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

+ **O.M.P. (COMM) 74/2017**

DELHI INTEGRATED MULTI MODAL TRANSIT
SYSTEM LTD (DIMTS) Petitioner

Through: Mr Sumit Bansal, Mr Prateek
Kohli, Mr Ankit Banati, Advocates.

versus

M/S R. S. SHARMA CONTRACTORS
PVT LTDRespondent

Through: Mr Virender Kumar Sharma,
Advocate.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER
24.05.2018

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VIBHU BAKHRU, J

1. The petitioner (hereafter 'DIMTS') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning the arbitral award dated 31.10.2016 (hereafter 'the impugned award') delivered by the Arbitral Tribunal constituted by a sole arbitrator, namely, Sh H.S. Dogra, a former Director General, CPWD (hereafter 'the Arbitral Tribunal'). The impugned award was rendered in the context of the disputes that had arisen between the parties in relation to the agreement dated 26.10.2009 (hereafter 'the Agreement').

2. By the impugned award, the Arbitral Tribunal has awarded an

aggregate sum of ₹1,18,86,326/- in favour of the respondent. The said amount comprises of (i) ₹70,77,079/- on account of loss of profit (Claim No.1) and ₹48,09,247/- on account of the work done (Claim No.2).

Factual Background

3. New Delhi Municipal Corporation (NDMC) entrusted DIMTS with the responsibility of developing an underpass and subway at Mandir Marg for New Delhi and on 13.10.2008, DIMTS and NDMC entered into a Contract for the said work.

4. On 18.08.2009, DIMTS on behalf of NDMC invited tenders for “*construction of Pedestrian Subway at Mandir Marg, New Delhi in NDMC area on Design and Build basis*” (hereafter ‘the project’).

5. On 15.09.2009, the respondent submitted its bid pursuant to the aforesaid invitation. Thereafter, on 01.10.2009, DIMTS accepted the respondent’s bid and issued a Letter of Acceptance (LOA) for execution of the project directing the respondent to submit a Performance Security of ₹30,21,414/-.

6. On 26.10.2009, the project was awarded to the respondent and DIMTS and the respondent entered into the Agreement for execution of the project for a contract price of ₹6,04,28,269/-. The period stipulated for completion of the project was eleven months from commencement of the project – that is, eleven months from 08.10.2009.

7. It is stated that traffic diversion plans were submitted for obtaining the clearance of the traffic police but the same were not forthcoming, therefore, on 26.03.2010, the respondent was asked to demobilize its resources from the site and the project was to be taken up after the completion of the Commonwealth Games, 2010. Accordingly, the respondent demobilized its resources from the site.

8. Thereafter, in May, 2012, the Traffic Police furnished the clearance (NOC) for the traffic diversion plan and DIMTS once again called upon the respondent to mobilize its resources for restarting the project. The traffic diversion plan was also published in the newspapers on 17.08.2012. However, the respondent claimed that on 31.08.2012, it was telephonically informed that DIMTS/NDMC had finally decided not to implement the project of construction of the subway at Mandir Marg.

9. By a letter dated 11.09.2012, the respondent was advised to demobilize from the site immediately, as the project was not to be implemented. The respondent was also asked to submit the financial implications for foreclosing the Agreement within a period of ten days from the date of the said letter. Admittedly, a certain amount due for the work done was released after adjusting the security deposit of ₹1,76,376/-.

10. Thereafter, the respondent sent a letter dated 21.12.2012 requesting for the release of its performance security as well as the security deposit of ₹1,76,376/- adjusted by DIMTS. Admittedly,

certain meetings and discussions were held between the parties for resolving the disputes between the parties and to ascertain the amount payable to the respondent.

11. On 21.12.2012, the respondent sent a letter referring to a mutual agreement for finalizing its claims at ₹66,38,288/- and payment of ₹12,66,897/- against the final bill as full and final settlement. The respondent also asked DIMTS to adjust the mobilization advance and to release the bank guarantee submitted for securing the same.

