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

Date of decision: 18th September, 2018

\+ **O.M.P. 59/2009**

NATIONAL PROJECTS CONSTRUCTION CORPORATION LIMITED ..... Petitioner

Through: Mr. Anup J. Bhambani, Senior Advocate with Mr. Rajat Arora & Ms. Vishelakshmi Singh, Advocates (M-9958593888).

versus

M/S AMBIKA ENGINEERS & CONSULTANTS ..... Respondent

Through: Mr. Sandeep Sharma & Mr. Bhrigu Dhami, Advocates (M-9810022432).

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter, 'the Act'*) has been preferred against the award of the Learned Sole Arbitrator dated 6th October, 2008.

2. The brief background of the petition is that on 26th February, 2003, the Petitioner – National Projects Construction Corporation Limited (*hereinafter 'NPCC'*) decided to participate in a tender floated by the Chief Engineer, MES, Lucknow Zone for work relating to "OTM Accommodation for Rajput Regional Centre Phase -1 at Fategarh (Uttar Pradesh), Lucknow"

3. The Respondent – M/s Ambika Engineers & Consultants (*hereinafter 'Ambika'*) put forth a pre-tender tie up for the execution of the said work as

per the terms and conditions of the Notice Inviting Tender, issued by M/s MES, which was accepted, by execution of a Memorandum of Understanding (*hereinafter, 'MoU'*) dated 13th June, 2003. The said MoU was executed between NPCC and Ambika. Thereafter, disputes arose between the parties which were referred to the Learned Sole Arbitrator. Ambika filed its claims before the Arbitrator and NPCC filed its counter claims. The brief details of the various claims and counter claims as per the award are:

A. Claims of the Respondent/Claimant

a) **Claim No.1: Due to negligence/failure of NPCC to approach MES properly on award of works by MES and for not signing agreement with Claimant in terms of MOU Rs.58,89,343.00** – Taking into account the payment of Rs.65,76,470.00 made by NPCC to Ambika, it was awarded Rs.31,66,949.00.

b) **Claim No.2: Refund of Earnest Money and pre-tender Expenses Rs.5,47,192.00 –** The Ld. Arbitrator held that the earnest money deposited was already included while calculating the amount spent on the work done, which was part of Claim No.1. Thus, this claim was rejected by the Arbitrator.

c) **Claim No.3: Actual expenses incurred by Claimant with 10% profit for the period the Claimant was made to work in the name of NPCC minus payment given to Claimant by NPCC. This includes work measured/unmeasured and not paid, Rs.58,27,429.23** – Holding that the claim of margin of 10% was reasonable, the Ld. Arbitrator allowed the claim of Rs.43,65,396.00.

d) **Claim No.4: Value of shuttering materials/tools/plants belonging**

to Claimant lying at site and not permitted to be taken out by NPCC Rs.12,00,000.00 – Due to lack of any concrete evidence to support the claim, this claim was rejected.

e) **Claim No.5: Loss of goodwill Rs.12,00,000.00 -** Due to lack of sufficient evidence showing loss of goodwill, this claim was rejected.

f) **Claim No.6: Interest @15% P.A. w.e.f. 7.7.2004 till payment** – This claim was allowed of interest payable @ 15% p.a. on a sum of Rs.75,32,345.00 from 7th July, 2004 till date to payment.

g) **Claim No.7: Cost of Arbitration Rs.5,00,000.00** – NPCC was directed to make payment of the cost of Arbitration amounting to Rs.3,00,000 to the Ambika.

