

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 16.07.2019

+ **W.P.(C) 1789/2019 and CM Nos.8372/2019, 9353/2019, 13080/2019, 13085/2019 & 16813/2019**

SHELADIA ASSOCIATES

..... Petitioner

Versus

UNION OF INDIA AND ANR.

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Parag Tripathi, Senior Advocate with Mr Chirag M. Shroff, Ms Sanjana Nangia, Mr Lalitaksh Joshi and Ms Natasha Vij, Advocates.

For the Respondents : Mr Sandeep Sethi, Senior Advocate with Ms Madhu Sweta and Ms Kanika Tandon, Advocates.
Mr Abhay Prakash Sahay, CGSC for UOI.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. The petitioner has filed the present petition impugning a Circular (hereafter 'the impugned order') dated 06.02.2019 issued by respondent no.2 (National Highways Authority of India – hereafter 'NHAI') debarring the petitioner from participating in any work connected with NHAI for a period of one year.

2. The petitioner formed a joint venture with another entity (Aarvee Associates) for the purpose of acting as a Consultant for NHAI projects. The Joint venture so formed entered into an agreement with NHAI for the purpose of carrying out the contract for Consultant's services in respect of "Four Laning of Beawar - Pali – Pindwara section of NH-14 (From km.0.000 to km.244.120) in the State of Rajasthan under NHDP Phase-III on Design, Build, Finance, Operate and Transfer (Toll) Basis" (hereafter "the Project").

3. The petitioner assails the impugned order, essentially, on three grounds. First, it is contended that the impugned order is in violation of principles of natural justice inasmuch as no show cause notice was issued to the petitioner specifically stating that NHAI proposed to blacklist the petitioner. Second, the impugned order is arbitrary and discriminatory inasmuch as whereas the petitioner has been debarred on account of substandard construction of the Highway in question, no such punitive action has been taken against the Concessionaire despite the fact that the allegations of poor performance are primarily attributable to the Concessionaire. And third, that the petitioner disputes the proportionality of the punitive action imposed on it for the reason that only liquidated damages has been imposed against the Concessionaire for poor performance whereas the petitioner has been debarred for a period of one year.

Factual Background

4. On 22.06.2011, NHAI entered into a Concession Agreement awarding the work “*Four Laning of Beawar - Pali – Pindwara section of NH-14 (From km. 0.000 to km. 244.120) in the State of Rajasthan under NHDP Phase-III on Design, Build, Finance, Operate and Transfer (Toll) Basis*” (hereafter ‘the Concession Agreement’) to M/s L&T BPP Tollway Pvt. Ltd (hereafter ‘the Concessionaire’).

5. In terms of the aforesaid the Concession Agreement, the appointed date for the Project was 19.12.2011 and the completion date for Four-Laning was scheduled as 15.06.2014. Further, the first extension of time (EOT) was given on 10.03.2015 thereby extending the period upto 30.06.2015. The Concessionaire agreed to pay a sum of ₹251.01 Crores as premium for the first year and increase the said premium every year at the rate of 5%.

6. On 09.01.2012, the petitioner entered into a joint-venture (JV) with one Aarvee Associates (hereafter “Aarvee”), for the purpose of providing services of an Independent Engineer, in respect of the Project to NHAI.

7. Thereafter, on the same day, that is 09.01.2012, NHAI and the said joint venture (JV) entered into a contract for “Independent Engineer for Four Laning of Beawar - Pali – Pindwara section of NH-14 (From km. 0.000 to km. 244.120) in the State of Rajasthan under NHDP Phase-III on Design, Build, Finance, Operate and Transfer (Toll) Basis” (hereafter ‘the Contract’). The original period of the Contract between the petitioner and NHAI for providing the said services was

from 09.01.2012 to 08.01.2015 (thirty-six months) and it included construction period of thirty months and development/O&M period of six months, that is, upto 08.01.2015.

8. Thereafter, NHAI sent two letters dated 08.05.2015 and 09.06.2015 informing both the partners of the JV that the Independent Engineers (IEs) were authorised to issue “Provisional Completion Certificate” (PCC) without having to refer to NHAI. For this purpose, NHAI also annexed a checklist-based guidelines along with the aforesaid letters which were to be followed by the IEs for issue of PCC. Further, it was also stated in the aforesaid letters that IEs, by virtue of being the authority to issue PCC, would be entirely responsible for compliance of the provisions of the Concession Agreement before the issuing the PCC, as it is linked with the start of “tolling for the project”.