12. On 29.05.2013, DIMTS sent a letter confirming that subsequent to the respondent accepting the full and final settlement by its letter dated 21.12.2012, the project accounts had been finalized and after adjustment of mobilization advance, TDS, VAT and other statutory deductions for an amount of ₹19,324/- was to be paid by the respondent in full and final settlement of the account. Accordingly, the respondent was requested to pay the aforesaid amount within a period of seven days.

13. Admittedly, the respondent remitted the aforesaid amount by a banker's cheque dated 05.06.2013 under the cover of its letter dated 07.06.2013 and the bank guarantees furnished by the petitioner were released. Thereafter, on 23.08.2013, the respondent sent another letter enclosing therewith a letter dated 06.06.2013, *inter alia*, claiming that it had submitted the letter dated 21.12.2012 at the insistence of DIMTS and in order to avoid encashment of the bank guarantees. The respondent claimed that the said letter was "obtained under force and

coercion”. DIMTS disputes that the letter dated 06.06.2013 was received by it at the material time. It is further contended that the said letter is ante dated, as the reference number on the letter dated 07.06.2013 under the cover of which the respondent had remitted the banker’s cheque for closure of the project account and release of the bank guarantees, bears a lower number.

14. Thereafter, the respondent invoked the arbitration clause and the Arbitral Tribunal was constituted to adjudicate the claims and counter claims of the parties in relation to the Agreement.

15. The respondent filed its statement of claims before the Arbitral Tribunal claiming, (i) ₹71,40,674.97/- as loss of profit on account of pre-commitments towards the subject work; (ii) ₹48,15,028/- as payment due against the final bill along with interest; (iii) Refund of interest of ₹17,93,425/- on mobilization advance deducted by DIMTS; (iv) Pre-suit, *pendente lite* and post award interest at the rate of 18% per annum; and (v) Cost of arbitration proceedings quantified at ₹10 lakhs.

16. The arbitral proceedings culminated in the impugned award.

17. The Arbitral Tribunal awarded a sum of ₹70,77,079/- against loss of profits computed at 15% of the unexecuted work and ₹48,09,247/- for the work executed. However, the Arbitral Tribunal rejected the remaining claims.

18. Aggrieved by the impugned award DIMTS has filed the above

captioned petition.

19. The petition was listed before this Court for the first time on 17.02.2017 and a limited notice was issued on two issues raised on behalf of DIMTS: (i) that the loss of profits computed at 15% on the basis of rates published by CPWD was erroneous as in terms of the clarification issued by CPWD, the consolidated rate of 15% included profits at the rate 7.5% and overheads at the rate 7.5%; and (ii) that the Arbitral Tribunal had awarded the amount for 475 meters of barricading, even though the respondent had claimed the amount for only 400 meters and, therefore, the impugned award was beyond the claim made.

20. The petition was taken up for hearing on 24.04.2017 and on that date, the learned counsel for the parties agreed that the petition should be adjourned to enable DIMTS to approach the Arbitral Tribunal for re-examination of the question as to the quantum of loss of profits awarded in view of the circular issued by CPWD and to further examine respondent's claim of barricading. Accordingly, the petition was adjourned with liberty to DIMTS to approach the Arbitral Tribunal.

21. Thereafter, DIMTS approached the Arbitral Tribunal and after hearing the parties, the Arbitral Tribunal issued a clarification dated 31.10.2016, *inter alia*, clarifying that the loss of profits on the unexecuted value of work was computed at the rate of 15% in line with the decisions of the Supreme Court referred to in the impugned

award. The Arbitral Tribunal further clarified that the CPWD Circular as relied upon by DIMTS was never placed before the Arbitral Tribunal. The reference to the CPWD rate in the impugned award was only to “*re-enforce the rate of 15% as reasonable compensation*” and such award had nothing to do with the instructions or the circular of the CPWD. With regard to the issue of barricading, the Arbitral Tribunal had clarified that the claim made by the respondent for 400 meters of barricading was an obvious error. The Measurement Book (MB) recorded the barricading length of 475 meters. He, further, clarified that the principal issue between the parties was whether the length of barricading done at the time of first mobilization at site should be deducted from the length of barricading done during the second mobilization for the purposes of determining the payment due to the respondent. DIMTS had deducted 225 meters of barricading installed during the first mobilization, which was paid under the first RA Bill. This was held to be unjustified as the respondent had to again set up the barricading on mobilizing the site for the second time.

