

I.A.(CIVIL) 203/2022
IN REV. PET. 12/2022 (D/O)

For the Applicant : Mr. Bharat Chugh, Advocate,
Mr. Mayank Arora, Advocate.
Mr. Taka Masa, Sr. Advocate (Amicus Curiae).

For the respondents : Mr. S. Borgohain, Advocate
Mr. R.S. Bisht, Advocate.
Mr. Moa Jamir, Advocate for respondent Nos.6 and 7.
Mr. Basudeb Pal, Advocate for respondent No.10.
Mr. Imti Imsong, Additional AG, Nagaland.
Mr. Ajay Batra, GM, NHIDCL.

- B E F O R E -

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE LANUSUNGKUM JAMIR

31.03.2023

The instant Interlocutory Application has been filed by the applicant, Director, Oasis Techno Construction Ltd. seeking recall/review of the order dated 28.09.2022 passed in Review Petition No.12 of 2022 linked with PIL (Suo Motu) No.2 of 2019.

The order under review reads as below.

“Heard Mr. Taka Masa, learned Amicus Curiae for the petitioner. Also heard Mr. S. Borgohain, learned counsel along with Mr. Moa Jamir, learned counsel appearing for the NHIDCL. Mr. Pfosekho Pfothe, learned counsel appearing for Contractors of Package I II and III is present.

2. Pursuant to order dated 22.09.2022 passed by this Court, Mr. M.S. Deol, the Executive Director, NHIDCL Nagaland, Mr. Ajay Batra, Joint Manager, PMU, Mr. Yashpal Sharma, Director M/s Oasis Techno Construction Limited/ respondent No. 12 (Package-III), as well as Mr. Vasudev Pal, Authority Engineer and

Mr. I. Bopanna Venkata Komal, Project Manager/respondent No. 8 (Package I & II), is present in Court.

3. The Authority Engineer/respondent No. 10 has filed a Progress Report in compliance of the order passed by this Court on 20.09.2022. Therein, with regard to Package I it is stated that the physical progress is 96.756% and financial progress is 94.14% as on 27.09.2022. As regards Package II it is stated that the physical progress is 97.276% and financial progress is 95.94% as on 27.09.2022.

4. Mr. I. Bopanna Venkata Komal, Project Manager/respondent No. 8 submits that in so far as Package I & II is concerned, the respondent could not complete the work within the stipulated time but the respondent No. 8 is taking all steps for completion of Package I & II at the earliest, i.e., on or before 30.11.2022 without fail. However, due to certain intricacies, site related constraints and sustained force majeure events and also due to pendency of payments for the works done they are unable to complete the work on time. He, however, submits that if the concerned District Administration and Police are directed to give appropriate protection to the respondent No. 8, they will complete the work on or before 30.11.2022.

5. Regarding the submission made by Mr. I. Bopanna Venkata Komal, Project Manager/respondent No. 8 we direct that the respondent No. 8 shall complete the Package I & II on or before 30.11.2022.

Taking into consideration the difficulties faced by respondent No. 8, the Deputy Commission, Chumukedima as well as the concerned Police Authorities are directed to take up immediate steps to prevent any hindrance to the respondent No. 8 for completion of Package I & II and to ensure that the work is completed on or before 30.11.2022 as assured to this Court by the Project Manager/respondent No. 8.

In the meantime, the NHIDCL authorities are also directed not to make any further payment to the respondent No. 8 without the leave of this Court.

6. In regard to Package III, progress report dated 28.09.2022 indicates that the physical progress is

28.058% and financial progress is 26.45% as on 27.09.2022. From a perusal of the same it is seen that no progress has been made at all. Further, the relevant paragraphs with regard to Package-III contained in the report dated 28.09.2022 are reproduced herein below:

“6. Regarding Package-III that as it was informed in the last affidavit to the Hon’ble Court that the new Contractor M/s Oasis Projects Ltd. Had issued by themselves a Termination Notice to the Authority on 18.07.2022 of the Project as per Clause 21.7 of the Contract Agreement without discussing with the Authority (Vide No. OASIS/D-K/357 Dated 17.08.2022) and they have abandoned the Project site with all their resources including staff, Plants, Machineries & equipments. They had completely closed their office rooms & Testing Laboratory also.