9. Both the constituted members of the JV – the petitioner and Aarvee – inspected the Project and agreed upon certain works to be completed before a PCC could be issued. Accordingly, 09.05.2015, the IE issued a letter stating a list of major works yet to be completed by the Concessionaire prior to COD. Thereafter, another letter dated 20.05.2012 was sent by the IE reiterating the aforesaid position.

10. In the meanwhile, on 17.05.2015, a Project Review Meeting was also held by the Member (F) of NHAI at RO, Jaipur wherein the IW was directed to get the remaining work completed before the grant of PCC.

11. The petitioner submits that it held a joint inspection of the Project highway with the Concessionaire and listed its observations for compliance prior to the issuance of a PCC. It is further submitted that by the first week of June, 2015 the checklist as communicated by NHAI in the aforesaid letters dated 08.05.2015 and 09.06.2015 stood complied with inasmuch as the main carriageway was concerned.

12. Thereafter, on 11.06.2015, the IE issued the PCC and accordingly, the Project Highway was placed on commercial operation from that date. On 12.06.2015, NHAI received a letter dated 12.06.2015 from Aarvee, wherein it was alleged that the aforesaid PCC was issued by the petitioner without consultation with them. On 16.06.2015, the petitioner sent a letter dated to Aarvee clarifying that it had kept Aarvee informed about the progress on the Project.

13. The petitioner submits that in the meantime, the Regional Officer, NHAI Jaipur requested the petitioner to continue the services till another consultant is appointed by NHAI.

14. Thereafter, the petitioner received a letter dated 12.06.2015 from NHAI wherein it was stated that the PCC had been issued by the petitioner “*without addressing the revised recommendations of Safety Consultant and observations of the CGM(T) cum RO, Jaipur*”, and thus the petitioner was called upon to submit a comprehensive factual report on the following:

- (i) Compliance report on the works to be attended before issue of Provisional Completion Certificate as

Intimated by Independent Engineer to the
Concessionaire vide letter No.543
8/SAIHYD/L&TIDPL/BPP/2015-16/2 dated
25.05.2015.

(ii) Compliance of the observations of Road Safety
Audit report submitted by Safety Consultant and final
report from Safety Consultant.

(iii) Compliance of the observations made during the
site visit of the COM (T) / RO, Jaipur.

15. The term of the Contract was subsequently extended upto
30.06.2015 and further upto 30.09.2015 by the competent authority.

16. The petitioner submits that due to unprecedented rains in the
month of July-August, 2015 substantial damage was caused to the
Project Highway.

17. On 01.09.2015, the petitioner sent a letter to NHAI informing that
it would not be able to continue as IE beyond 30.09.2015.

18. On 11.09.2015, Aarvee sent a letter to NHAI again objecting the
issuance of the PCC by the petitioner without consulting them. On
18.09.2015, NHAI received another letter from Aarvee wherein Aarvee
indicated certain irregularities on part of the petitioner.

19. Thereafter, on 02.10.2015, an inspection of the Project Highway
was conducted by NHAI along with the representatives of IE and the
Concessionaire, wherein several defects were found. Consequently,
NHAI wrote a letter to the Concessionaire on 13.10.2015 enumerating
certain defects in the Project. The letter also recorded that the
Concessionaire had outsourced the work to petty contractors and it had

failed to supervise the work effectively. In this light, the Concessionaire was called upon to remedy the defects immediately. The petitioner submits that despite the aforesaid deficiencies, no action has been taken against the Concessionaire.

20. On 13.10.2015, the petitioner sent a letter to NHAI, *inter alia*, denying the aforesaid and further stating that the PCC was not issued in hasty manner as alleged.

21. Thereafter, a show cause notice dated 27.11.2015 was issued to the JV (the petitioner and Aarvee) holding them accountable for failing to review and verify the compliance of observations at the level of Concessionaire at the site of the Project and failing to act strictly as per the Concession Agreement. By way of the aforesaid letter, the petitioner and Aarvee were called upon to show cause as to why action not be taken against them in terms of the Contract and NHAI's extant policy.

