

\$~

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

+ **OMP 6/2009**

Reserved on: March 14, 2017

Date of decision: April 18, 2017

GAMMON INDIA LTD & ANR. Petitioners
Through: Mr. P.H. Parekh, Senior Advocate
with Mr. Sumit Goel and Ms. Raveena Rai,
Advocates.

Versus

DELHI DEVELOPMENT AUTHORITY Respondent
Through: Mr. Rajesh Manchanda with Mr.
Rajat Manchanda, Mr Rahul Rai, Mr. Mohit
Gupta, and Mr. Rameez Raju, Advocates.

AND

+ **OMP 674/2008**

DELHI DEVELOPMENT AUTHORITY Petitioner
Through: Mr. Rajesh Manchanda with Mr.
Rajat Manchanda, Mr Rahul Rai, Mr. Mohit
Gupta, and Mr. Rameez Raju, Advocates.

versus

GAMMON INDIA LTD & ANR Respondents
Through: Mr. P.H. Parekh, Senior Advocate
with Mr. Sumit Goel and Ms. Raveena Rai,
Advocates.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

%

18.04.2017

1. These are two petitions under Section 34 of the Arbitration and

Conciliation Act, 1996 ('Act') challenging the impugned Award dated 11th September 2008 passed by the learned sole Arbitrator in the disputes between the Delhi Development Authority ('DDA') and Gammon India Limited ('GIL'). OMP No. 6 of 2009 filed by GIL challenges the impugned Award to the extent that it has allowed Claim No. 1 (b) only in part and disallowed Claim Nos. 1(a), 1 (c), 1(d), 1(e) and Claim Nos. 2 (2), (3) and (4) and Claim No. 4. OMP No. 674 of 2008 is by the DDA to the extent that the learned sole Arbitrator has allowed the claims of GIL granting interest @ 18% per annum.

2. Background facts are that by a letter dated 7th January 1999, the following work of construction of flyover/grade separate in Delhi at four junctions was awarded by DDA to GIL:

- | | | |
|-----------------------|---|--------------|
| (i) Mathura Road NH-2 | - | Road No. 13A |
| (ii) NH-24 | - | Noida Road |
| (iii) Vikas Marg | - | Road No. 57 |
| (iv) Wazirabad Road | - | Road No. 66 |

3. A formal agreement was signed by both the parties on 9th January 1999. The stipulated date of start of the construction work was 22nd January 1999 with a construction period of 18 months. The actual date of completion of work for all the flyovers mentioned above were 21st February 2001, 30th November 2003, 25th July 2002 and 26th May 2003 respectively.

4. Both the parties state that the various delays occurred from time to time and extension of time ('EoT') for completion of work was allowed by the DDA to GIL.

5. It is pointed out on behalf of the GIL that DDA granted EoT till the

actual date of completion without levying compensation liquidated damages ('LD') for all the flyovers except for the flyover/grade separator at the junction of Noida Road. It is pointed out that initially by the letter dated 4th March 2003 DDA granted EoT for this purpose upto 30th September 2003. However, later by a letter dated 4th March 2004 the Engineer-in-Charge ('EIC') granted EoT for completion of the work at Noida upto 12th September 2003 without levy of compensation and for the period from 13th September 2003 to 30th November 2003 with compensation of Rs. 65,000.

6. As already noticed hereinbefore, there were four major claims by GIL. DDA also preferred its counter-claims. By the impugned Award dated 11th September 2008 the learned sole Arbitrator allowed only Claim 1 (b) which was for reimbursement of additional supervision charges in the sum of Rs. 35,10,000 as against Rs. 3,96,71,904 that was claimed by GIL. Further, the learned Arbitrator allowed Claim 2 (5) towards the amount receivable on satisfaction of quality quarries in the sum of Rs.3,50,000. The learned Arbitrator allowed Claim No. 3 towards interest @ 18% per annum on the aforementioned sums from 14th December 2004 to 11th September 2008. All the other claims were rejected. As regards DDA's counter-claims 'on account of waviness and poor finishing of road work on the flyover', a sum of Rs.14,87,500 was awarded.

