner submitted its bid for the civil work of "Four Laning of Demow [Km 534.800] to End of Moran Bypass [Km 561.700] of National Highway No. 37 in the State of Assam under SARDP-NE [Special Accelerated Road Development Programme in North East], Phase-A on EPC [Engineering, Procurement and Construction] Mode" [the subject-work', for short]. The petitioner's offered a bid value of Rs. 294.17 crores for the subject-work was accepted by the respondent NHIDCL by its Letter of Award [LoA] dated 14.01.2016 declaring the petitioner as the successful bidder. After issuance of the LoA dated 14.01.2016 and on completion of all the formalities, the petitioner and the respondent NHIDCL executed a Contract-Agreement on 09.02.2016 for the subject-work specifying the duration of the project as 36 months, with the appointed date as 12.02.2017. On 30.05.2022, the respondent NHIDCL authorities had terminated the Contract-Agreement. Aggrieved by the termination of the contract, the petitioner has approached the Court by the writ petition, W.P.[C] no. 3689/2022.

While the contention of the petitioner is that there was violation of the principles of natural justice in terminating the Contract-Agreement, the respondent NHIDCL authorities have contended that the termination order was preceded by due notice.

3. When the writ petition was taken up for consideration on 02.06.2022, the Court had observed as under :

“Considering the above and as per petitioner’s own submission in its letter dated 11.04.2022 as well as direction of the concerned Departmental Minister, the respondent NHIDCL is directed not to act upon/to keep in abeyance the impugned “Termination of the contract” issued under No. NHIDCL/Assam/NH-37/Dem-Mor/144888/1617 dated 30.05.2022 (Annexure-16) till the next date fixed. Further, till then the respondents in the NHIDCL shall not en-cash/withdraw the bank guarantee of Rs. 38,24,21,000/- given by the petitioner with the NHIDCL during the time of allotment of the said work. It is also directed that the petitioner shall not withdraw the said bank guarantee.

List on 30.06.2022.

During the period up to 30.06.2022, as per petitioner’s own request and direction of the Departmental Minister, as noted above, the petitioner shall complete the work of said of ‘Four laning of Demow to end of Moran Bypass’ of NH-37 in the State of the Assam with quality work, under complete supervision of the authorities in the NHIDCL in terms of the terms and condition of the said agreement dated 09.02.2016.

However, it is made clear that if the petitioner fails to complete the said work by 30th June 2022, i.e., the time which has been granted at its request, the respondents in the NHIDCL shall be able to take appropriate measure against the petitioner in terms of said agreement dated 09.02.2016.”

4. Notice was issued to the respondents by the order dated 30.06.2022 after hearing the learned counsel for the parties. The interim relief granted by the earlier order dated 02.06.2022 had been vacated on 30.06.2022 and the operative part of the order dated 30.06.2022 reads as under :-

“Having considered the facts and circumstances of the case, I am not inclined to extend the interim order dated 02.06.2022. The same is accordingly vacated. The respondents may go ahead and finalise the tender, if so advised. However, notwithstanding this order, it would still be open to the respondents to consider the request for extension of time made by the writ petitioner, if so advised. It is further directed that no coercive action shall be initiated against the writ petitioner until the returnable date.

List again on 01.08.2022.”

5. The interim protection granted by the order dated 30.06.2022 was extended, later on, by an order dated 01.08.2022 until further order.

6. The interlocutory application, I.A.[Civil] no. 311/2023, has been preferred by the petitioner as the applicant seeking the following reliefs :-

[i] Pass an order allowing the applicant to withdraw the instant writ petition, W.P.[C] no. 3689 of 2022 in terms of the instant application with liberty to the parties to raise all issues before the concerned Arbitral Tribunal;

[ii] Extend the interim protection granted to the Petitioner by way of *inter alia* the orders dated 02.06.2022, 30.06.2022 and 01.08.2022 by directing the respondents to maintain status quo with regard to the petitioner's Bank Guarantees until such time that the Arbitral Tribunal is seized of the petitioner's Application under Section 9 as well as Section 17 of the Arbitration and Conciliation Act, 1996; and

[iii] Pass such order and any further orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case.

