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

Reserved on : 28th September, 2018

Date of decision : 18th December, 2018

+ **O.M.P. 608/2008, I.As. 13043/2018, 13044/2018 & 13045/2018**

GOVT OF NCT OF DELHI

..... Petitioner

Through: Mr. Sanjay Dewan, Advocate.
(M:9811036782)

Mr. Yadvinder Singh, Executive
Engineer, PWD. (M:9717754877)

versus

M/S HURRYSON ENTERPRISES

..... Respondent

Through: Mr. Hemant Chaudhri and Mr. Arjun
Bhaskar, Advocates.

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

I.A. 13045/2018 (for condonation of delay)

1. This is an application seeking condonation of delay in filing I.A. 13043/2018 for restoration. For the reasons stated in the application, the same is allowed. I.A. is disposed of.

I.A. 13043/2018 (for restoration)

2. This is an application seeking restoration of the Petition. For the reasons stated in the application, the same is allowed. I.A. is disposed of.

O.M.P. 608/2008

3. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 arises out of award dated 29th May, 2008, by which the Ld. Sole Arbitrator has awarded a sum of Rs.3,37,424/- in favour of the Petitioner, Union of India ("UOI") and Rs.24,54,298/- to the Respondent,

M/s Hurryson Enterprises (“the contractor”). The operative portion of the award reads as under:

“22.1 NOW, THEREFORE, in view of above,

(a) I award Rs.3,37,424/- to the claimants, Union of India, against all their claims and simple interest on on this amount as awarded under para 21.1(a) of Claim No. 7&8 above.

(b) I also award Rs.2454298.80 to the respondents M/s Hurryson Enterprises against all their counter claims and simple interest on this amount as awarded under para 21.1(b) of Counter Claim No.24 above. This is in full and final settlement of all the above claims and counter claims of both the parties.”

4. The background of the petition is that the contractor was awarded works for the “*Proposed Improvement Scheme for Yamuna Bazar Intersection – Construction of a Flyover along with Widening/Improvements to lower level roads including dismantling of Monkey Bridge.*” The estimated cost of the project was Rs.3,08,86,850/-. The date of commencement of the work was 8th December, 1990 and the stipulated date of completion was 7th December, 1992.

5. It is the case of the UOI that the contractor, after award of the work, demonstrated complete negligence and did not comply with the orders of the Engineer-in-Charge. There was inadequate deployment of manpower and machinery. Adequate mobilization of finances was also not done.

6. A Show Cause Notice dated 7th September, 1992 was issued under Clause 3 of the agreement, and thereafter, the work was rescinded on 29th January, 1993.

7. The UOI invoked arbitration and raised the following claims. The amounts awarded against each of the claims are set out below:

CLAIM NO.1: Rs.2,75,00,000/- on account of extra expenditure being incurred for completion of the balance work at the risk and cost of M/s Hurryson Enterprises – **Nil award.**

CLAIM NO.2: Rs.10,00,000/- on account of compensation levied on M/s. Hurryson Enterprises for non-submission and finalization of design and drawings of all the components of the flyover as per terms of the contract – **Nil award.**

CLAIM NO.3: Rs.50,000/- on account of compensation levied on M/s. Hurryson Enterprises for non-submission of the model of the work as per the contract – **Nil award.**

CLAIM NO.4: Rs.4,11,771/- on account of uncovered amount of interest on mobilization advance of Rs.25.00 lacs given to M/s Hurryson Enterprises and which had accumulated till the date of encashment of bank guarantees – **Nil award.**

CLAIM NO.5: Rs.6,65,539/- on account of quantity of steel (for reinforcement) not returned by M/s Hurryson Enterprises out of total quantity issued to them. – **Rs.3,30,714/- awarded to the Petitioner**

CLAIM NO.6: Rs.6,896/- on account of shortage in quantity of fabricated M.S. liner returned by M/s. Hurryson Enterprises on which the secured advance was released to the contractor.

(Modified to Rs. 6,710/- in the Statement of Facts) –
Rs.6,710/- awarded to the Petitioner.

