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HIGH COURT OF DELHI AT NEW DELHI

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FAO (OS) 58/2007

Delhi Development Authority Appellant
Through Ms.Monica Sharma, Advocate

versus

M/s Subhash & Company Respondent
Through Mr.K.R. Gupta with Mr.Nitin Gupta
and Ms.Kiran Dharam, Advocates

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE DR. JUSTICE S.MURALIDHAR

O R D E R

8-8-2008

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1. This appeal is preferred against the judgment and order dated 13th September, 2006 of the learned single Judge whereby the objections filed by the appellant – DDA under Sections 30 and 33 of the Arbitration Act, 1940 were rejected and the award of the sole Arbitrator was made a rule of the Court.

2. The facts relevant for the disposal of this appeal are that the respondent was awarded the work of construction of M.S. Building on plot No.1,2 and 3 at the District Centre, Janak Puri, New Delhi and connected shopping centre (Zone-B) to the West including internal water supply, sanitary installation, site development and landscaping work up to plot No.4 at DDA (FAO(OS) 58/2007)

District Centre, Janak Puri vide agreement No.4/EE/WD-15/DDA/A/87-88. The date for the start of the work was 7th August, 1987 and the work was to be completed by 6th February, 1989. The work could not be completed by the stipulated date of completion, and the contract was finally rescinded on 13th March, 1989 by the appellant, Delhi Development Authority. Disputes arose between the parties and the Engineer Member, DDA was pleased to appoint Shri O.P. Mittal as the sole Arbitrator to adjudicate upon the said disputes. However, due to the demise of Shri O.P.Mittal, the sole Arbitrator, Shri R.J. Bakhru was appointed as the sole Arbitrator. Shri Bakhru entered upon the reference on 9th March, 1993 and made and published his award on 12th January, 1995.

3. Aggrieved by the award, the appellant – DDA filed an objection petition within the statutory period of 30 days, assailing the findings of the Arbitrator on claim Nos.1 to 6 and counter claims No.1 & and 7 to 13.

4. The learned single Judge vide order under appeal rejected all the challenges to the award and made the award a rule of the Court.

5. Before us only one claim was assailed by the counsel
(FAO(OS) 58/2007)

appearing for the DDA and that is claim No.2.

6. A perusal of the arbitral records show that the respondent had claimed Rs.6,94,098.40 towards 10% profit on balance work due to breaches committed by the appellant. The learned Arbitrator in his award after noticing that it is a well known fact that contractors provide for a certain element of profit in their tenders, which generally varies from 10% to 15% of the value of work, gave a finding that the respondent had become entitled to receive the same in view of the fact that the rescission of the contract had been held by him to be wrong and unjustified vide para 2.4 of the award. The learned Arbitrator further held that (i) the appellants were, thus, deprived of their right to earn profit, (ii) the rates quoted by the claimants were comparable to the then prevailing market rates, and (iii) as an established practice, Government / Semi-Government agencies assume an element of 10% of 'Profits Over Heads' in their estimates for such work. Accordingly, profit at the rate of 7½% of gross value of contract was considered by the Arbitrator as reasonable.

7. The Arbitrator noted that the contract value was Rs.2,53,78,598/- (after deduction of unconditional rebate of 2%) against which the value of the work executed was (FAO(OS) 58/2007)

Rs.1,80,79,938/-. The element of profit deemed to have been earned by the respondent at the rate of Rs.7.50% of value of unexecuted portion of the contract work (that is, Rs.72,98,660/-) works out to Rs.5,47,399.50. Consequently, a sum of Rs.5,47,399.50 was awarded by the Arbitrator in favour of the respondent towards loss of profits.

8. Learned counsel appearing for the DDA contended that claim No.2 is not payable to the respondent as the work which was awarded to the contractor-respondent had to be rescinded as he miserably failed to complete the work and that no evidence was led by the contractor to show that he has suffered damages on account of loss of profits. Whereas the learned counsel for the respondent supported the impugned judgment stating that the rescission of the contract was bad and illegal and due such rescission the respondent had to suffer losses and therefore the learned single Judge was right in upholding the award of the Arbitrator.

