

(2017) 03 DEL CK 0205

In the Delhi High Court

Case No : 102 of 2017

**CORSAN CORVIAM CONSTRUCCION S.A. Vs NATIONAL HIGHWAYS
AUTHORITY OF INDIA**

Date of Decision : 14-03-2017

Acts Referred:

Constitution of India, Article 28 -
Freedom as to attendance at religious instruction or religious worship in certain
educational institutions

Arbitration and Conciliation Act, 1996, <a href=

Citation : (2017) 03 DEL CK 0205

Hon'ble Judges : Vibhu Bakhru

Bench : SINGLE BENCH

Advocate : Akhil Sibal, Sandeep Sethi, Kanika Tandon, Madhu Sweta

Final Decision : Dismissed

Judgement

1. Corsan Corviam Construcccion S.A. (hereafter "Corsan") has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter "the Act") inter alia praying as under :- "a) Pass an order staying the effect and operation of the letter dated 22.02.2017 (bearing No. NHAI/11012/ CDTIEPC/2014/ 44) issued by the Respondent to the Petitioner herein whereby the Petitioner has notified its intent to terminate the Contract Agreement dated 27.01.2015;

b) Pass an order restraining the Respondent from taking any coercive steps against the Petitioner in respect of the Contract Agreement dated 27.01.2015 executed between the parties herein;

c) Pass an order staying the effect and operation of the letter dated 23.02.2017 (bearing No. NHAI20171PIUIDKNL/506) issued by the Respondent to the Petitioner herein whereby the Respondent has called upon the Petitioner herein to deposit an amount of Rs.68.64 crores of mobilization advance within a period of seven days;

d) Pass an order restraining the Respondent from invoking and / or encashing

the following bank guarantees furnished by the Petitioner herein under Contract Agreement dated 27.01.2015 executed between the parties herein:

i) Performance Bank Guarantee bearing No.402LG1176/14 dated 06.02.2015 amounting to Rs.64,35,00,000.00 (Rupees Sixty Four Crore Thirty Five Lacs Only) extended from time to time.

ii) Advance Bank Guarantee bearing No.12880BG15008119 dated 21.10.2015 amounting to Rs.28,31,40,000.00 (Rupees Twenty Eight Crore Thirty One Lacs Forty Thousand Only) extended from time to time.

iii) Advance Bank Guarantee bearing No.12880BG15008108 dated 21.10.2015 amounting to Rs.47,19,00,000.00 (Rupees Forty Seven Crore Nineteen One Lacs Only) extended from time to time;"

2. National Highways Authority of India (hereafter "NHAI") had invited proposals by a Request for Qualification (RFQ) dated 12.12.2013 in respect of "Two/Four Laning of Talcher-Dubari-Chandikhole Section of NH-200 from Km301.89 to Km.427.885 including km.8.5 to km. 14.886 of NH-23 in the State of Orissa under NHDP-III on EPC Mode" (hereafter "the works"). Corsan submitted its bid which was accepted and NHAI issued the Letter of Intent dated 30.10.2014 (hereafter "the LOI"). Thereafter, the parties entered into a contract dated 27.01.2015 (hereafter "the Agreement"). The stipulated dated for completion of the works was 910th day from the "Appointed Date" as per the milestones specified in Schedule-J to the Agreement.

3. In terms of the Agreement, Corsan furnished certain bank guarantees - 4 in number - issued by Kotak Mahindra Bank, the details of which are as under:-

S. no. Details Amount(Rs.)

1. BG No. 402LG1176/14 dated 06.02.2015 as performance guarantee valid upto 05.02.2017 (later changed to 05.02.2018) 64,35,00,000/-

2. BG No. 12280BG15008111 dated 21.10.2015 against advance payment valid upto 20.10.2017 18,87,60,000/-

3. BG No.12880BG15008119 dated 21.10.2015 against advance payment valid upto 20.10.2017 28,31,40,000/-

4. BG No. 12880BG15008108 dated 21.10.2015 against advance payment valid upto 20.10.2017 47,19,00,000/-

4. NHAI claims that Corsan has failed to achieve the requisite milestones as required under the Agreement and has barely completed about 4.75% (approximately) of the works, whereas as per the agreed milestones, Corsan ought to have completed more than 40% of the works. NHAI had also sent letters to Corsan pointing out the lack of progress in the execution of the works. NHAI also alleges that apart from failing to execute the works as per the time schedule, Corsan had also failed to repair and maintain existing roads and had

further failed to shift utilities as required in terms of the Agreement.

5. Since, according to NHAI, Corsan had not maintained the requisite progress and had failed to perform its obligations, NHAI issued a notice dated 19.12.2016 under clause 23.1.1 of the Agreement (Cure Period Notice) alleging that Corsan had defaulted in performance of the Agreement and called upon Corsan to cure the same within the specified period.

