

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 19.01.2015

+ **FAO(OS) 25/2015**

NATIONAL HIGHWAYS AUTHORITY OF INDIA ... Appellant

versus

**M/S SSANGYONG ENGINEERING &
CONSTRUCTION CO. LTD** ... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Pradeep K. Bakshi with Ms Prachi V. Sharma
For the Respondent : None

CORAM:-

**HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SANJEEV SACHDEVA**

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

CM 903/2015

Allowed subject to all just exceptions.

FAO(OS) 25/2015 & CM 902/2015

1. This appeal is directed against the judgment and/ or order dated 27.11.2014 passed by a learned Single Judge of this Court in OMP 1208/2014.

2. The appellant's said petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the said Act') was

rejected by the learned Single Judge. The single point raised by the appellant before the learned Single Judge was in respect of the challenge to the Award dated 16.06.2014 passed by the Arbitral Tribunal on the issue of reimbursement of entry tax on account of the hike from 1% to 27% by the State of Madhya Pradesh by bringing out an amendment to the Madhya Pradesh Entry Tax Act, 1976, which took effect from 01.04.2007.

3. The appellant had invited bids for construction of the four-lane highway in the Jhansi-Lakhanadon section between km 187 to km 211 of National Highway-26 (NH-26) in the State of Madhya Pradesh. The respondent was successful in the bid and a contract dated 12.04.2006 was executed, which was followed by a supplementary agreement dated 11.02.2009. The work was completed in October, 2012. At the time of submission of bids, all taxes, duties and levies, which prevailed 28 days prior to the last date of the submission of the bid had to be taken into account. Consequently, the base date, with reference to which taxes, duties and levies were factored in, was frozen at 29.09.2005.

4. At the time of the submission of the bid, the entry tax of high speed diesel, insofar as Madhya Pradesh is concerned, was 1%. Subsequently, as pointed out above, the State of Madhya Pradesh enhanced the entry tax

from 1% to 27 % by amending the Madhya Pradesh Entry Tax Act, 1976.

The hike in entry tax took effect from 01.04.2007.

5. The only issue was whether the respondent was entitled to the difference between 1% and 27% insofar as the hike in entry tax is concerned. The respondent took advantage of clause 70.7 of the Conditions of Particular Application (COPA). The said clause 70.7 reads as under:-

“Sub-Clause 70.7 Subsequent Legislation

If, after the date 28 days prior to the latest date for submission of bids for the Contract there occur in the country in which the Works are being or are to be executed, changes to any National or State Statute, Ordinance, Decree, or other Law or any regulation or by-law of any local or other duly constituted authority, or the introduction of any such State Statute, Ordinance, Decree, Law, regulation or by-law in India or States of India which causes additional or reduced cost to the Contractor, other than under the preceding Sub-Clauses of this Clause; in the execution of the Contract, such additional or reduced cost shall, after due consultation with the Employer and the Contractor, be determined by the Engineer and shall be added to or deducted from the Contract Price and the Engineer shall not notify the Contractor accordingly, with a copy to the Employer. Notwithstanding the, foregoing, such additional or reduced cost shall not be separately paid or credited if the same shall already have taken into account in the indexing of any inputs to the Price Adjustment Formulae in accordance with the provisions of Sub-Clauses 70.1 to 70.6.”

6. It is the contention of the appellant that the learned Single Judge as

also the Arbitral Tribunal did not give due credence to the proviso in the form of a *non-obstante* sentence in clause 70.7 of COPA, which stipulated that notwithstanding what was stated earlier in clause 70.7, any additional or reduced cost would not be separately paid or credited if the same had already been taken into account in the indexing of any inputs to the Price Adjustment Formula in accordance with the provisions of Clauses 70.1 to 70.6.

7. According to the learned counsel for the appellant, high speed diesel had already been factored into in clause 70.3 (vi) of COPA. Consequently, the benefit of clause 70.7 ought not to have been given to the respondent and the Tribunal as well as the learned Single Judge, having granted that benefit, did so contrary to the contract.

8. We find from the impugned judgment as also from the Arbitral Award that this aspect has been examined. The Arbitral Tribunal examined this aspect of the matter in the following manner:-

“6.4 The Claimant is a commercial organization and is executing the project for commercial gains. It is therefore expected that it will buy HSD from any place where it finds it convenient. Therefore purchase of HSD by the Contractor from Mathura does not violate any condition of the Contract and is in order.

6.5 The Price Adjustment mechanism under Sub-clause 70.3(vi) only takes into account the prevailing “average retail price of HSD at the local consumer pumps at Sagar. Nowhere it is laid down in the Contract that the Contractor is obliged to purchase HSD from Sagar. As mentioned in the preceding para, the Contractor is free to buy the same from any place of its choice.

6.6 With exemption in Excise Duty, procurement of HSD by the Claimant from Mathura was cheaper as compared to Sagar by Rs. 11.05 per litre before 1.4.07 when Entry Tax was payable @1%. Also, it was cheaper by Rs. 2.07 per litre even after payment of enhanced Entry Tax @ 27% after 1.4.07. Therefore it is logical that the Contractor would purchase HSD from Mathura Refinery.