22. On 18.12.2015, the petitioner replied to the aforesaid show cause notice providing a detailed clarification that there was no deficiency in service on part of the petitioner.

23. Thereafter, on 19.05.2016, the petitioner appeared before a committee comprising of three members with regard to the allegations as set out in the show cause notice dated 27.11.2015. The petitioner submits that there was no representation by Aarvee before the committee on the said date.

24. On 09.06.2016, the petitioner was granted a second Extension of Time (EOT) till 30.06.2016. Thereafter, on 08.09.2016, the IE sent a letter to NHAI submitting the summary of the proposed penalties to the date.

25. The petitioner submits that the Project Director, NHAI by way of a communication dated 21.10.2016, requested the petitioner to extend the Contract upto 31.12.2016 and the petitioner acceded to the said request. Thereafter, on 20.01.2017, the Project Director recommended EOT upto 31.12.2016 with an escalation of 5%. In August 2017, NHAI granted the JV and its constituents (the petitioner and Aarvee) an opportunity to give a presentation before a committee of three Chief General Managers (Committee) of NHAI. In response, the petitioner sent a letter dated 30.08.2016 stating that it has no additional information to present before the Committee and all the queries raised has been addressed before the Committee in its presentation dated 19.05.2016.

26. In the meanwhile, Aarvee wrote to NHAI denying certain averments made by the petitioner in its reply dated 18.12.2015 to the show cause notice and further denying any allegation of negligence or default on its part in performing its obligations under the Contract.

27. The petitioner contends that certain payments amounting to ₹31,50,918/- and USD 24,966 are currently owed to it by NHAI. It is further contended that reimbursement amounting to ₹1,12,3360/- is also

pending since December, 2013 towards a three-day traffic survey conducted by the petitioner at NHAI's request.

28. On 06.02.2019, NHAI issued the impugned order debarring the petitioner from participating in any future project/bid for NHAI projects for a period of one year, effective from 06.02.2019. Thereafter, NHAI issued another circular on the same date debarring Mr. M.V.N. Rao (Director of the petitioner) and Mr. Douglas Campbell (Team Leader for the Project) from participating in any future project/bid for NHAI projects for a period of one year effective from 06.02.2019.

29. By a letter dated 08.02.2019, NHAI informed the petitioner of imposition of financial penalty at the rate of 1% of the contract price amounting to ₹15,45,135/-. It was further stated therein that if the same was not furnished within seven days, NHAI would recover the same by invoking the bank guarantee submitted by the petitioner.

30. On 11.02.2019, the petitioner by an email asked NHAI details about the action being taken against Aarvee. On 13.02.2019, the petitioner wrote to NHAI that there is no case made out against it. However, notwithstanding the same, the petitioner requested NHAI to extend the period provided for payment of the penalty for a further period of seven days. This was rejected by NHAI on 13.02.2019.

31. Aggrieved, the petitioner filed the present petition.

Submissions

32. Mr Parag Tripathi, learned senior counsel appearing for the petitioner assailed the impugned order, essentially, on three fronts. First, he submitted that the impugned order blacklisting the petitioner was issued in violation of the principles of natural justice as the petitioner was not issued any show cause notice in this regard. He submitted that NHAI had, by the show cause notice dated 27.11.2015, called upon the petitioner to explain within a period of fifteen days from the issuance of the notice as to why action should not be initiated against the petitioner in terms of the Contract dated 09.01.2019 and the extant policy of NHAI for the omission and deficiency in services. He submitted that the petitioner was not specifically put to notice regarding any proposed action to blacklist or debar the petitioner from participating in any tender for any specified period. He referred to the decision of the Supreme Court in the case of ***Gorkha Security Services v. Government of NCT of Delhi and Ors.: (2014) 9 SCC 105*** in support of his contention that such a notice was necessary.

33. Second, he submitted that the impugned action was discriminatory. He stated that the principal allegation against the petitioner was that the petitioner had issued the Provisional Completion Certificate (PCC) in respect of the project highway in question despite the work being substandard and without the Concessionaire rectifying the defects as pointed out. NHAI had found that the project highway was extensively damaged and reflected poor construction, improper quality checks and lack of supervision in construction of the highway. He submitted that the allegations pertain to poor performance by the

Concessionaire, yet no such punitive action of blacklisting had been initiated against it. He submitted that this would imply that NHAI had taken a lenient view and the petitioner was entitled to a similar treatment. He referred to the decision of the Supreme Court in ***Vishundas Hundumal and Ors. V. State of Madhya Pradesh and Ors.:*** (1981) 2SCC 410 in support of his contention that the petitioner was required to be treated in the same manner as Concessionaire in regard to any punitive action.