7. That the Authority Engineer would like to appraise the Hon’ble Court that before issuance of Termination Notice by the Contractor as per Clause 21.7 of Contract Agreement, the Authority’s Engineer issued several letters to the EPC Contractor of Package-III alleging their Slow Progress of Works and Maintenance of existing road. That by observing the inaction of the Contractor even after receiving those letters (Copies enclosed from Page 7 to Page 40). The Authority’s Engineer had also issued total 7 (seven) Nos. of Non-Compliance Reports (NCR) to the Contractor fixing definite time to rectify those definite works. Ultimately the Authority’s Engineer had issued on dated 25.07.2022 a Cure Notice to the Contractor as per direction of the Authority in pursuant to the Provision of Clause 23.1 of the Contract Agreement (Copies enclosed in page 14 to Page 17).

8. That regarding the allegations of the Contractor for Security lapses, it is to appraise the Hon’ble Court that the NHIDCL Authorities of Dimapur & Kohima had made several correspondences with the District Administration, Kohima District requesting them to provide necessary protections to the lives and Properties of the employees of Package-III, the Chief Secretary Govt. of Nagaland

also directed the Kohima District Administration as per directives of the Hon'ble Court in this regard. That it was observed that the concerned Authorities had adopted such protective measures for safety of the staff of Package-III. That after adopting such protective measures by the said authorities, no FIR was found to have lodged by the affected party, i.e., Package-III which compels the Authority Engineer to doubt about the truth of such allegations. It is probable that all these allegations are just pretexts of the EPC Contractor to abandon the site and plunging the NHIDCL Authorities and public in great distress by their irresponsible activities.

9. That regarding the allegation of the Contractor about the adverse Geological condition and Porous Soil Strata of hills, the Authority's Engineer would like to appraise the Hon'ble Court that all the EPC Contractors were provided adequate data and information about the site conditions and were asked to verify by themselves the actual site conditions before submitting any bid for the work "Balance work of Four-Laning of Dimapur-Kohima Road" Vide Clause 2.5 of Tender Documents submitted to the bidders for which the Contractors were allowed adequate time also (Copies enclosed from Page 41 to Page 48).

10. That at present the newly appointed Contractor M/s T.Tachu & Co. is looking after the Maintenance and Safety works of Package-III and will continue till a new arrangement is made by the NHIDCL Authority."

7. This Court, on 11.05.2022, after hearing the parties has recorded as under:

"It appears from the progress-report given above that nothing much has progressed on the work at Package-III. In fact, there is nil progress as far as earth-cutting is concerned. The reason for non-progress in the work as stated by Mr. Luikang, learned counsel appearing for the contractor is due to the unexpected rain which has come a little earlier this year. It is also submitted that the contractor has taken a little

time in remobilizing his labours due to security threat. As far as the explanation given by the learned counsel of the contractor is concerned, the Authority Engineer is in agreement. However, the Authority Engineer submitted that all the parties involved had a meeting and had set a timeline for the completion of the project by January, 2023. Mr. Luikang, learned counsel for the contractor admits that the timeline given above was determined after discussion among stakeholders and is accepted by the contractor.”

8. Thereafter, the respondent No. 12/ Contractor of Package-III filed an affidavit dated 08.06.2022 in compliance of the order passed by this Court on 11.05.2022 and therein at paragraph-5, the respondent No. 12 has made a commitment on oath before this Court as under:

“5. The deponent respectfully submits that it will give the best effort to complete the project as reflected in the Ho’ble Court Order and meantime will continue to do the maintenance works ensuring that always minimum inconvenience is caused to the commuters.”

9. On 15.02.2022, when this PIL was heard, the respondent No. 12/ Contractor of Package-III, submitted that the Steel-Bridge at 155.20Km would be completed by the month of May. However, till date the commitment made by the respondent No. 12 is yet to see the light of day.