6.7 On base date i.e. 28 days prior to submission of bid, the State of Madhya Pradesh was levying Entry Tax only at the rate of 1% against procurement of HSD from outside the State. The same was increased from 1% to 27% vide Notification No. A-3-195-05-V(14) dated 01.04.2007 by the Government of Madhya Pradesh in exercise of its powers conferred under Section 4-A(1) of the Entry Tax Act, 1976. This increase of Entry Tax from 1% to 27% was on account of a 'Subsequent Legislation' in terms of Clause 70.7 of COPA which has caused additional cost to the Claimant and the same has not been denied by the Respondent.

6.8 The price adjustment mechanism under Sub-Clause 70.3(vi) takes into account average retail price of HSD prevailing at Sagar. This price of HSD includes the element of Entry Tax applicable to dealers which remained constant at 1% right from inception of the project to its completion. It did not change even after notification dated 01.04.07 issued by State Govt.

Enhancement of Entry Tax from 1% to 27% through above referred notification was only for consumers bringing the HSD from outside the State and hence did not become input to the price adjustment formula under Sub-Clause 70.3(vi) applicable for HSD in the present case.

Sub-Clause 70.7 provides for adjustment of cost on account of subsequent legislation. As per, this Sub-Clause, following conditions have to be met with for adjustment of cost:

1. There has to be a subsequent legislation and the same has to be effective from a date after base date, i.e. after 28 days prior to the latest date of submission of bids.
2. The subsequent legislation has to result in additional /reduced cost to the Claimant other than under the preceding Sub-Clauses of this Clause.
3. Additional/reduced cost shall not be separately paid if the same shall already have been taken into account in the indexing of any inputs to the price adjustment formulae in accordance with the provisions of Sub-Clauses 70:1 to 70.6.

The parties have accepted the fact of subsequent legislation issued and made applicable after the base date. As brought out in the preceding paras, the Respondent has not denied the fact that the subsequent legislation has caused additional cost to the Claimant. It has also been brought out that the additional cost has not been paid to the Claimant under Sub-Clauses 70.1 to 70.6. Enhancement of Entry Tax from 1% to 27% as a result of subsequent legislation has not been taken in the indexing of the inputs to the price adjustment formulae under Sub-Clause 70.3(vi). Thus all requirements of Sub-Clause 70.7 are met with.

In view of above, the additional cost incurred by the Claimant by way of payment of enhanced Entry Tax as a result of subsequent legislation is reimbursable to them under Sub-Clause 70.7.”

9. It will be seen from the above that the Arbitral Tribunal returned a finding that the additional cost, consequent upon the hike from 1% to 27%, had not been paid to the claimant under sub-clause 70.1 to 70.6. Consequently, the Tribunal came to the conclusion that this enhancement had not been taken into account in indexing of the inputs for the price adjustment formulae under clause 70.3 (vi) and that, therefore, all the requirements of clause 70.7 had been met. The same view has been confirmed by the learned Single Judge. The learned Single Judge also examined clause 70.7 of COPA and noted that the notification enhancing the entry tax from 1% to 27% was after the base date of 29.09.2005. Consequently, the learned Single Judge concluded that once this condition was met, the adjustment of costs was required to take place based on the impact of the subsequent legislation. The learned Single Judge noted that the only caveat to the adjustment of cost was where the addition or reduction in cost had already been taken into account in indexing of any of the inputs to the price adjustment formulae in accordance with the provisions of preceding sub-clauses, namely, clauses 70.1 to 70.6. The

Arbitral Tribunal had already returned a finding of fact that additional cost had not been paid to the respondent under clauses 70.1 to 70.6. There was no escape from the provisions of clause 70.7.

10. The learned counsel for the appellant states that there was no mandate to purchase the high speed diesel from Mathura (outside the state of Madhya Pradesh) and the respondent could very well have procured it from Sagar, which is in Madhya Pradesh. Had the respondent purchased the high speed diesel from Sagar, it would not have to bear the burden of the hike in entry tax. This aspect of the matter has also been examined by the Arbitral Tribunal as also by the learned Single Judge by holding that since the contract did not mandate the procurement of high speed diesel from Sagar or from any particular place in India, it was open to the respondent to procure the high speed diesel from a place which was most beneficial to it. It has also been recorded in the impugned judgment that the appellant was well aware of the fact that the respondent was procuring the high speed diesel from Mathura prior to the hike in the entry tax with effect from 01.04.2007. The respondent continued to do so because both pre and post hike, the price of high speed diesel came out to be cheaper for the respondent. It was ` 11.05 cheaper prior to the hike and ` 2.07 cheaper

post hike. This aspect of the matter has also been examined, as noted above and we see no reason to interfere with the same.

11. In view of the above, we see no reason to take a different view. The appeal is dismissed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

**JANUARY 19, 2015
SR**

SANJEEV SACHDEVA, J