CLAIM NO.7: Interest on the above amounts and on other amounts due from M/s Hurryson Enterprises @ 18% p.a. w.e.f. the date of amount became due till the date of actual payment thereof – pre-suit interest was nil.

8. The contractor raised the following counter claims:

COUNTER CLAIM NO.1: Rs.1,99,290.80 – Piling done by contractor balance amount – **Rs.1,99,290/- awarded.**

COUNTER CLAIM NO.2: Rs.1,05,196/- on account of MS Line at site, balance payment – **Rs.54,000/- awarded.**

COUNTER CLAIM NO.6: Rs.2,00,000 – On account of depreciated cost of barricading & its maintenance.

AND

COUNTER CLAIM NO.13: Rs.40,833 – On account of 272.2 M of barricade handed over to the department – **Rs.27,222/- awarded.**

COUNTER CLAIM NO.7: Rs.3,21,710 – On account of short payment including escalation in respect of retaining wall – **Nil award**

COUNTER CLAIM NO.9: Rs.15,000 – on account of advance paid for electrometer bearing and 24% interest. – **Rs.10,000/-.**

COUNTER CLAIM NO.12: Rs.15134 – on account of extra concreting in pile caps due to shift, after adjustments for the payments made at the stage of 9th R/A bill.

– Nil award

COUNTER CLAIMS NO. 3,4,5,8,10,11,14,16,17,18,22 – The total counterclaims on various items listed was to the tune of Rs.40,96,641/- **Rs.9,42,525/- awarded.**

COUNTER CLAIM NO.19 - The claim of expected profits on account of withdrawn work – **Rs.9,74,676/- awarded.**

COUNTER CLAIM NO.20 - Rs. 41,85,900/- on account of escalation under clause 10CC– **Nil award**

COUNTER CLAIM NO.21 - Refund of security deposit - **Rs.1,00,000/- awarded.**

COUNTER CLAIM NO.23 – Declaration granted

COUNTER CLAIM NO.25 AND CLAIM NO.9 – Costs of arbitration proceedings and cost of reference – **Nil Award**

CLAIMS NO.7 AND 8 AND COUNTER CLAIM NO.24 –

Interest awarded in the following manner:

“Keeping in view overall circumstances of the case, I consider reasonable and award:

(a) Simple interest @10% per annum on Rs.337424/- to the claimants w.e.f.12.7.94 till date of realization/adjustment against the payment of award of counter claims.

(b) I also award simple interest @ 10% per annum on Rs.2454298.80 to the respondents w.e.f. 26.12.95 till the date of payment.”

9. The main plank of the Petitioner’s objections are only in respect of two amounts i.e. the combined award of sum of Rs.9,42,525/- towards

counter claims 3, 4, 5, 8, 10, 11, 14, 16, 17, 18, & 22, and counter claim no.19. The basic submission of Ld. Counsel for the Petitioner – Mr. Sanjay Dewan, is that out of the total contracted amount, the work done by the Respondent/contractor was only Rs.38 lakhs. This constitutes less than 10% of the tendered amount. Thus the Contractor ought not to have been awarded loss of profits and overhead expenditure on the entire contractual sum. It is the case of the Petitioner that while on the one hand, the Petitioner was not awarded any damages for getting the contract executed at the contractor's risk and cost, the contractor, on the other hand has been awarded loss of profits. According to the Petitioner, despite lapse of such a long period, the contractor did not mobilize the labour or make adequate investment on the ground towards mobilization of resources. The contractor simply kept blaming the Petitioner for its alleged delays, and then raised claims.

10. On the other hand, Ld. Counsel for the Respondent submits that the delay was caused due to the Petitioner's own breaches. The Arbitrator, an officer of the CPWD itself, has taken a very reasonable amount of 2.5% of the unexecuted work as the loss of profit. Once the breach was held to be that of the Petitioner, the Respondent was automatically entitled to loss of profits.