7. This Court has heard the submissions of Mr. P.H. Parekh, learned Senior counsel appearing for GIL and Mr. Rajesh Manchanda, learned counsel appearing for DDA.

8. Claim No. 1 (a) by GIL is for refund of additional rent recovered from it by the DDA due to prolongation of contract period beyond the

stipulated period of 18 months. The amount claimed by GIL was Rs. 52,05,000. This claim was rejected by the learned Arbitrator on the ground that DDA had provided land to GIL on leave and licence basis and recovered rent for the actual period for which land was utilized by the GIL.

9. Clause 4 of Letter of Award ('LoA') dated 7th January 1999 stipulated the terms on which the land would be allotted. In terms of Clause 10, the LoA formed part of the contract. Thus, the leave and licence agreement was linked with the contract. The relevant portion of the Clause 4 of the LoA reads as under:

"4. Land will be allotted for the purpose of the setting up of the batching plant/central yard etc., and shall be governed by the terms and conditions as given in the contract of M/s. Labh Construction and Industries Ltd., for the work of "C/o.2016 EWS DU's in Sector 4, Rohini Phase-I". Extract of the terms and conditions is reproduced below:

"Upto 4 acres of land will be made available within project areas on leave and licence basis on monthly rental of Rs. 1 lakh per month payable in advance for installation of plant, machinery, for casting of various pre-fabricated components required for bonafide use in the work. In case the monthly rent is not due to contractor the monthly rent shall be deposited by the contractor to DDA in advance. The contractor will have to vacate the land within six weeks of completion of the project."

10. As rightly pointed out by GIL, if the work was not delayed GIL would have paid rent only for 18 months. With this DDA having granted licence for all the sections without compensation (except one specific period for Noida flyover where it levied compensation), the inevitable conclusion was that the delay was not attributable to GIL. At the time of bidding, GIL had considered the land rent for the period of contract. The excess rent payable for the period beyond the stipulated period was,

therefore, liable to be refunded to GIL. This aspect of the matter seems to be completely overlooked by the learned Arbitrator. The recovery made from GIL was, therefore, clearly excessive. GIL was right in its contention that EoT is not a substitute for the right to cost compensation. This was explained by this Court in ***M.S.J. (Engineers) & Company Private Limited v. Union of India*** 60 (1995) DLT 705 wherein a reference was made to ***Hudson's Building and Engineering Contracts*** (9th Edition, p.492) which set out the principles as follows:

“Where the clause of delay is due to breach of contract by the Employer, and there is also an applicable power to extend the time, the exercise of that power will not, in the absence of the clearest possible language, deprive the contractor of his right to damages for the breach.”

11. In ***Rawla Constructions Co. v. Union of India*** ILR 1982 Del 44 this Court explained as under:

"(6) The fact that the engineer has under the building contract, a power to extend for any reason the date for completion of the contract, and has so extended it, does not operate to free the employer from damages for breach of contract (i.e. for delay by the employer) unless the contractor, on his side also, has accepted this extension as full satisfaction in respect of the delay. In ***Trollope and Sons v. Singar*** (1913) HBC (4th Ed) 849 (2), during a contract for carrying out alterations and additions, to a dwelling house the contractor was delayed by (*inter alia*) the non-supply of drawings and details and essential information, and he claimed damages on these counts. The time for completion had been extended by the architect, and was further extended by the arbitrator, in an arbitration which ensued, to the date when the work was in fact completed. It was held that this extension of time did not affect the damages claimed by the contractor against the employer for breach of contract, by not affording possession of the site, and by interference with the execution of the work".

12. The Court, therefore, finds merit in the contention of Mr. Parekh, learned Senior counsel on behalf of GIL, that the reasons for the learned

Arbitrator to reject Claim 1 (a) are contrary to the provisions of the Act as well as the legal position. The impugned Award insofar as it rejects Claim 1 (a) of GIL is opposed to the fundamental policy of Indian law and cannot be sustained.

