

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Misc. Appeal No. 883 of 2006**

Airport Authority of India, a body corporate constituted under the Airport Authority of India Act, 1994, head office: Rajiv Gandhi Bhawan, Safdarganj Airport, New Delhi-3, Branch office: Raipur Airport, Mana Raipur (C.G.)

---- Appellant**Versus**

1. M/s. D.D. Singhal (Contractor) at 30, Industrial Estate, Nandini Road, Bhilai, Distt. Durg (C.G.)
2. Shri A.P. Parasar, Additional Director General (Retd.), C.P.W.D. L-1/15, Hauz Khas Enclave, New Delhi-110016

---- Respondents

For Appellant : Mr. S.S. Rajput, Advocate.

For Respondents: Mr. G.D. Waswani & Shri S.K. Yadu, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal**Order On Board****27/10/2017**

(1) In order to resolve the dispute arisen between the parties, the matter was referred to the Sole Arbitrator. Before the Sole Arbitrator, parties filed their statements of claim and after recording their evidence, the learned Sole Arbitrator delivered his award on 15-3-2004 and awarded an amount of Rs. 15,38,100/- along with interest. Dissatisfied with the award passed by the learned Sole Arbitrator, the appellant filed an application under Section 34(2) of the Arbitration and Conciliation Act, 1996 (for short, 'the Act of 1996') questioning the award passed. By the impugned order, learned District Judge has rejected the application affirming the award

passed by the learned Sole Arbitrator. Questioning legality, validity and correctness of the order passed by the District Judge, this misc. appeal has been filed under under Section 37 of the Act, 1996.

(2) Learned counsel appearing for the appellant would submit that the learned District Judge is absolutely unjustified in rejecting the application filed by the appellant herein for setting aside the award passed by the learned Sole Arbitrator. He further submits that findings recorded by the learned Arbitrator qua all the claims particularly claims No. 3 & 8 are perverse and therefore learned District Judge ought to have interfered with the findings recorded by the learned Arbitrator while answering those issues and the interest awarded is also on the higher side.

(3) Learned counsel appearing for the contractor/respondents would submit that the findings recorded by the learned Sole Arbitrator are based on evidence and material available on record and such findings are findings of fact, it is neither perverse nor illegal and therefore learned District Judge is absolutely justified in affirming those findings while hearing the application under Section 34 of the Act of 1996.

(4) I have heard learned counsel for the parties and also considered their rival submissions and gone through the record with utmost circumspection.

(5) In order to judge the correctness of the plea raised at the Bar, it

would be appropriate to consider the scope of application under Section 34 (2) of the Act of 1996.

(6) In a judgment recently delivered by Their Lordships of the Supreme Court in the matter of **Swan Gold Mining Limited V. Hindustan Copper Limited**¹, the Supreme Court has considered the question, whether the findings of fact recorded by the arbitrator can be interfered with by re-appreciating the evidence or material available on record and held that the Arbitrator appointed by the parties is the final judge of the fact and the findings of fact recorded by him cannot be interfered with on the ground that evidence has not been properly appreciated. Their Lordships observed in paras 11 and 12 as under:-

“11. Section 34 of the Arbitration and Conciliation Act, 1996 corresponds to Section 30 of the Arbitration Act, 1940 making a provision for setting aside the arbitral award. In terms of sub-section (2) of Section 34 of the Act, an arbitral award may be set aside only if one of the conditions specified therein is satisfied. The arbitrator's decision is generally considered binding between the parties and therefore, the power of the court to set aside the award would be exercised only in case where the court finds that the arbitral award is on the fact of it erroneous or patently illegal or in contravention of the provisions of the Act. It is well-settled proposition that the court shall not ordinarily substitute its interpretation for that of the arbitrator. Similarly,

1 (2015) 5 SCC 739

when the parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract then substituting new terms in the contract by the arbitrator or by the court would be erroneous or illegal.

“12. It is equally well settled that the arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him.”

(7) Three judges bench of the Supreme Court in case of **M/s. A.T. Brij Paul Singh and Bros. vs. State of Gujarat**² has clearly held that in a works contract, the party entrusting the work commits breach of the contract, the contractor would be entitled to claim damages for loss of profit which he expected to earn by undertaking the works contract. Paragraph 9 of the report states as under:-

"9. It was not disputed before us that where in a works contract: the party entrusting the work, commits breach of the contract, the contractor would be entitled to claim damages for loss of profit which he expected to earn by undertaking the works contract. What must be the measure of profit and what proof should be tendered to sustain the claim are different matters. But the claim under this head is certainly admissible."

Thereafter, Their Lordships allowed 15% of the value as damages for loss of profit by holding as under:-

"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 the facts and circumstances of the case between the same parties and for the same type of work at 15% of the value of remaining parts of the works contract, the damages for loss of profit can be measured."

(8) Thereafter, the Supreme Court in case of **Dwarka Das vs. State of M.P. and another**³ noticing the earlier decision of Supreme Court in case of **M/s. A.T. Brij Paul Singh and Bros** (supra) clearly affirmed the principle that claim of expected profits is legally admissible on proof of the breach of contract by the erring party.

