

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 31.07.2018
Judgment pronounced on: 10.10.2018

+ O.M.P. (COMM) No.325/2018 & I.A. Nos.10013-15/2018

NATIONAL HIGHWAY AUTHORITY OF INDIA Petitioner

Through: Mr. Sudhir Nandrajog, Sr. Adv. with
Mr. Shailendra Pratap Singh, Mr.
Alok Singh, Mr. Deepak Shukla, Mr.
Nilendra Pratap Singh, Ms. Seema
Singh, Ms. Chandrika Prasad Mishra
and Ms. Richa Rajesh, Advs.

versus

GAYATRI LALITPUR ROADWAYS LIMITED Respondent

Through: Mr. Arun Kathpalia, Sr. Adv. with
Mr. Angad Mehta, Mr. Samaksh
Goyal and Mr. Ram Babu, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.

Prefatory Facts:

1. This petition is directed against a unanimous award dated 30.03.2018 passed by an Arbitral Tribunal comprising three Members. Via the award, the Arbitral Tribunal has granted not only the principal claim but also allowed consequential reliefs sought for by the respondent.

2. By virtue of the main award the Arbitral Tribunal has agreed with the stand of the respondent that it is entitled to bonus annuity which was its principal claim and the consequential claims which included interest and costs.

3. The petitioner being aggrieved has approached this Court by way of the instant petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (in short '1996 Act'). Therefore, what I am required to examine is: as to whether the conclusion reached by the Arbitral Tribunal emerges from the record, which includes the Concession Agreement dated 29.09.2006 (in short 'C.A.'), the Supplementary Agreement dated 01.11.2010 (in short 'S.A.') and the documentary evidence placed before it.

4. In order to appreciate the contours of the dispute arising between the parties the following broad facts are required to be noticed.

5. As indicated above, the parties entered into a C.A. The C.A. envisaged that the respondent would design, provide necessary engineering, finance, procure, construct, operate and maintain the road between 49.700 km to 99.005 km on the National Highway No.26, in the State of Uttar Pradesh, under the North-South Corridor NHDP (hereafter referred to as "project"). In other words, the petitioner was required to earn its annuity on BOT basis i.e. based on build, operate and transfer model.

6. The construction on the subject project commenced on 28.03.2007. Under the C.A. the subject project was to be completed by 28.09.2009. Thus, the initial tenure of the contract was 30 months. Under the contract the respondent was entitled to receive annuity every year i.e. on 27th March

and 26th September of each calendar year. The C.A. envisaged payment of annuity by the petitioner for a period of 20 years i.e. till 27.03.2027.

6.1 At the heart of the dispute is a provision in the C.A. that requires payment of bonus annuity in case early completion of the subject project is attained. The formula for that purpose is incorporated in Clause 6.2 of the C.A. The said clause encapsulates the formula which is so configured that depending on the calculation made by the Independent Consultant (in short 'I.C.') with regard to the 'X' factor provided in the formula, which is nothing but the aggregate number of days by which the completion of contract was delayed, a decision is taken in the matter. In other words, the formula would throw up as to whether the concessionaire, in this case the respondent, would receive bonus annuity for early completion of the project or incur reduction in the annuity for delayed completion of the project, as the case may be.

6.2 It is not in dispute that a provisional completion certificate was issued by the I.C. on 31.07.2010, by which time the respondent had completed work equivalent to 45.220 km. The balance work which the respondent was required to complete was only 4.085 km. The record shows, and regarding this aspect there is no dispute, that the parties executed a S.A. on 01.11.2010 on account of delay by the petitioner in handing over the balance land so as to enable the respondent to execute the remaining part of the project.

7. It appears that with the execution of the S.A and upon receipt of the first and second annuity invoices dated 19.08.2010 and 26.08.2010, the petitioner released the fixed annuity amounts in the sum of Rs. 46,94,20,000/- against the said invoices on 06.12.2010.

