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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. (COMM) 239/2018 & IA no. 7405-7406/2018 &**
CAV. 512/2018

NATIONAL HIGHWAY AUTHORITY OF
INDIA

..... Petitioner

Through: Mr Shailendra Pratap Singh, Mr
Alok Singh, Mr Deepak Shukla,
Ms Richa and Mr Nilendra
Pratap Singh, Advocates.

versus

GAYATRI JHANSI ROADWAYS
LIMITED

..... Respondent

Through: Mr Arun Kathpalia, Sr.
Advocate with Mr Angad
Mehta and Mr Kaushik Laik,
Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER
25.05.2018

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VIBHU BAKHRU, J

1. The petitioner (hereafter 'NHAI') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an arbitral award dated 31.01.2018 (hereafter 'the impugned award') delivered by the Arbitral Tribunal constituted by Justice K.S.P. Radhakrishnan (Retd.) (Presiding Arbitrator), Justice Aftab Alam (Retd.) and Justice B.P. Singh (Retd.) (hereafter 'the Arbitral Tribunal'). The impugned award was delivered by the majority with Justice Aftab Alam (Retd.) entering a dissenting

note.

2. By the impugned award, the Arbitral Tribunal has accepted the respondent's claim that it was entitled to Bonus Annuity in terms of Concession Agreement dated 29.09.2006 and rejected NHAI's contention that the respondent (hereafter 'GJRL') had waived its right to receive the Bonus Annuity in terms of the Supplementary Agreement dated 01.11.2010.

3. The principal controversy in the present case relates to the question whether GJRL had waived its right to receive Bonus Annuity.

Factual Background

4. NHAI had invited bids from the pre-qualified bidders for the design, construction, development, finance, operation and maintenance of the project involving the widening of the existing two lane portion on the National Highway 25/26 in the State of Uttar Pradesh on BOT (Annuity) basis (hereafter 'the Project'). The Project was to be executed under a Concession Agreement on BOT (Annuity) basis. The concession period of the Project was stipulated as 20 years, which included the construction period of 30 months from the notified date of commencement of construction. M/s Gayatri Project Ltd. and IDFC Ltd. formed a consortium and submitted their bid on 16.03.2006. The said bid was found acceptable and, on 29.04.2006, NHAI issued a Letter of Intent (LOI) awarding the contract to the said consortium. Thereafter, for the purposes of implementing the Project,

the said consortium incorporated the respondent company (GJRL).

5. On 29.09.2006, NHAI and GJRL entered into the Concession Agreement (hereafter 'the Concession Agreement'). The Concession Agreement stipulated a development period of six months from the date of signing of the agreement. During this period, GJRL was to achieve financial closure, prepare and submit design and drawings and mobilize resources at the site for timely completion of the project work.

6. The Concession Agreement stipulated 28.03.2007 as the date of commencement of construction and the Schedule Project Completion date was fixed at 28.09.2009. In terms of the Concession Agreement, NHAI was obliged to handover encumbrance free existing Right Of Way (ROW) within a period of one month and encumbrance free additional land within a period of twelve months, from the notified date of commencement of work.

7. Concededly, there were delays in handing over of the ROW and additional land. NHAI could handover only 18.312 kms of encumbrance free stretch out of a total stretch of 49.700 km within a period of twelve months from the notified date of commencement of works. Further, NHAI could handover only 21.679 kms within the period of twenty-four months from the notified date for commencement of works.

8. At the material time, GJRL sent several letters to the Independent Consultant and NHAI pointing out that it could not start

the work on certain stretches of the road due to delay in handing over of hindrance and encumbrance free land. Such delay was attributed to delay in cutting the trees along the road side in various stretches of ROW; delay in availability of lines in certain stretches either due to non-acquisition/non-disbursement of compensation for land; non-shifting of electrical land and utilities etc. GJRL also complained that even the stretches of land that were handed over, were not free from hindrances and, thus, work could not be started in some of those stretches of land as well.

