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

+ **O.M.P. (COMM) 380/2017 & IA No.12474/2017**

**NATIONAL HIGHWAYS AUTHORITY
OF INDIA**

..... Petitioner

Through: Mr Rajiv Kapoor, Mr Srikant
Sharma and Mr Rashid Azam,
Advocates alongwith Mr Ashok
C. Prakash Malhotra, AR of the
petitioner.

versus

**SSANGYONG ENGINEERING & CONSTRUCTION
CO. LTD.**

..... Respondent

Through: Mr Navin Kumar, Ms Rashmeet
Kaur and Ms Arpana
Majumdar, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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16.03.2018

VIBHU BAKHRU, J

1. The petitioner (hereafter 'NHAI') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, impugning an arbitral award dated 09.06.2017 (hereafter 'the impugned award') delivered by the Arbitral Tribunal comprising of three members, Sh. O.P. Goel, Shri S.P. Singh and Sh. Dilip Namdeo Potdukhe (hereafter 'the Arbitral Tribunal').

The impugned award was rendered by the majority with Sh. Potdukhe entering a Dissent Note.

2. By the impugned award, the respondent's claim for price adjustment under Clause 70.7 of the Conditions of Particular Application (COPA) of Contract in respect of increase in the price of High Speed Diesel (HSD) consequent to the enhancement in the Entry Tax, was accepted by the Arbitral Tribunal.

3. Briefly stated, the controversy between the parties arise in the following context:-

4. NHAI invited bid, for the work of "*Four-Laning of Jhansi-Lakhanadon Section from km. 297.00 to km. 351.00 of NH-26 in the State of Madhya Pradesh- (Package No. ADB-II/C-8)*".

5. The respondent (Ssangyong) submitted its bid for the aforesaid work on 27.10.2005, which was accepted by NHAI on 30.12.2005. Thereafter, the parties entered into an agreement on 12.04.2006 (hereafter 'the Agreement'). NHAI issued a notice to commence the works on 28.04.2006 and the same were commenced on 28.05.2006.

6. The disputes between the parties relate to the Ssangyong's claim on account of increase in the rate of Entry Tax on High Speed Diesel. The State Government of Madhya Pradesh issued a notification dated 01.04.2007 (hereafter 'the Notification') under the Provisions of Madhya Pradesh "*Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976*" (hereafter 'the Madhya Pradesh Entry Tax

Act, 1976') increasing the levy of Entry Tax on High Speed Diesel (HSD) from 1% to 27% with effect from 01.04.2007.

7. Admittedly, the rate of Entry Tax on HSD prevailing on 29.09.2005 (that is, 28 days prior to last date of submission of bid by Ssangyong) was 1%.

8. In view of the increase in the Entry Tax, Ssangyong sent a letter dated 15.07.2009 claiming reimbursement of the extra amount paid on account of increase in the Entry Tax on HSD. The said claim was rejected by NHAI on 10.12.2010.

9. Aggrieved by the same, Ssangyong sought reference of the dispute to Dispute Adjudication Board (DAB) under Clause 67.1 of COPA. The disputes could not be resolved before the DAB and on 05.06.2012, the same were referred to arbitration.

10. Ssangyong filed a claim for an amount of ₹9,83,69,920/-, which included the amount of ₹5,86,50,477/- on account of reimbursement of Entry Tax and interest amounting to ₹3,97,19,442/- as computed up to 15.06.2015.

11. The Arbitral Tribunal held that the Notification enhancing the Entry Tax from 1% to 27%, was a "Subsequent Legislation" as contemplated under Clause 70.7 of COPA and, thus, was liable to be added to the contract price. The Arbitral Tribunal allowed the Ssangyong's claim for reimbursement of the amount of ₹5,86,50,477/- paid on account of the increase in the Entry Tax.

12. The Arbitral Tribunal also awarded a sum of ₹6,07,23,720/- as interest computed till the date of the award that is, 09.06.2017. In addition, the Arbitral Tribunal also awarded interest on the awarded amount of ₹11,93,74,197/- at the rate of 10% per annum from 10.06.2017 till the actual date of payment. However, the Arbitral Tribunal also stated that no post award interest will be payable if the sum awarded was paid within a period of ninety days from the date of the impugned award.

13. Mr Potdukhe entered a Dissenting Note. He accepted that the Notification under the Madhya Pradesh Entry Tax Act, 1976 was a Subsequent Legislation. However, according to him, the extra cost incurred was not reimbursable. Mr Potdukhe agreed with the NHAI's contention that since Ssangyong had not included its claim in each of its monthly statements in terms of Clause 60.1 of COPA, it must be taken that Ssangyong had relinquished or waived its claim.