6. Corsan replied to the said notice by its letter dated 13.02.2017 inter alia submitting that NHAI had not considered "the real hindrances / impediments faced on the ground by EPC Contractor before ascertaining the Contractor's default". In its letter, Corsan pointed out several reasons and hindrances responsible for the delay in execution of the works and requested NHAI to withdraw the cure notice. Corsan claimed that the delay was solely for the reasons beyond its control.

7. On 22.02.2017, NHAI sent a notice of its intention to terminate the Agreement in terms of clause 23.1.2 of the Agreement. In its letter, NHAI countered the claims made by Corsan in its letter dated 13.02.2017.

8. Mr Sibal, learned counsel appearing for Corsan did not dispute that the milestones as per schedule "J" of the Agreement had not been met. He, however, contended that no adverse action in this regard could be taken by NHAI because the necessary work Site had not been handed over to Corsan. He earnestly contended that 90% of the Site was required to be handed over to Corsan before declaration of the Appointed Date. He submitted that milestones of progress of the execution of the works had to be reckoned from the Appointed Date and, therefore, the time schedule for execution of the works could commence only once the necessary pre-condition - that is, handing over of 90% of the work Site - had been complied with. He referred to NHAI's notice dated 22.02.2017 and referred to paragraph 10 of the said letter wherein NHAI had asserted that 80.4 kms of working front was available. He submitted that in view of the admission that only 80.4 kms of working fronts was available, as against the contracted length of approximately 132 kms, it could not be disputed that 90% of the site had not been handed over to Corsan. He submitted that in view of the admission that NHAI had not handed over 90% of the site, the question of adherence to the time schedule for execution of the works could not be insisted by NHAI.

9. He submitted that Corsan had agreed to waive the conditions of clause 4.1.3(a) of the Agreement and had agreed not to claim any penalty as per clause 8.3 of the Agreement for delay in providing the necessary land. However, the same was subject to the condition that NHAI would make available the said land within a period of six months. He submitted that in view of the admitted default on the part of NHAI to provide the working site, Corsan's bank guarantees could not be invoked and any such invocation would be fraudulent and unsustainable.

10. Mr Sethi, learned Senior Counsel appearing for NHAI countered the submissions made by Mr Sibal. At the outset, he contended that the present

petition was liable to be dismissed as Corsan had suppressed the relevant documents. He submitted that the annexures to the notice of intention to terminate had been intentionally suppressed. He referred to Corsan's letter dated 17.04.2015, whereby it had agreed to waive the condition of clause 4.1.3(a) of the Agreement. He also referred to a letter dated 09.06.2015 sent by Corsan, which indicated that only 9.98% of the project length was obstructed and thus, Corsan had been provided 90% of the project length.

11. Mr Sethi, further contended that NHAI was obliged to provide 90% of the Right of Way (RoW) and that could not be understood to be the entire 60 meter width, but only the width of the road, the embankment and a three meter strip of land. He contended that NHAI was not obliged to provide the entire site of width of 60 meters as the same also included land for future expansion.

12. I have heard the learned counsel for the parties.

13. As is apparent from the submissions recorded above, the dispute between the parties essentially relate to the progress of execution of the works. Admittedly in terms of clause 4.1.3 of the Agreement, NHAI was obliged to provide Corsan, 90% of the Right of Way of the total length of the project highway on receiving of the performance security. Clause 4.1.3 of the Agreement is set out below:- "4.1.3 The Authority shall provide to the Contractor:

(a) upon receiving the Performance Security under Clause 7.1.1, the Right Way in accordance with the provisions of Clauses 8.2 and 8.3, within a period of 15 (fifteen) days from the date of this Agreement, on no less than 90% (ninety per cent) of the total length of the Project Highway;

(b) approval of the general arrangement drawings (the ""GAD") from railway authorities to enable the Contractor to construct road over-bridges/ underbridges at level crossings on the Project Highway in accordance with the Specifications and Standards, and subject to the terms and conditions specified in such approval, within a period of 60 (sixty) days from the Appointed Date, and reimbursement of all the costs and expenses paid by the Contractor to the railway authorities for and in respect of the road over-bridges/under bridges; and

(c) all environmental clearances as required under Clause 4.3."

