

**HIGH COURT OF TRIPURA
AGARTALA**

ARB.A. NO.10 OF 2022

1. Tripura Housing & Construction Board,
represented by its Deputy Executive Officer(W-III),
Gurkhabasti, PO:- Kunjaban-799006,
District:- West Tripura, Tripura.

2. The Chief Executive Officer,
Tripura Housing & Construction Board,
Gurkhabasti, PO:-Kunjaban-799006.

3. The State of Tripura,
represented by the Secretary-cum-Commissioner,
Public Works Department(R&B),
New Secretariat Building,
PO Kunjaban,
Agartala, West Tripura.

.....Applicant-Appellant(s)

Versus

M/s Raimohan Majumder & Co.,
represented by its partner and
attorney, Sri Shyamal Kanti Majumder,
Milan Chakra, TV Tower, Road No.4/A,
PO:- A.D Nagar,
Pin:- 799003,
Agartala, Tripura West, Tripura.

..... Respondent-contractor(s)

For the applicant-appellant(s)	:	Mr. K. De, Addl. GA
For the respondent(s)	:	Mr. A. Sengupta, Advocate
Date of hearing and delivery of Judgment & Order	:	24. 01.2024
Whether fit for reporting	:	No

**HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH
HON'BLE MR. JUSTICE ARINDAM LODH**

JUDGMENT & ORDER(ORAL)

Heard Mr. K. De, learned Addl. GA appearing for the applicant-appellants as well as Mr. A. Sengupta, learned counsel for the respondent.

2. This appeal filed under Section 37(1)(c) of Arbitration and Conciliation Act, 1996(for short, the Act of 1996) read with Section 13(1A)

of the Commercial Courts Act, 2015 is directed against the impugned judgment and order dated 19.03.2022, passed by the learned District Commercial Court, West Tripura, Agartala, in Civil Misc.(Arbitration) No.05 of 2017, whereby and whereunder the learned Court below rejected the application filed by the applicant-appellants and upheld the arbitral award passed by the learned Arbitrator in Arbitration Proceeding No.1 of 2016.

3. The factual background in the context of which the present appeal has been filed is briefly enumerated hereunder:

3.1. The claimant-respondent, being a registered contractor entered into a contract Agreement being No.THCB/T/06/DED/(W-III)/13-14 with the applicant-appellants, the Tripura Housing & Construction Board(here-in-after referred to as the 'appellants-Board') for construction of Auditorium Building of St. Paul's H.S School, A.D. Nagar, Agartala, Tripura. The total cost of the contract work was Rs.1,77,40,695/- and the stipulated period for completion of the said work was 10(ten) months from the date of issuance of the work order dated 11.12.2013 and the work was scheduled to be commenced from the fifteenth day of the date of issuance work order.

3.2. The appellants-Board on 20.02.2014 had furnished the relevant structural plan of the work to the claimant-respondent and the site was also handed over to him on finalization of layout plan. Accordingly, the claimant-respondent mobilized his plants and machineries, etc. deploying watch and wards staff and took preparation for execution of the work. But at that stage, the authority of the St. Paul's H.S School did not allow the claimant-respondent to go ahead with the work on the plea that the layout of the work site as finalized by the appellants-Board fell inside the playground of the

school and the school authority desired to shift the work site towards back side of the school.

3.3. Situated thus, since there was deviation of the work site, an option was sought for on behalf of the appellants-Board from the claimant-respondent as to whether he was ready to execute the work necessitating the shifting of the work site of construction at the agreement rate and in response thereto the claimant-respondent communicated his decision to execute the work as per agreement, claiming rate for the deviated amount as well. However, the appellants-Board did not agree to accept the deviated amount so claimed by the claimant-respondent. Ultimately, the work could not be commenced, rather the contract was terminated and the work order was also cancelled.

3.4. As a result of the difference and disputes arose between the parties, on a petition filed on behalf of the claimant-respondent this Court appointed an Arbitrator for adjudication of the disputes arrived at between the parties.

3.5. Considering the controversies transpired from the respective statement of claims and defense and the documents filed by the parties, the learned Arbitrator framed the following issues:

- “(1) Is the cancellation of work order issued under letter No.F.2(68)/THCB/DEO(W-III)/2012/82-84 dated 01.01.2015 by the Respondent-the Dy. Executive Officer(W-III) addressed to the Claimant justified? If not, whether it amounted to breach of the terms and conditions of the Agreement executed by and between the Claimant and the Respondents under No THCB/06/DEO (W-III)/13-14 and the work order issued vide No. F.2(68)/THCB/ DEO(W- III)/2012/5702-19 dated on 11.12.2013?*
- (2) Has the Claimant suffered any loss due to cancellation of the said work order under letter No.F.2(68)/THCB/DEO(W-III)/2012/82-84 dated 01.01.2015*

above liable to be compensated? If it is in the affirmative, what shall be the quantum of compensation?

(3) Is the Claimant entitled to interest on the amount of compensation as claimed for? If it is in the affirmative, what shall be the rate of compensation?

(4) Is the Claimant entitled to cost of arbitration as claimed for?”