34. Third, he contended that the punishment imposed on the petitioner was highly disproportionate. He submitted that the Concessionaire was responsible for execution of the work and was primarily responsible for alleged poor construction and quality of the highway in question. He submitted that NHAI had imposed liquidated damages on the Concessionaire and had not initiated any action for blacklisting it. He contended that by that standard, the punishment imposed on the petitioner was highly disproportionate. He relied on the decision of the Supreme Court in ***Kulja Industries Ltd. V. Chief General Manager, Western Telecom Project BSNL and Ors.:*** (2014) 14 SCC 731.

35. Mr Sethi, learned senior counsel appearing for NHAI countered the aforesaid submissions made on behalf of the petitioner. He submitted that allegations made against the petitioner were undisputed. He submitted that PCC was issued by Mr M.V.N. Rao who was not authorized to issue the same. He stated that in terms of the Contract, the PCC was required to be issued by Mr Jens Abraham. He further

submitted that the quality of construction was poor is undeniable and the petitioner had issued the PCC without ensuring that the requisite conditions were met. He further contended that PCC was issued by Mr Rao (the authorized representative of the petitioner) without any prior consultation with the petitioner's JV Partner (Aarvee Associates).

36. Mr Sethi drew the attention of this Court to the Policy Circular 97/2012 issued on 17.04.2012 and contended that the said Circular expressly provided for imposing the penalty of debarring a defaulting consultant from participating in tenders floated by NHAI and the fact that action under the said circular was being contemplated was duly informed to the petitioner in the show cause notice. He submitted that the petitioner had no doubt that punitive action was being contemplated against it and was granted full opportunity to respond to the allegations.

Reasons and Conclusion

37. The first and foremost question to be addressed is whether the impugned order has been passed in violation of principles of natural justice. At the outset, it is relevant to note that the allegations in respect of which the impugned measure of blacklisting has been imposed on the petitioner was specifically mentioned in the show cause notice dated 27.11.2015. The said show cause notice specifically mentioned that the project highway was inspected on 12.05.2015 and 13.05.2015 and several deficiencies were found. It was specifically alleged that although the letter dated 09.05.2015 pointing out the major works required to be rectified/completed was issued to the Concessionaire, the

petitioner had neglected to ensure that the same were rectified before issuance of the PCC. The show cause notice also mentions that a letter dated 12.06.2015 had been issued by Aarvee (the Joint Venture Partner of the petitioner) objecting to the issuance of the PCC. It was alleged that the same had been issued without consultation with it and without its consent. Aarvee had sent another letter dated 18.09.2015 observing several irregularities and had alleged that the petitioner had failed to ensure that the same were addressed prior to issuance of the PCC.

38. It was alleged in the show cause notice that the project highway was inspected on 02.10.2015 and it was found to be in a “*pathetic condition*”. It was alleged that the same reflected poor construction, improper quality checks and lack of supervision. The damage to the project highway, noticed during inspection and as set out in the show cause notice, is reproduced below:-

- “Extensive damages on bituminous surface such as potholes, settlements, raveling, rutting, alligator cracks etc. throughout the stretch between Km131+000 to Km 244+120Km.
- Major settlements of RE Walls of approaches of structures were observed at three locations at km. 187+287(VUP), km. 195+710(PUP) & km. 218+784 (VUP).
- Significant settlements on approach slabs on many other structures were also observed which are to be suitably rectified.
- Huge rock falling, sliding of carriageway and dripping in Tunnel on Sirohi Bypass occurred in the month of July 2015.