7.1 It is the stand of the petitioner that with the execution of the S.A. the respondent waived, all claims, including claims towards damages, penalties, costs, expenses and losses that could arise directly or indirectly as a consequence of the delay by the petitioner in meeting its obligations under the C.A., which included delay in handing over of the subject land, obtaining statutory clearances or on any other ground whatsoever.

7.2 I may note, at this juncture, that the respondent, however, disputes the fact that by executing the S.A., it gave up its right qua dues receivable under the contract which included its claim for receiving bonus annuity for early completion of the contract.

8. The record, however, shows that both before the execution of the S.A. and thereafter, the respondent continued to make entreaties to the I.C. with regard to impediments placed in its way and the resultant delay in the execution of the project. Pertinently, as indicated above, the calculation of 'X' factor was dependant on the I.C. ascertaining the period of delay.

Correspondence on delay

9. I may delve on this aspect, briefly, to show dogged persistence of the respondent to get the I.C. to freeze the period of delay.

9.1 The record shows that the first time when the respondent wrote to the I.C. was on 27.11.2008 (Ex: C-4). By this communication the respondent called upon the I.C. to make a recommendation to the petitioner for approving an 'X' factor equivalent to 579 days, *albeit*, as on 13.12.2008.

9.2 At this juncture, the I.C. appears to have written back to the respondent stating that the request made for calculation of the 'X' factor

was pre-mature as the work on the subject project had not been completed and the site had not fully been handed over by the petitioner to the respondent. These aspects find mention in Ex: C-37 placed before the Arbitral Tribunal.

9.3 Thereafter, the respondent appears to have written to the I.C. on 28.03.2009. By this communication it required the I.C. to forward its recommendation to the petitioner for approving the 'X' factor which according to it, at that juncture, equaled 730 days (Ex: C-6). As in the past, the I.C. again reminded the respondent that the issue raised with regard to calculation of the 'X' factor was pre-mature (Ex: C-39 and Ex: C-40).

9.4 The record shows that by 28.09.2009 the petitioner had handed over land admeasuring 42.180 km. out of a total road length of 49.305 km to the respondent. By this time nearly 30 months elapsed which, once again, propelled the respondent to write to the I.C. to calculate the 'X' factor. The period of delay according to respondent at this stage was equivalent to 906 days.

9.5 Pertinently, the I.C. on 18.08.2010 (Ex: C-49) wrote to the petitioner that it should furnish the necessary information so as to enable it to calculate the 'X'-factor as on 31.07.2010.

9.6 On 25.10.2010, the respondent wrote to the I.C. that it should forward to the petitioner its recommendation concerning delay in execution of the contract for a period equivalent to 1299 days (Ex: C-11), on account of reasons which, according to it, fell within the ambit of clause 6.2 (c)(i) and (ii).

9.7 The record shows, an aspect that I have already noticed above, that on 06.12.2010, pursuant to the execution of the S.A. the petitioner released amounts towards the first and second annuity.

9.8 It appears that the matter did not end there, since there were delays in handing over the land by the petitioner even after the execution of the S.A. which hampered the completion of balance works by the respondent. These aspects came to the fore upon perusal of letters dated 28.03.2011, 28.10.2012 and 26.03.2013. These communications were addressed by the respondent to the I.C. (Ex: C-13, C-16 and C-17 respectively). Given this background, on 27.07.2013, the respondent wrote to the petitioner demanding bonus annuity under the provisions of clause 6.2 (c)(i)(ii), (d) and (e) (Ex: C-18).

9.9 In response thereto, the I.C. vide letter dated 31.07.2013 (Ex: C-19) rejected the respondent's claim for bonus annuity. The I.C. rejected the petitioner's claim, apparently, on two grounds. First, that the execution of the S.A. did not change the scheduled date provided in the C.A. for completion of the contract which was 28.09.2009 and since, the completion was delayed beyond that date, the petitioner was not entitled to annuity. In this behalf, it was noted by the I.C. that the provisional completion certificate for the length of 45.220 kms was issued on 31.07.2010 only to enable release of annuity. Second, with the execution of the S.A., the respondent had, in any event, given up all its claims which included the claim for bonus annuity.