13. Claim 1 (b) was for reimbursement of additional supervision charges incurred by GIL due to prolongation of contract period beyond the stipulated period of 18 months. The learned Arbitrator restricted the claim and awarded a sum of only Rs.35,10,000 by observing that justice would be done if the salary of one Senior Engineer and 4 *chowkidars* for each of the three projects, i.e., Sarita Vihar Flyover, Vikas Marg and Wazirabad was allowed. For flyover at Noida Injunction, no reimbursement was allowed by the learned Arbitrator.

14. Admittedly, the work was delayed for the well beyond the period of 18 months in fact it was delayed upto 40 months. GIL was bound to employ minimum staff and to pay salary of such staff. There is no reasonable basis to explain the impugned Award to the extent it has restricted the reimbursement to the salaries of only one Senior Engineer and four *chowkidars*. This appears to be arbitrary and whimsical. It is also contrary to Clause 36 which mandates the deployment of technical staff and employees. The relevant portion of Clause 36 reads as under:

"i) The contractor shall provide all the necessary superintendence during the execution of work and as along thereafter as may be necessary for the fulfilling of the obligations under the contract.

ii) The contractor shall provide and employ on the site only such technical assistance as are skilled and experienced in the respective fields and such foreman and supervisory staff as are competent to give proper supervision to the work .

The contractor shall provide and employ skilled, semi skilled and unskilled labour as is necessary for proper and timely execution of

the work.....”

15. In fact in the impugned Award the learned Arbitrator notes that the work was delayed for 40 months and that DDA admitted that GIL was "bound to employ the minimum staff and to pay salary to such staff....” The conclusion in the impugned Award on this claim however is contrary to the law explained by the Supreme Court in *McDermott International v. Burn Standard Co. Limited (2006) 11 SCC 181* and *K.N. Sathyapalan (Dead) by LRs v. State of Kerala (2007) 13 SCC 43*. The reason, therefore, for restricting the claim to only Rs.35,10,000 has no legal or factual basis. The Award to the extent it rejects Claim 1 (b) beyond Rs.35,10,000 is accordingly set aside.

16. Claim 1 (c) was for refund of additional interest recovered from GIL due to prolongation of contract period beyond stipulated period of 18 months. The background to this claim was that in terms of Clause 10B of the contract, DDA had provided mobilization advance to GIL which carried interest @ 18% per annum. If the contract had been completed within the stipulated period, mobilization advance would have been recovered in its entirety by the time 80% of the contract was completed i.e., by the 15th month which is April 2000. However, since the work was delayed for reasons not attributable to GIL, the mobilization advance could not be recovered in its entirety by the 15th month. This made the interest on the mobilization advance for the period beyond 15th month by which time it was fully recovered. This excess amount of interest was worked out at Rs.56,45,671.

17. The reasons for the learned Arbitrator to reject the claim was that there was 'no dispute' with regard to interest but only 'for the period of recovery'. As rightly pointed out by GIL, the entire dispute was only with

regard to interest on the mobilization advance for the period beyond the period of contract. This is evidenced from Clause 10 B of the agreement which provided for mobilization advance. This part of the Award, i.e. rejection of Claim 1 (c) is unsustainable in law and liable to be set aside.

18. Turning to Claim 1 (d) which was for reimbursement of various other overheads/expenditure incurred by GIL due to prolongation of contract period beyond the stipulated period of 18 months, GIL was able to demonstrate that on account of delay in completion of the contract, for reasons not attributable to GIL, it incurred extra expenditure of Rs.93,45,611 towards bank charges, insurance premium, office running expenses etc. The learned Arbitrator rejected the claim on the ground that GIL was supposed to bear and maintain all such expenditure as per the clause of the contract. Clause 7.4 of the Special Conditions of Contract (SCC) provided that in the case the completion of work was extended then the performance bank guarantees (PBGs) would be accordingly get extended/ validated. Consequently, the expenditure on this score for the period beyond the stipulated period of 18 months was obviously liable to be reimbursed to GIL. Likewise it is also required to keep the insurance cover alive and other facilities like office, watch and ward etc. for the extended period. GIL was expected to maintain and bear such expenditure for its own use as long as the contract shall stood cancelled on the period of contract. In view of the finding that EoT was granted to GIL without levy of compensation, the logical conclusion was that the expenditure incurred by GIL for the extended period was liable to be reimbursed. The rejection by the learned Arbitrator of Claim 1 (d) is unsustainable in law and is contrary to the provisions of the contract.