11. However, before considering the claims awarded to the Contractor, the question is as to whether the Petitioner was justified in rescinding the contract. The Ld. Arbitrator has, by simply relying on the letters written by the Contractor come to the conclusion that the UOI was responsible for the delay and hence it could not have rescinded the works. The findings of the arbitrator are as under:

"I hold that rescission of contract by claimants were unjustified, illegal and was taken in void on

the following counts:

(1) The work was rescinded under clause 3 without issuing fresh notice under clause 3 as the notice issued vide letter dated 7.9.92 had lost its significance on account of: (a) engaging in further correspondence regarding various issues pertaining to execution of work after receipt of reply of respondents without reserving their right to take further action of rescission on the notice dated 7.9.92.

(2) The time was no more essence of contract after the stipulated time was over on 7.12.92 as the same was not extended with mutual consent thereafter.

(3) The respondents were not found responsible for delay in work and resultant breach of contract.

In view of above finding, I hold that the claimants are not entitled for forfeiting the security deposit and getting the remaining work completed at the risk and cost of respondents.”

12. A perusal of the arbitral record, however, shows that several important documents have not been considered by the Ld. Arbitrator. The Arbitrator completely ignores even the clauses of the contract. The Notice Inviting Tender was very clear as to the location of the work and the contractor was to carry out an inspection and seek any clarification, which may have been required before offering the rates. The contractor had clearly been given an 18 months period for executing the contract.

13. A perusal of the contractor's letter dated 6th April, 1990 shows that the contractor claimed to be having enormous experience in building bridges. The contractor had clearly represented “*we are working contractors building bridges for last twelve years*”. Further, clause 4.4 of the tender document is also set out hereinbelow:

“Site

It shall be deemed that the contractor has satisfied himself as to the nature and location of the work, general and local conditions and particularly those pertaining to transport including the restrictions on plying of trucks etc. The department will provide all possible assistance by way of reasonable recommendations, in obtaining permits for plying trucks etc. during hours of restrictions from the concerned traffic authorities) handling and availability and storage of material, availability of labour, weather conditions at site and general ground level and the tenderer has estimated cost included his cost accordingly.”

14. From the above, it is clear that the contractor was conscious of the location at which the work was to be executed and the conditions prevalent at the site.

15. The commencement of work was to happen in December, 1990 and the contractor's letters as of April, 1991, stated that no work could have started without the approval of GAD. In fact, letter dated 19th December, 1990 clearly informs the contractor that the dismantling of the bridge would not be permissible. As of May, 1991, the contractor submitted drawings for approval, which were duly approved in July, 1991. There are several letters written by the Government to the effect that the contractor ought to have been aware of the conditions at site as per Clause 4.4 and Clause 10.6 of the tender. Vide letter date 9th August, 1991, the Government informs the contractor that the first approval for diversion plan of traffic was submitted by the contractor only on 7th May, 1991 and the final plan for diversion was submitted only on 31st July, 1991. The relevant portion of the said letter is extracted herein below:

“The design of piles under Pier P4 and P5 has been approved but you have not been able to start the piling work due to non-finalisation of design mix by you, non-availability of steel liner and lack of proper planning, for which you have been requested in several occasions. Safety and security of services and traffic at site of work is contractors’ responsibility. You may therefore kindly ensure proper safety measures against any accident. Already 7 months time has lapsed and no appreciable progress has been made so far. You are once again requested to kindly make proper planning for the completion of the work in scheduled time and submit a copy of the same to this office so that proper and effective monitoring of the progress of the work can be done.”

16. A reading of this letter shows that the Government notified the contractor that even after a lapse of seven months, there was no progress in the work. Thereafter, there are several letters written by the Government intimating the contractor that the progress of work is extremely unsatisfactory, including letter dated 21st March, 1992, 6th April, 1992 and 5th May, 1992. On 1st May, 1992, a meeting was held where it was admitted by the contractor that the delay had occurred due to the shortage of labour. The same reads as under:

“Mr. Walia intimated that the work could not be started due to shortage of labour”.

