

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 18.01.2017

FAO(OS) 7/2017

NATIONAL HIGH WAYS AUTHORITY OF INDIA ... Appellant

versus

GAMMON ATLANTA (JV)

... Respondent

Advocates who appeared in this case:

For the Appellant
For the Respondent

: Mr Ramesh Kumar
: Mr Sumit Goel with Ms Raveena Rai

CORAM:

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE ASHUTOSH KUMAR

J U D G M E N T

BADAR DURREZ AHMED, J (ORAL)

1. This appeal arises out of the judgment and order dated 15.11.2016 delivered by a learned Single Judge of this court in, *inter alia*, OMP 99/2008. That was a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said 'Act'), wherein the respondent had impugned the award dated 05.10.2007 passed by the Arbitral Tribunal in a dispute between the parties arising out of a contract dated 20.12.2000 for the work of "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-Bhubaneswar)”. The only grievance that has been raised by the learned counsel for the National Highways Authority of India (NHAI) (the appellant herein) is with regard to the finding of the learned Single Judge in respect of claim no.1.8 which pertains to the reimbursement of excise duty under clause 70.8 of Conditions of Particular Application (COPA).

2. The learned Single Judge held that the decision of the Arbitral Tribunal on claim no. 1.8 which was against the respondent was unsustainable in law as it was not based on any clause of the contract. In fact, the learned Single Judge noted that the only reason why the Arbitral Tribunal had rejected the claim of the respondent on this account was because it was raised after nearly three years after a change in the legislation. This was found to be untenable by the learned Single Judge as the terms of the contract were otherwise.

3. In order to appreciate the rival contentions of the parties it would be necessary to set out clause 70.8 of the COPA. The same reads as under:-

“Sub-Clause 70.8 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 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 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 (1) to (7) of this Clause.”

(underlining added)

At the time of tendering, the project in question merited classification as a deemed export project under the export-import policy in terms of the extant Export Import (Exim) Policy. Under paragraph 10.2, the benefit of deemed export and thereby exemption from payment of excise duty was available, *inter alia*, to supply of goods in relation to, *inter alia*, infrastructure projects provided the minimum specific investment was Rs. 100 crore or more. The present project qualified for the exemption under that provision inasmuch as

it was an infrastructure project and the minimum specific investment was more than Rs. 100 crore.

4. Subsequently paragraph 10.2 (g) underwent an amendment on 31.03.2001 wherein the benefit of exemption was limited to supply of goods to the power and refinery sectors not covered in sub-clause (f). In other words, the benefit which was earlier available to, *inter alia*, infrastructure projects had been taken away by virtue of the amendment.

5. Consequent upon this, the respondent sent a letter to the consultant appointed by the appellant on 20.06.2003 claiming the benefit of clause 70.8 of COPA on the ground that because of subsequent legislation it had to incur additional cost because of the burden of payment of excise duty which was hitherto exempt. In the said letter it was specifically stated that when the tender was due to be submitted, clause 10.2 (g) as it stood then entitled the respondent for refund of excise duty to be paid in respect of the material incorporated. The contract was awarded on International Competitive Bidding basis and it was in the sector listed namely roads, bridges or other infrastructure projects. The clause got truncated by virtue of the amendment in March 2001 restricting the applicability of the said clause 10.2 (g) only to projects pertaining and to power and refinery. It was contended by the

respondent in the said letter that in view of the change, the excise duty on incorporated material was required to be reimbursed to the respondent in accordance with the provision contained in clause 70.8 of COPA.

6. In response to the said letter dated 20.06.2003, the consultant acting on behalf of the NHAI sent a reply dated 30.10.2003 rejecting the claim for refund of excise duty. It was pointed out in the said letter dated 30.10.2003 that the claim for refund of excise duty was not tenable because of the following grounds:-

- “1. The benefit is available to an original supplier;
2. Such additional cost is not separately to be paid or credited, since these are already taken into account in indexing of inputs of Price Adjustment Formulae as per Sub-Clause 70.8 of Conditions of Particular Applications.”