10. The respondent being aggrieved triggered the dispute resolution clause provided in the C.A. and since, an amicable resolution of the dispute could not take place, it conveyed its request to have the dispute adjudicated

via the arbitration route. It is in this backdrop that the impugned award came to be passed.

Submissions of counsel:

11. In support of the petitioner's case, arguments were addressed by Mr. Sudhir Nandrajog, senior counsel instructed by Mr. Shailendra Pratap, while on behalf of the respondent, the submissions were advanced by Mr. Arun Kathpalia, senior counsel instructed by Mr. Angad Mehta.

11.1 Briefly, the submissions advanced on behalf of the petitioner can be broadly paraphrased as follows: -

- i) Firstly, the Arbitral Tribunal had committed a grave error in accepting the claim for bonus annuity made by the respondent by ignoring the role of the I.C. under the C.A. The I.C. was vested with the authority to determine the 'X' factor. The Arbitral Tribunal, however, accepted the period of delay calculated by the respondent and, thereby granted, without due application of mind, the entire amount claimed by the respondent towards bonus annuity.
- ii) Second, in another case involving the petitioner and an entity going by the name: Gayatri Jhansi Roadways Ltd., the Arbitral Tribunal, in an identical situation, had left the 'X' factor to be determined by the I.C. This award was passed by the said Arbitral Tribunal on 31.01.2018. Based on the direction contained in the award, the I.C. vide its communication dated 19.03.2018, awarded an amount of Rs.49,97,79,342/- to the claimant in that case against a claim of Rs.80 crores.

(ii) (a) It was also sought to be brought to the notice of this Court that one of the Arbitrators was common to both Arbitral Tribunals which passed the award dated 31.01.2018 and that which passed the impugned award. In addition thereto, my attention was drawn to the fact that the award dated 31.01.2018 was not a unanimous award.

iii) Third, the Arbitral Tribunal had not appreciated the fact that the scheduled completion date which was fixed as 28.09.2009, had not been changed with the execution of the S.A. Since, the scheduled completion date remained the same, the respondent as per the formula given in Clause 6.2 would not be entitled to bonus annuity.

iv) Fourth, the Arbitral Tribunal failed to comprehend the scope and ambit of Clause 6.2(e) and (f). These clauses when read conjointly would show that the respondent was entitled to bonus annuity only if it met the following two criteria: First, that it attained Commercial Operation Date (COD). Second, the COD was achieved prior to the first annuity payment date. In this case, admittedly, COD was achieved on 31.07.2010 while the first annuity as per Schedule G of the C.A. was payable on 27.03.2010.

(v) Fifth, the Arbitral Tribunal had committed an error in ignoring the contents of letter dated 30.11.2010, written by none other than the Chairperson of the respondent wherein the stand taken on behalf of the respondent was that it would make no claim which arose on account of default of the petitioner. In this behalf, reference was made to Clause 6.2(c)(vi) of the C.A.

(vi) Sixth, the Arbitral Tribunal failed to notice that with the execution of the S.A., the respondent had given up all its claims arising out of delay attributable to the petitioner. Therefore, given this stand, the provision of the Indian Contract Act, 1872 (in short ‘Contract Act’) which was applicable was Section 62 and not Section 63. The S.A. brought about a “modification” of the C.A. Therefore, the Arbitral Tribunal’s finding that there was no waiver, an aspect which stands encapsulated in Section 63 of the Contract Act, was erroneous.

(vii) Seventh, the Arbitral Tribunal failed to notice that the Chairperson of the respondent had, in fact, reprimanded the respondent’s team leader for issuing letter dated 25.11.2010. In other words, the Arbitral Tribunal ought to have noticed the conduct of the respondent post the execution of the S.A. In this behalf, emphasis was laid on the correspondence which was exchanged between the parties after the execution of the S.A. (i.e. between November, 2010 and 2013) to demonstrate that their tone and tenor was materially different from those which were exchanged between them during the period commencing from 27.11.2008 and ending on 25.10.2010. In other words, what was sought to be put forth was that the conduct of the parties post execution of the S.A. According to the petitioner, a perusal of the correspondence exchanged between November, 2010 and 2013 would show that the respondent had given up all claims including its claim for bonus annuity. Reliance in this behalf was placed on the judgment of the Supreme Court in *Godhra Electricity Company Ltd. & Anr. vs. State of Gujarat & Anr.*, (1975) 1 SCC 199.