B. Counter Claims of NPCC:

a) **Counter Claim No.1: A sum of Rs.1,94,29,309.00 being the amount suffered by the way of loss on account of Respondent having to get the balance work abandoned by the Claimant to be executed at the risk and cost of the Claimant –** Ld. Arbitrator held that there was nothing on record to even consider the items referred to in the Counter Claim, the Ld. Arbitrator rejected it.

b) **Counter Claim No.2: A sum of Rs.22,05,000.00 being the cost of establishment charges of NPCC (Respondent) from August, 2004 to April, 2006 –** Due to failure to adduce evidence proving this claim, the Ld. Arbitrator rejected it.

c) **Counter Claim No.3: A sum of Rs.3,95,000.00 being the loss suffered on account of shifting of construction material and T&P from the site to MES store-yard and back to site and watch and ward from 15th Sept '04 to March '05 -** Due to failure to adduce evidence proving this claim, the Ld. Arbitrator rejected it.

d) **Counter Claim No.4: A sum of Rs.58,93,000.00 being the liquidated damages for non-completion of work in time (10% of the contract value which is which is equal to contract value = Rs.5,89,30,000.00** – It was due to the fault of NPCC that the work stood stopped by Ambika, and thus, the Ld. Arbitrator rejected this.

e) **Counter Claim No.5: A sum of Rs.13,402.00 being the loss on account of publication of NIT charges -** Due to failure to adduce evidence proving this claim, the Ld. Arbitrator rejected it.

f) **Counter Claim No.6 – Pre-suit, pendentelite & future interest @15% p.a –** due to rejection of all the counter claims, the question of awarding interest did not arise.

g) **Cost of Arbitration: A sum of Rs. 5 lacs being the cost of arbitration –** Rejected this claim.

4. The Ld. Arbitrator, in his award, concluded as under:

> *"95. Accordingly, I hereby pass the award*
>
> *i. Directing the Respondent to pay the Claimant a sum of Rs.75,32,345.00 with interest at 15% from 07.07.2004 till the date of payment.*
>
> *ii. Directing the Respondent to pay the Claimant the sum of Rs.3,00,000/- towards Costs of Arbitration proceedings.*
>
> *iii. Rejecting the Claim no.4 of the Claimant.*
>
> *iv. Rejecting the Claim no.5 of the Claimant.*
>
> *v. Rejecting the Counter Claims made by the Respondent.*
>
> *vi. Directing the Respondents to bear its own costs."*

5. Mr. Anup J. Bhambani, Learned Senior Counsel for NPCC submits that against rejection of counter claims, no objections are filed. The present

objection petition is primarily in respect of claims no.1 and 3 as also interest and costs. Thus, the present O.M.P. is being decided only in respect of claim nos.1, 3, 6 and 7. None of the other objections are pressed or argued.

6. Mr. Bhambani submits that the Learned Arbitrator has made serious errors in the award inasmuch as the award clearly confuses between claims no.1 and 3. The discussion at para 82 to 83 is in respect of expenses claimed by Ambika. The same has been wrongly characterised as claim no.1. In fact, claim no.1 is a loss of profits claim, and not a claim for expenses. He further submits that even the discussion in the award in respect of claim no.3 in para 85 is confusing because the same relates to expenses but has been characterised as a loss of profits claim. Even the amounts mentioned by the Arbitrator are incorrect. Mr. Bhambani further submits that it is the settled position in law that a loss of profits claim cannot be granted without any evidence on record. He relies on the following judgements:

- ***Edifice Developers and Project Engineers Ltd. v. Essar Projects (India) Ltd [Appeal No.11/2012 decision dated 3rd January, 2013]*** *(hereinafter, 'Edifice Developers and Project Engineers Ltd.')*
- ***Essar Procurement Services Ltd. v. Paramount Constructions [Arbitration Petition No.470/2012 decision dated 25th November, 2016]*** *(hereinafter, 'Essar Procurement Services Ltd.')*
- ***GTM Builders and Promoters Pvt. Ltd. v. Sneh Developers Pvt. Ltd. [OMP (COMM) 10/2016 decision dated 3rd July, 2018]*** *(hereinafter, 'GTM Builders and Promoters Pvt. Ltd.')*

7. His submissions in effect are that in awarding claims no.1 and 3, the Learned Arbitrator has made serious errors, as he has confused the amounts claimed. Even the arithmetic calculation is incorrect and the entire

assessment of profits is based on conjecture.