Submissions

14. At the outset, Mr Navin Kumar, learned counsel appearing for Ssangyong submitted that the issue being raised by NHAI was squarely covered by the decision of this Court in ***National Highway Authority of India v. Ssangyong Engineering & Construction Co. Ltd.: O.M.P. 1208/2014, decided on 27.11.2014***, wherein a Coordinate Bench of this Court had rejected NHAI's application under Section 34 of the Act assailing an arbitral award dated 16.06.2014, whereby the similar claim had been allowed in favour of Ssangyong.

He pointed out that the said decision was carried in appeal before the Division Bench of this Court in *FAO(OS) 25/2015* captioned “*National Highway Authority of India v. Ssangyong Engineering & Construction Co. Ltd*”. The said appeal was also dismissed by a judgment delivered by the Division Bench of this Court on 19.01.2015. NHAI had preferred a Special Leave Petition in *SLP No. 14726/2015* captioned “*National Highway Authority of India v. Ssangyong Engineering & Construction Co. Ltd.*”, which was converted to a Civil Appeal (Civil Appeal No. 6019/2015) and was dismissed. The order dated 03.08.2015 passed by the Supreme Court dismissing the said appeal reads as under:-

“SLP (C) No. 14726 of 2015

Leave granted.

Heard Mr. Pradeep K. Bakshi, learned counsel for the Petitioner and Ms. Meenakshi Arora, learned senior counsel for the respondents.

Having heard learned counsel for the parties, we are of the considered opinion that the controversy is covered by the decision in *National Highways Authority of India vs. M/s. ITD Cementation India Limited: 2015 (5) Scale 554*.

Accordingly, the appeal stands dismissed. There shall be no order as to costs.”

15. Mr Rajiv Kapoor, learned counsel appearing for NHAI did not dispute that the issue whether Ssangyong was entitled to reimbursement on account of increase in the Entry Tax on HSD, was

squarely covered by the aforesaid decisions. He stated that notwithstanding the above, Ssangyong would not be entitled for the amount claimed as: (i) the claims are barred by limitation; (ii) Ssangyong was not a dealer and, therefore, the Notification issued under the Madhya Pradesh Entry Tax Act, 1976 was not applicable to Ssangyong; and (iii) Ssangyong was not obliged to procure HSD from IOCL as its refinery and, therefore, could not claim any reimbursement of enhancement in the Entry Tax.

Reasons and Conclusion

16. The contention that Ssangyong's claim is barred by limitation is unmerited. Although, the contract was to be completed within a period of 30 months from commencement of work, it is not disputed that the contract was extended and the Final Payment Certificate as required to be prepared in terms of sub-clause 60.13 of COPA has not been prepared as yet. Mr Kapoor had relied heavily on sub-clause 60.1 of COPA which required the contractor to submit monthly statements indicating the amounts which the contractor considers himself entitled to. However, it is seen that the said monthly statements were required to be prepared for monthly payments. Such payments were plainly interim in nature.

17. At this stage, it would be relevant to refer to the relevant extract of sub-clauses 60.1, 60.2, 60.11 and 60.13 of COPA. The same are set out below:-

“Sub-Clause 60.1: Monthly Statements

The Contractor shall submit a statement in 3 copies to the Engineer by the 7th day of each month for the work executed up to the end of the previous month in a tabulated form approved by the Engineer, showing the amounts to which the Contractor considers himself to be entitled.

The statement shall include the following items, as applicable, which shall be taken account in the sequence listed:

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(g) amounts reflecting changes in cost and legislation, pursuant to Clause 70, expressed in the relevant amounts for foreign and local currencies.

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Sub-Clause 60.2: Monthly Payments

Within 5 days of receipt of the monthly statement from the Contractor in pursuant to Sub-Clause 60.1, the Engineer shall broadly determine the amount due to the Contractor and shall, accordingly, recommend to the Employer for release to the Contractor up to a maximum of 75% of net payment as part payment against the monthly statement, pending certificate of IPC by the Engineer. Within 2 days of the receipt of recommendation of the Engineer, the Employer shall make payment to the Contractor.

The said statement shall be approved or amended by the Engineer in such a way that, opinion, it reflects the amount due to the Contractor in accordance with the Contract, deduction, other than pursuant to Clause 47, of any sums which may have become due payable by the Contractor to the Employer. In cases where there is a

difference of opinion to the value of any item, the Engineer's view shall prevail.

Within 21 days' of the receipt of the monthly statement referred to in Sub-Clause 60.1 Engineer shall determine the amount due to the Contractor and shall deliver to the Employer and the Contractor, an Interim Payment Certificate, certifying the amounts due to Contractor after adjusting the payment already released to the Contractor against the statement.

Notwithstanding the terms of this Sub-Clause or any other clause of the Contract, no amount will be certified by the Engineer for payment until the performance security has been provided by the Contractor and approved by the Employer.

Sub-Clause 60.11: Final Statement

Not later than 56 days after the issue of the Defects Liability Certificate pursuant to Sub-Clause 62.1, the Contractor shall submit to the Engineer six (6) copies of a draft final statement for consideration with the supporting documents showing in detail, in the form approved by the Engineer,

- (a) the value of all work done in accordance with the Contract; and
- (b) any further sums which the Contractor considers to be due to him under the Contract.

