

\$~39

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. (COMM) 97/2018 & I.A. Nos. 2879/2018 & 2880/2018**

**NATIONAL HIGHWAY & INFRASTRUCTURE
DEVELOPMENT CORPORATION LIMITED** Petitioner

Through: Ms Geeta Luthra, Senior Advocate
with Mr Mohit Singh, Mr Ritesh
Bajaj and Mr Prateek Yadav,
Advocates.

versus

KMC CONSTRUCTIONS LIMITED Respondent

Through

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

%

28.02.2018

VIBHU BAKHRU, J

1. The petitioner (hereafter 'NHIDC') has filed the present petition impugning an arbitral award dated 26.09.2017 (hereafter 'the impugned award') delivered by the Arbitral Tribunal constituted by Mr G. Sharan, Mr S.S. Agarwal and Mr V. Ravindranath, Presiding Arbitrator (hereafter 'the Arbitral Tribunal'). The impugned award was rendered in the context of the disputes that had arisen in relation to the Engineering Procurement and Construction Agreement dated 16.03.2015 (hereafter 'the EPC Agreement')

2. The controversy involved in the present petition relates to the imposition of penalty on the respondent (hereafter 'KCL') on account of delay in submission of the Performance Bank Guarantee (hereafter 'PBG'). According to NHIDC, KCL is liable to pay penalty at the rate of 0.05% of

the contract value for the delay in submission of the Performance Security (PBG) in terms of Clause 7.1.3 of the EPC Agreement.

3. KCL disputes that any penalty is payable, and further denies that there was any delay on its part in submission of the PBG. It is KCL's case that it was ready and willing to furnish the PBG; however, there was some confusion with regard to the party in whose favour the PBG was to be made. The EPC Agreement was entered into with the Ministry of Road Transport and Highways (hereafter 'MoRTH') but a notification had already been issued in the Gazette for NHIDC to step in place of MoRTH in relation to the subject stretch of the highway. Finally, the PBG was submitted to NHIDC and the same was accepted without any reservation.

4. Briefly stated, the above controversy arises in the context of the following facts:

5. MoRTH had invited bids for "*Improving/ Widening to two laning with paved shoulder of Agartala - Udaipur Section from Km. 6.800 to Km. 55.000 of NH-44 in the State of Tripura under SARDP-NEW Phase-A*" (hereafter 'the Project').

6. KCL submitted its bid pursuant to the above invitation. In terms of the tender documents, it also furnished a bank guarantee in the sum of ₹3,03,83,000/-, as the Bid Security.

7. KCL's bid for the aforesaid project was accepted by MoRTH and on 31.10.2014, MoRTH issued a Letter of Acceptance (LoA) to KCL. In terms of the said LoA, the concerned parties were to execute the EPC Agreement

within a period of 15 days from the issuance of the LoA.

8. Thereafter, on 17.02.2015, MoRTH issued a notification declaring that NHIDC shall exercise the function in relation to the development and maintenance of the specified stretch of nine National Highways, which included the stretch on which the project had to be carried out (Agartala-Udaipur section).

9. Although in terms of the notification dated 17.02.2015, all functions in relation to the stretch of highway in question were entrusted to NHIDC, MoRTH and KCL entered into the EPC Agreement on 16.03.2015.

10. Thereafter, the MoRTH, KCL and NHIDC entered into a Tripartite Agreement on 03.07.2015, whereby the project was formally transferred from MoRTH to NHIDC.

11. In terms of the EPC Agreement, KCL was required to furnish a Performance Security equivalent to 7.5% of the contract value (which works out to a sum of ₹ 27,67,50,000/-) within a period of 10 days from execution of the EPC Agreement. KCL claims that in view of the notification dated 17.02.2015, there was some confusion as to whether the PBG was to be issued in favour of NHIDC or MoRTH. It claims that it sent a letter dated 14.04.2015 to MoRTH seeking clarifications in this regard; however, the same is stoutly disputed by NHIDC.

12. On 13.04.2015, a draft of the Tripartite Agreement to be executed between MoRTH, NHIDC and KCL was forwarded to KCL. Thereafter, KCL sent a letter dated 22.04.2015 to NHIDC stating that it would submit

the PBG within a period of 15 days of signing of the Tripartite Agreement. KCL claims that since it did not receive any response to the aforesaid letter, it submitted the Performance Security (PBG in the sum of ₹ 27,67,50,000/-) on 06.05.2015.