22. Although, a limited notice had been issued as noticed above, the learned counsel for the parties have also been heard on the question whether the Agreement had been discharged by accord and satisfaction.

Submissions

23. Mr Sumit Bansal, the learned counsel appearing on behalf of DIMTS had assailed the impugned award on three fronts. First, he

submitted that the parties had finally settled the amounts due for closing the Agreement. He submitted that after discussions, the respondent had submitted a letter dated 21.12.2012 accepting the terms of settlement, which was subsequently implemented. Thus, the Agreement had been discharged by accord and satisfaction. He further contended that the letter dated 06.06.2013 was fabricated and ante dated. The said letter was forwarded to DIMTS for the first time under the cover of the letter dated 23.08.2013. He further pointed out that the reference number on the letter dated 06.06.2013 was RSSCPL/DIMTS/MM/13-14/72; however, another letter dated 07.06.2013, which was admittedly received by DIMTS bore the reference number RSSCPL/DIMTS/MM/13-14/71. He submitted that the letters were serially numbered and a letter issued on 06.06.2013 could not have a higher reference number (72) than the reference number (71) on the letter issued on 07.06.2013.

24. He also submitted that the respondent had not produced any evidence to substantiate its claim that it was coerced into accepting a full and final settlement.

25. Next, Mr Bansal submitted that the respondent had not produced any evidence to substantiate its claim for loss of profits and such claim could not be awarded without any evidence at all. Mr Bansal also sought to contend that the impugned award, insofar as the amount due for barricading is concerned, was in excess of the amount claimed. However, he could not dispute that the reference to 400 meters of barricading was an obvious error.

26. Mr Virender Kumar Sharma, the learned counsel appearing for the respondent countered the submissions made on behalf of DIMTS. He submitted that the Arbitral Tribunal had accepted the respondent's contention that it was coerced into submitting a letter accepting the full and final settlement and such finding could not be disturbed under Section 34 of the Act. Next, he contended that the Arbitral Tribunal had computed the claim for loss of profits at 15% of the unexecuted work of the contract in line with various decisions of the Supreme Court and, therefore, the award was well reasoned and could not be assailed under Section 34 of the Act.

Reasons and Conclusions

27. The first and foremost question to be addressed is whether the decision of the Arbitral Tribunal to reject the contention of DIMTS that the respondent had accepted the payments "*in full and final settlement*" in terms of the letter dated 21.12.2012, is sustainable.

28. Before proceeding further, it would be relevant to refer to the respondent's letter dated 21.12.2012. The said letter is set out below:-

"Ref. No. Dated. 21.12.2012

The General Manager (Projects)
Delhi Integrated Multi Modal Transit System Ltd.
5th Floor, ISBT,
Kashmere Gate,
New Delhi

Sub: Construction of Pedestrian Subway at Mandir

Marg, New Delhi in NDMC Area on Design &
Build Basis - Certificate of
Acceptance/Undertaking

Sir,

The subject work was foreclosed by NDMC on 11.09.2012 following which we were asked to submit our compensatory claims on account of foreclosure of the subject work.

Accordingly, we submitted our claims for Rs.1,44,75,941/- and Rs.60,81,925/- against 2nd & final bill against work done at site. Consequently, in various meetings, deliberations and discussions held with the department, it is mutually agreed upon that the due payment against our claims works out to be Rs.66,38,288/- and the due payment against work done in final bill works out to be Rs.12,66,897/- as full & final settlement.

We hereby undertake that the above stated amounts as agreed above are acceptable to us and we shall not claim & demand anything extra above & beyond the same.

We further give our consent to the Department to kindly adjust the mobilization advance of Rs.60,00,000/- and the interest charges on mobilization advance against these compensatory Claims and release the bank guarantees submitted by us for release of mobilization advance.

Further, the department may adjust the statutory recoveries, as required, before reimbursing the compensatory claims to us.

In case the recoveries to be affected become more than the dues payable to us, the amount/payment to be credited may please be advised to us which will be deposited by us within 7 days of such intimation.