12. As against this, Mr. Kathpalia relied upon the award which contained two concurrent views taken by the members of the Arbitral Tribunal. It was the contention of the learned counsel that the execution of the project was delayed on account of faults attributable to the petitioner. The fact that the project was delayed due to faults attributable to the petitioner was demonstrable, according to Mr. Kathpalia, by one singular piece of evidence which was the S.A. It was, therefore, the contention of the learned counsel that once this fact is borne in mind, then, the only other aspect which had to be seen by the Arbitral Tribunal was that, as to whether the execution of the S.A. barred the respondent from claiming dues which arose out of the terms of the C.A.

12.1 It was Mr. Kathpalia's contention that bonus annuity was a claim which arose out of the provisions of the C.A. and that the execution of the S.A. did not efface the claim of the petitioner in that behalf. In other words, the stand taken was, what was given up by the respondent once it signed and sealed the S.A. was the claims for damages, *etcetera* which the respondent would have been able to lodge had it not entered into an S.A. with the petitioner.

12.2 Mr. Kathpalia submitted that it is because the petitioner took this stand that the Arbitral Tribunal examined the issue as to whether the respondent had waived its rights to claim bonus annuity in terms of Clause 6.2 of the C.A. Mr. Kathpalia contended that the petitioner is attempting to set up an entirely new case inasmuch as it now claims that the C.A. was "modified" with the execution of the S.A. and, therefore, the Arbitral Tribunal was required to look at the scope and ambit of the provision of Section 62 of the Contract Act as against the provision relating to waiver i.e. Section 63.

12.3 For this purpose, the learned counsel drew my attention to the award to demonstrate that the petitioner had, in fact, set up a case of waiver contrary to what is sought to be portrayed before this Court.

12.4 It was Mr. Kathpalia's submission since the period of delay was far in excess of 180 days which is the time span between two annuities as per the formula incorporated in Clause 6.2 of the C.A., the respondent was clearly entitled to bonus annuity. Learned counsel submitted that in order to oust the respondent's claim for payment of bonus annuity one would have to come to a definitive conclusion that such a claim had been given up by the respondent. In support of its stand, Mr. Kathpalia relied on the judgment of a Single Judge of this Court dated 25.05.2018, passed in O.M.P. (COMM.) No.239/2018.

Issues:

13. I have heard learned counsel for the parties and perused the record based on the stand taken on behalf of the parties, in my view, the following issues arise for consideration: -

- i) Whether the Arbitral Tribunal committed an error and acted contrary to the provisions of the 1996 Act by awarding the claim made by the respondent in respect of bonus annuity without referring the matter to the I.C. for determination of 'X' factor?
- ii) Whether the Arbitral Tribunal erred in failing to appreciate the stand of the petitioner that with the execution of the S.A. the C.A. stood modified?

- iii) Did the petitioner actually set up a stand that the C.A. was modified and not that there was a waiver of all claims by the respondent with the execution of the S.A.?
- iv) Did the Arbitral Tribunal fail to notice and, thereby, appreciate the contents of the letter dated 30.11.2010 issued by the Chairperson of the respondent, whereby, according to the petitioner, the respondent had given all claims which arose on account of defaults committed by the petitioner as envisaged under Clause 6.2(c)(vi) of the C.A.?
- v) Whether the Arbitral Tribunal failed to appreciate the scope and ambit of Clause 6.2(e) and (f) of the C.A. which envisaged payment of bonus annuity to the respondent, if the COD was achieved prior to the first annuity payment date?

