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## **Gammon India Ltd. & Anr. v National Highways Authority of India**

<b>Citation</b>	<b>OMP 680/2011 (New No. OMP (COMM) 392/2020)</b>
<b>Date</b>	<b>23 July 2020</b>
<b>Court</b>	<b>High Court of Delhi</b>
<b>Bench</b>	<b>Prathiba M. Singh J.</b>

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## FACTUAL BACKDROP:

- A contract was executed between Gammon- Atlanta JV, a Joint Venture of Gammon India Ltd. and Atlanta Ltd. ('Contractor') and National Highways Authority of India ('NHAI') on December 23, 2000 for the work of widening to 4/6 lanes and strengthening of existing 2 lane carriageway of NH-5 in the State of Orissa with a value of INR.118.9 crores commencing from January 15, 2001 to be executed within 36 months ('Project').
- *Award No.1 – October 05, 2007* – During execution of the Project, disputes had arisen between the parties in respect of some claims. The same were raised both by the Contractor and by NHAI. On August 01, 2004, the Disputes Review Board ('DRB') was constituted in terms of sub-clause 67.1 of the Conditions of Particular Application ('COPA'). The DRB expressly communicated its inability to resolve issues pertaining to a period earlier to its constitution. Accordingly, the Contractor invoked arbitration under subclause 67.3 of COPA vide notice dated January 27, 2005. The relevant claims referred for arbitration are as under:
  - a. *Claim 2.1:* Compensation for losses incurred on account of overhead and expected profit.
  - b. *Claim 2.2:* Compensation for reduced productivity of machinery and equipment deployed.
  - c. *Claim 2.3:* Revision of rates to cover for increase of cost of materials and labour during extended period over and above the relief available under escalation (price adjustment) provision in the agreement.
- The 3-member Arbitral Tribunal rendered an award on October 05, 2007 ('Award No.1') and held that Claim No.2 was found to not be barred by limitation. However, the compensation claimed by the Contractor on various pretext was rejected as the Arbitral Tribunal ('AT'). The AT upon adjudication awarded compensation to the Contractor w.r.t. Claim 2.1 INR5.28/- cores; Claim 2.2 INR1.85/- crores; and Claim 2.3 was considered outside the AT's terms of reference. 2 4.
- Award No.1 was challenged by the Contractor and by NHAI in OMP 99/2008 and OMP 107/2008. In OMP 99/2008, the Contractor withdrew the challenge in respect of Claim No. 2.3, which was rejected and sought liberty to approach the 2nd Arbitral Tribunal. Subsequently receiving assent by a Ld. Single Judge of on November 15, 2016 and Two Ld. Division Benches and Two SLPs, being SLP (C) No. 17022/2017 and 22663/2017, Award No. 1 attained finality.
- *Award No.2 – February 21, 2011* – In 2007, the Contractor had invoked the jurisdiction of the DRB in respect of payment of Tack Coat under bill of quantities ('BOQ') item No. 4.02 (b). The DRB rejected the said claim. Thus, the said claim, along with certain other claims, were referred to the 3-member Arbitral Tribunal constituted on January 02, 2008. Claim 2.3 of Award No.1 was then filed before this AT owing to the permission granted by the Court. Vide award dated February 21, 2011 ('Award No.2') by a 2:1 majority, claims of the Contractor were rejected. The minority award granted the claims of the Contractor.

- Along with Claim 2.3 in AT 1, the Contractor claimed for payment of tack coat; interest pendente lite and future @ 18% p.a. and cost of arbitration proceedings before the second Arbitral Tribunal. Upon due adjudication the AT 2 held that the Claim No. 1 is not barred by limitation, however, with detailed reasoning amount awarded is Rs. Nil only. It is pertinent to mention that non-grant of time extension was not considered in Award No.2 as the same was pending before the DRB.
- *Award No.3 – February 20, 2012* – NHAI imposed liquidated damages on the Contractor for the delay caused. Seven disputes were referred to the DRB on March 24, 2008. However, dissatisfied with the recommendations of the DRB, a third arbitration was invoked by the Contractor vide letter dated December 23, 2008. Vide award dated February 20, 2012 (“Award No.3”) the Contractor’s claim for recovery of amounts paid as liquidated damages was allowed.
- Award No.3 has been upheld by a Id. Single Judge and a Id. Division Bench of the High Court of Delhi and NHAI has paid the awarded sum. Accordingly, the award has attained finality.
- The present petition challenges Award No.2.

#### **CONTENTIONS OF THE PETITIONER:**

- The Petitioners primarily contended that the finding in Award No.3 adjudging NHAI responsible for the delay would bind the present proceedings challenging Award No.2. it was further stated that the delay was clearly caused by NHAI and the Contractor is entitled to escalation/compensation for the losses due to the said delays in the appointment of the engineer and handing over of the site and delays caused due to non-payment of dues, placing of variation order which had to be executed by the Contractor, non-grant of extension of time to the Contractor and default/delay in constituting the DRB.
- Moreover, the findings of the Arbitral Tribunal in Award No.2 with respect to Claim No.1 are that the consequences for uncertainties and delays during construction work are fully provided for in the contract itself. Insofar as any damages/compensation are concerned, which the Contractor may be entitled to claim under Section 55 of the Indian Contract Act, 1872 (‘ICA’), the same were found to be covered by Award No.1 which awarded INR5.28 crores and INR1.85 crores towards Claims 2.1 and 2.2 of the Contractor. It was contended at strength that the claim has been confused by the Arbitral Tribunal as being an award under Section 55 of the ICA whereas, in fact, Claim No.1 was not a claim under Section 55.
- Lastly, the Petitioners contended that in Award No.3 there was a clear finding that NHAI had caused a delay on various counts and hence, in view of the finding in Award No.3, this claim ought to be automatically allowed by placing reliance on the minority award of the 2nd AT as the minority award clearly distinguishes between compensation payable under Section 55 and Section 73 of the ICA. The Petitioners contended to uphold the minority award under which the Contractor has been awarded.