8. On the other hand, Mr. Sandep Sharma, Learned counsel for Ambika submits that the contract between NPCC and Ambika was to be approved by MES, which approval was never obtained. Since, the approval was not obtained, MES did not recognize Ambika on site and Ambika was forced to vacate the site. The contract contains reasonable estimates of profits which Ambika could have earned. Due to the breach by NPCC of not obtaining approval from MES, it could not execute the entire contract and had to leave mid way. Thus, it is entitled to loss of profits apart from the actual outstanding expenses it has incurred in respect of the work executed. Mr. Sharma further submits that the view in ***GTM Builders and Promoters Pvt. Ltd. (supra)*** is not in line with at least two Division Bench judgment of this Court in ***Delhi State Industrial & Infrastructure Development Corporation Ltd. v. Rama Construction Company 2014 (3) ARB LR 116 (Delhi)*** *(hereinafter, 'DSIIDC')* and ***Sudhir Bros v. DDA ILR (2009) Supp. (3) Del 358*** *(hereinafter, 'Sudhir Bros')*. He also relies upon ***Ahluwalia Contract (India) Limited v. Union of India 244 (2017) DLT 360 (DB)*** which is referred to in ***GTM Builders and Promoters Pvt. Ltd. (supra)*** to state that the Learned Single Judge in ***GTM Builders and Promoters Pvt. Ltd. (supra)*** may not have considered the other judgements of the Division Bench. He further submitted that despite repeated letters being written by Ambika, the approval from MES having not been obtained and the Arbitrator having held that NPCC was in breach, the claim for loss of profits is perfectly justified.

Chronology of events

9. Before actually going into the claims, it is necessary to recapitulate

the chronology of events that have transpired in the present case. The MoU dated 13th June, 2003 which was entered into between NPCC and Ambika had the following clauses:

> *"6. Initial Security Deposit, Security Deposit & Performance Guarantee, etc as required under the contract of NPCC Limited with Client will be furnished by M/S AEC directly in favour of client. However in case NPCC gets exemption in submission of bank guarantee/FDR etc. towards performance guarantee / initial deposit / mobilisation advance etc. the agency is required to furnish the same in the desired format as per tender condition in favour of NPCC.*
>
> *..............................*
>
> *9. All terms & conditions agreed between client and NPCC shall be binding to M/S AEC on back to back basis. Payment for all variations, escalations shall be made by NPCC to M/S AEC on pro rata basis in proportion to their quoted price to NPCC and NPCC's price to client. For all extra items and Claims, the margin of NPCC shall be 10% and 15% respectably.*
>
> *………………………*
>
> *19. M/S AEC agreed that during the execution of the work, if in the opinion of the NPCC's site in charge if it from that the works in M/S AEC's scope are not progressing in time or milestones are not being achieved with stipulated time frame or it is not possible to complete work in the balance period, then NPCC will be at liberty to terminate their contract partially or in full by giving notice of 10 days in writing and the balance work shall be got completed by NPCC at the risk and cost of M/S AEC.*
>
> *20. The M/S AEC shall not sublet the job without NPCC's consent.*
>
> *21. The above pre tender tie up is subject to the approval of NPCC's management and client.*

22. Both the parties shall make efforts to settle the disputes or differences amicably. If amicable settlement is not possible, the same shall be referred to the sole arbitrator of Chairman & Managing Director of NPCC or the person appointed by CMD. NPCC and the decision of the arbitrator shall be final and binding on both the parties. Arbitration shall be according to Indian arbitration and conciliation Act, 1996 and arbitrator shall give reasons of award."

10. As per the MES Contractor's sheet dated 20th August, 2003, the contract was to be completed in a phased manner, as under:

	Phase	Months	Commencement	Completion
(i)	Phase-I	03	25 Aug 2003	24 Nov 2003
(ii)	Phase-II	10	25 Aug 2003	24 Jun 2004
(iii)	Phase-III	08	25 Aug 2003	24 April 2004
(iv)	Phase-IV	18	25 Nov 2003 or very next day from completion of all works under phase-I which ever is earlier	24 May 2005 or after 18 month from the actual date of completion whichever is earlier
(v)	Phase-V	13	25 Jul 2004 or after one month from completion of all works under phase-II, which ever is earlier	24 Aug 2005 or after 13 month from the actual date of completion whichever is earlier
(vi)	Contract as a whole	24	25 Aug 2003	24 Aug 2004

From the above, it is clear that the work was to be completed on or before 24th August, 2005.

