

GAHC020001172023



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

Case No. : WP(C)/44/2023

STROYPROEKT-OIA JV
THROUGH ITS AUTHORISED REPRESENTATIVE, ANOOP GUPTA, OIA
HOUSE, 470 CARDINAL GRACIOUS ROAD, ANDHERI (E), MUMBAI-
400099

VERSUS

NATIONAL HIGH WAY AND INFRASTRUCTURE DEVELOPMENT
CORPORATION
MINISTRY OF ROAD AND HIGHWAYS, GOVT. OF INDIA, 3RD FLOOR,
PTI BUILDING, 4-PARLIAMENT STREET, NEW DELHI 110001

Advocate for the Petitioner : KN CHOUDHURY

Advocate for the Respondent :

BEFORE
HON'BLE MR. JUSTICE AJIT BORTHAKUR

For the petitioner : Mr. K.N. Choudhury, Sr. Advocate

For the respondent : Mr. Akhrieu Chusi, Advocate
Mr. Ravinder, Advocate

Date of hearing : 19.06.2023

Date of Judgment/ Order : 23.06.2023

JUDGMENT & ORDER (CAV)

Date : 23.06.2023

Heard Mr. K.N. Choudhury, learned Senior Counsel appearing for the petitioner. Also heard Mr. Akhrieu Chusi assisted by Mr. Ravinder, learned counsel for the respondent.

PETITIONER'S GRIEVANCE:

2. The petitioner/STROYPROEKT-OIA JV is a Joint Venture Company (EPC Contractor) having its registered office at Mumbai. The respondent/National Highway & Infrastructure Development Corporation Ltd. (for short 'NHIDCL') is a Public Corporation under the aegis of the Ministry of Road Transport and Highways, Government of India.

3. The grievance of the petitioner, in brief, is that on 29.05.2020, the petitioner entered into an Engineering Procurement and Construction (for short 'EPC') Agreement for '*Construction of two lanes with hard shoulder of Kohima-Jessami Road*' on NH-29 (Old NH-150) from existing km 98.380 (near Chizami Village) to existing km LZA367 (Nagaland Manipur Border) [Design Km 95.700 to design Rm LL7.2AA] [Design Length 21.500 k.m.] in the state of Nagaland under Bharatmala Pariyojna on EPC Mode (Package V) (hereinafter called as 'the Project') vide Annexure P-3 Contract Agreement, dated 29.05.2020. The Contract period commenced on 01.07.2020 and the Contract was initially to be completed within a period of 18 months from the appointed date. The Right of Way (ROW) was handed over to the petitioner on 24.12.2020 by the respondent. On 16.08.2021, for various hurdles faced by the petitioner Company as stated

in the letter including disruption caused due to Covid-19 pandemic, the petitioner sent a letter to the respondent seeking Extension of Time (EOT-I) vide letter No.JV/NHIDCL/PIDCPL/KJ-5/2021-22/28 and letter No.JV/NHIDCL/KJ-5/2021-22/29. In response to the aforesaid request for EOT sought for by the petitioner, the Authority's Engineer after due assessment of the grounds for request for EOT, on 27.08.2021, recommended EOT for extended period of 6 months based on the *force majeure* clause of the Contract Agreement due to Covid-19 pandemic as per the instructions of the Department of Expenditure, in accordance with the terms of the Contract. Again, on 02.06.2022, the petitioner, vide its letter No. JV/NHIDCL/PIDCPL/KJ-5/2022-23/HO/14 requested the respondent for another EOT for various reasons like the outbreak of Covid-19 pandemic, infection of 25% of the workforce with Covid-19 virus, quarantine and hospitalization of members of the workforce and mass resignation at the Project Site etc. On 06.06.2022, the Authority's Engineer in view of the aforesaid letter, dated 02.06.2022 by the petitioner seeking another EOT, recommended a total of 385 days of extension till 30.06.2023. Contemporaneously, the petitioner had also applied for recovering the loss caused due to *force majeure* events from its insurer vide letter No. JV/NHIDCL/KJ-5/2021-22/CAR-1/OS, dated 05.07.2022, issued by the petitioner to their insurer, namely New India Assurance Co. Ltd. However, the respondent vide its letter No.HIDCL /Corres/KJ-V/Vol-1/2020-21, dated 06.07.2022, despite the recommendation of the Authority's Engineer to extend the time, unilaterally declared the petitioner as a Non-Performer. On 09.07.2022, even after declaring the petitioner as a Non Performer, the Project Manager of the respondent, namely Mr. A.K. Singh, General