14. Before I proceed to answer the issues culled out above, I would want to advert to what has emerged from the record qua which there can be no dispute: -

- i) The parties had entered into a C.A. dated 29.09.2006. The commencement date of the agreement was 28.03.2007.
- ii) The tenure of the agreement was 30 months and, therefore, the Scheduled Project Completion Date was pegged at 28.09.2009.
- iii) Because there were delays in handing over Right of Way (ROW) by the petitioner, the S.A., to which I have made a reference hereinabove, was executed between the parties on 01.11.2010. The delay in handing over ROW was on account of factors such as delay

in acquisition of land, transfer of forest land from the concerned Ministry, and shifting of high tension electrical lines.

iv) As a result of the aforementioned factors ROW was made available over a period of time, *albeit*, in parcels; an aspect which was, admittedly, encapsulated in the S.A. in the following manner: -

<i>“Within 12 Months</i>	<i>24 Months</i>	<i>30 Months *</i>	<i>36 Months</i>	<i>39 Months</i>
<i>10.638 km</i>	<i>11.203 km</i>	<i>42.180 km</i>	<i>46.220 km</i>	<i>47.955 km</i>

**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 45.220 km stretch and Provisional Completion Certificate was issued by independent Consultant on 31.07.2010. The Concessionaire on 31st August, 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 31st July, 2010, the status of work under project highway is:

<i>Status of Work</i>	<i>Length (Km.)</i>
<i>Work completed</i>	<i>45.220 km</i>
<i>Work in progress in land handed over after March 2010</i>	<i>2.735 km.</i>
<i>Land yet to be handed over to Concessionaire by NHAI”</i>	<i>1.350 km</i>

(emphasis is mine)

(v) As seen above, by 31.07.2010, the respondent had completed out of a total road length of 49.305 km works on the road length measuring 45.220 km. Therefore, what remained to be completed by the respondent was the last bit which admeasured 4.085 km. Given this context, on 31.07.2010, the I.C. issued a provisional completion certificate to the respondent. Importantly, on 31.08.2010 static load test qua all completed structures and safety review of the project was also concluded. The tests carried out revealed that the project upto that stage was in conformity with the relevant norms.

15. The record reveals, and qua which the petitioner cannot quibble, that even as on 31.07.2010 it had not handed over land to the respondent admeasuring 1.350 km.

16. It is in the background of the aforesaid circumstances that the parties executed the S.A., as indicated above, on 01.11.2010.

17. On that date, as alluded to above, the respondent was required to complete the balance work qua road length equivalent to 4.085 km. For this purpose the respondent was given 6 months time, which was to commence from the day when encumbrance free land was made available to the respondent.

18. Therefore, as found by the Arbitral Tribunal there can be no dispute that the delay in completion of the project was entirely attributable to the petitioner. The petitioner in order to wriggle out of, as it appears, a difficult situation which included lodgment of claims by the respondent in respect of damages, penalties, costs, losses, etc. decided to embark upon an act of self preservation by taking a decision to extend the time allocated for completion

balance works in consideration of the respondent waving its right to make such like claims. Furthermore, the petitioner agreed that not only will it not exercise the right of “negative change of scope of work” qua the respondent but it would also *not* withhold or reduce the annuity payment as provided for in the C.A., if it was otherwise admissible. Given this set of facts one needs to answer, as indicated above, the issues which, according to me, arise in the instant matter.

Reasons:

Issue No.(i)

19. In order to render an answer to issue No. (i), one would have to look at the scope of Clause 6.2 of the C.A. For the sake of convenience, the same is set forth hereafter: -

“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 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 38.2

(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.”

20. A close perusal of the clause would show that the respondent was entitled to claim bonus annuity only if there was early completion of the project. On the other hand, in case there was delay in completion of the project which was attributable to the respondent it would have to incur reduction in annuity. Furthermore, as is evident upon perusal of sub-clause (b) of Clause 6.2 the annuity period i.e. the period between two annuities, was fixed as 180 calendar days. Therefore, in order to ascertain whether a concessionaire, in this case the respondent, would be entitled to bonus annuity or would have to suffer a reduction in annuity, the formula provided in sub-clause (c) of Clause 6.2 had to be applied. Undoubtedly, the formula required calculation of the ‘X’ factor which was nothing but the aggregate number of days of delay caused on account of anyone or more of the circumstances provided in Clause 6.2 sub-clause (c)(i) to (vi). The fact that the respondent had repeatedly written to the I.C. both before the execution of the S.A. and thereafter on the aspect pertaining to delay and the same being attributable to the petitioner is discernible upon perusal of the following letters: -

