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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO(OS) (COMM) 161/2018**

Date of decision: 1st August, 2018

NATIONAL HIGHWAY AUTHORITY OF INDIA Appellant
Through Mr. Sudhir Nandrajog, Sr. Advocate
with Mr. Shailendra Pratap Singh, Mr. Alok Singh,
Mr. Nilendra Pratap Singh, Ms. Chandrika Prashad
Mishra and Ms. Seema Singh, Advocates.

Versus

M/S GAYATRI JHANSI ROADWAYS LTD Respondent
Through Mr. Arun Kathpalia, Sr. Advocate
with Mr. Samaksh Goyal, Mr. Ram Babu, Mr.
Kaushik Laik and Ms. Bani Brar, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL)

National Highway Authority of India in this intra-Court appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (A & C Act, for short) read with Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 impugns order dated 25th May, 2018, whereby objections filed by the appellant under Section 34 of the A & C Act, vide OMP (COMM) No.239/2018, have been dismissed.

2. The primary issue raised and decided by Arbitral Tribunal was relating to interpretation and effect of recital clauses of the supplementary agreement dated 1st November, 2010, between, National Highway Authority of India ("appellant") and M/s. Gayatri Jhansi Roadways Limited ("respondent/ concessionaire").

3. For sake of convenience and completeness, we reproduce the supplementary agreement, which reads as under:-

“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 C O.M.P. (COMM) 239/2018 Page 14 of 21 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 inconformity 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/-”

4. The supplementary agreement records that respondent/concessionaire had been awarded work for the design, construction, development, finance, operation and maintenance of Km 0.000 Km to Km 49.700 covering 49.700 Km of National Highway No.25/26 in Uttar Pradesh on a Build, Operate and Transfer ("BOT") (Annuity) basis. The agreement also records candid admission of the appellant that there was default and delay in handing over of land to the respondent/concessionaire, as a result of which work could not be completed by the scheduled completion date i.e.

28th September, 2009. The agreement mentioned the work completed by the respondent/concessionaire as on 11th June, 2010, and that the balance work on 13.911 Km stretch of the project highway would be completed within 10 months from the day encumbrance free land was made available to respondent/ concessionaire.

5. Supplementary agreement had three relevant clauses. Paragraph two states that respondent/ concessionaire had indemnified and absolved the appellant from all damages, penalties, claims, costs expenses, or losses or any adverse action or impact by direct or indirect consequences or any dues due to delay in meeting the obligations in handing over the land or clearance or any other ground whatsoever. However, paragraph four records that appellant would not exercise negative change of scope to the concessionaire and would not withhold or reduce annuity payment as construed in the concession agreement dated 29th September, 2006, if it was otherwise admissible. First paragraph in supplementary agreement states that all provisions of the main concession agreement would be applicable to the supplementary agreement, except to the extent waived by the parties.

6. Annuity payment was stipulated and payable to the respondent/concessionaire in terms of Article VI of the concessionaire agreement, the relevant portion of which of reads as under:-

“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."

7. Majority award by Mr. Justice K.S.P. Radhakrishnan (Retd.) and Mr. Justice B.P. Singh (Retd.) considered the question and issue of waiver of bonus annuity with reference to the terms of the supplementary agreement. Arbitral Tribunal for interpreting the clauses, had referred to paragraph 44.2 concessionaire agreement, under the heading "waiver", to hold that waiver of any provision or obligation under the concessionaire agreement was not to operate or to be construed as waiver of other provisions or obligations under the agreement. Interpreting clauses/paragraphs two and four of the supplementary agreement it was held that respondent/concessionaire had not waived their claim for bonus annuity under clause 6.2 (c)(ii)(d). The appellant had not been absolved of their obligation to pay bonus annuity.

8. Learned single Judge referring to the supplementary agreement, bonus annuity clause of the concessionaire agreement and interpretation by the majority in their Award, has observed:-

"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."

9. We do not see any reason or ground to interfere with the said findings upholding the Majority Award and rejecting the challenge to the interpretation under Section 34 of the A & C Act. Interpretation placed by the Majority in their Award is clear, sound and well reasoned. It cannot be overturned as pre-se erroneous and wrong, to justify interference under Section 34/ 37 of the A & C Act.

10. Arbitral Tribunal had also examined legal effect of the letter dated 25th November, 2010 sent by the team leader, which was subsequently withdrawn by the respondent/ concessionaire by letter dated 30th November, 2010. Contention of the appellant that respondent/ concessionaire had withdrawn their claim or accepted that annuity bonus was not payable in view of the supplementary agreement was rejected for two reasons. Letter dated 30th November, 2010 was written post the supplementary agreement and would not be of consequence in interpreting the supplementary agreement. More importantly, reference was made to the contents of letter dated 30th November, 2010, in which respondent/ concessionaire had agreed that they would abide by provisions of the supplementary agreement, which had absolved appellant from all the damages, penalties, claims, costs expenses etc.

11. Learned single Judge in paragraph 36 of the impugned order, records and holds that there is a conceptual difference between a claim for damages, penalty, additional costs etc. and entitlement in the form of annuity bonus, which was in the nature of incentive and a part of cost or consideration payable. The appellant does not dispute that they were liable and have paid annuity in terms of clause 6.1. The dispute raised by them is only with regard to bonus payable in terms of clause 6.2. Bonus or reduction in annuity was to be added or was deductible from the annuity. Bonus annuity was not in the nature of penalty or damages payable by the appellant. Bonus annuity was payable for due compliance and timely completion of work.

12. Lastly, counsel for appellant drew our attention to paragraph 38 of the impugned order and the directions given in the Majority Award on computation of bonus annuity. This computation has to be carried out by an independent consultant within three months and interest @ 9% per annum, would be payable from the date on which it was due as per the contract, till the date of payment or realization. Counsel for appellant had submitted that observations made in paragraph 38 of the impugned order may be read as overriding the findings given in paragraph (b) of the Majority award, which had left computation to be determined by an independent consultant. Counsel for respondent/ concessionaire states that paragraph 38 has not

modified or amended the Majority Award including the directions given in paragraph (b). Independent consultant will comply with the directions given in paragraph (b). It is stated that the independent consultant has already made his computation. In view of the statement by counsel for respondent/concessionaire, we need not examine the submission except take on record the statement made by the respondent/concessionaire and observe that they would be bound.

13. Accordingly, we do not find any reason or ground to interfere with the impugned order. The appeal is dismissed, without any order as to costs.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

AUGUST 01, 2018
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