10. Mr. Yashpal Sharma, Director M/s Oasis Techno Construction Limited/ respondent No. 12 (Package-III) also submits that the progress of Package-III is hampered due to serious security threat and financial problems as well as due to landslides beyond the RoW and therefore no progress could be made and, therefore, they have decided to abandon the work. With regard to the submission made by the Director M/s Oasis Techno Construction Limited/ respondent No. 12, it is worth mentioning that this Court in the order dated 20.04.2022 had recorded as under:

“On the Package-III, since the last time the case came up, there has been very little progress

and in fact in some of the items there has been nil progress. For earth cutting the Contractors were directed to complete the work on or before the 10th of April 2022 keeping in view the onset of monsoon but as per the report submitted by the Authority Engineer, no progress has been made. Mr. Luikang, learned counsel submitted that this is due to serious security threat. He also submitted that most of his workers have run away. Mr. Kekhriengulie, learned Addl. A.G. by bringing to our notice the order dated 07.04.2022 of the Addl. DGP (L&O) Nagaland submitted that after this Court's direction for providing security to the workers of the Contractors in Package-III one section of IR Bn has been deployed and O/C of the Police Station concerned has been instructed to remain in regular contact with the officers of the company/contractor and also highway mobile of DEF Kohima have been stationed at the work areas and moreover, the SDPO, Kohima has also been directed to monitor and take prompt action in the event of any untoward incidence in around the work site. Mr. Luikang, learned counsel admitted that such actions have been taken. Therefore, we are not convinced that there is real security threat to the workers of the Contractor. However, if the threat is not imaginary but real, the Contractor should have a discussion with the Government represented by the Deputy Commissioner and the Home Commissioner and discuss the problem so that the same may be resolved and the progress of the work is not deterred any longer. The contract agreement between the NHIDCL and the Contractor was signed in the month of September, 2021 and the contract period is 12 months which means the time allotted for completion of the work will be over by the end of August this year, therefore the Contractor has only 4 months more to complete the project. The Authority Engineer submitted that 76% of the project work has been completed and 24% is left to be completed. If the progress of the work is as on today, it is very likely that the project will not be completed within the time given in the contract agreement. Therefore, we direct the Contractor, the

NHIDCL, the Authority Engineer and the State Government to work in tandem so that the work is completed within the time given in the contract agreement. In our earlier order dated 02.03.2022, we have directed the Contractor to maintain the road and also to complete the black topping of atleast 2-lane by 31.03.2022 so that the traffic is not disturbed. However, as per the report of the Authority Engineer 2.45Km is still left to be blacktopped, therefore we direct the Contractor to complete the 2.45Km length of the road within a period of 15 days.”

11. We have taken note that the work-order with regard to PackageIII was issued as early as on 01.09.2021 for an amount of Rs. 111.19/- Crore and that the time stipulation to complete the work was within 12 (twelve) months. However, nothing has been done and from the various affidavits filed by the Authority Engineer we have seen that the respondent No. 12 is not serious for execution of the work with regard to Package-III. Further, as the respondent No. 12 has already abandoned the work and it is confirmed by Mr. Yashpal Sharma, Director, M/s Oasis Techno Construction Limited/ respondent No. 12 today, we are constrained to pass a direction to the NHIDCL authorities not to release any pending dues including the Bank Guarantee to the respondent No. 12 without the leave of this Court. Taking into consideration the lackadaisical, irresponsible behavior as well as making deliberate false promises on oath before this Court we direct the respondent No. 12 to liquidate 10% (ten percent) of the total contract amount (Rs. 111.19/- Crore) to the NHIDCL authorities within a period of one month from today.

(Emphasis supplied)

12. We have also taken note of the submission made by the Authority Engineer in his progress report dated 28.09.2022 that they have appointed one contractor, M/S T. Tachu & Co. to look after the maintenance and safety works of Package-III in view of the emergent situation that has been created by the respondent No. 12. We, accordingly implead the Contractor, M/S T.

Tachu & Co. as a party respondent in the present PIL. We also direct the Authority Engineer as well as the authorities of the NHIDCL and the newly appointed Contractor, M/S T. Tachu & Co. to maintain the road under Package-III so that the commuters do not face any difficulties or inconveniences.