Manager (P) vide his letter No.NHIDCL/PMU-PFU/KJ-V/LLC-OIA/VOL-111/109 addressed to the Executive Director of the respondent recommended granting extension of time till 29.03.2023. On 14.07.2022, the Authority's Engineer recommended EOT-II with project completion date as 06.06.2023 vide letter No.PIDCPL-SO/420031/GL/1361. Despite the recommendation of the Authority's Engineer to extend the completion date till 06.06.2023, the respondent authority approved EOT-II of the project completion date extended up to 17.12.2022.

4. The petitioner has stated that thereafter, on 26.09.2022 despite the fact that the Project Manager had previously recommended extension till 29.03.2023, the respondent issued Cure Notice under Clause 23.1 (i) of the Contract for a period of 60 days. On 05.12.2022, the petitioner vide its letter No. JV / NHIDCL / PIDCPL / KJ-5 / 2022- 23/ HO /55 submitted the request for EOT-III to the respondent. On 14.12.2022, the Authority's Engineer vide letter No.PIDCPL-PO/420031/CL/1488 recommended EOT-III with Project completion date extended up to 04.07.2023. However, it is contended that the respondent without even considering the petitioner's request for EOT-III vide letter, dated 05.12.2022 and the Authority's Engineer's response vide letter, dated 14.12.2022 published the RFP. On 01.03.2023, the representatives of the respondent, the Authority's Engineer and the petitioner agreed upon another extension of time for a period of 1 month to achieve a DBM length of 5 k.m. in the month of March. However, on 15.03.2023, despite the fact that extension had been granted for a period of one month till the end of March by the respondent vide letter, dated 03.03.2023, Termination Order, dated 15.03.2023 NHIDCL/Nagaland/ Civil Work/KJ/PKG-5/2020/1589 was issued by the

respondent. The respondent issued another letter No. NHIDCL/ PMU- PFU/ KJ-V /SLLC-OIANOL-V/ 180, dated 25.03.2023 stating that the petitioner was carrying out work without the approval of the Authority's Engineer. Aggrieved by the Termination Order, dated 15.03.2023, the petitioner preferred a representation to the respondent on 29.03.2023, which was rejected by the respondent by a non-speaking order vide letter No.NHIDCL/Nagaland/Civil Work/KJ/ PKG-5/2020-21/1617, dated 31.03.2023. Hence, the instant petition.

ARGUMENTS:

5. Mr. K.N. Choudhury, learned Sr. Counsel appearing for the petitioner, submitted that on the question of maintainability of the instant writ petition on account of the arbitration clause included in the Contract Agreement, existence of an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court. Mr. Choudhury further submitted that on bare reading of the Contract Agreement, it becomes amply clear that as execution of the Contract work was spread over a long tenure, the intention of the parties to provide for extension reinforces the fact that timely performance was necessary and as such, in the instant case, time is not the essence of the Contract. Mr. Choudhury further submitted that it is an admitted fact that due to hurdles beyond the control of the petitioner, which were explained from time to time, the execution of the Project could not be completed as per programme work submitted by the petitioner even within the extended periods of time, but before completion of the tenure of the third extension, the respondent authority without paying any heed to the recommendation of the Authority's Engineer terminated the Contract abruptly. It has been further