9. On 28.03.2009 and 24.09.2009, GJRL sent letters to the Independent Consultant, *inter alia*, referring to Clauses 30 and 31.2 of the Concession Agreement and stating that that the default committed by NHAI had adversely affected GJRL's ability to complete the construction within the stipulated period of twenty-four months. GJRL sent further two letters dated 28.08.2009, *inter alia*, stating that it would be claiming damages under Clause 13.5.1 and 13.5.2 of the Concession Agreement on account of delay in execution of the Project that was attributable to NHAI.

10. NHAI referred the issues raised by GJRL to a committee constituted by it (CJM Committee).

11. NHAI had entrusted the issue regarding the payment of annuity to another Independent Consultant - M/s Zaidun Leeng Sdn. Bhd. - M/s Artifact Projects Ltd. (JV). The said Independent Consultant by a letter dated 12.04.2010, *inter alia*, recommended that issuance of

Provisional Completion Certificate to the concessionaire could be considered on substantial completion of the work and satisfactory completion of the test required under Schedule 'J' of the Concession Agreement.

12. In the meanwhile, GJRL sent several letters raising claims regarding Bonus Annuity as well as for damages on account of defaults committed by NHAI.

13. On 11.06.2010, the Independent Consultant issued a Provisional Completion Certificate.

14. After issuance of the Provisional Completion Certificate by the Independent Consultant, GJRL sent letters persisting with its request to work out the "X" factor for computing the annuity under Clause 6.2(c)(i) and 6.2(c)(ii) of the Concession Agreement as well as for payment of additional costs in accordance with Clause 30 and 31.2 of the Concession Agreement.

15. On 01.11.2010, the parties entered into a Supplementary Agreement (hereafter 'the Supplementary Agreement'), whereby GJRL absolved NHAI from all damages, defaults, claims, costs expenses, or losses on account of delay on the part of NHAI to meet its obligations.

16. GJRL raised invoices for the first annuity and the second Annuity payable in March and September 2010 respectively.

17. The Team Leader of GJRL sent a letter dated 25.11.2010 once

again demanding damages as well as Bonus Annuity. This letter was immediately withdrawn by the Chairman of GJRL by a letter dated 30.11.2010. He stated that the letter dated 25.11.2010 be treated as null and void and further assured NHAI that GJRL would abide by the provisions of the Supplementary Agreement. He also stated that no claims in relation to delay on account of handing over of land by NHAI would be raised. After receipt of the said letter dated 30.11.2010, NHAI released the annuities for March and September 2010, on 06.12.2010.

18. On 27.07.2013, GJRL sent a letter claiming Bonus Annuity under Clause 6.2 of the Concession Agreement enclosing therewith an invoice of an amount of ₹29,95,00,000/- for Bonus Annuity.

19. By its letter dated 01.08.2013, the Independent Consultant rejected GJRL's claim for Bonus Annuity, *inter alia*, on the ground that (i) the schedule date for completion of the project was 28.09.2009 and the same had not been changed; (ii) the Provisional Completion Certificate issued was for a length of 35.789 kms; (iii) GJRL had not completed the items indicated in the Punch List; and (iv) GJRL had to complete the project highway in all respects by the scheduled date of 28.09.2009 but the Provisional Completion Certificate was only for the length of 35.789 km.

20. GJRL responded by its letter dated 02.09.2013 refuting the observations made by the Independent Consultant and once again requesting for release of the Bonus Annuity.

21. Thereafter, on 24.09.2013, GJRL issued a letter to the Chairman of NHAI requesting for an amicable resolution of the matter. This was followed by another letter dated 29.05.2013 stating that if the disputes were not resolved the said letter be treated as an invocation of Clause 39.2 of the Concession Agreement for referring the disputes to arbitration. The Chairman of NHAI declined to take any steps. After exchange of further communications, the disputes were finally referred to arbitration by the Arbitral Tribunal.

Discussions and Conclusion

22. At the outset, it is relevant to refer to Clause 15.1 and 15.2 of the Concession Agreement, which expressly provides that the Project would be deemed to be complete and open to traffic only when the Completion Certificate or Provisional Certificate is issued. Clause 15.1 and 15.2 are set out below:-

“15.1: The Project shall be deemed to be complete and open to traffic only when the completion certificate or the Provisional Certificate is issued in accordance with the provisions of Article XVI (the ‘Project Completion’).