13. As stated above, KCL had also furnished a bank guarantee in the sum of ₹3,03,83,000/-, as the Bid Security. The said bank guarantee was valid till 13.09.2015, and was released by MoRTH on 12.10.2015.

14. Notwithstanding that MoRTH had released the Bid Security, it issued a letter dated 15.05.2015 to NHIDC directing it to recover damages in the sum of ₹7,56,45,000/- from the first and second running account bills (RA bills) submitted by KCL.

15. This was also communicated to KCL by NHIDC on 30.09.2015.

16. In view of the above, KCL filed an application under Section 9 of the Act – being O.M.P. (I) (COMM) 480/2016 captioned *KMC Constructions Ltd v. National Highways & Infrastructure Development Corporation Ltd.* – before this Court seeking stay of the operation of the said letter.

17. On 16.12.2016, this Court passed an *ad interim* order staying the letter dated 15.05.2015; accordingly NHIDC was restrained from recovering the damages as stated above. Subsequently, by an order dated 21.02.2017, this Court directed that the said *ad interim* order would continue to be operative till further orders are passed by the Arbitral Tribunal.

Impugned Award

18. The Arbitral Tribunal accepted KCL's claim (i) that it had not breached the EPC Agreement; (ii) that NHIDC/MoRTH had accepted the PBG and returned the Bid Security and thus had waived the delay in submission of the PBG; (iii) that NHIDC/MoRTH had not suffered any damage or loss; and (iv) that the levy of damages was contrary to the terms of the EPC Agreement.

18.1 The Arbitral Tribunal accepted KCL's contention that there was some confusion with regard to the submission of the Performance Security (PBG) as although the EPC Agreement was entered into with MoRTH on 16.03.2015, the stretch of the highway involved in the Project had been entrusted to NHIDC in terms of the Gazette notification issued on 17.02.2015 by MoRTH. The Arbitral Tribunal also accepted the KCL's contention that it had pursued with MoRTH for seeking a clarification as to in whose favour the PBG was to be submitted but had not received any response to such verbal requests. KCL had asserted that it had also sent a letter dated 14.04.2015 to MoRTH seeking the aforesaid clarification. The Arbitral Tribunal observed that although the NHIDC's witness (Mr V.K. Rajawat) had, in his affidavit, stated that the said letter was implanted, NHIDC in its Statement of Defence had not disputed the receipt of the said letter. The Arbitral Tribunal also noted that the copy of the said letter was sent subsequently through e-mail dated 16.04.2015. The Arbitral Tribunal also considered that KCL had submitted the PBG on 06.05.2015 which had been accepted by NHIDC. In the circumstances, the Arbitral Tribunal concluded that there was uncertainty as to in whose name the PBG was to be submitted and, therefore, KCL could not be held responsible for the delay in

submission of the same.

18.2 The Arbitral Tribunal also accepted KCL's contention that by accepting the PBG, NHIDC (as well as MoRTH) had waived the delay in submission of the PBG and, therefore, NHIDC was barred from imposing any damages at a later stage.

18.3 Further, the Arbitral Tribunal had held that no loss was suffered by NHIDC or MoRTH for delay in submission of the PBG as KCL was permitted to perform the contract from 15.09.2017 onwards (i.e. much after the KCL had submitted the PBG) and the delay in submission of PBG had no material effect. The Arbitral Tribunal also accepted KCL's contention that the damages sought to be recovered were not genuine pre-estimated loss or damage likely to be suffered or incurred by MoRTH and, therefore, NHIDC was not eligible to recover damages from KCL.

18.4 The Arbitral Tribunal held that MoRTH had chosen not to take any action under Clause 7.1.2 of the EPC Agreement, which entitled MoRTH to encash the Bid Security and terminate the EPC Agreement. MoRTH having decided not to take any action under Clause 7.1.2 of the EPC Agreement, NHIDC could not impose damages at a later stage. The Arbitral Tribunal held that the same "*will be contrary to the provisions of Contract*".

