

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

**COMMERCIAL APPEAL NO. 444 OF 2019
IN
COMMERCIAL APPEAL (L) NO. OF 2019
IN
COMMERCIAL ARBITRATION PETITION NO. 555 OF 2017**

Municipal Corporation of Greater Mumbai ... Appellant

Versus

M/s. Gammon India Ltd. ... Respondent

Mr. Ram Apte, Sr. counsel a/w Adv Dhruti Kapadia and Adv. Sagar Patil for the appellant.

Mr. Prakash Shah a/w Mr. Jas Sanghavi i/by PDS Legal i/by for the respondent.

**CORAM : B.P. DHARMADHIKARI,
ACTING CHIEF JUSTICE &
NITIN R. BORKAR, J.**

DATE : MARCH 13, 2020

P.C.:

Heard learned senior counsel for the appellant and learned advocate for the respondent.

2. Two questions are raised. First one is as per express stipulation in contract between the parties, as per clause 4.2, surcharge cannot be claimed from the appellant by respondent. Second contention without prejudice is with surcharge if claimable, can be demanded only after the payment thereof to

State Government is established.

3. Submission is these aspects are not properly dealt with by the learned Single Judge in the impugned judgment.

4. With the assistance of the respective counsel, we have perused the papers.

5. Clause 4.2 debars the contractor (respondent) from demanding reimbursement of the surcharge which is in lieu of sales tax. This aspect is specifically looked into by the learned Arbitrator in clause 17.20 of the award. Learned Single Judge has also considered it in paragraph 19 of the impugned judgment.

6. The contention raised in the alternate again is not supported by the factual matrix. The minutes of order dated 2/5/2011 show that the dispute regarding the quantum of sales tax could have been gone into by the arbitrator. The quantum fluctuates depending upon the admissibility of surcharge and also on fact of payment. The appellant before the arbitrator come up with the defence that as the sales tax or surcharge has not been factually paid, there was no occasion to demand reimbursement. This aspect is also considered by the learned Single Judge in paragraph 20 of the judgment.

7. With the result, we find no case made out. Appeal is accordingly rejected.

8. At this stage, our attention is invited to the fact that the cost of Rs. 25 lacs have been awarded by the arbitrator.

9. Respondents submit that this was not the issue argued in section 34 proceedings before the learned Single Judge. The judgment impugned supports the submission of the respondent. Accordingly we dispose of the proceedings.

NITIN R. BORKAR, J.

ACTING CHIEF JUSTICE