15.2 COD of the Project shall be the date on which the Independent Consultant has issued the Completion Certificate or the Provisional Certificate as the case may be, under this Agreement.”

23. In terms of Clause 16.4 of the Concession Agreement, it is necessary for the Independent Consultant to be satisfied that the test

for the stretch of road has been successfully completed. It is only once the Independent Consultant is satisfied that the Project highway can be legally, safely and reliably used for commercial operations that the Completion Certificate or a Provisional Completion Certificate can be issued. Clause 16.4 of the Concession Agreement is relevant and is set out below for ready reference:-

“16.4 Upon the Independent Consultant determining the Tests to be successful in respect of any stretch referred to in Clause 16.3 having been satisfied that such stretch of the Project Highway can be legally, safely and reliably placed in commercial operations, the Independent Consultant shall forthwith issue to the Concessionaire and NHAI a Certificate in respect of such stretch substantially in the form set forth in Schedule ‘K’ (the “Completion Certificate”) after approval from NHAI and upon Completion Certificate having been issued in respect of all stretches referred to in Clause 16.3 issue a final Completion Certificate certifying the Project Completion.”

24. Article VI of the Concession Agreement provides for payment of annuity. The relevant clauses of the said Article are set out below:-

“VI. ANNUITY

Subject to the provisions of this Agreement and in consideration of the Concessionaire accepting the Concession and undertaking to perform and discharge its obligations in accordance with the terms, conditions and covenants set forth in this Agreement, NHAI agrees and undertakes to pay to the Concessionaire, on each

Annuity Payment Date, the sum of Rs. 29.95 Crores (the Annuity).

6.1 Payment of Annuity

- (a) Subject to the provisions of Article 6 and only other applicable provisions of this Agreement, NHAI shall make payment of Annuity to the concessionaire on each Annuity Payment Date.
- (b) NHAI shall as security for payment of Annuity, provide to the concessionaire a Letter of Credit from a Scheduled Bank in India for a sum equal to Rs.29.95 Crores (one annuity payment amount). Such Letter of Credit shall be established within 30 days from the expected date of COD as intimated by the Concessionaire.

6.2 Bonus/Reduction in Annuity

- a) The Concessionaire shall either receive bonus for early completion of the Project (the Bonus) or incur reduction in the Annuity for delayed completion of the Project (the Reduction) as the case may be.
- b) For the purpose of this Article 6.2 each Annuity Payment Period shall be deemed to be a period of 180 calendar days.
- c) The Bonus or Reduction as the case may be shall be computed as under:

- (i) If COD is achieved prior to first Annuity Payment Date:

$$B \text{ or } R = [(SPCD-COD) + X] * A/180$$

- (ii) If COD is achieved between two Annuity Payment of Dates

$$B \text{ or } R = [(PAPD-COD) + X] * A/180$$

Where,

A = Annuity,

B = Bonus,

PAPD = Previous Annuity Payment Date.

R = Reduction

SPCD = Scheduled Project Completion Date (shall be the date as decided at the time of entering the concession agreement),

X = As determined by the Independent Consultant, the aggregate number of days of delay caused by:

- (i) Delay in delivery of the Project Site or any part thereof, as per Schedule 'H' by NHAI.
- (ii) Suspension of Construction Works or part thereof by NHAI or the Independent Consultant, for reasons not attributable to the Concessionaire,
- (iii) Change of Scope order pursuant to Article 17,

(iv) Stoppage of the Construction Works or part thereof on account of the Concessionaire allowing access and use of Project Site for public purposes pursuant to Article 36.2,

(v) Force Majeure Event which is a Political Event or Indirect Political Event,

(vi) NHAI Event of Default,

d) if the resultant figure arrived at pursuant to computation made in accordance with the preceding sub-article is positive, the same shall be the amount of Bonus payable to the Concessionaire and if negative, the same shall be the amount of Reduction. However, the amount of bonus payable shall not exceed one-annuity payment.

e) The Bonus shall be paid or Reduction shall be effected on the first Annuity Payment Date occurring after COD.

f) Notwithstanding anything inconsistent contained anywhere in this Agreement, NHAI's obligation to pay Annuity shall arise subject to and only upon occurrence of COD.”