14. The length of the project is 132.32 kms and in terms of clause 4.1.3(a) of the Agreement, NHAI was required to provide at least 90% of the said length before declaring the Appointed Date. It is also not disputed that the milestones specified in schedule "J" to the Agreement are to be reckoned from the Appointed Date. In terms of Article 28 of the Agreement, "Appointed Date" has been defined as under:- "Appointed Date" means that date which is later of the 15th day of the date of this Agreement, the date on; which the Contractor has delivered the Performance Security in accordance with the provisions of Article 7 and the date on which the Authority has provided the Right of Way on no less than 90% (Ninety per cent) of the total length of Project Highway;"

15. Having stated the above, it is also necessary to note that it is not disputed that Corsan had agreed to waive the condition of clause 4.1.3(a) of the Agreement and had requested NHAH to declare the Appointed Date by its letter dated 17.04.2015. The relevant extract of the said letter reads as under:- "The EPC Contractor is keen to initiate and take up the project construction activities and in the interest of the Project, agrees to waive condition of clause 4.1.3 (a) and shall not make any claim/ penalty as per the provision in Contract Agreement clause 8.3 for delay in providing the requisite Balance Land, if this vacant / encumbrance free Balance Land is made available/offered within the current financial year 2015-16 of the declaration of the Appointed Date by the Authority.

In view of the above, the EPC Contractor expressly undertakes to waive the above mentioned claim/penalty under clause 4.1.3 and 8.3 and humbly requests the Authority to declare the Appointed Date at the earliest under the Contract Agreement; we also request the Authority to allow the EPC Contractor to immediately take up the necessary project construction activities in a diligent manner."

16. It is also not disputed that a joint survey was conducted and on 09.06.2015, Corsan addressed a letter to NHAH enclosing the details of the joint survey, which indicated that more than 90% of the total project length was available. The relevant extract of the letter dated 09.06.2015 reads as under:- "Based on joint survey at site, Enclosed please find herewith the updated Appendix under Clause No.8.2 of Contract Agreement for your information and record. It is showing the availability of workable length of 90% and the listing of the obstructions present within the ROW of the site. It is requested a signed copy of this document may be forwarded to us for our record.

Based on the availability of workable length of 90%, the Appointed Date for the project may be please be issued."

17. It is also apparent that the joint survey was done in terms of the clause 8.2.1 of the Agreement which required the parties to inspect the site and prepare a memorandum containing the inventory of the Site including the vacant and unencumbered land, buildings, structures, road works, trees and any other immovable property on or attached to the Site.

18. Since Corsan had requested NHAH to declare the Appointed Date on the basis of the work fronts as available, it is doubtful whether it would be open for Corsan to now contend that it was not obliged to achieve the milestones as specified in Schedule "J" to the Agreement. The question whether the necessary work fronts that would enable Corsan to execute the works as per the time schedule, were available or not is a subject matter of the disputes that would have to be addressed by the Arbitral Tribunal. The reliance placed by Mr Sibal on paragraph 10 of the notice dated 22.02.2017 would not be determinative of the question whether the work fronts necessary to maintain the requisite progress were

available. It is also relevant to note that while in paragraph 10 of its letter dated 22.02.2017, NHAI has stated that 80.4 kms working front was available to Corsan, however, in paragraph 11 of the aforesaid notice, NHAI has also asserted that more than 90% of the project site was freely available for working and implementing the project.

19. At this stage, it is not necessary for this Court to dwell on the disputes between the parties, or render any finding (prima facie or otherwise) to the disputes between the parties. Corsan's principal grievance is with regard to encashment of bank guarantees and the law relating to interdiction of bank guarantees is now well settled.

20. A bank guarantee can be only interdicted where the petitioner has been able to establish that invocation is not in terms of the bank guarantee or on a prima facie case of an egregious fraud. Mere existence of contractual disputes provide no ground for interdicting encashment of bank guarantees (See: Svenska Handelsbanken v. M/s Indian Charge Chrome and Others: (1994) 1 SCC 502, Larsen & Toubro Limited v Maharashtra State Electricity Board and Others: (1995) 6 SCC 68, U.P. Cooperative Federation Limited v. Singh Consultants and Engineers Pvt. Ltd.: 1988 (1) SCC 174 and Hindustan Steel Works Construction Ltd. v. Tarapore & Co. and Anr.: AIR 1996 SC 2268).

21. It is not disputed that the bank guarantees in question are unconditional. It is also not disputed that milestones as specified in Schedule "J" of the Agreement have not been met as barely 4.75% of the work has been executed whereas 40% of the work ought to have been completed. As discussed above, the disputes between the parties relate to performance of the contractual obligations and it is not possible to accept that Corsan has established the "prima facie" case of fraud.

22. Insofar as the relief regarding the stay of notices are concerned, it is seen that the Agreement is a determinable one and in any event, the petitioner would have adequate remedy in damages if the petitioner is able to establish NHAI's termination of the Agreement to be wrongful.

23. In view of the above, the petition is dismissed.

24. Order dasti under signature of Court Master.