Submissions

19. Ms Geeta Luthra, the learned Senior Counsel appearing for the petitioner advanced contentions to assail the impugned award, essentially, on three fronts. First, she submitted that there was no confusion with regard

to submission of the PBG and the letter dated 14.04.2015 relied upon by KCL was fabricated. She further submitted that the Arbitral Tribunal had erred in not appreciating that the copy of the said letter was forwarded to NHIDC on 16.05.2015, which was after the PBG had been furnished by KCL and, therefore, the receipt of the said letter by NHIDC was not relevant. She emphatically submitted that the Arbitral Tribunal had rendered the impugned award on mere submissions and without any material or pleadings. She also stated that the e-mail dated 16.04.2015, as referred to by the Arbitral Tribunal, was not a part of the record and therefore the Arbitral Tribunal erred in relying on the same.

20. Next, she submitted that the Arbitral Tribunal's decision that MoRTH/NHIDCL had waived the right to levy damages was erroneous as in terms of Clause in terms of Clause 27.4.2 of the EPC Agreement, failure by either party to insist on any occasion on performance of any terms and conditions or grant of any time or indulgence would not be treated as waiver of such breach or relinquishment of any right.

21. Lastly, she submitted that in terms of Clause 1.2.1.(w) of the EPC Agreement, the parties had agreed that the damages payable by either party to the other, as set-forth in the EPC Agreement, are mutually agreed genuine pre-estimate of loss and damages likely to be suffered by the party entitled to receive the same. She submitted that in view of the above, the Arbitral Tribunal's decision that NHIDC had suffered any loss was wholly erroneous. She referred to the decision of this Court in ***Kailashnath Associates v. Delhi Development Authority & Anr.*: (2015) 4 SCC 136** and ***Oil and Natural Gas Corporation v. Saw Pipes Ltd.*: (2003) 5 SCC 705** in

support of his contention that NHIDC was not required to prove that it had suffered any loss.

Reasons and Conclusion:

22. At the outset, it is relevant to mention that it is NHIDC's case that damages are payable in terms of Clause 7.1.3 of the EPC Agreement. Thus, before proceeding further, it would be relevant to refer to Clause 7.1 of the EPC Agreement, which is set out below:-

“7.1 Performance Security

7.1.1 The Contractor shall, for the performance of its obligations hereunder during the Construction Period, provide to the Authority, within 10 (ten) days of the date of this Agreement, an irrevocable and unconditional guarantee from a Bank in the form set forth in Schedule-G (the “Performance Security”) for an amount equal to 7.5% (seven and half percent) of the Contract Price. The Performance Security shall be valid until 60 (sixty) days after the Defects Liability Period. Until such time the Performance Security is provided by the Contractor pursuant hereto and the same comes into effect, the Bid Security shall remain in force and effect, and upon such provision of the Performance Security, the Authority shall release the Bid Security to the Contractor. For the avoidance of doubt, the parties expressly agree that the Contractor shall provide, no later than 30 (thirty) days prior to the expiry of the Performance Security for the defects Liability Period specified in Clause 17.1.1, a Performance Security in respect of the extended Defects Liability Period specified in Clause 17.1.2 for

an amount equal to 5% (five per cent) of the estimated cost of Structures and Major Bridges specified therein.

7.1.2 Notwithstanding anything to the contrary contained in this Agreement, the Parties agree that in the event of failure of the Contractor to provide the Performance Security in accordance with the provisions of Clause 7.1.1 and within the time specified therein or such extended period as may be provided by the Authority, in accordance with the provisions of Clause 7.1.3, the Authority may encash the Bid Security and appropriate the proceeds thereof as Damages, and thereupon all rights, privileges, claims and entitlements of the Contractor under or arising out of this Agreement shall be deemed to have been waived by, and to have ceased with the concurrence of the Contractor, and this Agreement shall be deemed to have been terminated by mutual agreement of the Parties.

7.1.3 In the event the Contractor fails to provide the Performance Security within 10 (ten) days of this Agreement, it may seek extension of time for a period not exceeding 20 (twenty) days on payment of Damages for such extended period in a sum calculated at the rate of 0.05% (zero point zero five per cent) of the Contract Price for each day until the Performance Security is provided.”