- The Concessionaire has ignored the observations of Safety Consultant on rock cutting, safety measures and construction of Tunnel resulting in blocking of highway
- Crash Barriers are not erected at several high embankment sections and approaches to structures including major junction at Km 224+220 (end of Sirohi Bypass).
- At the time of issuance of PCC, all safety items are required to be executed and no safety related items are allowed to be put in Punch List. This is a serious negligence on the part of the IE.
- It is also observed that wire rope crash barrier have been provided as an alternate to Metal Beam Crash Barrier (MBCB). However, in some places, these were placed at the edge of the shoulders without providing sufficient cushion for recovery. Wire ropes have also been placed at many locations, on shoulder side after kerbs resulting in safety hazard.
- Deep rain cuts and unstable side slopes were observed at many locations which were not attended by the Concessionaire after monsoon.
- The box culvert of 3mx3m at Km 240+940 (Jhadoli Bypass) and PUP (6.0mx4.5m) at Km 182+730 (Village Purada, Sumerpur Bypass) constructed by the Concessionaire under CoS are not functional endangering highway users.
- The roads constructed at Km 138+865 (Village Kivra), Km 149+980 (Village Kenpura) at Km 155+815 (Village Birami) are in very bad shape.
- The discharge capacity of pipe culverts provided across slip roads at Km 138+865 and Km 155+815 is not adequate.

- The avenue plantation on entire Project Highway is negligible. The growth of median plantation is very poor due to filling of debris and un-conducive soil in median.
- Overall, there was lack of proper maintenance of Project Highway including clearing of ROW, up keeping of carriageway, weeding out of wild vegetation, closing of unauthorized median openings, removal of abandoned affected structures within ROW.”

39. The show cause notice had set out the deficiencies in services obtained and had called upon to Consultants (petitioner and Aarvee Associated) to explain within a period of fifteen days as to why action should not be initiated against them in terms of the Consultancy Agreement dated 09.01.2012 and the extant policy of NHAI with regard to omission and deficiency in services. It is relevant to note that the said notice was issued jointly and severally to the petitioner and its JV Partner (Aarvee).

40. There is merit in the contention that the said notice did not specifically indicate that it was proposed to blacklist the petitioner. In ***Gorkha Security Services (supra)***, the supreme Court had observed as under:-

“21. The Central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of Show Cause Notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another

requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/ breaches complained of are not satisfactorily explained. When it comes to black listing, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.

22) The High Court has simply stated that the purpose of show cause notice is primarily to enable the noticee to meet the grounds on which the action is proposed against him. No doubt, the High Court is justified to this extent. However, it is equally important to mention as to what would be the consequence if the noticee does not satisfactorily meet the grounds on which an action is proposed. To put it otherwise, we are of the opinion that in order to fulfil the requirements of principles of natural justice, a show cause notice should meet the following two requirements viz:

- i) The material/ grounds to be stated on which according to the Department necessitates an action;
- ii) Particular penalty/action which is proposed to be taken. It is this second requirement which the High Court has failed to omit.”

41. It is clear from the above that NHAI was not only required to set out the alleged breaches/ defaults in the show cause notice – which it undoubtedly did – but also the nature of the action contemplated against the noticee. In this case, NHAI had broadly indicated that action was contemplated against the petitioner and its JV Partner in terms of the

Contract and the extant policy; NHAI did not specifically put them to notice that it was proposed to blacklist them.

42. However, the show cause notice dated 27.11.2015 was not the only notice issued to the petitioner. The petitioner was also issued another notice on 04.05.2016. By the said notice, the petitioner was informed that a Committee of three Chief General Managers of NHAI had been constituted (hereafter “the Committee”) to look into the matter of *deterrent/punitive action* against the petitioner. The said notice is reproduced below:-

“Sir,

As per policy circular of NHAI (97/2012) dated 17.04.2012, a Committee of 3 CGMs has been constituted to look into the matter of deterrent/punitive action against defaulting consultants for negligence in discharging duties with due diligence as per the role and functions defined in the Agreement.

2. It has been brought to the notice of the committee that the Independent Engineer (i.e. JV of Sheladia and Aarvee) has not acted strictly as per provision of the Concession Agreement, keeping the overall public interest in a fair and impartial manner, consistent with highest standard of professional integrity and issued Provisional Completion Certificate (PCC) for the above project on 11.06.2015 without taking due regard to vital safety and reliability aspect. This act of the Independent Engineer has put the users of highway in danger; compelling them to pay user fee even though the highway has got damaged extensively soon after putting into Commercial Operation. This action of Independent Engineer has downgraded the prestige of NHAI, a

premier organisation who has successfully completed several mega highway projects.