9. We are afraid that the issue is no more res integra and is covered by at least two decisions of the Supreme Court. In **M/s. A.T. Brij Paul Singh and others v. State of Gujarat** (1984) 4 SCC 59, a three Judge Bench specifically dealt with the issue of (FAO(OS) 58/2007)

entitlement of loss of expected profit in the work. In that case the trial court categorically held that since the respondent was guilty of breach of work contract, part of which was already performed and for which the appellant-claimant had transported machinery and equipment from Pune to the work site near Rajkot in Saurashtra, and the appellant would be entitled to damages. One of the heads of damages under which claim was made was "loss of expected profit in the work". The claim under this head as canvassed before the High Court was in the amount of Rs.4,30,314/-, which came to be rejected by the trial court for want of proof. The High Court after holding that the respondent was not justified in rescinding the contract proceeded to examine whether the plaintiff – contractor was entitled to damages under the head "loss of profit". In this connection the High Court referred to *Hudson's Building and Engineering Contracts* (1970), tenth edition and observed that "in major contracts subject to competitive tender on a national basis, the evidence given in litigation on many occasions suggests that the head-office overheads and profit is between 3 to 7 per cent of the total price of cost" which is added to the tender. In other words, the High Court was of the view that the claim under this head was (FAO(OS) 58/2007)

admissible. The High Court, however, proceeded to reject the claim observing that the bare statement of the partner of the contractor's firm that they are entitled to damages in the nature of loss of profit at the rate of 20 per cent of the estimated cost is no evidence for the purpose of establishing the claim. Allowing the appeal, the Supreme Court held as under:

10. Mr. Aneja, learned counsel for the appellant urged that the appellant was placed at a comparative disadvantage on account of his two appeals arising from two identical contracts inter parties being heard on two different occasions by two different Benches even though one learned Judge was common to both the Benches. Mr. Aneja pointed out that in the appeal from which the cognate Civil Appeal No. 1998/1972 arises, the same High Court in terms held that the claim by way of damages for loss of profit on the remaining work at 15% of the price of the work as awarded by the trial court was not unreasonable. The High Court had observed in the cognate appeal that "the basis adopted by the learned Civil Judge in computing the loss of profit at 15% on the value of the remaining work contract cannot be said to be unreasonable". In fact, the High Court had noticed that this computation was not seriously challenged by the State, yet in the judgment under appeal the High Court observed that actual loss of profit had to be proved and a mere percentage as deposed to by the partner of the appellant would not furnish adequate evidence to sustain the claim. In this connection the High Court referred to another judgment of the same High Court in First Appeal No. 89 of 1965 but did not refer to its own earlier judgment rendered by one of the Judges composing the Bench in First Appeal No. 384 of

1962 rendered on 3/6 July, 1970 between the same parties. When this was pointed out to Mr. Mehta, his only response was that the court cannot look into the record of the cognate appeal. We find the response too technical and does not merit acceptance. We are not disposed to accept the contention of Mr. Mehta for two reasons: Firstly, that in an identical contract with regard to another portion of the same Rajkot-Jamnagar road and for the same type of work, the High Court accepted that loss of profit at 15% of the price of the balance of works contract would provide a reasonable measure of damages if the State is guilty of breach of contract. The present appeal is concerned with the same type of work for a nearby portion of the same road which would permit an inference that the work was entirely identical. And the second reason to reject the contention is that ordinarily a contractor while submitting his tender in response to an invitation to tender for a works contract reasonably expects to make profits. What would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid. In this case we have the additional reason for rejecting the contention that for the same type of work, the work site being in the vicinity of each other and for identical type of work between the same parties, a Division Bench of the same High Court has accepted 15% of the value of the balance of the works contract would not be an unreasonable measure of damages for loss of profit. We are therefore, of the opinion that the High Court was in error in wholly rejecting the claim under this head.

11. Now if it is well-established that the

respondent was guilty of breach of contract inasmuch as the rescission of contract by the respondent is held to be unjustified, and the plaintiff-contractor had executed a part of the works contract, the contractor would be entitled to damages by way of loss of profit, Adopting the measure accepted by the High Court in the facts and circumstances of the case between the same parties and for the same type of work at 15% of the value of the remaining parts of the work contract, the damages for loss of profit can be measured."