19. Claim No. 1 (e) was for reimbursement of additional plant, hire

charges due to prolongation of contract period beyond stipulated period of 18 months. Clause 10 CC of the contract provided for payment of expenditure incurred by GIL for prolongation of the contract. The above clause provides for payment due to increase in prices of material etc. It is an escalation clause. It does not cover the compensation payable to the contractor for plant and hire charges and other prolongation costs. In ***Krishna Construction Co. v. Delhi Development Authority 2002 (3) Arb LR 208 (Del)*** the Court explained the position as follows:

"33. There is no doubt that the claim of the petitioner by way of claim No. 1 was not on account of escalation. If the cause for delay is entirely that of the respondent, the load of blame cannot be shifted to the contractor. For such a delay the contractor is entitled for compensation. Clause 10CC takes care of only compensation on account of escalation of prices of material and wages for the employees and other staffs whereas compensation on account of delay either in giving site or issuing material etc. is distinct. In the instant case the contractor has to be compensated for keeping its entire establishment ready for the execution of the contract. The delay on the part of any of the parties amounts to breach of the contract. It is more so where time is essence of the contract."

20. Consequently, the Court has no hesitation in holding that rejection by the learned sole Arbitrator of Claim 1 (e) was contrary to the settled legal position and is opposed to the fundamental policy of Indian law. This part of the impugned Award is accordingly unsustainable in law.

21. Claim 2 (2) was for difference in the amount payable on the escalation. This was rejected on the ground that GIL should have objected to the amount of escalation and its method of calculation at the time of acceptance of the bills paid to GIL.

22. It is pointed out by GIL that while applying the formula for computing escalation in terms of Clause 10 CC, DDA used an old index

on the plea that the latest indices were yet to be made available. However, later on when they were available, the calculations were not revised. Clause 10 CC (i) of the contract *inter alia* provided that “the base date for working out such escalation shall be the last stipulated date of receipt of tender including extension, if any.”

23. In the present case the base date has to be from the last quarter of 1998 since the bid was submitted on 24th November 1998. This explained the difference in the argument formula applied by DDA and that claimed by the GIL. The explanation given by GIL that the difference in the case of Noida Flyover, which was to the extent of Rs. 86 lakhs was due to the following three reasons:

- “1) Wrong index number being adopted as above.
- 2) Due to the implication of the perception of DDA that they had granted extension of time upto 12th September 2003 only, whereas extension of time was granted upto 30th September 2003.
- 3) Even for work done upto the date upto which extension was granted, DDA has not made escalation payments.

24. GIL drew the attention of the learned Arbitrator to the above factors by its letter dated 6th April 2008. However, there is no mention of this in the impugned Award.

25. As against escalation claim for the Noida Flyover in the total amount of Rs. 1287 lakhs, DDA paid escalation only to the extent of Rs. 884 lakhs. Further the work done during the last two months on the Noida flyover, i.e., October and November 2003 was only asphaltic work. Several documents have been submitted to the learned Arbitrator. The quantum of bituminous work translated in to money worked out to Rs. 49.91 lakhs only. In other words it is submitted that escalation could have been denied only on the ground that this part of the work was during the

period when no extension was granted, i.e., after 30th September 2003. The Court finds that the above factors were not taken into account by the learned Arbitrator while rejecting Claim 2 (2). The rejection of Claim 2 (2) is accordingly set aside.