11. After execution of the MoU, on 6th October, 2003 **(R-5)**, NPCC wrote a letter to Ambika to the following effect:

"To
M/S Ambica Engineers & Consultant
263, Defence Colony, Flyover Market

N. Delhi – 110024

SUB:- <u>Provision of OTM accommodation at Rajput Regiment Centre (Phase-1) at Fatehgarh</u>

Ref : our L.O.I. No. 799/cont./719 at 5th Aug 03'

Dear Sir,

Kindly refer above L.O.I. wherein the above cited work has been awarded to you on back to back basis further we have already signed the contract agreement with MES as well as along with you also.

So you are requested to commence the work at site immediately.

Thanking you,
Yours faithfully
(Mukul Kumar)
U.O."

12. On 9th November, 2003 **(R-6)**, MES expressed concerns about the progress of work being slow and unless the work proceeded with diligence, the work may not get completed in time. On 25th November, 2003 **(R-7)** another letter was written by MES informing NPCC that MES would be forced to claim compensation for delay in completion of work due to non-performance. On 13th December, 2003 **(R-8)**, the observation of MES dated 12th December, 2003 were forwarded to Ambika. The same are relevant and extracted herein below:

"At present the following staff /supervisory staff are employed by you:

(a) Degree Holder two no.

(b) Diploma holders five no.

The area of the responsibilities of above staff please be given to give suitable instructions to appropriate staff on site.

Now roads are open. No material so far reach *on site. Please furnish the details of order given to firms by 13/12/03.*

Labours employed by you is very less. You are advised to employ more labours.

Sd/-
12/12/03"

13. Thereafter on 15th December, 2003 **(R-9)**, further deficiencies were pointed out to Ambika. On 8th January, 2004 **(R-10)**, MES informed NPCC that there is no significant improvement in the progress of work and raised several issues. Again on 15th January, 2004 **(R-11)**, the same situation continued. There was inadequacy of labour and materials. Sufficient quantities of steel and cement were being procured very slowly. It was also noticed that sufficient labour had not been mobilized on site. A meeting was held with Ambika on 15th January, 2004 wherein it was advised to make all possible efforts to achieve the targets, in view of the repeated complaints being raised by MES. On 23rd January, 2004 **(R-12)**, notice was issued that if steps were not taken to achieve the targets, penalties would be liable to be imposed. Along with this, the letter of MES dated 17th January, 2004 was also enclosed. On 23rd January, 2004 **(R-13)**, MES informed NPCC that the date of completion of work has already expired. This letter is important and set out below:

"Dear Sir,
1. Reference HQ CWE Kanpur letter No.8500/445/52/E8 dated 15 Jan 2004.
2. It has been reported by Commander Work Engineer Kanpur that you are not proceeding with the work with due diligence and considerable time has elapsed but no sincere effort has been made by you to push to work towards completion. ***The site of work was handed over to you on 25 Aug 2003 but you have been only able to***

***achieve 2% progress**, which is negligible*.
3. The rate of procurement of material required for work is extremely slow and labours employed by you at site are also not sufficient to have the required rate of progress.
4. You have also not prepared & submitted CPM/PERT Chart to the department & Engineers employed by you at site too are not acquainted with CMP/PERT techniques. Hence the inadequacy of labour & materials has resulted in slow progress of work & being not commensurate with the time spent since taken over of site by you.
5. Your are therefore called upon to accelerate the progress of work by procuring the requisite quantity of materials and increasing existing number of labours as necessary to bring the progress up to the requirement and to compensate the loss of working days so far.
6. Please note that the date of completion of work has already been expired and you have already become liable to pay compensation for delay in completion of work.
7. I hereby draw your attention to the fact that time is of the essence of your contract and if the present state of affairs continues in spite of this notice, I shall be constrained to consider cancellation of the contract.
8. Please acknowledge receipt."