25. In terms of Clause 6.2(f) of the Concession Agreement, NHAI's obligation to pay Annuity would arise subject to and only upon occurrence of COD. The term 'COD' is defined under Clause 1.1 of the Concession Agreement, as under:-

“COD” means the commercial operations date of the Project Highway and shall be the date on which the Independent consultant has issued the final Completion

Certificate or the Provisional Certificate certifying Project.”

26. In the present case, there is no dispute that a Provisional Completion Certificate was issued by the Independent Consultant on 11.06.2010. Thus, in terms of Article VI of the Concession Agreement, NHAI was obliged to pay annuity as agreed under the Concession Agreement. There is no dispute as to NHAI’s obligation to pay the Annuity and the only controversy that is raised relates to the payment of Bonus Annuity in term of Clause 6.2 of the Concession Agreement. It is also conceded that on a plain reading of the Concession Agreement, Bonus Annuity – as computed under Clause 6.2(c) – would be payable to the petitioner; however, NHAI claims it is absolved of paying bonus annuity in terms of Supplementary Agreement.

27. The Arbitral Tribunal (by majority) considered the rival contentions in this regard and rejected NHAI’s contention that it was absolved from paying the Bonus Annuity by virtue of the Supplementary Agreement. Thus, the only controversy that falls for consideration of this Court is whether the aforesaid conclusion is contrary to the terms of the Supplementary Agreement or otherwise falls foul of the fundamental policy of Indian law.

28. At this stage, it would be relevant to refer to the Supplementary Agreement, which is set out below:-

SUPPLEMENTARY AGREEMENT

BETWEEN

1. NATIONAL HIGHWAYS AUTHORITY OF INDIA, a statutory body constituted under the provisions of the National Highways Authority of India Act, 1988, and having its principal office at G-5&6, Sector - 10, Dwarka, New Delhi - 110075 (hereinafter referred to as “NHAI” which expression shall unless repugnant to the context or meaning (hereof including its administrators, successors and assigns) of One Part.

AND

2. Gayatri Jhansi Roadways limited, a company incorporated under the provisions of the Companies Act, 1956 and having its registered office at 63-1090, TSR Towers Somajiguda, Rajbhavan Road, Hyderabad (hereinafter referred to as the “Concessionaire” or “Company” which expression shall unless repugnant to the context or meaning thereof include its successors and permitted substitutes of the Other Part.

FOR

The work of Design, Construction, Development, Finance, Operation and Maintenance of Km 0.000 to Km 49.700 covering 79.700 KM of National Highway No. 25/26 (NH-25/26) in the state of Uttar Pradesh (Package NS1/BOT/UP-2) on BOT (Annuity) Basis.

WHEREAS

In accordance with the provisions of Concession Agreement, the National Highways Authority of India was to make available the entire land (ROW) to the Concessionaire within one year from the commencement

date i.e. 28.3.2007. On account of delays in land acquisition, transfer of forest land from Ministry of Environment Forest, Govt. of India, shifting of High Tension Electrical Lines, NHAI had handed over the land to the Concessionaire in the following manner:

Within 12 Months	24 Months	30 Months	36 Months	39 Months
18.312 km	21.679 km	28.602	33.355 km	40.690km

* Scheduled Completion Date - 28.09.2009

On account of delayed handing over of land by NHAI, the Concessionaire could not complete the entire work by scheduled completion date i.e. 28.09.2009. By June 2010, the Concessionaire completed the work in 35.789 km stretch and Provisional Completion Certificate was issued by Independent Consultant on 11.06.2010. The Concessionaire on 3rd September, 2010 completed the static load test on all the completed structures and Safety Review for the completed project highway was completed in all respects and found to be in conformity to the relevant norms:

As on 11th June, 2010, the status of work under project highway is:

Status of Work	Length (Km)
Work Completed	35.789 km

Work in progress in land handed over after March 2010	4.901 km
Land yet to be handed over to Concessionaire by NHAI	9.010 km

THEREFORE

This Supplementary Agreement is being made as an Addendum to the Main Concession Agreement dated 29th day of September 2006 and that all provisions of the Main Concession Agreement will be applicable to this Supplementary Agreement except to the extent waived by the parties thereto under this Supplementary Agreement.