13. Mr. Yashpal Sharma, Director M/s Oasis Techno Construction Limited/ respondent No. 12 also submits before this Court that there are three Directors in the M/s Oasis Techno Construction Limited who take a collective decision with regard to all projects. Accordingly, we direct all the three Directors to be present in Court on the next returnable date to enable this Court to pass appropriate orders. The further appearance of Mr. M.S. Deol, Executive Director, NHIDCL Nagaland and Mr. Ajay Batra, Joint Director, PMU is dispensed with for the time being.

14. With regard to the permissible tonnage of heavy vehicles plying within the Package-I, II & III, appropriate orders will be passed in the presence of the State authorities on the next date. Registry is directed to furnish a copy of this Order to the Deputy Commissioner, Chumukedima as well as the Police Authorities concerned for doing the needful.
List this matter again on 12.10.2022.”

By way of this Interlocutory Application, the applicant seeks to demonstrate that the inability on its part in completing the work upon the road in question was not intentional and was account of unforeseen and uncontrollable circumstances, *inter-alia*, security threats from locals and the unauthorised organisations, untimely rainfall, illegal mining activities within the ROW and frequent mountain sliding due to poor geological sub soil strata etc.

Seeking recall/review/modification of the directions given in the highlighted portion of the above order, learned counsel Mr. Bharat Chugh and Mr. Mayank Arora representing

the applicant, M/s Oasis Techno Construction Ltd. urged that the applicant had taken steps for terminating the contract because of valid reasons. They drew the Court's attention to the order passed by the Hon'ble Supreme Court in an ***SLP (Civil) Diary No(s).32354/2022*** filed by the applicant for challenging the order dated 28.09.2022 wherein, the Hon'ble Supreme Court permitted the applicant to move an application/affidavit indicating its stand and/or justification if so advised and the High Court was given liberty to pass any order(s) for appropriation of the amount so deposited by the petitioner.

It has been further submitted that the applicant/respondent No.12 has terminated the contract. The parties are governed by the arbitration clause in the contract and that arbitration has already started. Chief Justice (Retired) Manmohan Sarin has been appointed as the sole Arbitrator for resolution of the disputes between the parties. Thus, learned counsel for the applicant prayed that the order dated 28.09.2022 deserves to be vacated/recalled and 10% of the total amount of the contract directed to be liquidated may be released. It is further submitted that the NHIDCL has already encashed Bank guarantee of the applicant to the tune of Rs.3.50 crores furnished by the contractor.

Learned counsel representing the NHIDCL, Mr. S. Borgohain has vehemently opposed the submissions advanced by the applicant's counsel.

However, he admits that the parties to the contract are governed by an arbitral clause. It is also not in dispute that pursuant to the contract being cancelled, the arbitral clause has been invoked and Chief Justice (Retired), Shri Manmohan Sarin

has been appointed as the sole arbitrator to determine the rights/liabilities of the parties under the contract.

In this background, we are of the opinion that continuance of the order to liquidate/freeze 10% amount from the total contract value by the applicant/respondent No.12 would amount to an indirect encroachment into the jurisdiction of arbitrator appointed to determine the issues arising out of the non-performance of the contract in question and may also prejudice the defences of the applicant in the arbitration proceedings.

Thus, keeping view, the fact that Bank guarantee to the tune of Rs.3.50 crores furnished by the applicant has been encashed by the Corporation, we hereby modify the order dated 28.09.2022 and direct that the applicant shall furnish a Bank guarantee to the tune of Rs.7.50 crores with the sole arbitrator whereupon the order dated 28.09.2022 shall stand vacated/recalled and the 10% amount of the contract directed to be liquidated shall be released.

The applicant shall be at liberty to seek revocation of the Bank guarantee/modification of this condition in case the arbitration proceedings are not completed within 3(three) months from today.

It is further clarified that the observations made in these proceedings shall not be construed as prejudicing the case of any of the parties in the arbitration proceedings.

The I.A. (Civil) No.203/2022 is disposed of as above.

JUDGE

CHIEF JUSTICE

BIJOY