(i) Letter dated 27.11.2008 (Ex: C-4); (ii) Letter dated 28.03.2009 (Ex: C-6); (iii) Letter dated 26.03.2010 (Ex: C-9); (iv) Letter dated 25.10.2010 (Ex: C-11); (v) Letter dated 28.03.2011 (Ex: C-13); (vi) Letter dated 28.10.2012 (Ex: C-16); and (vii) Letter dated 26.03.2013 (Ex: C-17).

21. What is required to be noticed is that in the earlier stages of the execution of the project, the I.C. had taken the stance that the respondent’s

request that it should make recommendation *vis-à-vis* the 'X' factor was turned down on the ground that it was premature and that as such an exercise could be undertaken only when the project site was fully handed over to the prespondent.

21.1 This aspect of the matter emerges upon perusal of the I.C.'s communication dated 12.03.2009 (Ex: C-37).

21.2 However, after the issuance of the Provisional Completion Certificate on 31.07.2010, the I.C. vide its communication dated 18.08.2010 wrote to the petitioner that it should provide the necessary information for enabling it to calculate the 'X' factor.

21.3 The respondent vide letter dated 25.10.2010 (Ex: C-11) explicitly indicated that the delay attributable to the petitioner as on that date was 1299 days and, therefore, the I.C. should recommend for approval of the petitioner the 'X' factor equivalent to those many days.

21.4 Therefore, given these circumstances there can be no doubt that when the S.A. was executed the parties were aware of the fact that the 'X' factor which obtained in the matter was 1299 days. The fact that the petitioner had delayed handing over ROW to the respondent was therefore, clearly, recorded in the S.A. Thus, having regard to the aforesaid circumstances, in my view, there was no occasion for the Arbitral Tribunal to remit the matter to the I.C. for determination of the 'X' factor. It is also for this reason that no arguments whatsoever, it appears were addressed on this score before the Arbitral Tribunal. This is demonstrable from the fact that no ground is taken in the Section 34 petition to the effect that this aspect though put forth was not dealt with by the Arbitral Tribunal. Besides this, what

has to be borne in mind is that once the period of delay is more than 180 days, which undoubtedly was the case when the Provisional Completion Certificate was issued, the Contractor, in this case the respondent, would be entitled to payment of bonus annuity, which in terms of Clause 6.2(d) could not exceed one annuity payment. Therefore, in my opinion, issue no.(i) would have to be decided in favour of the respondent and against the petitioner.

Issue No.(ii), (iii) & (iv)

22. Since these issues are interrelated, I intend to take them up together. The argument advanced on behalf of the petitioner that it had, in fact, set up a case that the C.A. with the execution of the S.A. was modified (by which I would gather that the petitioner wished to submit that the C.A. stood novated) and that, their case was not that the respondent waived its claim pursuant to the execution of the S.A. is, in my view, a submission which is completely contrary to the record. The reason that I say so is on account of the fact that the Arbitral Tribunal in the award has copiously recorded the submissions advanced by learned counsel for the petitioner before it on the aspect of the waiver. As a matter of fact, judgments were cited by the learned counsel for the petitioner in support of this very submission. A bare perusal of paragraph 32 of the decision rendered by one of the Arbitrators and paragraph 14 to 18 of the decision rendered by the other Arbitrator would bear this fact out. I may also in this behalf advert to the following clause of the S.A.:-

“...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 indemnifies 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...”

(emphasis is mine)

23. A perusal of aforementioned clause would establish that the arguments advanced before the Arbitral Tribunal that the respondent by executing the S.A. had waived its rights to raise any claims arising out of C.A. emanated from what was provided in the S.A. Therefore, the submission that the Arbitral Tribunal failed to appreciate the petitioner's submission, which was, that it was contending that there had been a modification (i.e. novation) of the C.A., to my mind, is an afterthought. Therefore, this contention cannot be accepted.

