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

R-62 & 65

\+ **OMP No. 99/2008 & IA 15245/2008**

GAMMON INDIA LIMITED & ANR
(COLLECTIVELY REFERRED TO AS
GAMMON – ATLANTA JV) ..... Petitioners
Through: Mr. Subramaniam Prasad, Senior Advocate with Mr. Sumit Goel, Ms. Raveena Rai and Ms. Sonal Gupta, Advocates.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA...Respondent
Through: Mr. Mukesh Kumar with Ms. Gunjan SInha Jain, Advocates.

AND

\+ **OMP No. 107/2008**

NATIONAL HIGHWAYS AUTHORITY OF INDIA ...Petitioner
Through: Mr. Mukesh Kumar with Ms. Gunjan Sinha Jain, Advocates.

Versus

GAMMON – ATLANTA (JV) .... Respondent
Through: Mr. Subramaniam Prasad, Senior Advocate with Mr. Sumit Goel, Ms. Raveena Rai and Ms. Sonal Gupta, Advocates.

CORAM: JUSTICE S.MURALIDHAR

<u>O R D E R</u>

% **15.11.2016**

1. These petitions under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenge the impugned Award dated 5th October 2007 passed by the Arbitral Tribunal (AT) in the disputes between the parties

arising out of a Contract dated 20th December 2000 for the work "Widening of 4/6 lane and strengthening of existing 2 lane carriage-way of NH-5 in the State of Orissa from Km. 387.700 to Km. 414.000 (Khurda-Bhubaneshwar)".

2. OMP No. 99 of 2008 filed by Gammon – Atlanta - JV ('GA-JV') challenges the impugned Award in respect of the Claim Nos. 1.1, 1.8, 1.9, 2.1 and 2.2.

3. OMP No. 107 of 2008 by the National Highways Authority of India ('NHAI') challenges the award in respect of Claim Nos. 1.1, 1.4, 1.5, 1.9, 2.1 and 2.2.

4. At this stage it must be mentioned here that by an order 13th March 2009 in OMP No. 99 of 2008 this Court permitted the GA-JV to withdraw its challenge to the impugned Award in respect of Claim No. 2.3 with liberty to it to pursue the claim before the AT.

Claim No. 1.8: Reimbursement of excise duty under Clause 70.8 – Subsequent Legislation.

5. According to GA-JV, the work was awarded to it for a sum of Rs. 118,90,10,112 on the basis of International Competitive Bidding ('ICB'). It is stated that in accordance with the Exim Policy in force at the time of submission of bid on 17th October 2000, the project was eligible for refund of the excise duty. Subsequently, it is seen that in terms of para 10.2(g) of the Exim Policy, this benefit for available for supply of goods by the main/sub-contractors for power and refineries, coal, hydro-carbon, rail, road, port, civil aviation, bridges "and other infrastructure projects" provided minimum specific investment is Rs. 100 crores or more.

6. It is not in dispute that amendments were made in the above policy on

31st March 2001. Para 10.2 (g) was amended by limiting the benefit of refund of terminal excise duty only to supply of goods to the power and refineries and the same for infrastructure projects. After the above change in the Exim Policy, on 20th June 2003 the Claimant wrote to the NHAI specifically drawing an attention to the above change and pointed out that the excise duty is required to be reimbursed in accordance with Clause 70.8 of the Conditions of Particular Application (COPA). By its letter dated 30th October 2003 the Consultant declined to allow refund of the excise duty.

7. In the impugned Award the AT accepted the submission of the Claimant that "any amendment in this policy after the crucial date, will attract Clause 70.8 dealing with subsequent legislation." However, the AT proceeded to reject the claim by reasoning that "there is no document on record before the AT either at the time of submission of bid or immediately thereafter that the Claimant's bid was based on the premise that the quoted rates were exclusive of the excise duty on account of the alleged benefit available to the Claimant as per Clause 10.2 (g) of the Exim Policy applicable for the year 2000-01."

8. It was further observed by the AT that "if the claimant was so sure that the rates quoted by him while submitting the tender on 17th October 2000 were exclusive of excise duty, he would have expressed his intention to claim additional cost on account of excise duty on materials soon after the Exim policy was amended effective from 1st April 2001." The AT held that the very fact that such a claim was made "after nearly 3 years" is an afterthought.