17. These minutes were duly received by the contractor on 5th May, 1992, and are not challenged. On 30th May, 1992, a detailed letter was written by the Government to the contractor mentioning the Department’s concerns on the “*extraordinary delay in completion of the project*” with a request to accelerate the progress of the work. In reply to this, the contractor simply

stated that the fault was of the Government. A similar letter was again written by the Government on 26th October, 1992 and finally on 26th December, 1992, the Government brought to the notice of the contractor that the site was available from the beginning and despite the fact that obtaining the approval of diversion plan from the Traffic Department was the obligation of the contractor, the office of the CPWD had made efforts in obtaining the same. This letter concludes in the following manner:

“The fact remains that you could not deploy adequate manpower, plants and machinery even in the available space inspite of your own commitments. Even the single piling rig working at site was removed by you from the site on 20.12.92. This office Telegraphic message no. 54(11)/YBFD/PWD/DA/92-93/630 dated 21.12.92 and letter of even No. 632 dated 21.12.92 may please be referred to. Presently all the works at site are at standstill, even none of your authorized representatives is available at site.

You are requested to resume the work immediately and submit revised proposal for dismantling of the Monkey Bridge at the earliest.”

18. The termination finally took place on 29th January, 1993. What is relevant to note is that most of these letters do not find a mention in the award. It is the stand of the Government that in these circumstances it had no option but to terminate/rescind the contract.

19. Clause 10.15 clearly stipulates that time was the essence of the contract. In a period of 25 months, the contractor carried out only Rs.38 lakhs worth of work. The issues in respect of traffic diversion and running roads were well within the knowledge of the contractor when it had bid for the contract. The electrical polls were also present on the location. The contractor had the obligation to build diversion roads during the period of

construction. The obligation towards dismantling of the monkey bridge was also that of the contractor. The issues raised in the letters sent by the contractor, namely, traffic diversion plan, soil investigation, shifting of the central line of the flyover, non-providing of the traffic diversion plan prior to dismantling the monkey bridge, etc. are repeated in almost all the letters of the contractor. While the Arbitrator has considered the letters written by the contractor in detail, several clauses of the agreement as also the letters written by the Government that there was no mobilisation at the site, the minutes of the meeting held where the contractor admitted that there was shortage of labour etc., have been completely ignored by the Arbitrator. The Arbitrator has not taken into account the representations made by the contractor prior to the bid, the conditions stated in the Notice Inviting Tender, as also the letters written repeatedly by the Government.

20. Further, the contract was only rescinded more than two years after it was awarded. The total period for completion was itself 18 months. Thus, it cannot be held that the Petitioner acted in haste. The Petitioner waited for almost 25 months to lapse, and after assessing that less than 10% of the work had been executed by the contractor, had rescinded the contract. The finding of the Arbitrator that the rescission was unjustified by holding that the contractor was not responsible for the delay and that time was not the essence of the contract do not thus appear to be justified as the approach of the Ld. Arbitrator has been one-sided i.e., predominantly to consider the letters written by the contractor.

COMBINED COUNTER CLAIMS NO. 3,4,5,8,10,11,14,16,17,18,22

21. The total counterclaims on various items listed was to the tune of Rs.40,96,641/ towards which Rs.9,42,525/- was awarded in respect of

various expenses incurred by the contractor, including payments to designers, labours, idle staff, etc. These are overhead expenditures, for which reimbursement has been allowed by the Arbitrator. According to the contractor, since the contract was rescinded, the claims in respect of the proportionate amounts spent on overheads ought to be granted. The award of the Arbitrator is interesting and is set out herein below:

“15.1 Finding of Arbitrator and Award:

*All the above counter claims for total amount of Rs.4096641/- relate to overhead expenditure required to be made by respondents for performance of contract; hence they have been clubbed together. **Due to unjustified rescission of contract, the respondents were prohibited to earn full expected profit; hence they are entitled to get back the proportionate amount spent by them on over heads for which they could not earn their profits. The respondents failed to establish the quantum of said expenditure of Rs.4096641/- towards overheads incurred for the work with documentary evidences.** In C.P.W.D. Contract, 10% amount of cost of work is considered towards overheads and profits i.e. we may consider about 5% towards reimbursement of overheads expenditure and about 5% towards net profit. Thus for the awarded amount of Rs.36483840, it can be considered that Rs.33167127/- was the total cost of work and Rs.1658356/- was the amount of profit and amount of overheads each. Similarly for the unexecuted portion of work amounting to Rs.32489187 (36483840-3994653) work executed by respondents the amount of profit and overhead works out of Rs.1476781/- each. Respondents had already made all the initial preparation for executing the work and thus already incurred fixed overheads. They also incurred all the required running overheads during the entire stipulated period. Hence keeping in view of doctrine of*