24. As regards the other issue, which is the purported failure of the Arbitral Tribunal to appreciate the contents of letter dated 30.11.2010, one can only say that all that the chairperson of the respondent said in his letter of 30.11.2010 was that the respondent would abide by the terms of the S.A. In other words, the Chairperson had only indicated that it would not raise any claims in the nature of damages, penalties and/or losses which, perhaps, the respondent could have otherwise lodged on account of delay in handing over the project site by the petitioner. Undoubtedly, had the parties not entered into an S.A. the respondent would have perhaps lodged claims for

idling, for loss of profit, overheads, etc. The possibility of lodging such claims was obviously foreclosed in view of what had been agreed to between the parties. As rightly noted by the Arbitral Tribunal, the S.A., on the other hand, provided that the petitioner would not only not exercise the right of negative change of scope of work qua the respondent but would also not withhold or reduce annuity payment as envisaged under the C.A. Therefore, the only principal issue which the Arbitral Tribunal had to adjudicate upon was did the execution of the S.A. bar the respondent from claiming bonus annuity. I may in this behalf quote the extract of the letter dated 30.11.2010 which is found incorporated in the petitioner's letter dated 12.12.2018, whereby it communicated to the respondent that its claim for annuity bonus was not maintainable: -

“...We very much regret in admitting that the Letter No. GLRL/JHANSI/TL/2009-10/1202/1042 dated 25.11.2010 written by our Team Leader (Authorized Signatory) is without any approval or authorization from the Management.

With this letter we request you to treat the Letter No. GLRL/JHANSI/TL/2009-10/1202/1042 dated 25.11.2010 as null and void. We assure you that we will be governed by the provisions of the Supplementary Agreement we abide by the provision of the Supplementary Agreement and reiterate the following content of the Supplementary Agreement. The Concessionaire indemnifies and absolves NHAI from all the damages, penalties, claim, 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.

Further we undertake that in future any claims related to delay on account of landing over of land by NHAI shall not be raised

We take this opportunity to inform you that we have relieved the services of Mr. G.C.Taneja, Team Leader with immediate effect and in lieu thereof Mr. Sanjay Kumar Singh would be our new Authorized Signatory.

We regret for the inconvenience caused due to the deplorable act of our Team Leader.”

(emphasis is mine)

25. A bare perusal of the same would give credence to the fact that the Chairperson of the respondent had only agreed to abide by the terms of the S.A. and not give up its contractual claims pertaining to bonus annuity. Likewise, the following extract from the S.A.(an aspect which I have adverted to above as well) would show that the petitioner had agreed to pay annuity which would include bonus annuity if it was otherwise annuity payable.

“...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...”

25.1 Furthermore, it is pertinent to note that in the S.A., there is no reference to Clause 6.2(c) “NHAI Event of Default” finds mention in sub-clause (vi) of Clause 6.2(c). A perusal of Clause 6.2(c) would show that sub-clause (vi) along with the preceding sub-clauses i.e., (i) to (v), set forth possible circumstances which could emerge as the reason for delay and the consequent trigger for ascertaining the ‘X’ factor. Since the respondent did not waive its right to bonus annuity as conferred under Clause 6.2(c), the reference to “NHAI event of Default”, in my view, is misconceived.

26. In view of the foregoing, I am of the opinion that issue Nos. (ii) to (iv) have to be found in favour of respondent and against the petitioner.

Issue No.(v)

27. The arguments advanced on behalf of the petitioner in the context of sub-clause (e) and (f) of Clause 6.2¹ in a nutshell are as follows:-

(i) The respondent would be eligible for payment of bonus annuity only if the COD occurred prior to the date of payment of first annuity. The dates of payment of annuity are provided in Schedule G. Admittedly, the first date on which annuity was payable under Schedule G was fixed as 27.03.2010.