3. In this regard, NHAI has already issued a Show Cause Notice vide letter under reference(iv) jointly and separately to each of the JV partners. The two partners of the JV have submitted their reply to the show cause notice vide letter under reference (ii) and (iii) respectively.

4 It appears from broad examination of the replies that default has occurred on the part of the consultants to function with due diligence and negligence in discharging duties (role and functions) in issuing of Provisional Completion Certificate (PCG) for the above project on 11.06.2015 without taking adequate test for putting the project for commercial operation in traffic worthy and safe condition.

5. In view of above, the Committee has allowed to Grant a personal hearing on 19.05.2016. Accordingly, you are requested to present your case in personal hearing on 19.05.2016 at 03.00PM at NHAI HQ.

6. It may be noted that in case of failure to present your explanation as required, it will be presumed that you have no explanation to offer and the matter will be disposed of without any further reference to you.”

43. The above referred notice made it clear to the petitioner that (a) the Committee of Three Chief General Managers (the Committee) had been constituted; and (b) that the Committee would look into taking a deterrent / punitive action, against the petitioners and the Committee had allowed an opportunity to the Consultants to be personally heard. It is also relevant to bear in mind that the petitioner had already been informed that an action was being contemplated under the extant policy of NHAI.

44. At this stage, it is relevant to refer to the Policy Circular dated 17.04.2012 issued by NHAI. The said Policy Circular had clearly spelt out the procedure to be followed for taking “*deterrent penalty action*” against defaulting consultants. The relevant extract of the said Policy Circular is being reproduced below:-

“1.1 NHAI has been short-listing and engaging consultants for the preparation of pre-feasibility and feasibility reports, preparation of Detailed Project Report and supervision of works.

1.2 The contracts/agreements for consultancy services in highway sector do not specify the procedure to be followed for deterrent action to be taken by the Employer/client in case of deficiencies in work specially in respect of accuracy of data analysis and design, non-fulfillment of commitments by the consultants observed by the Employer/client during implementation of the project or at a later date. The penalty action is in addition to Liquidated damages and other actions specified in the contracts/agreements. It has further been decided to review the existing procedure and issue a fresh circular for dealing with such cases. This Technical Circular supersedes the previous Policy Circular: Technical (32/2004) dated 16 April 2004.

2. Deficiency of Services

2.1 Consultants in Highways sector are being engaged generally for following services:

- (i) Preparation of pre-feasibility and feasibility reports
- (ii) Preparation of detailed project report
- (iii) Supervision of projects and

(iv) Proof consultancy

2.2 It has been observed that major omissions by the consultants lead to substantial time and cost overrun in the projects. Besides, in some cases contractual complications leading to arbitration/court cases, failures of structures etc causing serious accidents etc occur. To ensure a fair degree of accuracy on the part of the consultants in carrying out the tasks assigned to them, it is necessary to take deterrent penalty actions against the erring consultants. In case of minor deficiencies on consultant's part a warning may be issued. In the case of significant deficiencies in services causing adverse effects on the Project or on reputation of the Authority, other penal actions including debarring for a specified period shall be initiated as per this policy. The deterrent penalty action can be taken in any of the following ways:

- (i) Issue warning to the consultants as decided by Employer/client.
- (ii) Suspend their short-listing with NHAI and debar then from award of future works in NHAI for a period of less than 12 months in case of minor deficiency in services.
- (iii) Debarring the consultants for a period of 1 to 5 years for major negligence/deficiency in services.

2.3 **Financial Penalty**

In addition to any penalty action (i) or (ii) or (iii) under Para 2.2 above, financial penal of appropriate percentage of contract value can further be imposed. For avoidance of doubt it is clarified that this financial penalty shall form part of penalty action which is in addition to all other actions such as recoveries,

appropriation of Performance Security, liquidated damages etc as per the agreement.

- 2.4 Wide publicity will be given to the deterrent action taken against the erring consultants for major negligence/deficiency (category (iii) above) through circulation to Ministry of Road Transport and Highways, all State Governments/Government departments dealing with National Highways and centrally sponsored schemes and publication of notices in newspapers and IRC journals. Publicity shall also be given to all concerned on actions taken under category (i) & (ii) above as may be decided in the circumstances of the case.