mitigation of losses, I consider it reasonable that 3.5% out of the 5% overheads expenditure amounting to Rs.1033747/- was already incurred by respondents against which the respondents could not get reimbursement by way of earning profit. Out of this an amount of Rs.91222/- [54000+ 27222 + 10000 already awarded against Counter Claim Nos.2, 6 + 13 and 9, respectively] have already been awarded against various counter claim which are also part of necessary overheads. Hence I hold that the claimants are entitled for Rs.9,42,525/- (1033747 - 91222) towards overhead expenditure made by them. I, therefore, award Rs.9,42,525/- to claimants against their counter claim No.3, 4, 5, 8, 10, 11, 14, 16, 17, 18, & 22 put together.”

22. The above award records the following findings:

- i. The contractor did not establish the quantum of expenditure of Rs.40,96,641/- towards overheads incurred for the work with documentary evidence.
- ii. In CPWD contracts, 10% is to be considered towards overheads and profits and thus 5% should be considered for overheads, and 5% towards net profit.
- iii. Thus the amount awarded in respect of overheads and profit would be Rs.16,58,356/- each.
- iv. The Arbitrator, by arriving at an estimate that 3.5% out of 5% overheads expenditure had already been incurred, concluded that the contractor was entitled to Rs.9,42,525/-.

23. The above reasoning of the Arbitrator is wholly bereft of any foundation. On the one hand the Ld. Arbitrator notes that the Contractor has not established the expenditure incurred but goes ahead and applies some

formula to award sums to the contractor. The entire award has been made without any documentary evidence having been filed by the contractor. The observation that since the contract was rescinded and the Contractor is entitled to loss of profits, the overheads are liable to be granted – does not appear logical. In effect the arbitrator seems to suggest that the rescission being unlawful, the Contractor should be given the loss of profits claim as also on a fictional basis the overheads which he would have otherwise incurred if the contract had been continued. Thus, apart from loss of profits the Ld. Arbitrator holds that the contractor is entitled to overheads on an estimated basis, without actually incurring the said expenditure. The Arbitrator has taken whimsical amounts towards overheads and profits, divided them equally, and out of 5% overhead expenditure has awarded 3.5%. The deployment of infrastructure, additional labour, idle staff and payment to dealers are all expenses which ought to have been proved with proper documentary evidence. The manner in which the Arbitrator has awarded the entire sum, without any documentary evidence having been filed, is rather surprising. The Arbitrator has arrived at this amount without a tenable basis. The Arbitrator has taken profits and expenditure to be equal and simply awarded the said amount by deducting claims already awarded in counter claims no.2, 6, 13 and 9. While the award in respect of counter claims no.2, 6, 13 and 9 is not being interfered with, the award of this amount on account of infrastructure expenses incurred, payments to staff, additional labour, idle staff, could not have been awarded without any evidence. The award is accordingly set aside.

COUNTER CLAIM NO.19

24. This is an award on account of loss of profits. The findings of the

Arbitrator are as under:

“16.1 Finding of Arbitrator and Award

Although as already held in previous para No.15.1 that due to reduction in work on account of wrongful rescission, the respondents could not earn their expected profit of Rs.1476781/-. It is also observed that the respondents had cautioned the claimants against the rescission of contract in their reply dated 15.9.1992 (R-86) to the show cause notice dated 7.9.92 issued by claimant under clause 3 and reserved their right to get relief under the law. The contractors' tender for the work for earning the profit which is their legitimate right under the law. However keeping in view overall circumstances, I consider 2.5% of unexecuted amount of work is a reasonable compensation on this account which works out to Rs.812229(32489187 x 2.5/100)= 812229.68 say Rs.8,12,229). I, therefore, award Rs.9,74,676/- to the respondents against this counter claim.”

25. The discussion in the award shows that the Arbitrator had held that time was not the essence of the contract and that the contractor was not responsible for delay in the work. Thus, the Ld. Arbitrator holds that the contractor is entitled to loss of profits.

