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## **CASE COMMENT: GAMMON INDIA LTD AND ANR V. NATIONAL HIGHWAYS AUTHORITY OF INDIA**

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Shatakshi Dwivedi, University of Lucknow

### **Citation:**

OMP 680/2011(New No. OMP(COMM) 392/2020)

**Date:** 23 July 2020

**Court:** High Court Of Delhi

### **Bench:**

Prathiba M. Singh J.

### **INTRODUCTION-**

The multiplicity of arbitration means multiple arbitrations taking place in a single contract or multiple contracts between different parties in the same project. In big complex projects involving multiple contracts and contractors, the number of arbitration cases can be very high. Consequently, a party may find itself participating in one or several cases covering nearly the same legal relationship. It may be efficient and cost-effective if the arbitration cases are allowed to be consolidated. The Hon'ble High Court of Delhi in Gammon India Ltd vs National Highways Authority of India dealt with the questions of the multiplicity of arbitral proceedings. The Delhi High Court with a bench by Justice Pratibha M. Singh with the multiple disputes arising out of the same agreement to arbitration.

### **BACKGROUND –**

A contract was executed between Gammon – Atlanta JV, a joint venture of Gammon India Ltm and Atlanta Ltd ['CONTRACTOR'] And National Highways Authority India ['NHAI'] on December 23, 2000, for the work of widening to 4/6 lanes and strengthening of existing

two-lane carriageway of NH -5 in the street of Orissa with a value of INR 118.9 crores commencing from January 15, 2001, to be executed within 36 months [‘Project’].

### **FACTS–**

- Gammon – Atlanta JV, a Joint Venture of Gammon India Ltd. and Atlanta Ltd. (hereinafter “Contractor”) and National Highways Authority Of India ( hereinafter “NHIA) entered into an agreement on 23<sup>rd</sup> December 2000, for the work of widening to 4/6 lanes and strengthening of existing 2 lane carriage of NH -5 in the State of Orissa ( hereinafter “Project”) contract value is Rs.118.9 crores and the commencement date is 15<sup>th</sup> January 2001, to be completed within 36 months i.e., by 14<sup>th</sup> January 2004.
- The 3 awards: A number of disputes between the contractor and NHAI arose during the course of execution of the project. Initially, the disputes were referred to the Dispute Resolution Board (DRB) which was constituted after the reference of the dispute by the contractor. However, the DRB expressed its inability to resolve the dispute pertaining to the period prior to its constitution. Hence, the contractor invoked the arbitration provision as provided under the contract. During the course of the project, the contractor invoked the arbitration provision three times and they were subsequently challenged in the civil courts against the arbitration decision. Following are the details of the 3 arbitration invoked by the contractor and the subsequent actions taken by the contractor,

#### **A. 1st Arbitral Tribunal**

The First Arbitral Tribunal, consisting of Mr. P.B. Vijay, Mr. C.C Bhattacharya and Mr. R.T. Atre was appointed in 2005, the contractor referred following disputes to arbitration under the contract:

- Claim No 1 – Compensation for losses incurred on account of overhead and expected profit.
- Claim No 2 – Compensation for reduced productivity of machinery and equipment deployed.
- Claim No 3 – Compensation for the increase in the cost of materials and labour during extended periods.

2. After hearing both the parties the Arbitral Tribunal awarded Claims No 1 and No 2 and rejected Claim No 3 as the third claim was not part of the initial Statement of Claim (SOC). This award of the tribunal shall be hereinafter referred to as – **Award 1**.

3. Both the parties challenged the award in separate proceedings in the civil court. The contractor later withdrew its objections with respect to the rejection of Claim No 3 and sought the court's approval to raise the same before a separate tribunal. Award 1 by the Arbitral Tribunal was upheld by the court with respect to Claim 1 and Claim 2.

### **B. 2<sup>nd</sup> Arbitral Tribunal**

The contractor once again invoked arbitration regarding the disputes related to NHAI's failure in fulfilment of contractual obligations, in the year 2007. Accordingly, the Second Arbitral Tribunal was constituted consisting of Mr. Swarup Singh, Mr. C.C Bhattacharya, and Justice E. Padmanabhan (Retd). The contractor also included its Claim No 3 from the first arbitration for which he had taken permission from the court.

The Second Arbitral Tribunal rejected the contractor's claim including the claim for compensation for NHAI's delay in fulfilling contractual obligations and also Claim No 3. However, the minority award therein granted both the claims of the Contractor. This award of the second Arbitral Tribunal shall hereinafter be referred to as – **Award 2**.