23. It is at once clear from the above that Clause 7.1.3 of the EPC Agreement is wholly inapplicable, as it does not provide for any unilateral right to MoRTH or NHIDC to levy damages. It only enables a contractor, which has failed to provide the Performance Security within the specified

period of 10 days from execution of the EPC Agreement, to seek extension of time on payment of damages calculated at the rate of 0.05% of the contract price for each day. This right is also not available for an indefinite period and is limited to seeking extension of time not exceeding 20 days. In the present case, admittedly, KCL had not sought any extension of time to furnish the PBG, as it is KCL's case that it required certain clarification as to in whose favour the PBG was to be issued and such clarification was not readily forthcoming. This contention is stoutly disputed by NHIDC, but it can hardly be disputed that Clause 7.1.3 of the EPC Agreement does not provide for a unilateral imposition of penalty by NHIDC.

24. The foundation of NHIDC/MoRTH's claim that it could unilaterally impose damages under Clause 7.1.3 is flawed. Although, the above is not clearly stated in the impugned award, the Arbitral Tribunal has held that there is no pre-estimate of genuine loss and as such no delay damages can be imposed on KCL. The Arbitral Tribunal has also categorically held that the levy of damages is contrary to the EPC Agreement.

25. Ms Luthra contended that in terms of Clause 7.1.2 of the EPC Agreement, NHIDCL/MoRTH had the right to forfeit the Bid Security and appropriate the proceeds as damages and also terminate the EPC Agreement. She reasoned that it was, thus, always open for NHIDC to take partial measures and impose damages while electing not to terminate the EPC Agreement pursuant to the default committed by the contractor. She contended that, in this view, NHIDC was entitled to recover damages while continuing with the EPC Agreement. This contention is also unmerited. Clause 7.1.2 entitles MoRTH/NHIDCL to forfeit the Bid Security and

appropriate the proceeds thereof and also terminate the EPC Agreement if the contractor fails to submit the Performance Security within a period of ten days of signing the EPC Agreement. Forfeiture of Bid Security and appropriating the proceeds as damages in terms of Clause 7.1.2 of the EPC Agreement is not the same as imposing damages at the rate of 0.05% of the contract value per day for any alleged delay of submission of the PBG. Thus, even if it is accepted – which the Arbitral Tribunal has not – that the delay in submission of the PBG is attributable to the respondent, Clause 7.1.2 does not provide for levy of any liquidated damages at the rate of 0.05% of the contract value per day and therefore, it is not permissible for NHIDC to recover the same from the amount due to KCL.

26. In terms of Clause 7.1.2 of the EPC Agreement, MoRTH/NHIDCL could forfeit the Bid Security if it concluded that KCL had breached the EPC Agreement by not submitting the Performance Security (PBG) within the specified period. However, no such action was initiated by NHIDCL/MoRTH. The Bid Security (which was in the sum of ₹3,03,63,000/-) was released to KCL on 12.10.2015. As stated above, Clause 7.1.2 does not contemplate levy of any further damages at the rate of 0.05% of the contract price per day. Thus, plainly, the provisions of Clause 7.1.2 do not support the levy of damages as claimed by NHIDC.

27. In view of the above, the reliance placed by NHIDC on the provisions of Clause 1.2.1(w) of the EPC Agreement is wholly misplaced. The said clause reads as under:

“1.2.1 In this Agreement, unless the context otherwise requires,

XXXXX XXXXX XXXXX XXXXX

XXXXX XXXXX XXXXX XXXXX

(w) the, damage payable by either party to other of them, as set forth in this Agreement, whether on per diem basis or otherwise, are mutually agreed genuine pre-estimated loss and damage likely to be suffered and incurred by the Party entitled to receive the same and are not by way of penalty (“the Damages”).”

28. It is apparent from above that the aforesaid Clause is applicable only in cases where the Agreement provides for imposition of damages. NHIDC/MoRTH had sought to recover the damages in terms of Clause 7.1.3 and, as stated above, the said Clause (Clause 7.1.3) does not entitle NHIDC/MoRTH to unilaterally impose and recover damages at the rates specified therein; it only enables the Contractor to seek extension of payment of certain damages. Thus, there is no provision in the EPC Agreement which entitles NHIDC to impose and recover damages at the rate of 0.05% of contract price per day.

29. Thus, no damage could be levied by MoRTH/NHIDC in the present case by seeking recourse to Clause 7.1.3 of the EPC Agreement.