26. There is no quarrel to the proposition that an estimate of profits can be awarded if the Arbitrator finds that any particular party has actually breached the contract and has wrongfully terminated or rescinded the contract. However, the facts ought to support the said award of profits. The award of profits cannot be speculative in nature. The evidence has to support and lend credence to the said award.

27. The judgments relied upon by the Respondent, right from ***A.T Brij Paul Singh & Ors. v. State of Gujarat AIR 1984 SC 1703*** are clear to this effect. In A.T. Brij Paul, the Supreme Court was considering a case where

the Bombay High Court had come to the conclusion in one of the contracts involving the contractor that the Government was in breach. The finding of breach was taken to be correct and then the Supreme Court observed that the contractor had actually moved machinery through a Poona based contractor for executing the works. In those circumstances the Supreme Court observed that loss of profits could be an estimate as well. The relevant portion is set out hereinbelow:

“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. Leaving aside the judgment of the trial court which rejected the claim for want of proof, the High Court after holding that the respondent was not justified in rescinding the contract proceeded to examine whether the plaintiff-contractor was entitled to damages under the head 'loss of profit.' In this connection, the High Court referred to Hudson's Building and Engineering Contract (1970), tenth edition and observed that 'in major contracts subject to competitive tender on a national basis, the evidence given in litigation on many occasions suggests that the head-office overheads and : profit is between 3 to 7% of the total price of cost' which is added to the tender. In other words, the High Court was of the view that the claim under this head was admissible. The High Court, however, addressed itself to the question whether adequate proof is tendered to sustain the claim. In this connection, it was observed that the loss of profit when it is sought to be recovered on

the percentage basis has to be proved by proper evidence. Having settled the legal position in this manner, the High Court proceeded to reject the claim observing that the bare statement of the partner of the contractor's firm that they are entitled to damages in the nature of loss of profit @ 20% of the estimated cost is no evidence for the purpose of establishing the claim. The High Court further observed that the appellant has not proved by any primary documents the basis of its pricing for the purpose of quotation in reply to the tender and more so when it has quoted at 7 1/2 % less than the original estimated cost and in this view of the matter the claim for loss of profit is unsustainable.

...

11. Now if it is well established that the respondent was guilty of breach of contract in as much 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% of the value of the remaining parts of the work contract, the damages for loss of profit can be measured."

28. Ld. Counsel for the contractor has also relied upon ***Dwarka Das v. State of Madhya Pradesh & Ors. AIR 1999 SC 1031*** to argue that even if actual loss has not been shown, loss of profit can be awarded. There is no quarrel to this proposition. In the said case, the contractor had not completed even 10% of the work awarded but the breach was by the State Government. The High Court had upheld the finding of the Trial Court in respect of breach of contract and in those circumstances award of 10% of the contract price

was held to be reasonable, as damages.

“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 rescinded.”

Thus, the award of loss of profits was justified, in **A.T. Brij Paul (supra)**, as the rescission of the contract was held to be illegal.

29. In **Associate Builders Vs. Delhi Development Authority AIR 2015 SC 620**, the Supreme Court was dealing with claims relating to damages wherein the contractor had shown that he had incurred the additional expenditure and the entire delay was accepted to have been attributable to the DDA. In those circumstances, the Supreme Court held that damages could be awarded as an estimate.

“15. The Division Bench while considering claims 9, 10, 11 and 15 found fault with the application of Hudson's formula which was set out by the learned Arbitrator in order to arrive at the claim made under these heads. The Division Bench said that it was not possible for an Arbitrator to mechanically apply a certain formula however well understood in the trade. This itself is going outside the jurisdiction to set aside an award Under Section 34 in as much as in McDermott's case (supra), it was held...

16. Obviously, the Division Bench has exceeded its jurisdiction in interfering with a possible view of the Arbitrator on facts.

...