#### **CONTENTIONS OF THE RESPONDENT:**

- The Respondent contended that Award No.2 is detailed and as such the Contractor had multiple opportunities before the Arbitral Tribunal and has lost on both counts. It was their firm stand that the minority award is of no consequence once the majority award has rejected the claims of the Contractor as there was no reason as to why this Claim was not included in the reference leading to Award No.1 and thereby is barred.
- The Respondent is of the stand that escalation has in fact been granted under Clause 70.3 and further harps upon the findings by the DRB, 1st AT and the 2nd AT are consistent.

#### **ISSUES FRAMED:**

- Whether it is permissible for the Contractor to jettison the findings in Award No.3 to argue that Award No.2 ought to be set aside and the claims of the Contractor ought to be allowed.
- Whether it is permissible to read the findings of a subsequent award to decide objections against the previous award.

#### **JUDGEMENT:**

- The parties had appointed three Arbitral Tribunals which adjudicated different disputes and claims. There were three Awards amongst which Award No.1 and 3 have attained finality and the present petition is a challenge to Award No.2 preferred by the Petitioner was dismissed by the Court with the reasons that the findings of the 2nd AT do not suffer from any patent illegality or perversity and no other grounds for interference under Section 34 of the Arbitration and Conciliation Act, 1996 are made out.
- The findings of the 3rd AT, those relate to delays caused in the project and the right of NHAI to impose liquidated damages. It is imperative that escalation or compensation for non-payment of increased rates, is not the subject matter of Award No.3. Therefore, none of the findings in Award No.3 can be jettisoned or incorporated into the present petition to rule in favor of the Contractor qua Award No.2 for awarding compensation/rate revision/escalation.
- The stand of the Contractor is thus not tenable and is liable to be rejected. The findings of the majority award are clear and succinct thereby the scope of interference is very limited.
- The Court dwelled upon the legal position on multiple arbitrations and multiple awards and analyzed that the provisions of the Arbitration and Conciliation Act, 1996 (Section 7, 8 and 21) shows that disputes can be raised at different stages and there can be multiple arbitrations in respect of a single contract and concluded that, if there are multiple disputes which have been raised at different times, the commencement of proceedings would be different qua each of the disputes.
- The constitution of multiple Tribunals in respect of the same contract would set the entire arbitration process at naught, as the purpose of arbitration being speedy resolution of disputes, constitution of multiple tribunals is inherently counterproductive.
- It was further held that parties have invoked arbitration thrice, raising various claims before three different Tribunals which have rendered three separate Awards. Considering that a previously appointed Tribunal was already seized of the disputes



between the parties under the same contract, the constitution of three different Tribunals was unwarranted and inexplicable.

- The Court also analyzed the precedents concerning multiple arbitration and discussed the findings of Indian Oil Corporation Vs. SPS Engg Co. Ltd.; Sam India Built Well (P) Ltd. v. UOI & Ors.; Parsvnath Developers Limited and Ors. v. Rail Land Development Authority and was of the view that what can lead to enormous uncertainty and confusion which ought to be avoided is the constitution of separate Arbitral Tribunals for separate claims in respect of the same contract, especially when the first Arbitral Tribunal is still seized of the dispute or is still available to adjudicate the remaining claims by placing reliance on the decision of the Apex Court in Dolphin Drilling Ltd. v. ONGC.
- Upon considering the relevant findings of all three Awards it was held that any attempt to conflate Award no.1 into Award no.2 or Award no.3 into Award no.2 would lead to extremely unpredictable consequences. It would have been ideal if one Tribunal ought to have dealt with all claims since the core issue was of delay.
- While concluding the Court held that there needs to be an end to such multiplicity of litigations as the second Award on its own, is quite well reasoned and is also in terms of the clauses of the contract thereby it cannot be said that the findings in the impugned Award no.2 are prone to challenge.
- In order to address the issue of multiplicity in arbitral proceedings so as to part ways with the long-drawn arbitral journey, as in the present case, the Court passed several directions for parties to arbitration to further avoid multiplicity of Tribunals and inconsistent/contradictory awards as follows:
  - a. In every petition under Section 34 of the Arbitration and Conciliation Act, 1996 (“Section 34 petition”), the parties approaching the Court ought to disclose whether there are any other proceedings pending or adjudicated in respect of the same contract or series of contracts and if so, what is the stage of the said proceedings and the forum where the said proceedings are pending or have been adjudicated.
  - b. At the time when a Section 34 petition is being heard, parties ought to disclose as to whether any other Section 34 petition in respect of the same contract is pending and if so, seek disposal of the said petitions together in order to avoid conflicting findings.
  - c. In petitions seeking appointment of an Arbitrator/Constitution of an Arbitral Tribunal, parties ought to disclose if any Tribunal already stands constituted for adjudication of the claims of either party arising out of the same contract or the same series of contracts. If such a Tribunal has already been constituted, an endeavor can be made by the arbitral institution or the High Court under Section 11, to refer the matter to the same Tribunal or a single Tribunal in order to avoid conflicting and irreconcilable findings.
  - d. Appointing authorities under contracts consisting of arbitration clauses ought to avoid appointment or constitution of separate Arbitrators/ Arbitral Tribunals for different claims/disputes arising from the same contract, or same series of contracts.