Yours faithfully,
Sd/-
(Pradeep Kapoor)
Brig
Chief Engineer"

14. On 28th January, 2004 **(R-14)**, Ambika replied to **R-12A** dated 23rd January, 2004 and assured as under:

"The Zonal Manager (Projects)
N.P.C.C. Ltd
Plot No.67 – 68, sector 25,

Faridabad (Haryana) 121004

SUB: PROVISION OF OTM ACCOMODATION FOR RAJPUT REGIMENT CENTER PHASE – I

Sir,
Please refer to your letter no. Proj/340/201/129 dt 23.1.04 on the above referred subject, and the unit offices MES work Fatehgarh letter no.7340003/MES/40 dt 17.1.04. As agreed after mutually discussing the progress of the works carried out so far and the planned programme of Rs.100.00 lacs and procurement of the required construction material, <u>we hereby assure you that not only the pace of the work will be maintained, adequate quantities of major material such as steel, cement, grit, sand, brick etc are being made. We also assure you that necessary steps have been undertaken to achieve the targets as decided in meeting held in chamber of garrison engineer on 15th January 04</u>
We are enclosing the photocopy of proposed programme upto march 04 to meet the requirement of construction programme of Rs.100. 00 lacs"

Yours faithfully
Sd/-
Ambika engineers & consultants"

15. Again on 10th April, 2004 **(R-17)**, 26th May, 2004 **(R-19A)** and on 9th June, 2004 **(R-20)**, MES raised objections to the slow progress of the work. On 11th June, 2004 **(R-26)**, MES called for a meeting with NPCC and on 25th June, 2004 **(R-27)**, MES informed NPCC that it would be invoking condition 50 of the General Conditions of Contract to claim compensation. On 18th August, 2004 **(R-27A)**, MES notified NPCC that even the labour working on site were not being paid. On 14th July, 2004 **(R-28)** in view of the slow progress of work, non-mobilisation of resources, non-payment of

wages to the labour, who started agitation at site, a detailed letter was written to Ambika **(R-28)** which clearly showed that as of 7th July, 2004 most of the phases were not completed, and in fact the on the same date, they had abandoned the site.

16. MES on 19th July, 2004 **(R-29)** also took serious objections to the slow progress of the work. On 23rd August, 2004, MES cancelled the contract of NPCC w.e.f. 10th September, 2004. Accordingly, NPCC had no option but to withdraw the works given to Ambika.

17. As against these letters Ambika relied on three letters dated 17th September, 2003 **(C-6)**, 30th September, 2003 **(C-7)** and 8th November, 2003 **(C-8)** by which it alleged to have raised an issue about the non-posting of the unit officer by NPCC, without which MES did not recognise them, and did not allow to start work at site. Vide letter dated 8th November, 2003 **(C-8)**, Ambika also asked NPCC for Head Office approval for signing the MoU, after taking due approval from MES, so that they could start the work. On 11th November, 2003 **(C-9)**, NPCC informed Ambika that it would purchase the building material in the name of NPCC and by giving the address of the site. However, vide letter dated 12th December, 2003 **(C-10)**, Ambika sought to reply to letter dated 27th November, 2003 sent by NPCC, and alleged that the delay was due to late posting of NPCC staff at the site. Vide the same letter, it was also claimed that no Power of Attorney was given by MES to carry out the work. Thereafter, it claimed *"now the staff has been posted and the work is progressing smoothly. We are now trying our best to cover this period of delay and hope to complete work in time"*.

18. Thereafter, on 7th July, 2004 **(C-11)**, Ambika raised an issue that NPCC has not obtained approval of MES. It also stakes its claim that

without approval of MES, the MoU cannot be considered to have started, and thus, NPCC would have to pay actual expenses plus 10% for all the work done. Thereafter, in reply to all the letters of NPCC dated 3rd July, 2004 and 2nd July, 2004 and two letters of 7th July, 2004, Ambika, vide letter dated 15th July, 2004 **(C-13),** took the stand that MES approval was not given, due to which it could not start the work. Thus, it was suffering huge losses and hardship. On 20th July, 2004 **(C-15)**, a curt letter was written to the Managing Director of NPCC asking for his intervention and that it would be claiming all costs with reasonable profits.