submitted that the respondent issued a 60 day Cure Notice under Clause 23.1 by overlooking the fact that the Authority's Engineer previously proposed an extension upto 06.06.2023. However, Mr. Choudhury submitted that the respondent published the impugned RFP disregarding the recommendation for extension upto 04.07.2023 made in the letter, dated 14.12.2022 causing irreparable pecuniary loss to the petitioner and thereby violated the fundamental rights under Article 14 and Article 19(1) (g) of the Constitution of India. According to Mr. Choudhury, learned Sr. Counsel, the respondent authority failed to appreciate that as an instrumentality of the State, they had a duty to act fairly and in a non-arbitrary manner. In support of his submission, Mr. Choudhury has relied on the ratio of the decisions rendered by the Hon'ble Supreme Court in- **(1)** *Welspun Specialty Solutions Ltd. -Vs- Oil and Natural Gas Corporation Ltd., reported in (2022) 2 SCC 382*; **(2)** *Union of India and Ors. -Vs- Tania Construction Pvt. Ltd., reported in (2011) 5 SCC 697* and **(3)** *Jai Bholenath Construction -Vs- The Chief Executive Officer, Zilla Parishad, Nanded & Ors., reported in 2022 LiveLaw (SC) 542*.

6. Mr. Akhrieu Chusi, learned counsel for the respondent, submitted that as per the Project Agreement, initially the Project was to be completed within a period of 18 months from the appointed date, that is, 01.07.2020. Mr. Chusi further submitted that accordingly, the Project had to be completed by 31.12.2021, but the petitioner could only execute the Project by 41.43% till termination of the Contract on 15.03.2023 after due process as per the Contract Agreement. Mr. Chusi submitted that the petitioner was granted sufficient opportunity to improve their deficiencies in execution of the Project and accelerate its progress of work as would be

evident from multiple Show Cause Notices issued and being not satisfied with the Show Cause Reply of the petitioner, on 16.01.2023, the Notice of Intent to Terminate the Contract was issued by the respondent. It has been submitted that despite the aforesaid facts, the petitioner failed to accelerate the execution of the Project and in the backdrop of the compelling circumstances, the respondent had to terminate the Contract by a letter, dated 15.03.2023. Mr. Chusi submitted that the Milestones in Schedule-J of Contract Agreement and Clause- 10.3(ii) stipulated Milestone in addition to programme of work at Clause-10.1 for the progress of work to be achieved by the petitioner Contractor. In Schedule-J of the Contract Agreement, the Milestone-I (192nd day) for 10% financial progress, Milestone-II (329th day) for 35% financial progress, Milestone-III (467th day) for 70% financial progress and Project Completion was (549th day) for 100% financial progress. Accordingly, Mr. Chusi submitted, the petitioner has programmed the 3 Milestones work to be completed as the Milestone-I 10%, that is, up to 08.01.2021 and Milestone-II 35%, that is, up to 25.05.2021 and Milestone-III, that is, up to 10.10.2021 and completion date was up to 31.12.2021.

7. It has been further submitted by Mr. Chusi that the petitioner Contractor has failed to achieve the targeted progress of work execution as stipulated in the programme work submitted by him, but, the petitioner was given the Extension of Time-I and revised the Milestones to the petitioner as there was no progress of work in terms of the stipulated Milestones. Mr. Chusi submitted that the petitioner was given opportunity based on land handover date on 09.12.2020. Thus, the petitioner