3. **Type of Deficiency of Service- Errors, Omissions & Commissions or Misconduct of Consultants**

Some of the common errors and omissions generally committed by the consultants are listed in Appendix "A". These are only indicative and not comprehensive

4. **Enquiry Procedure:**

- 4.1 Based on the report from the concerned Project Director or of the concerned Technical Division in NHAI bringing out deficiency of minor nature not having any time /cost implication for the successful implementation of the project of NHAI, will, after due examination, issue a warning to the Consultant.
- 4.2 In case of Minor/Major deficiency involving significant time/cost implication/adverse effect on the project a complaint or an observation of deficiency of services, errors and acts of omissions & commission by a consultant shall be sent by the Project Director to HQ, NHAI giving details of the errors, acts of omissions and commissions and deficiency of services of the consultant. The matter

will be examined in Headquarter and if considered fit, the Chairman, NHAI will constitute a committee consisting of three CGMs of NHAI to look into the complaint or observation.

The Chairman of the Committee would be one of the CGMs as decided by Chairman, NHAI.

- 4.3 If the Committee on examination of the complaint/adverse report from a Project Director feels that a prima-facie case exists for taking deterrent action against the Consultant, it will give a mandatory notice to the consultant at its registered address stating the facts of the deficient service, errors, acts of commissions/omissions. The consultant will be given a reasonable time to reply to the charge and also an opportunity to be heard in person by the Committee at a specified time and date.
- 4.4 The Committee will enquire into the charges refuted by the consultant. The consultant will have the right to Inspect the documents on which the complaint is based.
- 4.5 The Committee will record all written and/ or oral submission and arguments presented. Entire proceedings shall be recorded in writing and a decision given in each case. If the consultant chooses not to respond to notices issued by the Committee or does not attend the meeting of Committee to explain and defend the charges, an ex-parte enquiry may be conducted and decision recorded. The Committee shall decide on the severity of the deficiency/omissions etc considering the facts of the case and the implications on financial, safety and other aspects.

- 4.6 On completion of the enquiry, the committee shall submit its report with details of findings and recommendations to the concerned Member, NHAI.
- 4.7 The concerned Member, NI-LAI will take appropriate action based on the recommendations of the Committee.
- 4.8 The time frame for conducting inquiry and taking final action will generally be as follows:
- (i) Constitution of Committee- within 10 days of receipt of the complaint.
 - (ii) Submission of report by the Committee - within 3 months of receipt of the complaint.
 - (iii) Conveying the final decision - within 20 days of the receipt of the final report.”

45. In view of the above, it cannot be disputed that the petitioner was fully aware that NHAI had found a *prima facie* case for taking “deterrent action” against it and a Committee had been constituted to examine the same. The Committee was of the *prima facie* view that a case existed for taking a deterrent action against the petitioner in terms of the said policy. This was clear to the petitioner from the fact that it had received a notice dated 04.05.2016 in terms of the said policy affording the petitioner an opportunity to be heard.

46. It was also clear that such deterrent action was in addition to the liquidated damages and other action as contemplated under the Contract. The aforementioned Policy Circular listed out the deterrent penalty action that could be taken against the delinquent consultants and

the same also included debarring the delinquent consultants for a period of one to five years for major negligence / deficiencies in services.

47. In view of the above, the petitioner was fully aware that the penalty action contemplated against it could include being debarred or blacklisted for a period up to five years. Once, a contractor has been put to notice that a punitive measure is proposed against it which includes debarring him from participating in future contracts up to a specified period, it is not necessary to firm up the extent of such measure prior to hearing the contractor. The quantum of punishment that may be imposed is required to be firmed up after the contractor has had an opportunity to represent against such punitive measure.

48. The Supreme Court in ***Gorkha Security Services*** (*supra*) had also clarified that even if the particular penalty action which is proposed to be taken is not specifically mentioned in the show cause notice but can be safely discern from the reading thereof, the same would be sufficient to meet the requirement of the notice required to be given. As explained by the Court, the object of such show-cause notice is to enable the concerned party to respond to the allegations and meet the case set up against it. This would also include an opportunity to respond to the proposed punitive measure. Therefore, if it is proposed to blacklist the contractor, he should be aware of such a proposed action to effectively respond to it. In the present case, the notice sent to the petitioner had clearly spelt out that deterrent action as per the said policy was being contemplated. As noted above, the Policy Circular clearly indicated the “*deterrent penalty action*” – which included blacklisting for a period

upto five years – contemplated against a delinquent Consultant. The petitioner cannot be heard to state that it was not put to notice of such punitive measure, as the notice dated 04.05.2016 issued to the petitioner specifically indicated that deterrent penalty action under the Policy was proposed. The fact that such deterrent penalty action also included punitive measures other than blacklisting cannot by any stretch be construed to mean that that the petitioner had no notice the punitive measure proposed to be taken by NHAI.

