

\$~14

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

%

**Date of Decision: 17.5.2019**

+ **O.M.P. (COMM) 159/2019**

NATIONAL HIGHWAYS AUTHORITY OF INDIA..... Petitioner

Through: Ms. Tanupriya Gupta, Ms. Deepika  
Nandakumar, Advs.

versus

M/S GAMMON INDIA LTD.

..... Respondent

Through: Ms. Awantika Nanohar, Adv.  
alongwith Mr. Prashant Kumar, AOR  
in person.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SHAKDHER**

**RAJIV SHAKDHER, J. (ORAL)**

**I.A. No.5790/2019**

1. Allowed, subject to just exceptions.

**I.A. No.5792/2019**

2. This is an application seeking condonation of delay in re-filing.
3. The period of delay, according to the petitioner, is 5 days.
4. Ms. Awantika, who appears on advance notice on behalf of the respondent, says that she does not oppose the prayer made in the application.
5. Accordingly, the delay is condoned. The application is disposed of.

**O.M.P. (COMM) No.159/2019 & I.A. No.5791/2019**

6. This is a petition seeking to assail the award passed by the

majority members of the arbitral tribunal. The impugned award is dated 12.12.2018.

7. I may also note that the minority member of the arbitral tribunal has also passed a separate award, *albeit*, of even date i.e. 12.12.2018.

8. As a matter of fact, the minority member qua the claim assailed in the present petition has awarded an amount equivalent to Rs.999.12 lakhs whereas the majority members have awarded a total sum of Rs.336.69 lakhs. In addition thereto, the majority members have also awarded interest to the respondent.

9. The claim in respect to which challenge is raised by the petitioner arises out of the purported reduction in the scope of work.

10. Briefly, the dispute between parties has arisen in the background of the following facts:

10.1 The petitioner on 29.11.2005 awarded a contract in favour of the respondent of a value equivalent to Rs.3,56,51,49,208/-. The duration of the contract was 30 months. The agreement between the parties was executed on 7.2.2006. The petitioner had issued a Notice To Proceed (NTP) to the respondent on 8.3.2006. Therefore, the scheduled date of completion was pegged at 7.9.2008.

10.2 The scope of the work involved widening and strengthening “4-Lanes of existing single/intermediate lane Carriageway of NH-57 section from KM 230.00 to KM 190.00 (Forbesganj-Simrahi Section) in the State of Bihar on East West Corridor under NHDP - Phase -II (Contract Package C-II/BR-3)” (hereafter referred to as “package BR-3”).

10.3 It appears that insofar as the respondent was concerned, the end

point of the carriage way was brought forward from Km 190.000 to Km 192.800.

10.4 It is on account of this circumstance obtaining that the respondent raised claim.

11. The record shows that the stretch of the road which was lopped off from the respondent's package i.e. package BR-3, was given to another agency under package BR-4.

12. It is in this backdrop that the respondent raised the following claims:

|                                                                                                                                                        |                               |
|--------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------|
| <i>“i) Unrecovered costs of productivity of Plant &amp; Machinery deployed due to omission of work from Ch: 190.000 km to 192:800 km. amounting to</i> | <i>Rs.333.62 lakhs</i>        |
| <i>ii) Unrecovered cost of site overheads, H.O. overheads and profit due to omission of work from Ch: 190.000 km to 192.800 km. amounting to</i>       | <i><u>Rs.665.50 Iakhs</u></i> |
| <i>Total</i>                                                                                                                                           | <i><u>Rs.999.12lakhs</u></i>  |
| <i>(iii) Interest at the rate of 12% compounded Monthly from the dates when the amount were due till the date of payment.</i>                          |                               |
| <i>(iv) Cost of Arbitration.”</i>                                                                                                                      |                               |

13. The majority members having examined the material placed before them came to the conclusion that Clause 51.1, which is, the variation clause in the agreement obtaining between the parties would not apply in view of the fact that the work which had been excluded had been carried out by another agency.