Contractor was given Extension of Time (EOT) thrice to complete the Project work after fairly considering the grounds shown for the delay. Accordingly, Mr. Chusi submitted that during the review meeting on progress of execution of the Project, held on 01.03.2023, the petitioner was instructed to target 5 k.m. DBM in the month of March, 2023 keeping in view the onset of monsoon and to achieve the progress of work relatively quicker to cope up with the programme of work. However, till 15.03.2023, the petitioner failed to do any DBM work and as such, due to unsatisfactory and slow progress of work execution, the Contract had to be terminated after due process as per Agreement. Mr. Chusi submitted that due to non-exhaustive fundamental violation of the terms of the Contract repeatedly and in view of the continuing gross default by the petitioner Contractor in fulfilling the contractual obligations thereby causing material adverse impact on the Project, the Contract Agreement with the petitioner by the respondent was terminated vide Termination Notice, dated 15.03.2023, which contains the details of defaults. Mr. Chusi submitted that the Contract Agreement signed between the parties provides for arbitration clause in the event of any dispute, difference or controversy arising out of the execution of the work and as such, the petitioner ought to have resorted to the Arbitration clause for resolution of the disputes in question. In support of his submission, Mr. Chusi has relied on the judgment and order rendered by the Hon'ble Apex Court in *Uttar Pradesh Power Transmission Corporation Ltd. and Anr. Vs. CG Power and Industrial Solutions Ltd. and Anr.*, reported in (2021) 6 SCC 15.

APPRECIATION:

8. In Para 33 of ***Tantia Construction Pvt. Ltd. (supra)***, the Hon'ble

Apex Court held that on the question of maintainability of the writ petition on account of the arbitration clause included in the agreement between the parties, it is now well established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. It has been further held in Para 34 that notwithstanding the provisions relating to the arbitration clause contained in the agreement, the High Court is fully within its competence to entertain and dispose of the writ petition. In the case in hand, Article 26 of the Contract Agreement vide Annexure P-3 although provides for dispute resolution between the parties, in view of the reliefs seeking for enforcement of fundamental rights of the petitioner as a result of purported failure to observe the principles of natural justice while terminating the Contract in question, the instant writ petition is sustainable in law.

9. Further, as held in ***Welspun Speciality Solutions Ltd. (supra)***, the said Contract Agreement having provided for extension of time for performing the Contract work, time is not the essence of the said Contract.

10. It is the admitted position that the Contract for the Project in question was awarded on 24.04.2020 and subsequently, the Contract Agreement was signed on 29.05.2020 during the period of Covid-19 pandemic resulting in nationwide lockdown, with a stipulated time period of 18 months for completion of execution of the Project. However, after a delay of 167 days, that is, on 24.12.2020, the ROW was handed over to the petitioner although the Contract period commenced on 01.07.2020,

that is, the appointed date. The Contract was initially agreed to be completed within a period of 18 months from the appointed date. However, the ROW was handed over belatedly on 24.12.2020 by the respondent due to Covid-19 pandemic. On 16.08.2021, the petitioner had submitted an application to the respondent for Extension of Time (EOT-I) vide Annexure P-4 for a further period of 6 months till 30.06.2022 from its original proposed completion date of 31.12.2021. Accordingly, in response thereto, the competent authority of the respondent had accorded approval of EOT of Project Milestone-II and III as per Article 21.6.1(a) of the Contract Agreement till 10.06.2022 vide Annexure P-5 although the Authority's Engineer recommended for 6 months extension on the ground of *force majeure* clause of the Contract Agreement due to Covid-19 pandemic as per instruction of the Department of Expenditure, in accordance with the Contract vide letter, dated **27.08.2021**.

11. In the context of the aforesaid letter, the competent authority had accorded approval of EOT vide Annexure P-5 as under-

Sl. No.	Milestone	Financial Progress	Date as per CA	Revised Date as per EOT
1	Milestone-I	10%	08.01.2021	18/06/21
2	Milestone-II	35%	25.05.2021	02.11.2021
3	Milestone-III	70%	10.10.2021	20.03.2022
4	Project Completion Date	100%	31.12.2021	10.06.2022

12. However, again, the petitioner could not complete the work within the scheduled time due to continuation of Covid-19 pandemic which entailed quarantine and hospitalization of the workforce *en masse* and mass resignation of workforce at the Project site located at a remote area of the state. Therefore, in the compelling situation, the petitioner

requested for further Extension of Time (EOT-II) by a letter, dated 02.06.2022 vide Annexure P-6 showing the reasons for the unintentional delays in achieving the target work as under-