As pointed out above, disputes had arisen between the parties. The matter went into arbitration and the Arbitral Tribunal made the award dated 05.10.2007 which was the subject matter of challenge in OMP 99/2008. The Arbitral Tribunal in its award has examined claim no. 1.8. It had noted the contention of the parties and particularly of NHAI that the benefit of refund of terminal excise duty was available to an original supplier and that such additional cost was not to be separately paid since it had already been taken

into account in indexing of inputs in the price adjustment formulae. The Arbitral Tribunal also noted that NHAI had taken the plea that since the respondent herein was not a manufacturer, the benefit was not available to it. However, it was specifically noted in paragraph 2.1.8.2 of the award that NHAI had not commented upon the quantum of refund claimed in the various Interim Payment Certificates (IPC) which had been referred to in the award.

7. The Arbitral Tribunal after examining the issue noted that since the Exim Policy is notified from time to time and the same is placed before each house of Parliament and is also published in the official gazette, it would qualify as subordinate legislation and accordingly any amendment in the policy after the crucial date would attract clause 70.8 dealing with subsequent legislation. Despite this, the claim of the respondent was rejected primarily on the ground that the claim was made merely three years later which, according to the Arbitral Tribunal, went to establish that it was merely an afterthought. Consequently, the Tribunal concluded that the change on account of the amended Exim Policy had not caused any additional cost to the contractor and as such the claim did not fall within the

purview of clause 70.8 of COPA. Accordingly, the Arbitral Tribunal rejected claim no. 1.8.

8. The learned Single Judge after considering the arguments of the counsel on both sides came to the conclusion that the finding of the Tribunal was not supported by any terms of the contract. And, merely because the respondent had made the claim after three years of the amendment would not disentitle the respondent from getting the benefit of clause 70.8 of COPA if it otherwise qualified for it. Consequently, the learned Single Judge set aside the impugned award in respect of the claim no. 1.8.

9. After examining the impugned judgment, the award and considering the arguments raised by the counsel for the parties and also the Supreme Court decision in the case of **National Highways Authority of India v. ITD Cementation India Limited: (2015) 14 Supreme Court Cases 21**, we are of the view that the conclusion arrived at by the learned Single Judge ought not to be interfered with.

10. Upon a plain reading of clause 70.8 of COPA it is evident that it comprises of two parts. The first part enables a contractor or an employer as the case may be to get the benefit of an increase or reduction in the cost (as

the case may be) consequent upon subsequent changes in legislation. The second part which is a non-obstante provision is essentially to ensure that neither the employer nor the contractor gets a double benefit. In other words if by subsequent legislation a benefit accrues to the contractor under the first part he would not be entitled to that benefit if the same is already factored in the price adjustment formulae which are given in sub-clauses 70.1 to 70.7 of COPA.

11. There is no doubt that there has been a change in the Exim policy which has been construed as a change in legislation. There is also no doubt that because of the change when, earlier, the respondent was not liable to pay excise duty, after the amendment it would be exigible to excise duty. The arguments that this benefit is not available to the respondent as it is not the manufacturer would not hold any water because excise duty is an indirect tax and although it is levied on the manufacturer of goods and collected from the manufacturer, the same is passed on to the consumer. Therefore, if there has been any additional burden of payment of excise duty cast upon the respondent by virtue of the change in the Exim Policy it would certainly be covered under the first part of sub-clause 70.8 of COPA.

12. We must at this point of time note that in the award itself it has been recorded that the quantum of the additional burden is not in dispute.

13. The only thing that remains to be seen is whether this additional benefit on account of additional cost which has been given under the first part of sub-clause 70.8 is not a double benefit in the sense that it is not already included in the price adjustment formulae.