7. It has been averred by the petitioner-applicant in the interlocutory application that the petitioner-applicant approached the respondent NHIDCL

authorities vide a letter dated 22.07.2022 seeking conciliation of the disputes and its claims in terms of Clause 26.1.1 r/w Clause 26.2 of the Contract-Agreement dated 09.02.2016. Citing failure on the part of the respondent authorities to conciliate the disputes and claims, the petitioner-applicant subsequently invoked arbitration in terms of Clause 26.3 of the Contract-Agreement dated 09.02.2016 vide its notice dated 30.07.2022 issued in terms of Section 21 of the Arbitration and Conciliation Act, 1996. The applicant-petitioner stated to have notified its claims in excess of Rs. 124 Crores against the respondent NHIDCL authorities which have arisen as a consequence of the wrongful termination of the Contract-Agreement dated 09.02.2016. Stating that the respondent NHIDCL authorities had allegedly refused to agree for appointment of an Arbitrator by way of its reply dated 31.08.2022, on the ground that seeking of appointment of an Arbitrator was on misconceived ground, the petitioner-applicant had preferred an application under Section 11 of the Arbitration and Conciliation Act, 1996 before the Hon'ble Delhi High Court being Arb. Petition no. 1073/2022 and the same is pending as on date. It is further averred that owing to refusal by the respondent NHIDCL to certify the value of the unpaid works of the petitioner-applicant and the imminent appointment of a 3rd party contractor in respect of the subject-work, the applicant-petitioner has also filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 before the Hon'ble Delhi High Court and the same has been registered and numbered as OMP [I][Comm] no. 384/2022 seeking certification of the value of the unpaid remaining works. The said application under Section 9 of the Arbitration and Conciliation Act, 1996 is also pending as on date. When the Arb. Petition no. 1073/2022 came up for consideration before the Hon'ble Delhi High Court on 19.01.2023, the Hon'ble

Delhi High Court took note of the fact that the present writ petition questioning the validity of the termination of the contract was pending before this Court. Having regard to the submissions advanced by the learned counsel for the parties on that date, the Hon'ble Delhi High Court had deferred the arbitration application to enable the learned counsel for the petitioner therein to obtain instructions.

8. It is the above backdrop of events, the interlocutory application has been filed seeking the afore-stated reliefs.

9. It is submitted by Mr. Mazumdar, learned Senior Counsel for the applicant-petitioner-applicant that the petitioner-applicant, at the time of execution of the Contract-Agreement, had submitted following 3 [three] bank guarantees and the details of the bank guarantees, as on date, are as under :-

Sl No	Name of Contractor	Name of Project	Type of BG	BG No	Amount [Rs]	Valid Upto	Claim Period Upto
1	M/s GDCL	Demow to	Performance	0607016BG1000009	22,06,27,500	24.08.2022	24.08.2023
2		End Moran	Mobilization	0607017BG1000040	6,47,17,400	07.06.2022	07.06.2023
3		Bypass	Advance	1908IGFIN000719 [1908IFGIN000719 As per BGMS]	9,70,76,100	27.03.2023	27.03.2023

9.1. Mr. Mazumdar has submitted that it is on the apprehension that the afore-mentioned bank guarantees might be encashed by the respondent NHIDCL authorities before consideration of the application either under Section 9 of the Arbitration and Conciliation Act, 1996 or under Section 17 of the Arbitration and Conciliation Act, 1996, the interlocutory application has been filed seeking the above relief, while seeking withdrawal of the writ petition. Mr. Mazumdar has submitted that this Court has already observed in its order dated 30.06.2022 that no coercive action shall be taken against the petitioner until the

returnable date and the said interim had been extended by the subsequent order dated 01.08.2022 until further order.

10. Mr. Saikia, learned Senior Counsel for the respondent-opposite party nos. 1, 2, 3 & 4 in the NHIDCL, has submitted, on instruction, that the petitioner-applicant has to take the requisite steps for extension of the period of the 3 [three] bank guarantees by sufficient period. He has further submitted, on instruction, that the respondent NHIDCL authorities can provide the petitioner-applicant a period of 2 [two] months with the assurance that within the said period of 2 [two] months, the respondent NHIDCL authorities shall not take any coercive steps like invocation of the afore-mentioned 3 [three] bank guarantees, etc. and such interim order will cease to have any effect after expiry of a period of 2 [two] months from today. He has, thus, submitted that both the writ petition and the interlocutory application can be disposed of with such observations.

11. Mr. Mazumdar, learned Senior Counsel for the petitioner-applicant has submitted that the petitioner-applicant is agreeable to such an arrangement.

12. Having found that the parties have reached a consensus in the afore-stated manner, the Court is of the view that the writ petition as well as the interlocutory application can be closed with the observations indicated. They are accordingly closed, extending the interim protection granted to the petitioner-applicant by providing that the respondent NHIDCL authorities shall not take any coercive action against the –petitioner-applicant pursuant to the termination of the Contract-Agreement for a period of 2 [two] months from today [13.02.2023], subject to the condition that the period of the 3 [three] bank guarantee shall be extended for a time period by the petitioner, in the manner sought for by the respondent NHIDCL authorities. It is further observed that the

interim protection will cease to have any effect after expiry of 2 [two] months from today [13.02.2023].

JUDGE

Comparing Assistant