49. The next question to be examined is whether there has been any hostile discrimination against the petitioner inasmuch as a similar punitive action has been taken against the Concessionaire and/or R.V. Associates.

50. Insofar as the Concessionaire is concerned, NHAI had imposed liquidated damages in terms of the Concession Agreement. It is stated that the Concessionaire has since raised a dispute which has been referred to arbitration. During the course of the proceedings, Mr Sethi had also handed over a show cause notice dated 04.04.2019 issued to Larsen and Toubro Infrastructure Development Projects Ltd. and the Concessionaire calling upon them to show cause as to why penalty, action inclusive of blacklisting the Concessionaire and its constituent partners, not be taken. Mr Tripathi contended that the said notice was an afterthought as it had been issued on 04.04.2019, which was after this Court had passed an order on 26.02.2019 directing NHAI to file an affidavit indicating why no action had been taken against the Concessionaire.

51. This Court is not called upon, in these proceedings, to examine the merits of the allegations made against the petitioner. The scope of the present proceedings is limited and does not entail an enquiry into the allegation of deficiencies in the services provided by the petitioner. Suffice it to state that there is sufficient material on record for NHAI to take a view that the services rendered by the petitioner were deficient. First of all, it is not disputed that the project highway was inspected on 02.10.2015 and various deficiencies as spelt out in the show cause notice were found. The petitioner claimed that the same were on account of the unprecedented rain in the month of May 2015. However, that contention was not accepted and this Court finds no reason to fault the said decision.

52. In view of the above, the punitive action taken against the petitioner does not warrant any interference. It is the petitioner's claim that since NHAI had taken a lenient view in respect of the Concessionaire, similar leniency should also be accorded to the petitioner. However, this contention is unmerited for several reasons. First of all, the nature of contract between NHAI and the Concessionaire is materially different from the nature of contract with the petitioner. The decision not to enter into the contract with any party has commercial considerations. Thus, it is not necessary that NHAI be bound down to take the same punitive measure against all persons whose services are found to be deficient. However, this issue is not material since NHAI has also initiated the punitive action to blacklist

the Concessionaire and its constituent partners *albeit* after the present petition was filed.

53. In the case of *Vishundas Hundumal and Ors.* (*supra*), the Supreme Court had set aside the order curtailing the permits of the petitioners prohibiting them from travelling on certain part of their route as the same overlapped with the notified route. However, no such order was passed curtailing the permits in respect of similarly situated persons. In this view, a case of hostile discrimination was clearly established. It is relevant to note that the Supreme Court quashed the orders curtailing the permits since it found that the State Authorities were not willing to rectify the error either before the High Court or before that Court. Clearly, the State Authorities had the option to also uniformly implement their decision and cancel/curtail the permit of other persons similarly situated as the petitioners in that case. However, the State Authorities did not express their willingness to do so. This is materially different from the facts of the present case. Apart from the other distinguishing features, NHAI has taken steps to ensure that the discriminatory treatment as alleged is redressed: it has taken steps to ensure that the punitive action against the Concessionaire is also initiated.

54. The petitioner has also alleged that it has been discriminated in comparison with its JV Partner – Aarvee.

55. Indisputably, Aarvee Associates was also jointly and severally liable for performance of the Contract; however, no action to debar

Aarvee had been taken as the Competent Authority of NHAI accepted the view that Aarvee's involvement was to a lesser degree and the PCC was issued without its consent. It is not necessary to examine this aspect in any detail as Mr Tripathi did not press this challenge.

56. This Court is also unable to accept that the punitive action taken by the NHAI is disproportionate considering the allegations levelled against the petitioner.

57. In view of the above, no interference with the impugned order is called for. The petition is, accordingly, dismissed. All the pending applications are also disposed of.

58. The parties are left to bear their own costs.

JULY 16, 2019
RK

VIBHU BAKHRU, J