19. On 2nd August, 2004 (**C-18**), NPCC informed Ambika that none of the notices being sent by NPCC are being received by Ambika, and thus, there was no one available from Ambika with whom the matter could be discussed. Thus, as of August, 2004, there was complete stalemate between the parties, leading to the termination of agreement between NPCC and Ambika dated 6th September, 2004 **(C-24)**. In response, Ambika wrote letter dated 17th September, 2004 (**C-26**) which states as under:

Regd. AD

17.09.2004

To,
Chairman & Managing Director
NPCC Ltd.
Raja House
30-31 Nehru Place
New Delhi – 110019

Sir,

Please refer our Regd. Letter dt. 20.07.2004 addressed to you, which has not been replied by you or by your office. It is regretted that NPCC decided to take us as its associate and your office holds biased views, even without hearing to us. We cannot naturally *expect, therefore, that you will act impartially. We therefore, request your to appoint an independent person, retired High Court judge as Sole Arbitrator in the following matter within 30 days, as per terms of MOU.*

That NPCC signed with us a Memorandum of Understanding (MOU) dated 13.06.2003, in respect of tender for provision of OTM Accommodation for Rajput Regiment Centre Phase-I at Fathegarh, invited by Chief engineer MES, Lucknow Zone, Lucknow. That tender was submitted by NPCC, with Earnest Money of Rs.5,00,000/-paid by us for & on behalf of NPCC.

That the above tender was accepted by MES Order Sheet dt. 20.08.2003. That on receipt of order, NPCC was required to obtain MES approval for the predetermined understanding between us and approve draft agreement to be signed by NPCC with us and sign an agreement with us for the said tender-order. That NPCC totally neglected this and forced us to work in their name, promising MES approval and signing of proper agreement as per the MOU. NPCC cannot treat that work at MES conditions/rates.

*That we addressed number of letters to NPCC, including letters dt. 08.11.03, 12.12.03, 07.07.04, 15.07.04, 20.07.04, 30.07.04, 09.08.04, 12.08.04, 23.08.04 etc. All these were not replied by NPCC. NPCC decided to take adhoc % …… **[illegible]** payment from MES, which was incorrect.*

That we were not paid even the payments released by MES and NPCC was totally neglecting to seek approval of MES, so looking to helplessness of NPCC, we stopped ad hoc working from 07.07.04.

That MES terminated the contract of NPCC, vide its letter dt. 23.8.2004. NPCC vide its letter dt. 6.9.2004 received by us on 11.09.04 informed us about that letter of 23.8.04 and withdrew our works wrongly alleging operation of cl. 19 of MOU and claiming risk *and cost from us which we deny wholly.*

That NPCC did not give us permission of MES, to remove our materials, machinery, tools, temp. Hutments, arrangements etc. and got it, taken over/seized by MES.

That we submit that it is gross failure of NPCC and its getting some works executed by us in dishonest way, under false promises is in violation of letters and spirit of MOU. Therefore, there are disputes arisen as per clause 22 of the said MOU and are to be resolved by Sole Arbitrator. ……………………"

20. Vide this letter, Ambika invoked the arbitration clause and raised various claims on 2nd November, 2004 **(C-27)**. It requested for joint measurement and inventory at the earliest. However, on 7th January, 2005 **(C-28)**, NPCC informed Ambika that the joint measurement was done on 15th September, 2004 for which Ambika failed to appoint a representative. It also gave notice that the material on site to the tune of Rs.8,60,232/- may be lifted by 22nd January, 2005, failing which, it would be disposed of at Ambika's risk and cost. Along with this letter, the complete chart of material which was on site was also enclosed.