18. It is clear, therefore, that the Division Bench

obviously exceeded its jurisdiction in interfering with a pure finding of fact forgetting that the arbitrator is the sole Judge of the quantity and quality of evidence before him and unnecessarily bringing in facts which were neither pleaded nor proved and ignoring the vital completion certificate granted by the DDA itself. The Division Bench also went wrong in stating that as the work completed was only to the extent of Rs. 62,84,845/-, Hudson's formula should have been applied taking this figure into account and not the entire contract value of Rs. 87,66,678/- into account.

22. Here again, the Division Bench has interfered wrongly with the arbitral award on several counts. It had no business to enter into a pure question of fact to set aside the Arbitrator for having applied a formula of 20 months instead of 25 months. Though this would inure in favour of the Appellant, it is clear that the Appellant did not file any cross objection on this score. Also, it is extremely curious that the Division Bench found that an adjustment would have to be made with claims awarded under claims 2, 3 and 4 which are entirely separate and independent claims and have nothing to do with claims 12 and 13. The formula then applied by the Division Bench was that it would itself do "rough and ready justice". We are at a complete loss to understand how this can be done by any court under the jurisdiction exercised Under Section 34 of the Arbitration Act. As has been held above, the expression "justice" when it comes to setting aside an award under the public policy ground can only mean that an award shocks the conscience of the court. It cannot possibly include what the court thinks is unjust on the facts of a case for which it then seeks to substitute its view for the Arbitrator's view and does what it considers to be "justice". With great respect to the Division Bench, the whole

approach to setting aside arbitral awards is incorrect. The Division Bench has lost sight of the fact that it is not a first appellate court and cannot interfere with errors of fact.”

30. Recently, in ***Ahluwalia Contract (India) Limited Vs. UOI FAO (OS) (COMM) 143/2017, Decided on 17th October, 2017*** a Ld. Division Bench of this Court has held that in order for an award of loss of profits to be passed, injury has to be established. The observation of the Division Bench is as under:

“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.”

31. However, in the present case where the contractor has executed less than 10% of the tendered amount, that too in a period of 25 months as against the total period of 18 months for execution of the contract, the award for loss of profits is wholly unjustified.

32. Loss of profits can be awarded only when it is clear that the rescission is invalid and illegal. Moreover, no evidence was led in respect of loss of profits and only an estimate has been awarded. Compensation for loss of profits cannot be based on conjecture, and has to be based on real evidence.

33. There is a further feature of the impugned award. A reading of the award shows that a large number of letters written by the Contractor have been considered by the Ld. Arbitrator and in some parts of the award, the language used sounds as though the same has been simply lifted from submissions made by the Contractor. Some such sentences which form part of the award are set out below:

“But again the claimants failed to discharge their

*obligation of approving the drawings their obligation of approving the drawings within three weeks **and we had to again remind them** and ultimately part approval of P-4 and P-5 group was given on 15.7.91 (R-14) and further approval for balance part was given only on 30.4.92 (R-41/C-99) i.e. after a period of 344 days from the date of submission.”*

...

*“In spite of all the clarifications and explanations given by the respondents structural consultant, ultimately the claimants referred the matter to their structural experts (C-30 dated 24.9.92) and sought his advice. After receiving the report of their expert regarding **structural soundness of our proposal**, the claimants allowed these piles group of 6 piers to be casted only on 30.5.92”*

...

*“But the claimants **in an efforts to deny legitimate compensation for our losses**, rescinded the contract vide letter dated 29.1.93 (C-63). This action of department was further illegal on account of the fact that stipulated time of contract was already over on 7.12.92 and time was not extended with mutual consent after 7.12.92.”*

The above language in the award shows that the Ld. Arbitrator is using language used by the Claimant-Contractor itself. This feature of the award is disturbing to say the least.

34. Under these circumstances, the award as contained in para 15.1 and 16.1 is liable to be set aside. The remaining claims are not interfered with. The Arbitrator held that the Petitioner cannot forfeit the security deposit, or claim any damages for completing the work at risk and cost of the contractor. The said findings are upheld. Interest is awarded from the date of passing of

the award till date of payment @ 10% per annum.

35. The Petitioner has not pressed any of the other objections in respect of the award.

36. OMP is disposed of. All pending IAs are disposed of.

PRATHIBA M. SINGH, J.
JUDGE

DECEMBER 18, 2018
Rahul