3.6. On going through the documentary evidence furnished by the parties with their respective statement of claim and defense and having heard the learned counsel of the parties, the learned Arbitrator by the impugned order dated 18.04.2017 rendered the award in the following manner:

“(1) The respondents shall pay special damages on account of loss of profit an amount of Rs.17,74,070/- being the 10% of the value of the contract of Rs.1,77,40,695/- to the claimant within a period of three months from the date of announcing this award;

(2) The claimant shall also be entitled to simple interest for the period from 07.02.2015 to 08.04.2017 @7% (seven percent) per annum and the claimant shall also be entitled to future interest @9% (nine percent) per annum with effect from 09.04.2017 till payment by the respondents.

(3) In case the respondents fails to make payment of the amount of award including interest within the period of three months, the claimant shall be at liberty to realize the amount by putting the award in execution.

(4) The cost of arbitration being the fees of the Arbitrator amounting to Rs.3,37,500/- has already been borne equally by both the parties as ordered by the Hon'ble the Chief Justice of the High Court of Tripura. So, no further award is made as to cost.”

3.7. Being aggrieved by the award dated 08.04.2017, the appellants-Board filed a petition before learned District Commercial Court, West Tripura, Agartala under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the arbitral award passed by the learned Arbitrator in Arbitration Proceeding No.01 of 2016 which was registered as Civil Misc(Arbitration) No.05 of 2017. The learned District Commercial Court by an order dated 19.03.2022 upheld the arbitral award passed by the learned

Arbitrator and rejected the petition filed by the appellants-Board. Hence, the instant application at the instance of the applicant-appellants, Board.

4. Mr. De, learned Addl. G.A. appearing for the appellants submitted that the Dy. Executive officer(W-III) could not hand over the clear site to the respondent-contractor to facilitate the commencement of work. As per the modified drawing, it was estimated to an amount of Rs.3,39,91,315/- and the value of the work under the agreement with the claimant-respondent was for an amount of Rs.1,77,40,695/- and thus, the deviation amount was Rs.1,62,50,620/- which was 92% on the higher side. It was further argued that to observe the formalities of a proposal for inclusion of deviation of work in the agreement in issue was placed before the Board in its 86th meeting, but the Board rejected the proposal and decided to invite fresh tender on the basis of modified drawing, as it was technically not feasible to get a part of the work done by one agency and the balance part by another agency, the appellants-Board could not consider the willingness of the claimant-respondent for execution of the work.

4.1. Mr. K. De, learned Addl. GA further submitted that Clause 12 and 12A of the terms of contract cannot supersede the financial power of the Executive Engineer or Dy. Engineer who signed the cancellation order on behalf of the Tripura Housing & Construction Board. The Board is constituted as per law and as such the Board has the power to rescind the agreement under compelling circumstances, which does not fall within the domain of dispute, as a result the decision of the Board cannot be held liable for committing breach of contract between the parties. In the instant appeal, the appellants have *inter alia* made the following prayers:

*“(i) Admit this application;
(ii) Issue notice upon the respondent;
(iii) Call for the LC records;
(iv) After hearing the parties, set aside the judgment and order dated 19/03/2022 passed in Civil Misc(Arbitration) 05 of 2017 by the Ld District Commercial Court, West Tripura, Agartala, along with arbitral Award passed by the Ld. Arbitral Tribunal on 08/04/2017 in Arbitration Proceeding No. 1 of 2016;
(v) Any other order/order(s) may pass as Your Lordship may deem fit and proper.”*

5. On the other hand, Mr. A. Sengupta, learned counsel appearing for the respondent-contractor submitted that the learned Arbitrator while discussing the issue no.1 rightly found that there was no justification in cancellation of the work order. Mr. Sengupta, learned counsel unequivocally submitted that the said cancellation of work order amounted to a breach of contract on the part of appellant and as such, the respondent-contractor claimed 15% of the value of contract as ‘*loss of expected profit*’.

5.1. Further, Mr. Sengupta, learned counsel reiterated that while deciding issue no.(ii), the learned Arbitrator relied on the decision laid down by the Hon’ble Supreme Court in ***M/s A.T. Brijpaul Singh and Bros. vs. State of Gujarat***, reported in ***AIR 1984 SC 1703*** : (1984) 4 SCC 59 and decided that the claimant-respondent is entitled to special damages in the head of ‘*loss of profit*’. Learned Arbitrator had referred to paragraphs 10 and 11 of the said judgment which are encapsulated here-in-below:

“10. 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 implied 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 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 had 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, therefore, are of the opinion that the High Court was in error in wholly rejecting the claim under the 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 per cent of the value of the remaining parts of the work contract, the damages for loss of profit can be measured.”

6. We have considered the rival submissions of learned counsel appearing for the parties and gone through the relevant materials placed on record. We have also gone through the award returned by the learned Arbitrator as well as the judgment and order passed by learned District Commercial Court whereby the arbitral award passed by the learned Arbitrator has been upheld.