Thanking you.

for M/s R S Sharma contractors Pvt. Ltd.

(Kunal Sharma)
Director”

29. Admittedly, the respondent had taken no steps to retract from the said letter at the material time. Thereafter, on 29.05.2013, DIMTS sent a letter informing the respondent that pursuant to its acceptance of full and final settlement, the project accounts had been finalized and an amount of ₹19,324/- was to be paid by the respondent. The said letter is set out below:-

“No. DIMTS/VPE/NDMC/40/MM/2013 29.05.2013

M/s R.S.Sharma Contractors Pvt. Ltd.
C-3/60, Janak Puri,
New Delhi-110058

Sub: Construction of Pedestrian Subway at Mandir
Marg in NDMC Area on design & build basis -
Closure of Project Account.

Sir,

Please refer to your two letter Nos. Nil both dated 09.11.2012, submitting your second & final bill for the work done and other claims due to foreclosure of the project by NDMC. It is to inform that subsequent to your acceptance of the final settlement vide undertaking dated 21.12.2012, the project accounts have been finalized and after adjustment of mobilization advance, TDS, VAT & other statutory deductions, it has been found that an amount of Rs. 19,324/-(Rupees Nineteen Thousand Three Hundred & Twenty Four Only) is to be paid by you for

final settlement of project account.

You are requested to deposit an amount of Rs.19,324/- (Rupees Nineteen Thousand Three Hundred & Twenty Four only) vide Pay Order/Banker's Cheque (payable at N. Delhi) of the same amount issued in favour of "DIMTS Ltd." within 7 days of the issue this letter for final settlement of project account and return of bank guarantees submitted by you.

Thanking you,

Yours faithfully

(Deepak Rai)
Gen. Manager/Projects"

30. Admittedly, on receipt of the said letter, the respondent had sent a banker's cheque for a sum of ₹19,324/- under cover of its letter dated 07.06.2013.

31. The respondent has relied upon the letter dated 06.06.2013 in support of its contention that it had been coerced into submitting the letter dated 21.12.2012. There is a serious controversy as to the receipt of the said letter. There is no evidence or material to establish that the said letter was delivered to DIMTS. Curiously, on 07.06.2013, the respondent had forwarded the banker's cheque in response to the letter dated 29.05.2013 of DIMTS without raising any protest or referring to the letter dated 06.06.2013 claimed to have been sent earlier. DIMTS admits receiving the letter dated 06.06.2013 as an enclosure that the letter dated 23.08.2013, which was received by the petitioner on 23.09.2013, as is evident from the date of receipt stamped by the

petitioner on receiving the letter.

32. The Arbitral Tribunal had noted the respondent's contention that the letter dated 21.12.2012 was obtained under duress and after referring to the decision of the Supreme Court in ***R.L. Kalathia & Co. v. State of Gujarat: (2011) 2 SCC 400*** had held that in view of the legal position, DIMTS's contention that the amounts due were settled could not be accepted.

33. Concededly, the respondent had not produced any evidence or material to establish that it had been coerced or forced to furnish the letter dated 21.12.2012. The only case set up by the respondent was that DIMTS had informed the respondent that unless a letter was given by the respondent, DIMTS would not settle the account or release the bank guarantees, and in the circumstances, the respondent had no option but to give the letter dated 21.12.2012. The relevant extract of the Statement of Claim is set out below:-

“21. The Claimant was called upon to submit its claims due to foreclosure of the work, which were accordingly submitted by the Claimant. The Claimant was prevailed upon to write a letter dated 21st December, 2012 on the dictates of the Respondent virtually on dotted lines otherwise the lawful dues of the Claimant would not have been paid at all.”

34. The respondent had also referred to its letter dated 06.06.2013. Although, the said letter is disputed, nonetheless, it would be relevant to refer to the same to understand the case sought to be projected by

the respondent. The relevant extract of the said letter is set out below:-

“23. As department told us flatly that unless the letter, as directed in the language of the department is given by us, neither our account will be settled nor the bank guarantees will be released. In such circumstances we had no option but to give the letter dated 21.12.2012 in the language of the department in order to save ourselves from the en-cashing of the bank guarantees of Rs.90.21 lacs and blockage of the said amount of Rs.225.00 lacs against expenditure incurred by us on account of idle labor/man power, other expenditures incurred by us on account of the project, loss of profit due to non execution of project, payment of work done as per terms and condition of the agreement, etc.