Analysis and Findings:

21. A perusal of the correspondence referred to above raises some startling facts. The letters dated 17th September, 2003 and 30th September, 2003 do not fine a mention in the final letter issued by Ambika dated 17th September, 2004. Unlike in all the other letters, the registered post slips are also not attached showing dispatch of these letters. Reference to these letters has been made in para 17 of the claim petition wherein both these letters are denied. NPCC has categorically averred that the said letters are manipulated

and were never received by them. These facts have been completely ignored by the Arbitrator. The extract of NPCC's reply is set out herein below:

> *"The contents of this para is denied and disputed. Claimant was aware of the specification of work and the initial work had nothing to do with the posting of Respondent officer. In any case, copy of the agreement between MES & Respondent was handed over to Claimant. Respondent had issued LOI dtd.05.08.2003 to start the work. Rather Claimant wasted 2 months time. The alleged letter dtd.17.09.2003 and letter dtd 30.09.2003 are denied. The said letters are manipulated and never received by Respondent (C-6 & C-7 respectively)"*

22. Thus, after the starting date of the contract i.e. 25th August, 2003, the complaint of MES on 9th November, 2003 that the progress of the work is very slow and that the contract is not likely to be completed within the agreed period, appears to be the real position on site. There is serious doubt as to whether the letters of September 2003 were in fact sent. The non-reference to these letters in any contemporaneous correspondence raises a clear doubt that Ambika has attempted to create back-dated letters to justify its claims. Even during arguments Ld. Counsel tried to rely on these letters. Ambika's letter of 8th November, 2003 seems to raise issues in respect of its rates which was clarified by NPCC on 11th November, 2003. Moreover, as recorded by MES, in the site instruction register on 12th December, 2003, no material had reached the site as on the said date and the labour employed was also less. Even as of 8th January, 2004, the progress on Phase-1 i.e. sewage disposal was at a standstill. <u>As recorded in letter dated 15th January, 2004 by MES as on the said date, only 2% of the work was completed</u>. This continued to be the position all along. As per the MoU, the completion of

work was to take place Phase-wise and in any case before 24th August 2005. But the progress of work was pathetic to say the least, as per the letters written by MES. There is no reason to disbelieve MES which was the client for whom NPCC, and in turn Ambika, were executing the work.

23. In his cross-examination, Mr. V.K. Narula, the witness on behalf of the Claimant submits that he does not have any proof to show that the letters dated 17th September, 2003, 30th September, 2003 and 8th November, 2003 were served on NPCC. He simply stated that he went to the office and served it personally but did not obtain acknowledgment. The Ld. Arbitrator, in his award, noticed that it was argued by Ambika that since the approval was not given by MES to the MoU entered into between NPCC and Ambika, it had to stop the work in July, 2004. This is contrary to Ambika's actual conduct wherein it repeatedly sought to justify its conduct saying that the work is progressing smoothly. The alleged non-approval was only an `excuse' which Ambika was looking for, to justify the abandonment of the work and exit the same.

24. The finding of MES that even as on 15th January, 2004, 2% of the work was not completed is very telling. Ambika clearly did not commission the work in right earnest. The letters written by Ambika clearly appear to be manipulated and the attempt in the correspondence is only to create evidence or justify its conduct by relying on the alleged non-approval of the MoU by MES.

25. The next question that arises is as to whether the MoU required the approval of MES. The Learned Arbitrator has relied upon Clauses 17 and 18 of the GCC to hold that since MES had not given any approval, the counter claims cannot be allowed. Clauses 17 and 18 of the GCC are set out herein

below:

> *"17. **Assignment or Transfer of Contract** – The Contractor shall not without the prior written approval of the Accepting Officer assign or transfer the Contract, or any part thereof or any share, or interest therein. No sum of money to become payable under the Contract shall be payable to any persons other than the Contractor unless the prior written approval of the Accepting Officer to the assignment or transfer of such money is given.*
>
> ***18. Sub-contracts.** – The Contractor shall not sub-let any portion of the Contract without the prior written approval of the Accepting Officer. The Accepting Officer may invite offers for performance by sub-contractors of any work in satisfaction of prime cost sums included in the tender documents. In the exercise of this option, offers will be made returnable to the Accepting Officer who shall select the firm to do the Work and inform the Contractor, who will be required to conclude a Contract with the nominated sub-contractor for the execution of the work as specified by the Accepting Officer to the sub-contractor. The Accepting Officer shall not nominate any sub-contractor against who the contractor shall make reasonable objection.*
>
> *The contractor shall be responsible for any sub-contractor or contractor who may carry out any work or supply any material in connection with the Contract, whether such person be selected by the Accepting Officer or by the Contractor. The Contractor shall make good any loss or damage suffered by Government by reason of any default, neglect or failure on the part of such person in relation to such work or material.*
>
> *Nothing herein contained shall relieve the Contractor of his liabilities and obligations under the Contract or in any way affect the Contractor's direct responsibility to Government nor shall it render*