6.1. The scope of interference in an appeal under Section 37 of the Act of 1996 has been delineated in several decisions rendered by the Apex Court. We are inclined to refer to the latest decision of the Apex Court in this regard rendered in case of ***S.V. Samudram v. State of Karnataka and Anr.*** reported in ***2024 SCC OnLine SC 19***[Civil Appeal No. 8067 of 2019 decided on 04.01.2024]. We may gainfully refer here paras 62 to 73 which read as follows:

“62. Moving further, we now consider the judgment impugned before us, i.e., the order of the High Court upholding such modification, under the jurisdiction of Section 37 of the A&C Act.

63. It has been observed by this Court in MMTC Ltd. v. Vedanta Ltd.

“14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such

interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings.”

(Emphasis Supplied)

64. This view has been referred to with approval by a bench of three learned Judges in *UHL Power Company Ltd v. State of Himachal Pradesh*. In respect of Section 37, this court observed:—

“16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed.”

65. This Court has not lost sight of the fact that, as a consequence to our discussion as aforesaid, holding that the judgment and order under Section 34 of the A&C Act does not stand judicial scrutiny, an independent evaluation of the impugned judgment may not be required in view of the holding referred to supra in *MMTC Ltd*. However, we proceed to examine the same.

66. We may also notice that the circumscribed nature of the exercise of power under Sections 34 and 37 i.e., interference with an arbitral award, is clearly demonstrated by legislative intent. The Arbitration Act of 1940 had a provision (Section 15) which allowed for a court to interfere in awards, however, under the current legislation, that provision has been omitted.

67. The learned Single Judge, similar to the learned Civil Judge under Section 34, appears to have not concerned themselves with the contours of Section 37 of the A&C Act. The impugned judgment reads like a judgment rendered by an appellate court, for whom re-examination of merits is open to be taken as the course of action.

68. We find the Court to have held the award to be perverse and contrary to public policy. The basis for such a finding being the delay on the part of the contractor in completion of the work which “could have been avoided”. Significantly, as we have observed earlier such a finding is not backed by any material on record.

69. What appears to have weighed with the court is that the factoring of the cost escalation between the years 1989-1990 and 1992 by 100% was exaggerated. But then equally, there is no justification in granting lump sum escalation by 25% of the contract value. Well, this cannot be a reason to modify the award for the parties are governed by the terms and conditions and the price escalation stood justified by the petitioner based on cogent and reliable material as was so counted by the Arbitrator in partly accepting and/or rejecting the claims.

70. In our considered opinion, the court while confirming the modification of the award committed the very same mistake which the Court under Section 34 of the A&C Act, made.

71. The Court under Section 37 had only three options:—

(a) Confirming the award of the Arbitrator;

(b) Setting aside the award as modified under Section 34; and

(c) Rejecting the application(s) under Section 34 and 37.

72. The learned single Judge has examined the reasoning adopted by the learned Arbitrator in respect of certain claims (claims 3 and 7, particularly) and held that allowing a claim for escalation of cost, was without satisfactory material having been placed on record and is “perverse and contrary to the public policy”. However, it appears that such a holding on part of the Judge is without giving reasons therefor. It has not been discussed as to what the evidence was before the learned single Judge to arrive at such conclusion. This is of course, entirely without reference to the scope delineated by various judgments of this Court as also, the statutory scheme of the A & C Act.

73. Having referred to J.G Engineers (P) Ltd. v. UOI and more particularly para 27 thereof, it has been held that the award passed by the learned Arbitrator is “patently illegal, unreasonable, contrary to public policy.” There is no reason forthcoming as to how the holding of the learned Arbitrator flies in the face of public policy.”

7. Though the learned Arbitrator is the sole judge for construction of the terms and conditions of the agreement, but in this case, we find that the learned Arbitrator has not taken into account the entire Clause 12 and 12A of the Agreement. Clause 12 of the agreement stipulates that, “*the Engineer in charge shall have the power to make any alterations in omissions from, addition to or substitutions for the original designs and instructions that may*

appear to him to be necessary or advisable during the progress of the work but in no case shall the additions or deductions exceeded twice the deviation limit” and Clause 12A of the agreement stipulates that—the Engineer-in-charge has been given the power and liberty to cancel the order to carry out such increased quantities of work by giving notice in writing to the agency.”

8. The learned Judge, District Commercial Court also has failed to test the correctness of the award within the contours of the grounds available under Section 34(2) and 34(2-A) of the of the Arbitration and Conciliation Act, 1996 without referring to the relevant Clauses of the Agreement which requires the determination and non-consideration of the same makes the judgment of the learned Commercial Court unreasonable and patently illegal.

9. Based on the principles enunciated in *S.V. Samudram*(supra) and the discussions made here-in-above, we are of the view that the matter be remitted to the learned District Commercial Court, West Tripura, Agartala, to decide the issue relating to Clauses 12 and 12A of the condition of contract and as regards to the expected loss of profit or adjustment in accordance with law within a reasonable time preferably 3(three) months from the date of receipt of the certified copy of this order since the Arbitration proceeding was initiated way back in the year 2016.

The appeal is disposed of in the manner and to the extent as indicated above.

(ARINDAM LODH, J)

(APARESH KUMAR SINGH, CJ)