

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

Reserved on: 21.05.2012

Pronounced on: 02.07.2012

+ **FAO (OS) 120/2012, C.M. APPL. 4896/12 & 4897/12**

NATIONAL HIGHWAYS AUTHORITY OF INDIA Appellant
Through : Sh. Sudhir Nandrajog, Sr. Advocate with Sh.
Mukesh Kumar and Ms. Meenakshi Sood, Advocates.

VS

AFCONS INFRASTRUCTURE LTD. Respondent
Through : Sh. Manu Seshadri with Sh. D. Balaraman,
Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE S.P.GARG

MR. JUSTICE S.RAVINDRA BHAT

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C.M. APPL. 4896/12 (for condonation of delay) & 4897/12 (for exemption)

Allowed, subject to just exceptions.

FAO (OS) 120/2012

1. This appeal is directed against orders passed under Section 34 of the Arbitration and Conciliation Act, 1996 ("the Act") questioning an arbitral award dated 18.08.2010. The respondent had claimed reimbursement of excise duty due to subsequent change in legislation. The Claimant's bid was furnished to the appellant on 28.02.2001; it was accepted on 09.04.2001. The respondent's claim was accepted by the Award; the appellant

questioned it. By the two impugned orders, the appellant's objections have been rejected.

2. The brief facts are that the respondent's bid, dated 28-3-2001, was premised on the condition that

“the rates and prices which included all duties, taxes and other levies payable by the Contractor under the contract, or for any other Causes as of the date prevailing 28 days prior to the last date for submission of bid in terms of Clause 13.4 of the instruction to Bidders”

The rates and prices quoted were subject to adjustment during the performance of the contract in accordance with provision of Sub-clause 70 of COPA (Conditions of Purchase Agreement) in turn, based on Clause 13.5 of the Invitation to Bid (ITB). The claimant had urged that in terms of provisions of the prevailing Export-Import Policy (EXIM Policy) at the relevant time, i.e., on 31.01.2001, supplies to this work, forming part of the National Highways Development Project (NHDP), were eligible for classification as *“Deemed Exports”*. Among the benefits available to a supplier of goods under “deemed exports” scheme was the entitlement to refund of the excise duty element in the value of manufactured goods supplied by it. A bidder instructed to consider the rates and prices as on 31st January 2001, i.e. 28 days prior to the deadline for submission of bids, was therefore entitled to consider the value of manufactured goods supplied to the project to be effectively without excise duty in terms of Clause 13.4 ITB. The respondent claimed that any such duty, if eventually made payable subsequently on account of withdrawal of the duty drawback scheme, had to

be refunded to the supplier in terms of Clause 13.5 of ITB and Sub-Clause 70.8 of COPA.

3. The EXIM Policy underwent an amendment on 31.03.2001, effective from 01.04.2001. As a consequence, goods supplied to projects in the Roads and Bridges segment, became ineligible to the “deemed export” benefit or facility, resulting in burdening the suppliers with excise duty. The claimant, therefore, asked for such additional costs under sub-Clause 70.8 of COPA. The Arbitral Tribunal awarded Rs.8,73,31,118/- towards reimbursement of additional costs incurred on account of excise duty due to this change.

4. The appellant questioned the award. In its statement of defence, before the arbitrator, the appellant had urged as follows:-

“It is submitted without prejudice that the ingredients of Clause 70.8 are:-

i. There should be a legislation;

ii. The legislation should have an impact on the contract.

iii. The impact of the legislation on the contract should be by way of causing additional or reduced cost to the Contractor other than cause covered under 70.1 to 70.7.

iv. The contractor should not have already been compensated for the additional or reduced cost under clause 70.1 to 70.7.”

No evidence was led by the appellant to prove that the contractor has already been compensated for the additional or reduced cost under Clause 70.1 to 70.7. That submission of the appellant, founded upon Clause 70.8 was, therefore, rejected by the award, and by the learned single judge. The next argument made, but which did not find favour with the learned single judge was that the claim made by the respondent was belated. The appellant

had relied on the decision reported as *P. Manohar Reddy and Bros. Maharashtra Krishna Valley Development Corporation & Ors* (2009) 2 SCC 494. Similarly, the argument that withdrawal of duty drawback facility did not amount to legislative change, imposing a new levy, qualifying for reimbursement, also did not find any merit with the learned Single Judge.