30. This Court also finds no infirmity with the Arbitral Tribunal’s view that having decided to release the Bid Security and continue with the EPC Agreement, NHIDC could not at a later stage seek to unilaterally impose and recover damages.

31. The reliance placed by Ms Luthra on Clause 27.4.2 of the EPC

Agreement is misplaced. The said Clause reads as under:-

“27.4.2 Neither the failure by either Party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement or any obligation thereunder nor time or other indulgence granted by a Party to the other Party shall be treated or deemed as waiver of such breach or acceptance of any variation or the relinquishment of any such right hereunder.”

32. As is clear from the plain language, the aforesaid Clause only clarifies that failure by either party to insist on a performance of any term would not constitute waiver. Further, grant of any indulgence or time by one party to another shall also not be deemed to be waiver of any breach or acceptance of any variation or relinquishment of any such right thereunder.

33. If the respondent was in default of submission of the Performance Security within the period of ten days of entering upon the EPC Agreement, MoRTH had the right to terminate the EPC Agreement and forfeit the Bid Security; but having elected to continue with the EPC Agreement, it would now not be open for NHIDC to claim that it still had the right to terminate the EPC Agreement. Further, in the present case, MoRTH and NHIDC had voluntarily released the Bid Security. The stage at which the rights under Clause 7.1.2 of the EPC Agreement could be exercised had passed and Clause 27.4.2 of the EPC Agreement would be of little assistance to NHIDC in the given facts.

34. In view of the above, it is also clear that the decision delivered by the Supreme Court in the case of *Kailashnath Associates* (supra) and *Oil and*

Natural Gas Corporation Limited (supra) are not applicable.

35. Having stated the above, it would also be apposite to observe that the said decisions are not an authority for the proposition that even where it is clear that a party had suffered no damage at all, it can nonetheless recover damages if the same are stipulated in the agreement. In the present case, the Arbitral Tribunal had also come to the conclusion that there was no loss whatsoever that had been suffered by MoRTH/NHIDCL. No material was placed before the Arbitral Tribunal to indicate as to how MoRTH could have possibly suffered any loss. The EPC Agreement does not provide for any unilateral right to NHIDCL/MoRTH to impose any penalty or damage as sought to be done in the present case; nonetheless NHIDC could claim damages, provided it could establish that KCL breached the EPC Agreement and that NHIDC had suffered any loss. Nevertheless, NHIDC has not substantiated that it had suffered any loss but merely relied on Clause 7.1.3 of the EPC Agreement for recovering liquidated damages. This claim, as discussed above, is not sustainable.

36. Insofar as the claim that the Arbitral Tribunal had erred in accepting the KCL's contention that there was some uncertainty as to in whose favour the PBG had to be issued, it is relevant to state that this Court is not required to examine the impugned award as the Court of First Appeal. The judicial review under Section 34 of the Act is limited; unless this Court finds that the impugned award is without jurisdiction or is opposed to the fundamental policy of Indian law or is patently illegal, no interference with the award would be warranted. In the present case, the Arbitral Tribunal had sufficient material to accept KCL's contention that there was uncertainty in whose

favour the PBG was to be furnished. Although, the notification for NHIDC to take over the said stretch had already been issued, the EPC Agreement was entered into with MoRTH. This itself provide sufficient material for the Arbitral Tribunal to draw the conclusion that it did. Admittedly, NHIDC did not produce any communication addressed at the material time, which would lend any clarity to the issue. Also, admittedly, there was no communication produced before the Arbitral Tribunal by NHIDC calling upon KCL to furnish the PBG in favour of the particular entity. Thus, the Arbitral Tribunal has accepted KCL's contention that it had verbally sought clarifications from the officers of MoRTH but no such clarification was forthcoming. Since there is material for the Arbitral Tribunal to draw the conclusion that it did, the impugned award cannot be interfered with under Section 34 of the Act. In proceedings under Section 34 of the Act, this Court is not called upon to re-appreciate the material on the basis of which the Arbitral Tribunal has rendered the impugned award.

37. The petition is, accordingly, dismissed. The pending applications are also disposed of. The parties are left to bear their own costs.

नात्यमेव जयते

VIBHU BAKHRU, J

FEBRUARY 28, 2018

RK/pkv