14. For this purpose we would have to examine sub-clauses 70.1, 70.2, 70.3, 70.4 of COPA which read as under:-

“Sub-Clause 70.1:

Price adjustment

“The amount payable to the contractor and valued at base rates and prices in the Interim Payment Certificates issued by the Engineer pursuant to Sub-Clause 60.1 hereof shall be adjusted in respect of the rise or fall in the indexed costs for labour, materials and other inputs to the Works, by the addition or subtraction of the amounts determined by the formulae prescribed in this Clause.”

Sub-Clause 70.2:

Other changes in cost

“To the extent that full compensation for any rise or fall in the costs to the Contractor is not covered by the provisions of this or other clauses in the Contract, the unit rates and prices

included in the Contract shall be deemed to include amounts to cover the contingency of such other rise or fall in cost.”

Sub-Clause 70.3:

Adjustment formulae

The adjustment to the Interim Payment Certificates in respect of changes in cost and legislation shall be determined from the following formula:

$$P_n = A + b \frac{L_n}{L_o} + c \frac{M_n}{M_o} + d \frac{F_n}{F_o} + \frac{B_n}{B_3}$$

Where:

pn is a price adjustment factor to be applied to the amount for the payment of the work carried out in the subject month, determined in accordance with Sub-Clause 60.1(d), and with Sub-Clauses 60.1 (e) and (f), where such variations and Daywork are not otherwise subject to adjustment:

$$A = 0.50, b = 0.15, c = 0.25, d = 0.10$$

Ln. Mn. Fn. Etc., are the current cost indices or reference prices of the cost elements in the specific currency for month “n” determined pursuant to Sub-Clause 70.5, applicable to each cost element: and

Lo. Mo. Fo. Etc., are the base cost indices or reference prices corresponding to the above cost elements at the date specified in Sub-Clause 70.5.

The amounts, determined as payable to the contractor as a price adjustment factor in a currency or currencies other than the Indian Rupee. Will be converted from Indian Rupees to the currency or currencies of payment at the exchange rate (s), as determined by the Reserve Bank of India, on the date of the current index and not at the rate (s) established in the Appendix to Bid, if any.

Sub-Clause 70.4

Sources of Indices and Weightings

The sources of indices shall be as follows:

- L shall be minimum wage for labour as published by the Orissa State Government.
- M shall be the wholesale price index (All commodities) as published by the Reserve Bank of India.
- F shall be the price of one litre of diesel fuel as applicable at Bhubaneswar.

Sub-Clause 70.5

Base, Current and Provisional Indices

The base cost indices or prices shall be those prevailing on the day 28 days prior to the latest date for submission of bids. Current indices or prices shall

be those prevailing on the day 28 days prior to the last day of the period to which a particular Interim Payment Certificate is related. If at any time the current indices are not available, provisional indices as determined by the Engineer will be used, subject to subsequent correction of the amounts paid to the Contractor when the current indices become available.”

xxx xxx xxx xxx xxx”

15. The price adjustment formula given in sub-clause 70.3 of COPA is based on the indices of three cost elements or inputs- (i) labour costs; (ii) wholesale prices; and (iii) diesel fuel costs as applicable at Bhubaneswar. We are not concerned with labour costs or diesel fuel costs. Insofar as the wholesale prices are concerned, we find that the price adjustment formula takes into account the change in the wholesale price index (all commodities) as published by the Reserve Bank of India for the current period as against the base period. Now, the question that arises is whether the excise duty component is a part of the wholesale price. The answer is clearly – yes, it is. Therefore, an argument could be raised that the changes in excise duty would in any event be covered by the changes in the wholesale price index and

therefore the benefit could not be given under the first part of sub-clause 70.8 of COPA as then it would amount to a double benefit. But, in the present case the change is not in the excise duty but in the exim policy and this change would not be reflected in the wholesale price index.

16. Since, there is no double benefit to the respondent, the benefit under the part of sub-clause 70.8 of COPA cannot be derived to it. The decision of the learned Single Judge is, therefore, correct.

17. The appeal is dismissed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

ASHUTOSH KUMAR, J

JANUARY 18, 2017

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