13.1 For the sake of convenience, the relevant part of Clause 51.1 is

extracted hereafter:

*“Clause 51.1 : Variation*

*The Engineer shall make any variation of the form, quality or quantity of the works or any part thereof that may, in his opinion, be necessary and for that purpose, or if for any such reasons it shall, in his opinion, be appropriate, he shall have the authority to instruct the Contractor to do and the Contractor shall do any of the following:*

- a) xxx    xxx    xxx*
- b) Omit any such work (but not if the omitted work is to be carried out by the Employer or by another contractor).*
- c) xxx    xxx    xxx*
- d) xxx    xxx    xxx*
- e) xxx    xxx    xxx*
- f) xxx    xxx    xxx.....”*

*(emphasis is mine)*

13.2 The finding to this effect is recorded by the majority members in paragraph 7.3.12 of the award. The relevant observations made by the majority members in this behalf are, once again, for the sake of convenience, extracted hereafter:

*“7.3.12 From the contemporary records as brought out in para 7.3.6 above, the Engineer has stated that the deleted scope of work pertains to km 190.000 to 192.800. From para 7.3.5, 7.3.6 & 7.3.7 above, it is clear that there is overlap of 2.8 km in packages BR-3 & BR-4. Respondent has stated that the end point of BR-4 having chainage 17.382km is also the end point of BR-3(both are one and the same) and that chainage 190.000 km falls westwards of km 174.382 (the end point of BR-4 executed by M/s Simplex Infrastructures Ltd). From a harmonious interpretation of all these statements of the Respondent, we have come to the conclusion that the reduction in scope of 2.8 km is from chainage 190.000km to 192.800 km and this*

length has been executed by the agency which has done the adjacent road length forming part of BR-4 package.”  
(emphasis is mine)

14. To my mind, no error can be found in the reasoning adopted by the majority members of the arbitral tribunal. The conclusion reached by the majority members is a plausible conclusion based on their appreciation of the material placed before them and their interpretation of the terms of the agreement.

15. Insofar as the quantification of the claim is concerned, the majority of the arbitral tribunal, once again, quite correctly rejected the claim made by the respondent on account of purported loss of plant and machinery.

15.1 The arbitral tribunal, however, has granted compensation for loss of profit on account of reduction in the scope of work and also compensation for loss of overheads. Insofar as loss of profit is concerned, the majority of the arbitral tribunal has awarded a sum of Rs.266.20 lakhs in favour of the respondent. As regards compensation for loss of overheads which included on-site and off-site costs, the majority members have awarded a sum of Rs.70.49 lakhs.

15.2 The compensation under the aforementioned heads has been granted by taking into account the trade practice i.e. the framework provided in the Standard Data Book for Analysis of Rates of Ministry of Shipping, Transport and Highways (in short “Standard Data Book”).

15.3 I am unable to find any error in the application of the formula provided under the Standard Data Book.

16. Ms. Gupta, however, assails the quantification made by the arbitral tribunal with regard to compensation for loss of overheads on the ground that the agreement obtaining between the parties is an item rate agreement and the quantities executed by the respondent fall within the scope of the work which was awarded to the respondent.

16.1 To my mind, this objection cannot sustain as the claim lodged by the respondent was with regard to the reduction in the scope of work. The reduction in the scope of work did not fall within the provisions of the variation clause i.e. Clause 51.1. It is evident on a bare perusal of Clause 51.1 that only if the work is omitted without it being executed either by the employer i.e. the petitioner or any other agency then the contractor can be denied compensation.

16.2 In this case, the majority of the arbitral tribunal has returned a finding of fact that the work which was excluded from the respondent's package was actually awarded to another agency. Therefore, the necessary consequences which followed had to be examined and quantified in monetary terms which is what has been done by the arbitral tribunal. Thus, I am unable to accept the contention raised by Ms. Gupta.

17. Insofar as the interest is concerned, though the respondent had asked for interest at the rate of 12 percent per annum, the majority of the arbitral tribunal has awarded interest at the rate of 10 percent (simple) per annum.

17.1 The rate of interest awarded is neither usurious nor a rate which would shock one's conscience. The majority members have employed their discretion in the matter, which, to my mind, cannot be interfered

with given the circumstances obtaining in this case.

18. I have carefully examined the award passed by the majority of the arbitral tribunal. I am disinclined to entertain the petition. The petition is, accordingly, dismissed.

19. Consequently, the application for stay shall stand closed.

**MAY 17, 2019**  
**rb**

**RAJIV SHAKDHER, J**