If the Engineer disagrees with or cannot verify any part of the draft final statement, the Contractor shall submit such further information as the Engineer may reasonably require and shall make such changes in the draft as may be agreed between them. The Contractor shall then prepare and submit to the Engineer the final statement as agreed (for the purposes of these Conditions referred to as the "Final Statement").

If, following discussions between the Engineer and the Contractor and any changes to the draft final statement which may be agreed between them, it becomes evident that a dispute exists, the Engineer shall issue to the Employer an Interim Payment Certificate for those parts of the draft final statement which are not in dispute. The dispute shall then be settled in accordance with Clause 67. The Final Statement shall be agreed upon settlement of the dispute.

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Sub-Clause 60.13: Final Payment Certificate

Within 28 days after receipt of the Final Statement, and the written discharge, the Engineer shall deliver to the Employer (with a copy to the Contractor) a Final Payment Certificate stating,

- (a) the amount which in the opinion of the Engineer, is finally due under the Contract; and,
- (b) after giving credit to the Employer for all amounts previously paid by the Employer and for all sums to which the Employer is entitled under the Contract, other than Clause 47, the balance, if any, due from the Employer to the Contractor or from the Contractor to the Employer as the same may be.”

18. It is apparent from the plain reading of sub-clause 60.2 of COPA that the purpose of submitting monthly statements to an Engineer was to secure Interim Payment Certificate (IPC) certifying monthly amounts due to the contractor, such payments are obviously interim in nature and do not finally foreclose the right of the contractor or NHAI to seek further payments if the contractor is so entitled to. This is apparent from the plain reading of sub-clause 60.11 of COPA.

In terms of Sub-clause 60.11 of COPA, the contractor is required to submit to Engineer 6 copies of the draft final statement for consideration with supporting documents showing in detail in the form approved by the Engineer (a) the value of work and in accordance with the contract; and (b) any further sum which the contractor considers to be due to him under the contract.

19. In view of the above, the contention that Ssangyong's claim is barred by limitation, is plainly unsustainable. The said contention was considered by the Arbitral Tribunal. The Arbitral Tribunal had noted that the claims made by Ssangyong were rejected by the NHAI on 10.12.2009 and, therefore, claims made were within a period of limitation. As stated above, this Court is unable to accept that any interference in the impugned award is called for in these proceedings as the Ssangyong's claim is clearly not barred by limitation.

20. The contention that Ssangyong did not qualify as a Dealer under the Madhya Pradesh Entry Tax Act, 1976 and, therefore, the notification dated 01.04.2007 is not applicable to Ssangyong is also unmerited.

21. Admittedly, the Notification enhancing the rate of Entry Tax under the Madhya Pradesh Entry Tax Act, 1976 was applicable to a "Dealer". The term "Dealer" is not defined under the Madhya Pradesh Entry Tax Act, 1976. However, by virtue of Section 2(2) of the Madhya Pradesh Entry Tax Act, 1976, the definition of the terms defined under the Madhya Pradesh Commercial Tax Act, 1994 are

incorporated by reference. Section 2(2) of the Madhya Pradesh Entry Tax Act, 1976 reads as under:-

“2(2) All those expressions, other than expression “goods” and “sale” which are used but are not defined in this Act and are defined in the Vanijiyik Kar Adhiniyam shall have the meanings assigned to them in that Act.”

22. Section 2(h) of the Madhya Pradesh Commercial Tax Act, 1994 defines the term “Dealer” and there is no dispute that Ssangyong falls within the scope of the said definition.

23. In view of the above, there can be no dispute that the Notification is also applicable to Ssangyong. More importantly, Ssangyong had produced challans indicating payment of the Entry Tax at enhanced rate and there is no dispute that Ssangyong had in fact paid the Entry Tax at such enhanced rate.

24. The contention that the impugned award is also liable to be set aside on the ground that the Arbitral Tribunal had erred in proceeding on the basis that Ssangyong was obliged to procure HSD from IOCL’s refinery, is also unpersuasive. The Arbitral Tribunal had considered Clauses 4.1 and 4.2 of the Instructions to Bidders and had arrived at its conclusion. However, notwithstanding the same, the NHAI has placed no material on record that required Ssangyong to procure HSD from Jabalpur and not from the refinery at Mathura. The Arbitral Tribunal had also noted that despite enhancement in the Entry Tax from 1% to 27%, the actual cost of HSD procured from Mathura Refinery, with

applicable exemption on excise duty, was less than the price of HSD prevailing at the local consumer pumps at Jabalpur.

25. In view of the above, this Court finds no ground to interfere with the impugned award.

26. The petition is, accordingly, dismissed. The pending application also stands disposed of. The parties are left to bear their own costs.

27. Order *dasti* under signatures of the Court Master.

MARCH 16, 2018
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VIBHU BAKHRU, J