(ii) The undeniable fact is that the COD was achieved on 31.07.2010. Furthermore, the record would shows that invoices for payment of the first two annuities were raised by the respondent on 19.08.2010 and 26.08.2010 and these were paid on 06.12.2010.

28. While the aforesaid facts are not in dispute, the submission made on behalf of the petitioner is untenable. The argument of the petitioner would, perhaps, have had some merit if sub-clause (c)(i) of Clause 6.2 was not in existence. This clause when compared to sub-clause (c)(ii) of Clause 6.2 would show that they are different. Sub-clause (c)(i) of Clause 6.2 provides for payment or reduction in annuity (as the case may be) where COD is

¹ “6.2 a)
b)
c)
d)
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.*”

achieved prior to first annuity payment date. On the other hand sub-clause (c)(ii) of Clause 6.2 provides for payment of bonus or reduction in the payment of annuity (as the case may be) where COD is achieved between two annuity payment dates. The formula for the two eventualities is different.

28.1 Since, the circumstances as obtaining in the instant case were different from those provided in Clause 6.2(c)(i) what applied to the respondent was the formula provided in sub-clause (c)(ii) of Clause 6.2. Thus, if the said formula is applied to the dates and events set out hereinabove, it would establish that not only was the bonus annuity payable to the respondent but that it had been correctly determined.

28.2 Therefore, the argument that since the COD in the respondent's case falls after the date of payment of the first annuity, which was, 27.03.2010, but before the date of the second annuity, which was, 26.09.2010 and, therefore, it could not be paid bonus annuity is, clearly, untenable.

28.3 This argument, it appears, is premised on an erroneous belief that the Scheduled Project Completion Date did not undergo a change. A bare perusal of Clause 6.2 (c)(ii) would show that payment of bonus annuity or reduction thereof is not dependent on the Scheduled Project Completion Date. Thus, this issue would also have to be decided in favour of the respondent and against the petitioner.

29. Before I bring this judgment to a close, as noted by the Arbitral Tribunal and I have no different view in the matter, the judgment of the Supreme Court in *Godhra Electricity* does not further the cause of the petitioner. The ratio of the judgment of the Supreme Court in *Godhra*

Electricity Co. Ltd. is simply this, which is, that when there is latent ambiguity in the agreement obtaining between the parties recourse can be taken to extrinsic evidence, in the shape of interpretation, put on such terms which has concurrence of both parties.

29.1 To my mind, first of all there is no latent ambiguity in the S.A. and secondly, even if it is assumed that there was some ambiguity, there was no “interpreting statement” given on which both parties agreed which would shed light on what the provision in the S.A. concerning waiver stood for. The argument advanced on behalf of the petitioner is based primarily on the correspondence which was exchanged between the parties post execution of the S.A. and the contents of the letter dated 30.11.2010.

29.2 A close look at the correspondence of this period and in particular, letter dated 30.11.2010 would show that the respondent never veered from its stand that what would apply to it were terms of the S.A.

29.3 In other words all that the respondent had given up, was, the claims on account of damages, penalties, loss of profit which possibly could have arisen on a consequences of the delay attributable to the petitioner, and not, the legitimate claims which flowed and/or arose out of the provisions of the C.A. Bonus annuity was one of such claim which was clearly embedded in sub-clause (c) of Clause 6.2 of the C.A.

30. I may also indicate, while the judgment qua the instant petition stood reserved, a Division Bench of this Court vide judgment dated 01.08.2018, passed in FAO (Comm.) No.161/2018 has in fact sustained the judgment of the Single Judge dated 25.05.2018, passed in O.M.P. (Comm.) No.239/2018, on which, reliance was placed on behalf of the petitioner. I

am making reference to this aspect only for the sake of good order and record as this fact was brought to my notice. As indicated above, in this case, the Arbitral Tribunal did not feel the need of referring the matter to the I.C. for determination of 'X' factor given the circumstance which arose in this case.

31. Thus, for the foregoing reasons, I find no merit in the petition. The petition is, accordingly, dismissed. Costs will follow the result.

RAJIV SHAKDHER
(JUDGE)

OCTOBER 10, 2018
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