26. Claim No. 2 (3) was for difference in the amount of reimbursable sales tax. GIL pointed out that it had been paying sales tax on the contract on composition basis at 4% of the bill value. The tax deducted at source was 4%. Therefore, the difference between the amount of tax deducted and the amount reimbursed represented the balance amount due to GIL from the DDA. The further amount of tax payable on the awarded amount was claimed by GIL. This claim was rejected on the ground that GIL had not submitted any details of the amount to be reimbursed. A reference made by GIL to Clause 37 (i) of the contract which reads thus:

“Sales tax or any other tax on materials in respect of this contract shall be payable by the Contractor and Government shall not entertain any claim whatsoever in this regard.”

27. GIL states that GIL had submitted a statement showing the balance amount due towards reimbursement of sales tax which was part of the final bill. If indeed, the further details were necessary the learned Arbitrator could have asked GIL for the same. The Court finds that the basis of rejection of claim is not convincing at all. If indeed, the GIL was in a position to furnish details, it should have been called for by the learned Arbitrator. There is no justification for rejection of the claim only on the ground that the details have not been submitted by GIL. This part of the impugned Award is, therefore, hereby set aside.

28. Clause 2 (4) was for entitlement of labour welfare cess. Under the Delhi Labour Cess Rules, 2002 GIL was required to deposit the amount of cess with DDA as per Section 3 of the Building and Other

Construction Workers Welfare Cess Act, 1996. Since this liability arose on account of the above statute which became law after the submission of bid by GIL, the GIL was entitled to reimbursement in terms of Clause 38 of the Agreement.

29. The reasons given by the learned Arbitrator for rejecting the claim GIL did not refute the DDA's submission to the effect that the entire amount deducted on account of Cess had been reimbursed to GIL. Since the liability arose subsequent to the submission of the bid it could not have been considered or acted on by the GIL. The impugned award appears to be contrary to the records. The final bill submitted by the GIL clearly showed that there was a difference between the amount claimed by GIL as reimbursement of the labour welfare cess and the amount actually reimbursed by DDA. The rejection of Claim 2 (4) has therefore no basis on the evidence on record and is also contrary to the terms of the contract and cannot be sustained in law.

30. Turning now to the counter-claims by DDA for a sum of Rs.14,87,500 on account of waviness and poor finishing of road work on the flyover, it is pointed out by GIL that at no point in time was any notice given to GIL about the defects in the Noida More Flyover. There is merit in the contention that these differences have been properly detected beyond the defect period of liability. It is pointed out that in terms of Clause 7.4 and 7.5.3 of the contract, the maintenance period of 36 months was only with respect to items of bearing, expansion joints and re-enforced earth.

31. The defects pointed out by the DDA in the counter-claims were beyond the maintenance period of 36 months. There was also no proof placed on record by DDA about having suffered loss to the tune of

Rs.14,87,500 on account of poor and bad work. There was no proof to show that DDA had carried out the rectification work. The award of Rs.14,87,500 in favour of DDA for allowing its counter-claims appears to be based on no evidence and therefore, is unsustainable in law.

32. For the aforementioned reasons, the Court first hereby set aside the impugned award to the extent that it had rejected the Claim 1 (b) of GIL for amount beyond Rs.35,10,000 and to the extent it has rejected in *toto* Claims 1 (c) and 1 (e) and Claims 2 (2) (3) and (4) and the entire Claim 4. The impugned award to the extent it has allowed the counter claim of DDA to the extent of Rs.14,87,500 is hereby set aside.

33. It will be open to GIL to commence the arbitration *denovo* in respect of the above claims which have been wrongly disallowed by the learned Arbitrator. For this purpose GIL can seek the benefit of Section 34 (4) of the Act, if so permissible.

34. The Court does not consider that the award of interest at 18% per annum on the limited claims of GIL which have been allowed by the learned Arbitrator is excessive or unreasonable. The challenge by DDA that portion of the impugned Award is hereby rejected.

35. OMP No. 6 of 2009 is allowed in the aforementioned terms, OMP No. 674 of 2008 is dismissed. There shall be no orders as to costs.

S. MURALIDHAR, J

APRIL 18, 2017

Rm