5. It is argued by learned Senior counsel on behalf of the appellant that the single judge fell into error in not considering that the amendment, to the EXIM policy, effective from 1-4-2001, did not constitute a fresh levy or new tax. All that it did was to withdraw the eligibility of duty drawback, and also saying that procurement for road infrastructure did not fall within the “Deemed export” regime, which exempted payment of excise duty. This court notices that the learned single judge had found that

“the State can impose a levy, or withdraw the same, only through legislation. Legislation would include subordinate legislation. It is not the appellant’s case that the withdrawal of the duty drawback w.e.f. 1st April, 2011 was not done on the basis of a statutory notification.”

There is, in this Court’s opinion, no error in such finding. The State can and does, in its sovereign capacity to tax its citizens and corporate bodies, adopt several devices, which may not conform to traditionally understood stereotypes. This may include exemption notifications, notifications which extend concessional rates of duty, subject to fulfilling predetermined criteria, incentives by way of duty drawbacks, and export incentives, linked with one or other qualifications, to attract and promote foreign trade, with the objective of augmenting foreign exchange reserves and investments. The

imposition of these can be in the form of rules, notifications, schemes, regulations, etc, all of which are under one or more statutes. In this case, the duty drawback incentive was linked with the concept of deemed export, defined under the EXIM policy, which was framed under the Foreign Trade (Development and Regulation) Act, 1992, read with provisions of the Central Excise Act, 1944 and the Central Excise Tariff Act, 1985.

6. The appellant's next argument is that the claim was barred by limitation, which was taken before the arbitrator, but not dealt with the said issue with reference to the contractual terms. Learned senior counsel relied on Clause 67.1 of COPA which stated that a dispute of any nature whatsoever arising during execution of the work or after its completion was to be first raised before the Engineer, who was required to give his decision within 84 days. If he failed to give notice of his decision on or before the 84th day after the date on which he received the reference, the aggrieved party could, before the expiry of 70th day (after the day on which the said period of 84 days expired) give notice to the other party of his intention to invoke arbitration. The appellant's counsel contended that the respondent made its claim on 23-10-2003 though the withdrawal of duty drawback became effective from 1st April, 201. The Engineer did not give his decision within 84 days of 23-10-2003. The respondent did not issue notice invoking arbitration within the 70th day period of expiry of the period of 84 days, and the notice invoking arbitration was given on 11-3-2005. Senior counsel for the respondent, had urged that the notification withdrawing the deemed export status was issued w.e.f. 01.04.2001. This was after the submission of the bid by the respondent and

the effect of the withdrawal of deemed export status was that it was entitled to be paid the excise-duty on the raw materials. The respondent raised its bill for excise-duty for the period ending on 31.05.2003, on 23.10.2003. The Team Leader by a letter dated 19.11.2003 communicated the comments of the Senior Quality Surveyor which, stated

“As this concerned with the tender terms and conditions it has to be dealt by the NHAI only. If it is falling under “deemed Export” the statement of certified quantities of specified materials will be scrutinized and submitted for making payment after the final go ahead from NHAI”.

7. The respondent argued that other interim bills were submitted for reimbursement of extra cost incurred on excise-duty on 26.07.2004 and 25.07.2005. As the respondent did not receive any communication regarding reimbursement of deemed export benefits till 11.03.2005, it concluded that a dispute had arisen in relation to reimbursement of excise-duty and sought the decision of the Team Leader under Clause 67.1 of the Conditions of Particular Application (COPA) by letter dated 11.03.2005. The learned single judge accepted the respondent's submission, and also found that:

“The Engineer did not give his decision within 84 days. Within 70 days of the expiry of the said period of 84 days, the petitioner had invoked the arbitration. Therefore, the submission made by the petitioner that the claim was barred by limitation, is fallacious.”