S.N.	Reasons	Cumulative Delays
1	Delay in handling over of ROW and subsequent hindrance in the ROW from 01.07.2020 to 30.05.2022 and delay is still continuing	699 days
2	Delay due to lockdowns and restrictions due to Covid-19 from 25.03.2020 to 24.09.2020 (184 days) and 14.05.2021 to 30.06.2021 (48 days)	232 days
3	Delay due to unprecedented and unseasonal rains from January 2021 to April 2021 and from September 2021 to December 2022	120 days
4	Total Cumulative delays	1051 days
5	Deduct overlapping delays	352 days
6	Net Delays	699 days

13. It was stated in the aforesaid letter that the delay occurred within the scheduled completion period of the Contract was 549 days and delay occurred beyond the scheduled completion date was 150 days, total 699 days as shown above. The petitioner attributed the aforesaid hurdles to *force majeure* in Article 21 of the Contract Agreement. Accordingly, upon consideration of the aforesaid grounds, the petitioner mentioned in the letter, dated 02.06.2022, the Authority's Engineer vide Annexure P-7, letter, dated 06.06.2022, recommended for Extension of Time upto 16.09.2022 for Milestone-II and for Milestone-III upto 31.03.2023 and further, for Milestone-IV upto 30.06.2023. Accordingly, request was approved with the revised EOT by the respondent. It further appears that by a letter, dated 05.12.2022, the petitioner again submitted request for EOT-III vide Annexure P-14. The Authority's Engineer by a letter, dated

14.12.2022 vide Annexure P-15 recommended EOT-III with Project completion date extended upto 04.07.2023. However, the aforesaid recommendations with justifications were not appropriately considered by the respondent and the respondent authority on 27.02.2023 published the RFP for balance work of construction without even considering the petitioner's request for EOT-III vide letter, dated 05.12.2022 and the Authority's Engineer's recommendations vide letter, dated 14.12.2022 aforementioned. Thereafter, on 01.03.2023, the representatives of the respondent, the Authority's Engineer and the petitioner agreed upon for another extension for a period of 1 month to achieve a DBM length of 5 k.m. in the month of March, 2023. It is also seen that the Authority's Engineer by a letter, dated 02.03.2023 vide Annexure P-16 addressed to the petitioner, stated with reference to the VC meeting, dated 01.03.2023, that during discussion with the authorized persons of HQ, NHIDCL, the Contractor agreed to achieve DBM in a length of 5 k.m. in the month of March, 2023 and accordingly, the petitioner was requested to plan and achieve the committed target. On 03.03.2023, the respondent authority wrote a letter to the petitioner vide Annexure P-17 with reference to the first MD review meeting, held on 01.02.2023, the petitioner was instructed to complete 5 k.m. of DBM by the end of March, 2023.

14. It is further noticed, however, on 15.03.2023, despite the fact that extension had been granted for a period of 1 month, that is, till the end of March, 2023, Termination Order vide Annexure P-1 was issued to the petitioner citing, *inter-alia*, various contractual defaults, breaches and willful non-performance as well as noncompliance of various notices and instructions of the authority/Authority's Engineer in writing and failure to

achieve the progress in accordance with Clause 23.1(ii) of the Contract Agreement for violation of Article 23 Clause 23.1(i)(c), (d), (f), (g), (i), (p) and (q). Again, on 25.03.2023, the respondent authority issued a letter vide Annexure P-18 alleging that the petitioner continued the execution of the terminated Contract work without the approval of the Authority's Engineer and further, that the respondent was entitled to the ownership of all materials, plant or works and the Project Highway as per Clause 23.7. (a) of the Contract Agreement clause.