(Emphasis supplied)

10. In ***Mohd. Salamatullah and others v. Government of Andhra Pradesh*** AIR 1977 SC 1481 the then Hyderabad Government had placed orders with the plaintiffs-appellants for manufacture of certain number of guns, the price per gun being put at Rs.125/-. Although some of the guns were manufactured the contract could not be completed and it was held concurrently that there was a breach of contract on the part of the plaintiff. Although the plaintiff had claimed a much larger sum, the State, through its counsel, pointed out that the plaintiffs themselves had estimated the margin of profit at a sum of Rs.1,87,500/- which worked out to 15 per cent of the total amount invested in the gun-making. Based on this argument of the government counsel, the trial court awarded the aforesaid sum of Rs.1,87,500/-. In appeal, however, the High Court observed that it will be just and

reasonable to put this profit at 10 per cent of the contract price which works out to Rs.1,25,000/-. The Supreme Court restored the order of the trial court by observing as under:

“We are not able to discern any tangible material on the strength of which the High Court reduced the damages from 15% of the contract price to 10% of the contract price. If the first was a guess, it was at least a better guess than the second one. We see no justification for the appellate court to interfere with a finding of fact given by the trial Court unless some reason, based on some fact, is traceable on the record. There being none we are constrained to set aside the judgment of the High Court in regard to the assessment of damages for breach of contract. We restore the award of Rs. 1,87,500 made by the trial Court on account of estimated profits (it transpires that when the trial Court passed the decree the amount was recovered by the appellants with the result that there was nothing more to be paid by the State to the respondents herein).”

11. Learned counsel appearing for the appellant, however, submitted that in a recent decision in **Bharat Coking Coal Ltd. v. L.K. Ahuja** (2004) 5 SCC 109, a two Judge Bench of the Supreme Court has taken a different view. According to her in that case the Supreme Court has clearly held that in the absence of any evidence led by the claimant to substantiate loss of profit, the Arbitrator ought not to have passed award under that head. We are unable to agree with the learned counsel. In that case,

Claim No.9 was for loss arising out of turnover due to prolongation of work and the claim made under that head was in a sum of Rs.10 lacs. The Arbitrator held that on account of escalation in wages and prices of materials, compensation was obtained and, therefore, there was not much justification in asking for compensation for loss of profits on account of prolongation of the work. However, the Arbitrator came to the conclusion that a sum of Rs.6 lacs will be appropriate compensation in a matter of such nature, being 15% of the total profit over the amount that has been agreed to be paid. While a sum of Rs.12,00,00/- would be appropriate entitlement, he held that a sum of Rs.6,00,00/- would be the appropriate entitlement. He also awarded interest on the amount payable at 15% p.a. Allowing the appeal, the Supreme Court held that when the claim for escalation of wage bills and price of materials compensation has been paid and compensation for delay in the payment of the amount payable under the contract or for other extra works is to be paid with interest thereon, it is rather difficult to accept the proposition that in addition, 15% of the total profit should be computed under the heading 'Loss of Profit'. It was observed that it is not unusual for the contractor to claim loss of profit arising (FAO(OS) 58/2007)

out of diminution in turnover on account of delay in the matter of completion of the work. What he should establish in such a situation is that had he received the amount due under the contract, he could have utilised the same for some other business in which he could have earned profit. Unless such a plea was raised and established, claim for loss of profits could not have been granted. In the absence of any evidence, the arbitrator could not have awarded the same. The question before the Court was about the loss of profit arising out of diminution in turn over on account of delay in completion of the work. Moreover the Court was of the opinion that when the claim for escalation of wage bill and prices of materials is accepted and when the compensation for delay in payment of the amount payable under the contract and for other extra work is to be paid by way of interest, there was no justification for a separate claim for loss of profit. This would virtually amount to claiming compensation twice under the same head. This decision has no application to the facts of the present case.

12. A Division Bench of this Court in **Delhi Development Authority v. Polo Singh & Co.** 101 (2002) DLT 401 (DB) has held that 10% of the contract value was fair and reasonable basis (FAO(OS) 58/2007)

to work out the amount of loss of profit.

13. In view of the above discussion, we are of the opinion that the view taken by the Arbitrator is a plausible view and it is not permissible for this Court to interfere with the Arbitrator's view merely because another view of the matter is possible.

14. The appeal is devoid of any substance and is hereby dismissed.

CHIEF JUSTICE

**S.MURALIDHAR
JUDGE**

August 08, 2008

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