The Concessionaire indemnities and absolves NHAI from all the damages penalties, claims, costs expenses, or losses or any adverse action or impact to NHAI by direct, indirect consequential or any dues, due to delay in meeting the obligations (handing over the land or clearance as the case may be) or on any other ground whatsoever.

The Concessionaire shall complete the balance works in the 13.911 km of stretch of the project highway within a period of 10 (Ten) months from the day when encumbrance free land is made available to the concessionaire.

NHAI will not exercise Negative Change of Scope to the Concessionaire and not withhold or reduce the Annuity Payment as construed in the Concession Agreement, if it is otherwise admissible.

Now, therefore, in consideration of the facts stated above, the parties hereto hereby agree to the Terms and Conditions as stated above.

For on behalf of
National Highway Authority
of India
Sd/-

For on behalf of
Gayatri Jhansi
Limited
Sd/-”

29. As is apparent from the facts as noticed above, the Supplementary Agreement was entered into between the parties in view of the failure on the part of NHAI to handover stretch of ROW and additional land in terms of the Concession Agreement. The Project had been delayed and it was claimed that the delay was attributable to NHAI. In terms of the Concession Agreement, the concessionaire would also be entitled to damages under Sub-clause 13.5.1 and 13.5.2 of the Concession Agreement, on failure of NHAI to enable access to the existing ROW and/or additional ROW. Further, in terms of Clause 31.2 of the Concession Agreement, NHAI was also obliged to pay to the concessionaire compensation for all direct additional cost suffered or incurred arising out of such material default by NHAI. Clause 31.2 of the Concession Agreement is set out below;-

“31.2 In the event of NHAI being in material default of this Agreement and such default is cured before Termination, NHAI shall pay to the Concessionaire as compensation, all direct additional costs suffered or incurred by the Concessionaire arising out of such material default by NHAI, in one lumpsum within 30 (thirty) days of receiving the demand or at NHAI’s

option in 3 (three) equal semi-annual installments with interest @ SBI PLR plus 2% (two per cent).”

30. Admittedly, GJRL had made such claims and the same were also discussed by the CJM Committee constituted by NHAI.

31. It is in this backdrop that the parties entered into a Supplementary Agreement. As is apparent from the plain language of the Supplementary Agreement, the respondent absolved NHAI from all damages, penalties, claims, costs, or losses or any adverse action or impact to NHAI due to delay on the part of NHAI for meeting the obligations of handing over the land. NHAI also agreed not to exercise any *Negative Change of Scope to the Concessionaire*. In other words, NHAI agreed to maintain the scope of work as per the Concession Agreement. It also agreed *not to withhold or reduce the Annuity Payment* as payable under the Concession Agreement.

32. Clause 6.2(c) of the Concession Agreement provides the formula for computing the Bonus Annuity. Since this formula includes a factor pertaining to delays in handing over the site, NHAI claims that the claim for Bonus Annuity is also premised on the delay in handing over the land for which it was absolved in terms of the Supplementary Agreement.

33. The Arbitral Tribunal had considered the above contention and, by the impugned award (rendered by majority), rejected NHAI’s contention that the respondent had waived its right to receive Bonus Annuity. The Arbitral Tribunal reasoned that the question whether

there was any waiver would have to be construed with reference to Clause 44.2 of the Concession Agreement, which expressly provided that waiver by either party of any default by the other party in the observance and performance of any provision or obligations under the Agreement “*shall not operate or be construed as a waiver of any other or subsequent default hereof or of other provisions of or obligations under this Agreement.*” The Arbitral Tribunal noticed that the Supplementary Agreement did not refer to any specific provisions to this effect.

