

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 19.07.2017
Pronounced on: 17.10.2017

+ **FAO (OS) (COMM) 143/2017, C.M. APPL.25112/2017**

AHLUWALIA CONTRACT (INDIA) LIMITED Appellant

Through : Sh. Dhruv Mehta, Sr. Advocate with
Sh. S.K. Maniktala and Sh. Sanjay Kumar,
Advocates.

versus

THE UNION OF INDIA
Respondents

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Through : Sh. Arun Bhardwaj, CGSC.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE S.P. GARG

MR. JUSTICE S. RAVINDRA BHAT

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1. Ahluwalia Contract (India) Ltd (the appellant, hereafter "Ahluwalia") appeals the decision of a learned Single Judge, under Section 37 of the Arbitration and Conciliation Act ("the Act"), declining to set aside the award of an arbitral tribunal, under Section 34.
2. The facts are that Ahluwalia was awarded the contract for 'Package III, Electrical Services at AIIMS, Raipur entered into on 11.08.2011

(hereafter 'the Agreement') after it successfully bid in a tender process floated by the Respondent, through the Ministry of Health and Family Welfare (hereafter "the Principal"). The agreement involved the supply, installation, testing and commissioning of electrical equipment(s). The total contract value was ₹ 41,20,09,326/-. The completion period of the contract was 16 months, starting from 19.08.2011. Ahluwalia alleged that the Principal did not hand over the entire site till December 2015. In the meanwhile, the tenure of completion under the Agreement was extended eleven times. Accordingly, it alleged that delays in the performance of the Agreement – attributable - to the Principal's acts and omissions, resulted in losses to it. It claimed compensation. The Principal refuted these allegations and blamed Ahluwalia for the delays; it further alleged that in terms of the General Conditions of Contract (hereafter 'GCC'), no compensation was payable for any delay in handing over of the site. Since these disputes could not be resolved through mutual negotiation, they were referred to arbitration, in terms of a condition under the contract.

3. Ahluwalia sought an Award in respect of 17 heads of claims. 12 claims (nos. 1 to 6, 8, 9, 10, 11, 15 and 16) were allowed. 4 claims, i.e. nos. 3 to 5 and 7 were concerned with expenses alleged to have been incurred by Ahluwalia during the extended period of agreement. They were, however, rejected by the tribunal, which held that the contract did not provide for such expenses separately. The arbitrator furthermore held that the claims were in fact covered within the mark-up of 15% costs of materials/labour provided to cover all overhead profits. An important claim, i.e. no.12 relating to loss of profits suffered during the extended

period of agreement was rejected on the basis that it was hypothetical and conjectural. Likewise, claim no.13 for bonus in terms of clause 2A of the GCC was rejected.

4. In the petition under Section 34, eight claims rejected by the tribunal were impugned. Learned Single Judge took note of clause 2X – which defined “market rates” and clause 40h of the Special Conditions of Contract (SCC) which had prohibited compensation on account of delay in the starting of work – on account of acquisition of land, encroachment and in case of clearance work or towards sanction to estimates etc. The learned Single Judge was of the opinion that the reasoning given by the tribunal was unsustainable.

5. With respect to the rejection of the claim for loss of profits, the learned Single Judge held as follows:

“16. The arbitrator had also rejected ACIL's Claim no.12 for loss of profits during the extended period. The arbitrator found such claim to be hypothetical and this court is unable to accept the contention that the aforesaid view is not a plausible one. It is well settled that the claim for loss of profits is in the nature of damages and it would be incumbent on any party claiming such damages to establish the same with reasonable certainty.

17. In Bharat Coking Coal Ltd. v. L K Ahuja: (2004) 5 SCC 109, the Supreme Court had observed as under:-

“It is not unusual for the contractors to claim loss of profit arising 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 is raised and established, claim for loss of profits could not have

been granted.”

18. It is obvious that in the facts of the present case, the arbitrator was not convinced of the opportunity costs and/or loss of profits claimed by ACIL. This court is mindful of the limited scope of judicial review in these proceedings. It is not open for the court to supplant its view over that of the arbitrator by re-appreciating the evidence and material placed on record. Thus, no interference with the decision of the arbitrator to reject ACIL's claim for loss of profits during the extended period, is warranted.”

Likewise, the claim for extra amounts towards bonus in respect of the extended period too was rejected.

