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

F-88.

\+ **O.M.P. 223/2008 & IA No. 4967/2008 (exemption)**

NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Petitioner
Through: Ms. Gunjan Sinha Saini, Advocate.

versus

M/S. OSE-GIL (JV) ..... Respondent
Through: Mr.Anil Airi, Senior Advocate with Mr. Ravi Kishan Chandna, Ms. Bindiya Logawney, Ms. Sadhna Sharma and Ms. Naveli, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

% **22.11.2016**

1. This petition by the National Highways Authority of India ('NHAI') against M/s. Oriental Structure Engineers Limited - Gammon India Limited, Joint Venture challenges the Award dated 19th October, 2007 passed by the Arbitral Tribunal ('AT') in the disputes between the parties arising out of a contract dated 26th March, 2002 for the work of "Four Laning and strengthening of existing two lane section from Km. 199.96 to Km. 250.50 of NH-2 in UP-(Construction Package 1-A)".

2. There were six claims of the Respondent which were dealt with by the Arbitral Tribunal ('AT') as under:

> "(i) Claim No. 1: Reimbursement of increased rate of royalty imposed on soil/earth by the Government of Uttar Pradesh through Notification dated 15th December, 2004 under Clause 70.8 of the Conditions of Particular Application ('COPA') in the Contract;

(ii) Claim No. 2: Reimbursement of additional cost incurred on account of imposition of Entry tax on cement by the Govt. of Uttar Pradesh through notification dated 9th May, 2003 under Clause 70.8 of the Conditions of Particular Application (COPA) in the Contract;

(iii) Claim No. 3: Reimbursement of additional cost incurred on account of increase in the rate of Sales Tax on fuel and lubricants by the Govt. of Uttar Pradesh through notification dated 9th May, 2003 under clause 70.8 of the Conditions of Particular Application (COPA) in the Contract;

(iv) Claim No. 4: Payment of interest on Unpaid Advance against material brought to the site;

(v) Claim No. 5: Payment of interest on unpaid and uncertified amounts;

(vi) Claim No. 6: Payment of extra lead on account of closure of mines for Granular Sub-Base & Wet Mix Macadam base."

3. At the outset, it is stated by Ms. Gunjan Sinha, learned counsel for NHAI that payment as regards Claim No. 1 has already been made by NHAI to the Respondent in terms of the impugned Award. Therefore, the challenge to the Award in respect of Claim No. 1 is not pressed.

4. As regards Claim No. 2 regarding reimbursement of additional cost incurred on account of imposition of entry tax on cement by the Government of Uttar Pradesh by Notification dated 9th May, 2003, Ms. Sinha refers to the order dated 3rd August, 2015 passed by the Supreme Court in Civil Appeal No. 6982 of 2013 (***National Highways Authority of India v. Oriental Structure Engineers Ltd.***) which notes that the claim stands covered by the decision in ***National Highways Authority of India v. ITD Cementation***

India Limited* 2015 (5) SCALE 554**. In fact by the same order, the Supreme Court also disposed of Special Leave Petition (C) No. 14726 of 2015 which concerned a claim similar to Claim No. 3 in the present case i.e., reimbursement of additional cost incurred on account of increase in the rate of Sales Tax on fuel and lubrication by the Government of Uttar Pradesh by Notification dated 9th May, 2003. That SLP was also disposed of in terms of the decision of the Supreme Court in ***National Highways Authority of India v. ITD Cementation India Limited (*supra*).

5. It is, however, submitted by Ms. Gunjan, that the impugned Award in respect of both Claim Nos. 2 and 3 is declaratory and fails to quantify the sum to be reimbursed to the Respondent. Referring to the decision of the High Court in ***National Highways Authority of India v. ITD Cementation India Ltd. 2008 (100) DRJ 431 (DB)***, she submits that the matter should be remanded to the AT for quantifying the sum to be actually reimbursed to the Respondent, for which purpose the Respondent will have to place the necessary supporting documents on record.

6. Mr. Anil Airi, learned Senior counsel appearing for the Respondent, on the other hand, submits that the impugned Award is not entirely declaratory. It in fact grants relief up to the date of claim and leaves the quantification for the future period to be decided in terms of what has been held by the AT.