9. Having heard learned counsel for the parties, the Court is of the view that the AT erred in denying the Petitioner's claim only because it was

raised "after nearly three years" after change in the legislation. As already noticed hereinabove, the Claimant wrote to the NHAI on 20th June 2003 making its claim and this was rejected by the Consultant on 30th October 2003. The AT having accepted the claim of the Claimant in terms of the subsequent legislation under Clause 70.8 of the COPA there was no justification to deny the claim only because the Claimant did not seek refund of the excise duty earlier than in 2003. The further reason that the Claimant would have to demonstrate at the time of submission of the bid that the rates quoted by him were exclusive of excise duty exemption is again not requirement of the contract at all. The NHAI itself does not dispute the Exim Policy which was available at the time of submission of bids. Clearly when the Claimant submitted its bid it would have accounted for the benefit under the Exim Policy and would have quoted its rates on that basis. This also becomes clear from the Claimant's letter dated 20th June 2003.

10. The Court holds that the decision of the AT on Claim No. 1.8 is unsustainable in law as it is not based on any clause of the contract. Accordingly, the impugned Award in respect of Claim No. 1.8 is set aside.

Claim No.1.1: Providing and maintaining PIU for use by the Engineer and NHAI under the BOQ Items 8.15 and 8.16.

11. The BOQ item 8.15 provides for a site office for the Engineer "including furnishing the same complete" as per the drawing and Technical Specifications Clauses 120 and 127. The quantity indicated is 342 sqm. and the quoted rate is Rs. 13,387/- per sqm. The BOQ item 8.16 provides that "maintaining the site office for the Engineer and other supervisory staff complete as per the drawing and Technical Specifications Clause 120".

12. Factually the Claimant took on rent and provided the site for the purpose of use by the Engineer and other supervisory staff. The AT has noted that over a period of more than four years, rent of only Rs. 18,000 per month was paid for such accommodation. The Claimant did not place any other document on record with regard to enhancement of such rent. In the circumstances, the AT allowed the claim in respect of the rent paid at the site office.

13. As far as the Claimant is concerned, the grievance is that the rates specified for the said BOQ items 8.15 and 8.16 should have been awarded notwithstanding that the required accommodation was provided by the claimants by way of hiring which is within the ambit of the Technical Specifications.

14. The challenge by NHAI to the award with regard to Claim 1.1 is that inasmuch as the payment of any rent for such site office is not envisaged, the claim should be rejected forthwith. Further with regard to the maintenance of the site office under BOQ item 8.16, the cost was to be borne by the Supervision consultant only and hence BOQ item 8.16 would become inapplicable.

15. The Court is unable to agree with either of the submissions of the Claimant or the NHAI in this regard. The AT appears to have reimbursed the Claimant only to the extent of the actual expenses incurred by the Claimant at the site office. It appears to be reasoned one in the context of description of BOQ items 8.15 and 8.16 and it cannot be said that the Claimant should have been reimbursed to the extent of expenditure not incurred by it.

16. Consequently, the Court finds that there is nothing perverse in the determination of claim by the AT. The challenge to the Award with regard to Claim 1.1 by both the Claimant and the NHAI is hereby rejected.

Claim No. 1.9: Reinforcement in Crash Barrier and Friction Slab – Payment of Cost

17. BOQ Item 8.29 is 'RCC Crash barrier monolithic with friction slab M-30 as per approved Drawing and Technical Specification Clause 809 and including cost of necessary material , formwork and reinforcement'. In deciding the above claim, the AT observed that even though the drawing at the time of tendering did not show any reinforcement in the crash barrier but showed friction slab without reinforcement, the Claimant was expected to include at least the minimum reinforcement in the crash barrier. On that basis, the AT held that the rate quoted in the BOQ item 8.29 is inclusive of the minimum quantum of reinforcement and that the reinforcement used "in excess of 0.8% of the weight of concrete in crash barrier needs to be paid separately in addition to the payment released/being released under BOQ item 8.29. The rate for extra reinforcement to be paid was calculated and awarded along with interest @ 12% per annum.