Government in any way responsible to such sub-contractor"

26. A perusal of the above two clauses clearly shows that Clause 18 permitted sub-contracting. However, the contractor i.e. NPCC in this case would be responsible for the sub-contractor. These two clauses cannot be construed as meaning that sub-contracting is not permitted at all. Moreover, MES was, all along, kept in the loop in respect of the MoU with Ambika. It was aware of the arrival of the labour. It was supervising the material arriving at the site. The initial security deposit, security deposit and the performance bank guarantee were furnished by Ambika in favour of MES directly. MES, at no point of time, had raised an objection to Ambika's execution of the work. Learned counsel for Ambika has not been able to show any letter written by MES objecting to Ambika's presence at the site. In the absence of the same, there was no reason for Ambika to presume that the approval of MES was not given. In fact, the observation of MES that even as of January, 2004, barely 2% of the work was executed, itself shows that Ambika was never serious in executing this work. The non-approval by MES has been used as a convenient tool by Ambika to avoid its obligations under the contract. Thus, it cannot be held that the MoU was not approved by MES. In this factual background, claims no.1 and 3 are to be decided.

27. The finding of the Arbitrator in paragraph 87 *"It was the Respondent who was responsible for the Claimant declining to go-ahead with the work and not be characterized as abandonment of the work"*, is not sustainable. It is clearly not NPCC which was responsible, but Ambika which was completely responsible for not executing the work in time. The correspondence clearly reveals that Ambika was merely looking for excuses

and attempt to justify its conduct, for not executing the work. Thus, the contract is held to be validly terminated by NPCC vide its letter dated 6th September 2004.

28. In the above context, the claim in respect of work executed is not liable to be interfered with. The Arbitrator has construed this to be the claim in relation to expenses. Though, clearly the Learned Arbitrator has erred in interchanging the claims, that by itself may not be sufficient for completely rejecting the claim. Ambika had placed on record the valuation of the claims which appears at page 129 of the arbitral record. Though, there was delay in the execution by Ambika, since NPCC does not dispute that the work was actually executed to the tune of the bills which were raised. The Arbitrator has considered Exhibit C-42 and after giving credit to the payments already made, has awarded a sum of Rs.31,66,949/-. The said award is not interfered with.

29. Insofar as loss of profits is concerned, the breach having been committed by Ambika itself which, did not execute the work under the garb of non-approval by MES, and also left the site on 7th July, 2004, no loss of profits is liable to be awarded. The legal position as canvassed from both sides is not required to be gone into the present case inasmuch as, since the facts do not support the finding of breach by NPCC to that extent, the award does not deserve to be upheld. Moreover, it is the settled position that loss of profits cannot be awarded merely upon a surmise or a conjecture. The loss has to be proved. It cannot be mere `paper profits'. Only once it is established that the loss has been suffered, only then the manner of estimating the same can be gone into by applying any of the recognised methods. Moreover, loss of profits can be awarded only if there is wrongful

termination or breach by NPCC. In the present case, owing to the manner in which the works were delayed beyond reasonable periods and despite repeated notices, there was no progress seen, the termination by NPCC is held to be valid. Hence no claim of loss of profits is liable to be awarded. Since the termination is held to be valid, the case laws cited on both sides, need not be considered.

30. Interest on the awarded sum of Rs.31,66,949/- is liable to be granted @ 6% simple interest per annum till date. The payment shall be made within 10 weeks, failing which interest @ 8% would be liable to be paid on the decreetal amount. The OMP is disposed of in these terms.

PRATHIBA M. SINGH
JUDGE

SEPTEMBER 18, 2018
Rahul