### **C. 3<sup>rd</sup> Arbitral Tribunal**

The contractor again invoked the third arbitration for the third time against NHAI's decision to levy liquidated damages on the contractor for the delay in completion of work in the year 2008. The contractor disputed the imposition of liquidated damages and referred the disputes to the DRB in the year 2008. However, dissatisfied with the DRB's recommendation invoked third arbitration, and accordingly, the Third Arbitral Tribunal was constituted consisting of Mr. RH Tadv, Mr. V. Velayutham, and Mr. V.S. Karandikar:

The third Arbitral Tribunal accepted the contractor's claim and awarded to the contractor recovery of amounts deducted as liquidated damages from the contractor's due payment. The tribunal observed that NHAI had committed several breaches of contract and had failed to provide encumbrance-free land to the contractor. Due to the breaches by NHAI the contractors work suffered and consequently the delay in completion of the work occurred.

NHAI cannot levy liquidated damages for the delays caused by itself. This Tribunal's Award was subsequently upheld by the court and attained finality. The third Arbitral tribunal award is hereinafter shall be referred as – **Award 3.**

#### **ISSUE-**

- Whether it is permissible for the contractor to jettison the finding 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 reason that the findings of the 2<sup>nd</sup> 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 3<sup>rd</sup> AT, relate to delays caused in the project and the right of NHIA 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 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 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 the arbitration is the speedy resolution of disputes, the 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 disputes between the parties under the same contract, the constitution of three different Tribunals was unwarranted and inexplicable.

The court also analysed the precedents concerning multiple arbitrations and discussed the findings of *Indian Oil Corporation vs SPS Engg Co. Ltd; Sam India Built Well (P) Ltd. Vs UIO& Ors ; Parsvnath Developers 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 on *Dolphin Drilling Ltd. vs ONGS*.

Upon considering the relevant findings of all three Awards it may be 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 litigation 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 journey, as in the present case, the court passed several directions for parties to arbitrations to further avoid multiplicity of Tribunal and inconsistent / contradictory awards as follows :-

- 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 contractor and if so, what is the stage of the said proceedings and the forum where the said proceedings are pending or have been adjudicated.
- At the time when a Section 34 petition is being heard, parties ought to disclose as 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.
- 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 same series of contracts. If such a Tribunal has already been constituted, an endeavour can be made by 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.
- 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.

#### **ANALYSIS –**

Upon the analysis of the judgment, there are multiple observations made on the given case. The court highlighted that according to the Arbitration and Conciliation Act 1996 disputes can be raised at any stage of the project, and there is a possibility of multiple arbitration in respect of a single contract.

The principles of res judicata and provisions of the CPC clearly indicate the legislative intent to avoid multiplicity of the proceedings. Though the arbitration is not strictly governed by CPC, a multiplicity of proceedings should be avoided as a matter of public principle. The Delhi High Court that multiplicity of proceeding involves parallel adjudication of overlapping issues resulting in enormous confusion. The following situation was observed by Delhi High Court, regarding the multiplicity of arbitral proceedings :

- 1) Arbitration and proceedings between the same parties under the same contract.

- 2) Arbitration and proceedings between the same parties arising from a multiple set of contracts, which bind them in a single legal relationship.
- 3) Arising out of identical or similar agreements, between one set of entities, wherein the other entity is common.

### **Aftermath Of The Judgment –**

Once the judgement was passed by the Delhi High Court there were certain suggestions made to reduce multiplicity of arbitral proceedings :

- 1) In case of any particular contract or series of contracts, where parties are in a legal relationship, the endeavour always ought to be to make one reference to one Arbitral Tribunal.
- 2) If there are different disputes arising at different times, the disputes should be referred to the same Arbitral Tribunal and separate awards can be pronounced by the same Tribunal.
- 3) The parties should bring to the notice of the court any prior challenges pending in respect to the awards out of the same contract so that all challenges can be adjudicated in one go.

### **CONCLUSION :**

The issue of multiplicity in arbitral proceedings is very common in arbitrations nowadays and the court has provided much – needed clarity on how to deal with such issues. The court emphasised the importance of parties to the dispute to maintain discipline while invoking arbitration and subsequent challenges and not go on forum hunting to redress the issue. Parties should bear in mind that any misuse of the dispute resolution process by the parties shall not be looked at kindly by the courts. This will not only help in the administration of justice but also prevent contradictory awards and orders.