18. The grievance of the Claimant is that reinforcement of the crash barrier was not a BOQ item and therefore, should be compensated on actual basis. The Court finds that the distinction in the BOQ Item 8.29 is that it contains the word 'including' and ends with the word 'reinforcement'. The AT interpreted the BOQ item 8.29 and held that it envisaged a minimum reinforcement and that being a plausible interpretation it cannot be said to be perverse. The claim of the NHAI is that the Claimant was over compensated is again not borne out from the

BOQ item 8.29. Consequently, the challenge to the Award in respect of Claim No. 1.9 is hereby rejected.

Claim No. 1.4: Non-payment of additional cost of GSB and WMM in Profile Corrective Course.

19. The NHAI has challenged the Award with respect to claim No. 1.4 which concerns the non-payment of additional cost of GSB and WMM in profile corrective course. The AT has noted that while the contract provides for enhanced rate for laying profile corrective course with dense bituminous macadam it did not specifically provide for such enhancement when the material used is GSB/WMM. There the AT noted that the work of the GSB and WMM in profile correction should also be entitled to separate rate. On the NHAI's contention that the profile corrective course was covered under the BOQ Items 3.01 and 3.02, the AT after perusing the specification relied upon by NHAI held that it does not refer to the work of profile correction. On further analysis, the AT had decided that this work be paid at 10% extra over the rates of respective items in BOQ items 3.01 and 3.02 with the amount being arrived at by allowing price adjustment under Clause 70.3 along with interest @ 12% per annum.

20. Having heard learned counsel for the parties and having examined the aforementioned BOQ items, the Court is unable to find any perversity in the reasoning and conclusion arrived at by the AT in its decision to allow Claim No.1.4 to the limited extent. The Award in respect of Claim 1.4 is accordingly upheld.

Claim No. 1.5: Payment at revised rates for construction of additional flyover No. 5 at Jayadev Vihar at Km. 418.

21. As regards Claim 1.5, the controversy was whether the extra leads of 18 km for the road work should be calculated from the project centre

point to the location of Flyover 5 or from the end of the Project Works as contended by NHAI. It was noted that the Engineer recommended the revised rates with detailed rate analysis for the work to the NHAI. The rate recommended by the Engineer on the basis of the detailed analysis was found to be correct by the AT.

22. As noted by the AT itself that the road work stood completed with Flyover 2. The work of Flyover 5 was outside the contract limits and therefore, an additional new work and not a substitute work which had to be considered from the centre point. The Court finds no ground having been made out to interfere with the Award in respect of Claim 1.5.

Claim Nos. 2.1 and 2.2: Claim of losses incurred on account of overhead and expected profit and compensation for reduced productivity of machinery and equipment deployed.

23. The AT observed that the delays occurred in the completion of the work cannot be attributed to the Respondent/GA-JV. The AT noticed that the tendered rates incorporated a provision for overheads and profit at 27.28% of the tendered cost. This included a provision of 14.28% towards overheads. Further, during the cross-examination, the Claimant filed details of overheads on the basis of books of accounts of JV partners prior to tendering and established the figure of 14.28%. Since the NHAI has not commented on these figures, the AT has accepted the overheads as 14.28%. Consequently, the AT computed the compensation towards overheads on the work of Rs. 37 crores affected on account of the delay in handing over of the site as Rs. 5.28 crores.

24. With regard to the claim for loss of profit, the AT noticed that the Claimant was still executing the work and therefore held that the claim for profit does not survive. However as regards the compensation for loss

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of productivity the AT noted that there were several occasions where the Claimant was responsible for under-utilisation of machinery and equipment during the initial contract period from 15th January 2001 to 14th January 2004. The AT held that the machinery component of 5% could be considered for the work of Rs. 37.00 crores as affected by the delay in handing over of the site. On that basis the compensation towards reduced productivity of equipment and machinery was computed at Rs. 1.85 crores.

25. The Court is not persuaded to hold that the above determination is arbitrary or speculative as is sought to be contended. The AT has provided sufficient reasons for arriving at the above conclusions which have not shown to be perverse or contrary to the record. Consequently, the Court negatives the challenge by both NHAI and GA-JV to the Award in respect of Claims 2.1 and 2.2.

26. The petitions the pending application are disposed of in the above terms.

S.MURALIDHAR, J

NOVEMBER 15, 2016
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