The learned single judge further held that the accounting in relation to the contract in question was a running account and the final

bill had not even been prepared by the time the respondent had invoked arbitration; as a result, the said claim was not time-barred. Article 1 of the Limitation Act was mentioned, and it was held that this found mention in the award. It was also concluded that the arbitral award also dealt with the question of limitation. It was also held that:

“7. Having heard learned counsel for the parties, I am of the view that there is no merit in the objection of the petitioner. A perusal of Clause 67.1 of COPA shows that the existence of a dispute is the sine qua non for invocation of the said clause. It begins with the words “if a dispute of any kind whatsoever arise between the employer and the contractor”... The dispute in this case cannot be said to have arisen either on the date when the notification dated 31.03.2001 was issued or even on the date when the respondent submitted its interim bills to claim payment of the excise-duty. For a dispute to arise, there should be a claim and repudiation of a claim. In this case there was no repudiation of the respondent’s claim by the petitioner. In fact, even on 11.03.2005, when the respondent referred the matter to the Engineer, the same was construed as a dispute by the respondent on account of inordinate delay and silence maintained by the petitioner in relation to the respondent’s bills raised for claiming excise-duty. There was no express repudiation of the said claim ever by the petitioner. The limitation under Clause 67.1 in this case, therefore, arose on 11.03.2005 and not at any time before that date.

8. The submission of the petitioner that the Arbitral Tribunal has not considered the pleas of the petitioner in relation to the limitation, is also not correct. As referred to above, the Tribunal has extensively dealt with the issue of limitation in its award. I, therefore, find no merit in this petition.”

8. This court does not discern any error or infirmity in the approach of the learned single judge. The parameters of review under Section 34 of the

Act – despite the seemingly wide interpretation of the term “contrary to public policy” in *Oil and Natural Gas Commission v. SAW Pipes Ltd.*, AIR 2003 SC 2629, are restricted and narrow. The courts will be slow in interfering with an award, unless it discloses manifest disregard of the law. As far as the interpretation of Clause 13.5 of the ITB and Clause 70.5 of the COPA is concerned, there is no factual dispute that the deemed duty concession or facility was withdrawn with effect from 1-4-2001, much after the bid was submitted and even accepted. Therefore, the respondent relied on Clause 70.8 of the COPA.

9. In the decision reported as *All India Taxpayers Welfare Association v. Union of India & Ors.*, (2006) (4) STR 18) speaking about the obligation of the user, or buyer of services, to pay indirect taxes, the Supreme Court, though dealing with the incidence of Service Tax, referred to the Central Excise Act, held that:

"9. The provider of service is an assessee under s.65 of the Finance Act, 1994 and he has to collect service tax from the users of service as contemplated under ss. 12A and 12B of the central Excise Act. In this context, it is necessary to refer that s. 12A of the Central Excise Act contemplates that notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty of excise on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating assessment, sales invoice, and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold. Sec. 12B of the Central Excise Act contemplates that every person who has paid the duty of excise on any goods under this Act, shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods. Thus, the provider of

service only being an assessee according to s. 65 of finance Act is to collect service-tax from the users of service as contemplated under ss. all bills the details including service tax which is payable by the users".

It would also be necessary to notice here that Sections 12-A of the Central Excise Act, which are also made applicable by virtue of Section 83 of the Service Tax Act, prescribe that the provider of goods (in this case, service) has the obligation to indicate the quantum of tax, on the goods or services, sold or offered, for sale. The said provisions are as follows:

"12A. PRICE OF GOODS TO INDICATE THE AMOUNT OF DUTY PAID THEREON.

Notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty of excise on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating to assessment, sales invoice, and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold...."

The Court expressly referred to Section 12-B of the Central Excise Act, which reads as follows:

"12B. PRESUMPTION THAT INCIDENCE OF DUTY HAS BEEN PASSED ON TO THE BUYER.

Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.."

10. In view of the above, this Court is satisfied that the interpretation placed on the terms of contract, as far as liability for payment of excise duty, on account of withdrawal of the "deemed export" facility in relation to the

duty drawback scheme, did result in a new tax liability, which had to be borne by the appellant. The findings of the single judge cannot be faulted. So far as the question of liability is concerned, the findings in that regard are concurrent and therefore do not call for interference.

11. In view of the above discussion, this Court finds no merit in the appeal; it is consequently, dismissed.

S. RAVINDRA BHAT
(JUDGE)

S.P. GARG
(JUDGE)

JULY 02, 2012