

# M/S Oasis Projects Ltd vs Managing Director, National Highway ... on 1 December, 2022

**Author: Navin Chawla**

**Bench: Navin Chawla**

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\* IN THE HIGH COURT OF DELHI AT NEW DELHI  
+ O.M.P.(I) (COMM.) 352/2022 & I.A. 20221/2022  
M/S OASIS PROJECTS LTD ..... Petitioner  
Through: Mr.Bharat Chugh, Mr.Mayank Arora,  
Ms.Ekjit Bhasin, Mr.Siddharth  
Shivakumar, Advs.  
versus

MANAGING DIRECTOR, NATIONAL HIGHWAY AND  
INFRASTRUCTURE DEVELOPMENT CORPORATION LIMITED  
..... Respondent  
Through: None.

CORAM:  
HON'BLE MR. JUSTICE NAVIN CHAWLA  
ORDER

% 01.12.2022

1. Issue notice to the respondent, to be served through all modes, including electronically, returnable on 18th January, 2023, to be listed along with ARB.P. No.1364/2022.

2. Reply, if any, be filed within a period of two weeks of the receipt of notice. Rejoinder thereto be filed within a period of two weeks thereafter.

3. The learned counsel for the petitioner prays for an ad interim ex parte order of injunction restraining the respondent from blacklisting/debarring the petitioner and invoking the bank guarantees dated 29.07.2021 and 23.08.2021 submitted by the petitioner with the respondent in terms of the Contract Agreement dated 30th July, 2021 between the parties for the 'balance work for four-laning of NH-39 Dimapur-Kohima Road from design KM 152.490 to KM 166.700 (Existing KM 156.00 to KM 172.900) in the State of Nagaland under SARDP-NE through an Engineering, Procurement and Construction (EPC) Contract (Package-III) (hereinafter referred to as the 'Contract').

4. The learned counsel for the petitioner submits that Article 23.1(v) of the Contract provides that as a natural consequence of the termination of the contract by the respondent for alleged default of the petitioner/contractor, the contractor shall be deemed to have been debarred for a period of two years and shall not be able to bid any contract of the National Highways Authority of India. He submits that an order of debarment, without giving opportunity of hearing to the petitioner, would

be illegal. He, therefore, prays that the respondent be restrained from giving effect to the blacklisting/debarment of the petitioner.

5. On the issue of Bank Guarantee, he submits that the respondent already stands secured by way of deposit of Rs.11 Crores by the petitioner in compliance with the order dated 28.09.2022, passed by the Gauhati High Court inter alia in PIL (suo motu) 2/2019 in Re Kohima v. Union of India & Ors.. He submits that in terms of Article 10.3(iii) of the Contract, the maximum amount of damages on account of delay that can be levied on the petitioner cannot exceed 10% of the Contract Price. Rs.11 Lakh directed by the Gauhati High Court to be deposited by the petitioner, has been duly deposited by the petitioner, and represents this 10% of the Contract Value. No further damages are, therefore, leviable by the respondent on the petitioner.

6. Placing reliance on Article 7.3(i) of the Contract, he submits that the respondent can encash the Performance Security only for adjustment of the damages against the petitioner. Such damages having already been secured, the encashment of the bank guarantees would not be permissible to the respondent.

7. He finally submits that even if the Performance Bank Guarantee is to be encashed by the respondent, at least, an advance notice thereof be given to the petitioner for the petitioner to make an adequate representation thereagainst.

8. I have considered the submissions made by the learned counsel for the petitioner.

9. At the present stage, the ex parte relief prayed for by the petitioner, in my opinion, cannot be granted, especially in view of the observations made by the Gauhati High Court in its order dated 28.09.2022, passed in the Public Interest Litigation referred to hereinabove. The relevant observations of the Gauhati High Court are reproduced hereinbelow:

"11. We have taken note that the work-order with regard to Package- III was issued as early as on 01.09.2021 for an amount of Rs.111.19/- Crore and that the time stipulation to complete the work was within 12 (twelve) months. However, nothing has been done and from the various affidavits filed by the Authority Engineer we have seen that the respondent No. 12 is not serious for execution of the work with regard to Package-III. Further, as the respondent No. 12 has already abandoned the work and it is confirmed by Mr. Yashpal Sharma, Director, M/s Oasis Techno Construction Limited/ respondent No. 12 today, we are constrained to pass a direction to the NHIDCL authorities not to release any pending dues including the Bank Guarantee to the respondent No. 12 without the leave of this Court. Taking into consideration the lackadaisical, irresponsible behavior as well as making deliberate false promises on oath before this Court we direct the respondent No. 12 to liquidate 10% (ten percent) of the total contract amount (Rs. 111.19/- Crore) to the NHIDCL authorities within a period of one month from today.

12. We have also taken note of the submission made by the Authority Engineer in his progress report dated 28.09.2022 that they have appointed one contractor, M/S T. Tachu & Co. to look after the maintenance and safety works of Package-III in view of the emergent situation that has been created by the respondent No. 12. We, accordingly implead the Contractor, M/S T. Tachu & Co. as a party respondent in the present PIL. We also direct the Authority Engineer as well as the authorities of the NHIDCL and the newly appointed Contractor, M/S T. Tachu & Co. to maintain the road under Package-III so that the commuters do not face any difficulties or inconveniences."

10. The petitioner challenged the said order before the Supreme Court by way of Special Leave Petition (Civil) Diary no.32354/2922, titled Oasis Techno Construction Ltd. v. The Managing Director, National Highway and Infrastructure Development Corporation Ltd. & Ors. The said petition was disposed of by the Supreme Court vide its order dated 12.10.2022 with the following directions:

"(a) The petitioner shall deposit 10% of the contract amount as indicated in paragraph 11 with the National Highway and Infrastructure Development Corporation Limited (NHIDCL) on or before 30.11.2022. The NHIDCL shall keep the amount in an interest bearing fixed deposit account in a nationalized Bank with auto renewal facility.

(b) If the amount is so deposited, three Directors of the Company can enter appearance through a lawyer and their personal appearance need not be insisted upon.

(c) The deposit, as indicated above, shall be without prejudice to the rights and contentions of the petitioner.

(d) The petitioner shall be at liberty to file such application /affidavit, indicating its stand and/or justification, if so advised. The matter shall be gone into by the High Court before passing any orders for appropriation of the amount so deposited by the petitioner."

11. The termination notice was issued by the respondent on 16.11.2022, alleging various violations of the contract by the petitioner. Veracity of the same are to be determined in the arbitration proceedings. However, at the present stage, given the observations of the Gauhati High Court, in my opinion, the petitioner has been unable to make out a prima facie case in its favour.

12. As far as the relief against the encashment of the bank guarantees is concerned, it is a settled law that the invocation of a bank guarantee can be restrained only on the petitioner being able to make out a case of 'egregious fraud' or 'special equities' in the form of irretrievable injury. Both these exceptions, at least at the present stage, are not made out by the petitioner. The petitioner can always be compensated in case it is found that the termination of the contract by the respondent was

wrongful or for amounts in excess of what was payable under the contract.

13. Therefore, at this stage, and in the absence of the respondent, I do not consider it proper to grant relief as prayed for by the petitioner.

14. List on 18th January, 2023.

NAVIN CHAWLA, J DECEMBER 1, 2022/RN