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25. From the facts stated hereinabove it is evident that by taking the shelter of our letter dated 21.12.2012 obtained under force and coercion, the department unilaterally, without any basis and justification, despite the amounts of the bill payable to us, reduced the same at their whims and fancies. This is not acceptable to us and letter dated 21.12.2012 taken from us under the aforesaid circumstances is also hereby withdrawn.”

35. It is apparent from the above that apart from stating that it had submitted the letter dated 21.12.2012 on the dictates of DIMTS, there is no other material to substantiate the claim that the respondent had been coerced or was under any duress. There is no evidence to even remotely suggest that the financial condition of the respondent was

such that it could not sustain the invocation of the bank guarantees and due to economic compulsions, the respondent was effectively precluded from raising a dispute at that stage.

36. The reliance placed on the decision of the case of ***R.L. Kalathia & Co.*** (*supra*) is misplaced. The Supreme Court in several decisions has held that a bald plea of coercion and undue influence is not enough and a person who sets up such a plea must establish the same by sufficient material.

37. In ***New India Assurance Co. Ltd. v. Genus Power Infrastructure Ltd.***: (2015) 2 SCC 424, the Supreme Court had declined to appoint an arbitrator in the case where the petitioner had issued a certificate confirming that it had received payments in full and final settlement of all dues. Although, in that case, the petitioner had also sought to urge that the said certificate was not issued by free consent, the Supreme Court had rejected the same and held as under:-

“10. In our considered view, the plea raised by the respondent is bereft of any details and particulars, and cannot be anything but a bald assertion. Given the fact that there was no protest or demur raised around the time or soon after the letter of subrogation was signed, that the notice dated 31-3-2011 itself was nearly after three weeks and that the financial condition of the respondent was not so precarious that it was left with no alternative but to accept the terms as suggested, we are of the firm view that the discharge in the present case and signing of letter of subrogation were not because of exercise of any undue influence. Such discharge and signing of letter of subrogation was voluntary and free from any coercion or undue influence. In the circumstances, we hold that upon

execution of the letter of subrogation, there was full and final settlement of the claim. Since our answer to the question, whether there was really accord and satisfaction, is in the affirmative, in our view no arbitrable dispute existed so as to exercise power under Section 11 of the Act. The High Court was not therefore justified in exercising power under Section 11 of the Act.”

38. In *Union of India and Others v. Master Construction Co.:* (2011) 12 SCC 349, the Supreme Court had observed as under:-

“18. In our opinion, there is no rule of the absolute kind. In a case where the claimant contends that a discharge voucher or no-claim certificate has been obtained by fraud, coercion, duress or undue influence and the other side contests the correctness thereof, the Chief Justice/his designate must look into this aspect to find out at least, prima facie, whether or not the dispute is bona fide and genuine. Where the dispute raised by the claimant with regard to validity of the discharge voucher or no-claim certificate or settlement agreement, prima facie, appears to be lacking in credibility, there may not be a necessity to refer the dispute for arbitration at all.

19. It cannot be overlooked that the cost of arbitration is quite huge – most of the time, it runs into six and seven figures. It may not be proper to burden a party, who contends that the dispute is not arbitrable on account of discharge of contract, with huge cost of arbitration merely because plea of fraud, coercion, duress or undue influence has been taken by the claimant. A bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up such a plea must prima facie establish the same by placing material before the Chief Justice/his designate. If the Chief Justice/his designate finds some merit in the allegation of fraud, coercion, duress or undue influence, he may decide the same or

leave it to be decided by the Arbitral Tribunal. On the other hand, if such plea is found to be an afterthought, make-believe or lacking in credibility, the matter must be set at rest then and there.”