15. Aggrieved by the aforesaid Contract Termination Order, dated 15.03.2023, the petitioner preferred a representation to the respondent on 29.03.2023 vide Annexure P-19, but by a letter, dated 31.03.2023 vide Annexure P-20 rejected the same on the ground that no valid grounds were found to withhold the aforesaid Termination Order with the approval of the competent authority.

16. On scrutiny of the various documents annexed to the petition, it is noticed that before terminating the Contract Work, the respondent authority had reviewed the progress of work of the petitioner and held the opinion that the petitioner had failed to take corrective/curative steps for expediting the progress of work despite all possible support was given by the respondent and accordingly, notice was also issued to the petitioner vide letter, dated 30.03.2022 in the form of a Show Cause Notice for declaring as Non Performer due to slow progress and poor planning of work. Accordingly, the petitioner in reply, dated 21.04.2022 admitted the defaults on their part admitting as quoted hereinbelow-

“We admitted that the Milestone-II and Milestone-III were failed due to poor planning and poor management, and overall work progress is not satisfactory. We assured that all necessary efforts are being made and actions taken to streamline and expedite the work progress. We also assured to start the pending works immediately and complete the project by March, 2023.”

17. The aforesaid reply was examined by the respondent authority and on being not satisfied with the overall performance, declared the petitioner as Non Performer and accordingly, the petitioner Contractor was debarred from participating in any bid with MoRTH or its executing agencies till such time the Contractor is removed from the list of Non Performer vide Annexure P-9, Office order, dated 06.07.2022. Thus, it appears that by virtue of being a Non Performer the petitioner was marked responsible for failure to live up to the contractual obligations heralding the inevitable consequence of termination of the Contract in due course.

18. According to the respondent authority, the programme of work and dismal progress by the petitioner was as follows-

Month	Mar-22	Apr-22	May-22	Jun-22	Jul-22	Aug-22	Sep-22	Oct-22	Nov-22	Dec-22	Jan-23	Feb-23	Mar-23
% of work programme submitted by the Contractor	13.59	12.12	10.13	6.44	2.34	8.01	13.23	16.44	17.82	9.89	24.75	26.36	11.12
% of Progress achieved by the Contractor	1.54	0.83	0.91	2.98	0.16	0.37	0.37	0.76	0.8	2.32	0.91	0.73	0.38

19. It may be noted here that Article 23.1(i) provides the detailed procedure for Termination of Contract for contractor's default, *inter alia*, providing that when 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. So far the termination of Contract is concerned, Article 23.1(ii) provides that upon occurrence of a Contractor Default, the authority shall be entitled to terminate the 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 days, whether or not it is in receipt of such representation issue the Termination Notice.

20. Although the respondent authority published the RFP for the balance works without passing a speaking order of acceptance or rejection of the petitioner's request for EOT-III, vide letter, dated 05.12.2022 and the Authority's Engineer's response vide letter, dated 14.12.2022, while the EOT for performing the Contract Work was in subsistence, it cannot be said that the same was passed arbitrarily and illegally because from time to time, the hurdles faced by the petitioner in executing the work as per their assured schedules were duly considered by the respondent authority and granted accordingly. In this context, the admission of default of the petitioner Contractor quoted above may pertinently be referred.

21. It is, therefore, apparent on record that the decision making process

in terminating the Contract work was based on proper assessment of work progress and appreciation of the circumstances that had an impact on the delay in completion of the work, which involves public interest at large. In other words, the award of the Contract to the petitioner for construction of public road (National Highway) in a State like Nagaland was in public interest and the termination of the said Contract awarded to the petitioner was also in public interest where no interference of this Court in exercise of the extraordinary jurisdiction under Article 226 of the Constitution of India by way of review is warranted.

CONCLUSION:

22. Accordingly, the writ petition stands **dismissed**.
23. The interim order, dated 03.04.2023 stands **vacated**.

The writ petition stands disposed of accordingly.

JUDGE

Comparing Assistant