Paragraph 9 of the report states as under:-

"9. The claim of the petitioner for payment of Rs. 20,000/- as damages on account of breach of contract committed by the respondent-State was disallowed by the High Court as the appellant was found to have not placed the material on record to show that he had actually suffered any loss on account of the breach of contract. In this regard the appellate Court observed:

"It is not his case that for due compliance of the contract he had advanced money to the labourers or that he had purchased materials or that he had incurred any obligations and on account of breach of contract by the defendants he had to suffer loss on the above and other heads. Even in regard to the percentage of profit he did not place any material on record but relied upon assessment of the profits by the Income Tax Officer while assessing the income of the contractors from building contracts." Such a finding of the appellate Court appears to be based on wrong assumption. The appellant had never claimed Rs. 20,000/- on account of alleged actual loss suffered by him. He had preferred his claim on the ground that had he carried out the contract he would have earned profit of 10% on Rs. 2 lacks which was the value of the contract. This Court in **A.T. Brij Pal Singh** (supra), while interpreting the provisions of Section 73 of the Contract Act, has held that damages can be claimed by a contractor where the government is proved have committed breach by improperly rescinding the contractor and for estimating the amount of damages Court should make a broad evaluation instead of going into minute details. It was specifically held that where in the

works contract, the party entrusting the work committed breach of contract, the contract is entitled to claim the damages for loss of profit which he expected to earn by undertaking the works contract. Claim of expected profits is legally admissible on proof of the breach of contract by the erring party.

“What would be 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 a way of damages if the other party to the contract is guilty of breach of contract cannot be gain said. 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 percent of the value of the balance of the works contract would not be an unreasonable measure of damages for loss of profit.....

Now if it is well-established that the respondent was guilty of breach of contract inasmuch as the recession 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 percent of the value of the remaining parts of the work contract, the damages for loss of profit can be measured.

To the same effect is the judgment in Mohd. Salamatullah vs. Government of Andhra Pradesh⁴. After approving the grant of damages in case of breach of contract, the Court further held that the appellate Court was not justified to interfere with finding of fact given by the trial Court regarding quantification of the damages even if it was based upon guess work. In both the cases referred to hereinabove. 15% of the contract price was granted as damages to the contractor. In the instant case however the trial Court had granted only 10% of the contract price, which we feel was reasonable and permissible, particularly when the High Court had concurred with the finding of the trial Court regarding breach of contract by specifically holding that "we therefore see no reason to interfere with the finding recorded by the trial Court that the defendants by rescinding the agreement committed breach of contract." It follows therefore as and when the breach of contract is held to

have been proved being contrary to law and terms of the agreement, the erring party is legally bound to compensate the other party to the agreement. The appellate Court was, therefore, not justified in disallowing the claim of the appellant for Rs. 20,000/- on account of damages as expected profit out of the contract which was found to have been illegally rescind."

(9) In the matter of **Bharat Coking Coal Ltd. v. L. K. Ahuja**⁵, the Supreme Court has clearly laid down two principles for awarding loss of profit, firstly, that the contractor/claimant should establish that had he received amount due under contract on time, he could have utilized the same elsewhere and earned profit thereon and secondly, that he must establish that he has suffered loss of profit by placing material and observed as under:-

"24.What he should establish in such a situation is that had he received the amount due under the contract, he could have utilized the same for some other business in which he could have earned profit. Unless such a plea is raised and established, claim for loss of profits could not have been granted. In this case, no such material is available on record. In the absence of any evidence, the arbitrator could not have awarded the same. This aspect was very well settled in *Sunley (B) & Co. v. Cunard White Star Ltd.*⁶ by the Court of Appeal in England. Therefore, we have no hesitation in deleting a sum of Rs. 6, 00,000 awarded to the claimant."

(10) In the afore-cited case {**Swan Gold Mining Ltd.** (supra)}, Their Lordships have clearly held that the court will not substitute its interpretation for that of the arbitrator and the findings of fact

5 (2004) 5 SCC 109

6 (1940) 1 KB 740 : (1940) 2 All ER 97 (CA)

recorded by the arbitrator cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him.

(11) At this stage, counsel for the appellant has contended that the finding recorded by the Arbitrator with respect to Claim No. 3 regarding escalation clause is perverse and has been struck off by the parties *whereas* learned Sole Arbitrator has clearly recorded a finding that such plea is not available as escalation clause was not properly struck off.

(12) Further applying the principle of law laid down in above-stated judgments (*supra*), if the facts of the case in hand are examined, the findings recorded by the learned Arbitrator qua claims No. 3 & 8 are the findings of fact based on material available on record, it is neither perverse nor contrary to the record. Learned District Judge while considering the application under Section 34 of the Act of 1996 has clearly and specifically considered those findings and came to the conclusion that the findings are not perverse and do not suffer from any illegality.

(13) Interest awarded by learned Arbitrator for pre-reference period, *pendente lite* and from the date of award till payment is also in accordance with provisions contained in Section 37(1)(b) of the Act, 1996 and warrants no interference in this appellate jurisdiction.

(14) In view of above-stated analysis, I do not find any perversity in the findings recorded by the learned Arbitrator duly affirmed by the

learned District Judge. The appeal is liable to be and is hereby dismissed leaving the parties to bear their own cost(s).

Sd/-

(Sanjay K. Agrawal)
Judge

D/-