39. The aforesaid decisions were also followed by the Supreme Court in a later decision in *M/s ONGC Mangalore Petrochemicals Ltd. v. M/s ANS Constructions Ltd. & Anr.*: (2018) 3 SCC 373 wherein the Court had observed as under:-

“30. From the materials on record, we find that the contractee company had issued the “no dues/no claim certificate” on 21-09-2012, it had received the full amount of the final bill being Rs. 20.34 crores on 10-10-2012 and after 12 days thereafter i.e., only on 24-10-2012, the contractee company withdrew letter dated 21-09-2012 issuing “no dues/no claim certificate”. Apart from it, we also find that the final bill has been mutually signed by both the parties to the contract accepting the quantum of work done, conducting final measurements as per the contract, arriving at final value of work, the payments made and the final payment that was required to be made. The contractee company accepted the final payment in full and final satisfaction of all its claims. We are of the considered opinion that in the presents facts and circumstances, the raising of the final bill and mutual agreement of the parties in that regard, all claims, rights and obligation of the parties merge with the final bill and nothing further remains to be done. Further, the appellant contractor issued the completion certificate dated 19-06-2013 pursuant to which the appellant contractor has been discharged of all the liabilities. With regard to the issue that the “no-dues certificate” had been given under duress and coercion, we are of the opinion that there is nothing on record to prove that the said certificate had been given under duress or coercion and as the certificate itself provided a

clearance of no dues, the contractee could not now turn around and say that any further payment was still due on account of the losses incurred during the execution of the contract. The story about duress was an afterthought in the background that the losses incurred during the execution of the contract were not visualised earlier by the contractee. As to financial duress or coercion, nothing of this kind is established prima facie. Mere allegation that no-claim certificates have been obtained under financial duress and coercion, without there being anything more to suggest that, does not lead to an arbitrable dispute. The conduct of the contractee clearly shows that “no-claim certificate” was given by it voluntarily; the contractee accepted the amount voluntarily and the contract was discharged voluntarily.”

40. In view of the above settled law, the decision of the Arbitral Tribunal to accept the respondent’s bald plea of duress and coercion, is not sustainable. Concededly, no material had been placed by the respondent to substantiate its claim that the letter dated 21.12.2012 was submitted under coercion.

41. It is also relevant to note that the respondent had agreed to full and final settlement of dues by its letter dated 21.12.2012 and had, admittedly, taken no steps to withdraw the same at the material time. It is only by the letter dated 06.06.2013 that DIMTS seeks to raise the issue of coercion. Apparently, this letter surfaces for the first time as an enclosure to the letter dated 23.08.2013, which is received by DIMTS on 23.09.2013. The learned counsel for the respondent also offered no explanation as to why the said letter reflected a reference number greater than the number reflected on the letter dated 07.06.2013. Be that as it may, it is undisputable that the conclusion of

the Arbitral Tribunal to reject DIMTS's plea of full and final settlement was not founded on any evidence. The Arbitral Tribunal had merely noted the rival contention and had accepted the respondent's plea relying solely on the decision of the Supreme court in ***R.L. Kalathia & Co.*** (supra). The said decision must be read in the context of the facts placed before that Court.

42. In view of the above, the impugned award is liable to be set aside and it is not necessary to examine whether the Arbitral Tribunal had erred in awarding the claim of loss of profits in favour of the respondent. However, for the sake of completeness, this Court considers it apposite to examine the contentions in that regard as well. The Arbitral Tribunal had awarded the claim for loss of profits for the unexecuted works and had computed the same at 15% of the unexecuted value of the contract. Concededly, the respondent had produced no evidence or material to establish that the loss of profits or that 15% was a reasonable measure of the same. The Arbitral Tribunal has awarded the loss of profits solely on the basis of the decision of the Supreme Court in ***Mohd. Salamatullah & Ors v. Government of Andhra Pradesh: AIR 1977 SC 1481***. This was also amply clarified by the Arbitral Tribunal in the clarification issued on 31.10.2016.

43. None of the decisions relied upon by the Arbitral Tribunal are authority for the proposition that compensation for loss of profits can be awarded on mere assumptions and without any evidence at all. The Division Bench of this Court in ***Ahluwalia Contract (India) Limited v. The Union of India: 244 (2017) DLT 360*** had clarified the above

in the following words:-

“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.”