34. The Arbitral Tribunal also noticed that for a waiver to be effective, it has to be unambiguous and in clear terms. The Supplementary Agreement did not include reference to Clause 6.2(c)(ii) of the Concession Agreement and, therefore, the Arbitral Tribunal found it difficult to accept that the respondent had waived its claim for Bonus Annuity. The Arbitral Tribunal also noticed that there were no communications that expressly provided that the respondent had waived its claim under Clause 6.2(c)(ii)(d) of the Concession Agreement. The Arbitral Tribunal also reasoned that bonus/reduction in Annuity was an integral part of Annuity and NHAI was not absolved of its obligation to pay Annuity. Further, NHAI had unequivocally agreed not to exercise a Negative Change of Scope and withhold or reduce the Annuity payments; therefore, it could not withhold Bonus Annuity which was also an Annuity, payable under the Concessionaire Agreement.

35. This Court finds no reason to interfere with the aforesaid view

in these proceedings. A plain reading of the Supplementary Agreement bears out that the respondent had not expressly agreed to waive NHAI's obligation for payment of Bonus Annuity. The Supplementary Agreement must be read in the meaningful manner and its object was, plainly, to absolve NHAI from any claims of damages and penalty on account of the failure on the part of NHAI to handover the site within the period as agreed under the Concession Agreement. The scope of the Supplementary Agreement cannot be expanded to mean that the respondent had given up its claim for the consideration payable in terms of the Concession Agreement, which also includes Bonus Annuity.

36. There is a conceptual difference between a claim for damages, penalty, additional costs etc. and entitlement to an incentive. Whereas a claim for penalties, damages, costs are by their very nature compensation for defaults on the part of the other contracting party, and incentive is remuneration for better performance rendered by a contractor. In this case, there can be no dispute that the Bonus Annuity is a part of the Annuity payable by NHAI. It is obvious that the said payment is to provide an incentive for expeditious and timely completion of the work. By its very nature, it is not a penalty or a claim for loss or compensation against NHAI. The nature of damages as contemplated under Clause 13.5.1 and 13.5.2 or under Clause 31.2 of the Concession Agreement is materially different from NHAI's obligation to pay annuity. The decision of the Arbitral Tribunal in accepting that Bonus Annuity is a part of NHAI's obligation to pay

Annuity, cannot be faulted. In any view, the said conclusion cannot, by any stretch, be held to be perverse or opposed to the fundamental policy of Indian law.

37. The learned counsel appearing for NHAI had relied on the letter dated 30.11.2010 addressed by the Chairman of GJRL to NHAI withdrawing the earlier letter dated 25.11.2010 sent by the Team Leader. He contended that the said letter clearly established that GJRL had waived its claim to Bonus Annuity as the same was referred in the earlier letter dated 25.11.2010, which was withdrawn. The Arbitral Tribunal had considered the aforesaid contention and had not accepted the same for two reasons: first, that the letter dated 30.11.2010 was subsequent to the Supplementary Agreement and, therefore, was of little assistance in interpreting the Supplementary Agreement; and second, that on a plain reading, the letter dated 30.11.2010 did not indicate that the GJRL had given up its rights to receive annuity in terms of the Concession Agreement. The Chairman of GJRL had merely reiterated GJRL's commitment to abide by the term of the Supplementary Agreement and not make any claims relating to delay on account of the handing over of land. As discussed above, NHAI's obligation to Bonus Annuity cannot be considered as a claim relating to delay on account of handing over of land; it is a claim for expeditious completion of works. By its very nature, GJRL's claim is for a contractual payment for performance of the contract and is not a claim on account of defaults on the part of NHAI.

38. Examination of the formula as used in Clause 6.2(c)(ii) of the

Concession Agreement indicates that it provides for an objective measure for payment of incentive for timely completion of the works. For the efficacy of such measure, it is essential to exclude any delay cause by an Event of Default on the part of NHAI. The same cannot be construed to mean that Clause 6.2(c)(ii) of the Concession Agreement provides for a claim on account of default committed by NHAI. The fact that the formula for computing Bonus Annuity – which is the structured to determine the efficiency of the respondent – also takes into account the delay in handing over of land or defaults of NHAI, does not change the nature the Bonus Annuity.

39. In view of the above, this Court finds no infirmity with the impugned award. The petition is, accordingly, dismissed.

40. The caveat stands discharged. All pending applications are also disposed of.

MAY 25, 2018
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VIBHU BAKHRU, J