7. A perusal of the impugned Award in respect of both Claim Nos. 2 and 3 bears out the submission of Mr. Airi. In the first place, it requires to be noted that after the decision in ***National Highways Authority of India v. ITD Cementation India Limited*** (*supra*), the legal position is settled that

both Claims 2 and 3 are covered by Clause 70.8 of the COPA. In para 30 of its Award the AT has in respect of the Claim No. 2 held as under:

> "30. The Engineer has certified in Ex. CD/15 the amount of additional cost incurred by the Claimant on account of this imposition of Entry Tax on Cement at Rs.30,59,984/-. The Claimant, however, in its pleadings has claimed Rs.29,82,585/- towards additional cost on this count up to 31st July, 2006 and asked for a declaratory award for the subsequent period till completion of the project. We, accordingly, hold that the Claimant is entitled to be reimbursed this additional cost of Rs.29,82,585/- to it by the Respondent National Highways Authority of India with interest at rate stipulated in the contract in Clause 60.8(b) of Conditions of Particular Application (COPA) from appropriate dates, when parts of this extra cost were due for reimbursement, till the date of award. The Claimant would also be entitled to be reimbursed any additional cost incurred by it on this count from 1st August, 2006 onwards till completion of the project with appropriate interest as above."

8. As regards Claim No. 3, i.e., Sales Tax on High Speed Diesel ('HSD') again the AT has held as under:

> "40. The Engineer has certified this additional cost in the CD/15 at Rs.81,13,897/-. The Claimant however, has claimed a sum of Rs.75,62,760/- for the period up to 31st July 2006 in its Statement of Claim and a declaratory award for the subsequent period till the completion of the project. We accordingly hold that the Claimant is entitled to be reimbursed this additional cost of Rs.75,62,760/- for the period up to 31st July 2006, by the respondent National Highways Authority of India, along with interest at rate stipulated in the contract in Clause 60.8(b) of Conditions of Particular Application (COPA) from appropriate dates, when parts of this extra cost were due for reimbursement, till the date of award. The Claimant would also be entitled to be reimbursed additional cost incurred by it on this count from 1st August 2006 onwards till completion of the project with

appropriate interest as above, if any."

9. It is, therefore, seen that while the Respondent has been granted reimbursement for the period up to 31st July, 2006, all that is required to be done for the period subsequent thereto is to follow the same method of quantification. Therefore, it is not correct for NHAI to contend that the Award in respect of Claim Nos. 2 and 3 is merely declaratory.

10. The Respondent will write to NHAI in respect of the amount to be reimbursed to it both as regards Entry Tax as well as Sales Tax on HSD for the period from 1st August 2006 onwards by enclosing the relevant documentation and NHAI will make reimbursement after examining the document submitted to it. In the event there is any dispute as regards the quantification, it will always be open to the Respondent to file an enforcement petition as regards the balance which it claims to be due to it and the Court concerned will deal with such issue in accordance with law. The Court, therefore, sees no reason to have the matter referred again to the AT for this purpose giving rise to needless litigation on this score.

11. Claim No. 4 was on interest for unpaid advance against materials brought on site. It was contended by Ms. Sinha that instead of itself quantifying the claim, the AT left it to be re-worked and certified by the Engineer in accordance with its findings. Likewise, as regards Claim No. 5 in respect of interest on unpaid and uncertified amounts, it was left to the Engineer to work out the interest on the withheld amount in the Interim Payment Certificates ('IPCs') other than some of the IPCs as noted in para 51 of the Award. According to Ms. Sinha, these directions were incapable of

being implemented since there was no Engineer in place as of now and the AT ought not to have abdicated its function.

12. The Court is unable to agree with the above submission. The Court does not see why the directions issued by the AT cannot be implemented since the basis for re-working the interest in terms of Clause 60.8(b) of COPA has in fact been set out by the AT. The Court, in any event, does not find this to be a ground for interfering with the Award. The Court is of the view that there is sufficient clarity of the impugned Award both in respect of Claim Nos. 4 and 5 that can be implemented. As regards Claim No. 5 regarding interest on unpaid and uncertified amounts, the AT has taken into account in para 50 the distinction between the IPCs which are substantially short of Rs. 50 million and those marginally short of Rs. 50 million. The certificates of the Engineer are required where the IPCs are more than Rs.50 million. Therefore, the declaration in para 51 to the Engineer to work out the interest on the withheld amounts has to be in respect of IPCs where the amount is more than Rs. 50 million.

13. The Award in respect of Claim No. 6 has not been challenged. For the aforementioned reasons, the Court finds no reason to interfere with the impugned Award of the AT. The petition is dismissed but, in the circumstances, with no order as to costs. The pending application also stands dismissed.

S. MURALIDHAR, J

NOVEMBER 22, 2016/dn