44. In *Edifice Developers and Project Engineers Ltd. v. M/s. Essar Projects (India) Ltd.*: MANU/MH/0020/2013, the Division Bench of the Bombay High Court had referred to the decision of the Supreme Court in *M/s. A.T. Brij Paul Singh and Bros. v. State of Gujarat* (supra,) and observed as under :

“.....Section 28(3) requires the Arbitral Tribunal to decide in accordance with the terms of the contract and take into account the usages of the trade applicable to the transaction. The Arbitral Tribunal under Section 28(2) can act as amiable compositeur and can decide ex aequo et bono only if parties have expressly authorized it to do so. In the present case, the Learned Single Judge was correct in coming to the conclusion that the award of the

Arbitrator proceeds on the manifestly misconceived notion that a contractor is entitled to claim overhead losses even in the absence of evidence on the basis of Hudson's Formula. Similarly, the Arbitral Tribunal proceeded on a misconceived premise that this formula is invariably adopted for quantification of claims for overhead losses in India. In the present case the Appellant produced no evidence in support of its claim; this has been so stated in the Award. The award of the claim is on the misconceived basis that the Hudson's Formula must be applied despite the absence of evidence. Since the fundamental basis that has permeated the award is contrary to law, the judgment of the Single Judge cannot be faulted in setting aside the arbitral award on that aspect. The Arbitrator, as noted earlier, also awarded claims in respect of loss of profit, for under utilized plant and equipment and for reimbursement of infrastructure expenses. In respect of loss of profits, the Arbitrator merely held that a measure of 10% on the value of the remaining part of the works contract cannot be said to be unreasonable. The Arbitrator observed that a percentage representing 10% of the rate of profit is invariably accepted in the construction industry. Evidently save and except for an priori assumption, no evidence..... No material was produced before the Arbitrator on the nature of the practice in the trade. During the course of the hearing no basis has been indicated to the Court from the record to suggest that any practice of that nature in the construction industry was brought to the notice of the Arbitral Tribunal. In the circumstances, the arbitral award to the extent that it allows the claim for loss of profits is based on pure conjecture and in the absence of any evidence whatsoever was correctly set aside.”

45. The Arbitral Tribunal has also referred to the decision of the Supreme Court in *MSK Projects India (JV) Limited v. State of Rajasthan and Another: (2011) 10 SCC 573*. In that case, the

Supreme Court had referred to its earlier decision in *M/s. A.T. Brij Paul Singh and Bros. v. State of Gujarat* (*supra*) and had observed that a contractor would be entitled to damages where it is proved that the Government had committed a breach by improperly rescinding the contract and for estimating the amount of damages, the court should make a broad evaluation instead of going into minute details. However, that decision cannot be mislead to mean that the measure of damages could be based on mere assumptions and without any material or evidence to establish the same.

46. In view of the above, this Court is unable to concur with the view of the Arbitral Tribunal. The loss of profits relating to the unexecuted works could be estimated at 10% solely on the basis of the decision rendered by the Apex Court and without any other evidence or material to establish the same. DIMTS had pointed out that the contract is based on CPWD rates and this fact was also referred by the Arbitral Tribunal. However, the Arbitral Tribunal has computed the loss of profits at the rate which is twice the rates as computed by CPWD. The relevant circular of CPWD was produced before the Arbitral Tribunal after this Court had adjourned the matter to enable DIMTS to approach the Arbitral Tribunal in this regard. The Arbitral Tribunal had clarified that it had not followed the CPWD but had merely relied on the decisions rendered by the Apex Court. Thus, there was no material on record to sustain an assumption that the respondent would earn a profit of 15% on the unexecuted pattern of the works. Plainly, the award based on unsubstantiated assumptions

cannot be sustained.

47. Insofar as the computation for the award against barricading work is concerned, this Court finds no ground to interfere with the same.

48. In view of the above, the petition is allowed. The impugned award is set aside. The parties are left to bear their own costs.

MAY 24, 2018
pkv/MK

VIBHU BAKHRU, J



नित्यमेव जयते