6. Ahluwalia urges that the learned Single Judge fell into error in upholding the awards so far as it sustained the rejection of its claim towards loss of profits for the extended period. Learned counsel relied upon the *Bharat Coking Coal Ltd. v. L.K. Ahuja* 2004 (5) SCC 109 and submitted that the plea of loss of profits had not only been urged but supported through materials. In support of this argument, learned counsel also relied upon the line of questioning adopted during the arbitral proceedings with special emphasis on question nos. 88-90. It was stated that the nature of answers to the questions (which pertained to the margin of profit that the contractor accepted under such agreements) justified a finding in favor of claim for profits. Learned counsel also relied upon *A.T. Brij Paul Singh and Ors. v. State of Gujarat* 1984 (4) SCC 59 and submitted that 15% of the contract value towards loss of profits for the extended period was justified in the entirety of circumstances.

7. It was also argued that the claim for bonus for the extended period was likewise rejected in an unreasoned manner. It was argued on behalf

of the Principal, on the other hand, that the rejection of the claims towards loss of profits and for bonus for the extended period was entirely justified. Learned counsel highlighted the narrow scope of Section 67 of the Act, emphasizing that unless the Court which had dealt with a petition under Section 34 renders a finding which is plainly unreasonable or unsustainable in law, the scope of interference in appeal is limited. It was also urged that the issue whether and if to what extent damages towards loss of profits is to be awarded relates to examination of pure questions of law. Without a finding with regard to patent error in law on the face of the record or findings that are contrary to stipulations in the contract or an approach indicative of such unreasonableness on the part of the Tribunal that no reasonable person placed in such or like circumstances would have arrived at, the award cannot be set aside. It was urged that besides relying upon the line of questioning in cross-examination of the Principal's witness, there was no documentary evidence to establish the loss of profits in fact claimed. Therefore, the denial of claims under that head was justified and valid.

8. From the above analysis, it is evident that Ahluwalia's appeal is confined principally to the denial of its claim for damages towards loss of profits. It is an undeniable fact that the contract could not be completed within the time agreed; several successive extensions were granted. Equally, the extensions were mutually agreed and apparently on account of the Principal's defaults. Ahluwalia, no doubt, in its claims set out 17 heads and sub-heads. The tribunal had initially allowed damages on 9 heads of claims. To this, the impugned order added 3 further claims, rejection of which was held to be untenable. Of the 2 claims in respect of

which the appeal has been preferred, the main one appears to be no.12, i.e. loss of profits.

9. *Bharat Coking (supra)* and *Brijpaul (supra)*, no doubt, are authorities for the proposition that the Court even in arbitration cases should be conscious of and ordinarily should not refuse claims towards loss of profits. At the same time, the reference to Section 73 – which finds express mention in *Brijpaul (supra)* clarifies that damages claimed cannot be granted as a matter of course; some material evidence is necessary. In this case, the extensions led to claims for payments on various accounts and heads during the extended period. The cumulative effect of the award and the impugned judgment is such that the majority of such heads of claim for extra expenditure, increased salary and other overheads for the additional period have been granted. They are based upon certain formulae under the contract. However, in the case of the claim of general loss of profits, having nexus with the value of the contract, the Court finds that there is no worthwhile evidence – apart from the line of questioning adopted by the claimants.

10. That in arbitration proceedings, just as in civil cases, an injured party can claim damages, does not necessarily translate into an award for damages towards loss of profits unless some diligence is exercised by the party (in the present case, Ahluwalia claiming it). In other words, a claim for damages (general or special) in the proceedings, cannot as a matter of course, result in an award, without proof of having suffered injury. The tribunal – as well as the learned Single Judge in this case appreciated the conspectus of circumstances. The former had the benefit of consideration of record as the primary adjudicatory body. The Tribunal was unable to

discern any substantial material to justify the claim for damages towards loss of profits. Having regard to these facts, this Court is of the opinion that the rejection of claim nos. 12-13 was dealt with correctly and reasonably by the learned Single Judge in the impugned judgment, which does not warrant interference.

11. For the above reasons, there is no merit in the appeal. It is accordingly dismissed without order on costs.

**S. RAVINDRA BHAT
(JUDGE)**

**S.P. GARG
(JUDGE)**

OCTOBER 17, 2017

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