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

Date of decision: 15th March, 2018

+ O.M.P. 44/2015

M/S ROSHAN REAL ESTATES PVT LTD Petitioner
Through: Mr.Sandeep Sharma, Mr.Amit
Choudhary, Mr.Bhrigu Dhani, Advs.

versus

DELHI STATE INDUSTRIAL INFRASTRUCTURE
DEVELOPMENT CORPORATION Respondent
Through: Mr.Moni Cinmoy, Mr.A.K.Pandey,
Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

I.A. No.28/2018

This is an application seeking recall of the order dated 30.11.2017 by which the petition i.e. OMP 44/2015 had been dismissed for non-prosecution.

For the reasons stated in the application and no objection expressed by the learned counsel for the respondent, the application is allowed and the petition is restored back to its original number.

O.M.P. 44/2015

1. With the consent of the counsel for the parties, the petition is heard on merits.

2. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 has been filed by the petitioner challenging the Arbitral Award dated 12th September, 2014 passed by the Sole Arbitrator adjudicating the disputes between the parties in relation to the award of work of construction of Academic Building, Fashion Centre & Hostel for NIFT at Hauz Khas Institutional Area, New Delhi in favour of the petitioner by the respondent vide Letter of Acceptance dated 6th April, 2010. Some of the relevant details with respect to the contract are given as under:-

“The salient features of this contract agreement are mentioned below:

(i)	<i>Estimated Cost in Rs.</i>	<i>28.40 Cr</i>
(ii)	<i>Contract Amount in Rs.</i>	<i>27.40 Cr.</i>
(iii)	<i>Stipulated Date of Start</i>	<i>16/4/10</i>
(iv)	<i>Stipulated date of Completion</i>	<i>15/5/12</i>
(v)	<i>Date of Determination of contract</i>	<i>17/1/13</i>

3. One of the issues before the Arbitrator was whether the determination of the contract by the respondent was legal and justified. The Arbitrator, on perusal of the evidence, held that the respondent itself was in breach of the contract and, therefore, its action to determine the contract was improper, invalid and unjustified.

4. As a consequence of the above determination of the validity of the foreclosure of the agreement, was the claim of the petitioner on account of loss of profit. The petitioner had claimed 10% of the contractual amount as loss of profit in the arbitration proceedings. The Arbitrator, however, has awarded 2% of the contract value of Rs.27,40,70,627/- i.e. Rs.54,81,412/- in favour of the petitioner and against the respondent as loss of profit. This has

been challenged by the petitioner in form of the present petition.

5. Before I consider the submissions made by the counsel for the petitioner, it is relevant to note that the respondent had also challenged the Impugned Award, including on the award of amount with respect to loss of profit in favour of the petitioner. This Court, vide its order dated 5th February, 2015 passed in OMP No.1671/2014 rejected such challenge and the finding of the Court, as far as the issue of loss of profit is concerned, is reproduced hereinunder:-

*“13. It is then submitted that the learned Arbitrator erred in awarding the Respondent an amount equal to 2% of the contract value in respect of Claim No.1 on account of loss of profit despite returning a finding that no evidence was led by the Respondent in support of such claim. Counsel for the Petitioner relied upon the decisions in **Mukesh Kumar Singhal v. Nagara Palika Parishad, Bhind 2006 (3) RCR (Civil) 180**, to contend that in the absence of any evidence on the question of loss and profit, the learned Arbitrator could not have adopted an estimate value.*

*14. It is seen that the aforementioned decision was not in the context of challenge to an Award under Section 34 of the Act. The scope of interference by the Court with an arbitral Award has been considerably narrowed down by the Supreme Court in several decisions, including **Oil and Natural Gas Corporation Ltd. v. Western Geco International Ltd. (2014) 9 SCC 263** and **Associate Builders v. Delhi Development Authority 2014 (13) SCALE 226**. None of the said decisions have been discussed in the aforesaid decision of the Madhya Pradesh High Court in **Mukesh Kumar Singhal** (supra). In any event, the Court finds that the Arbitrator has adopted a reasonable approach after noting that the Respondent did deploy personnel and machinery pursuant to the award of the work.*

15. The Court does not find any merit as regards the

objection to Claim No.2 on account of losses and damages due to idling of engineering staff, establishment, watch and ward is concerned. The Arbitrator adopted a reasonable yardstick in proceeding to award an amount accordingly. The determination by the learned Arbitrator of the other claims of the Respondent also does not call for interference. The impugned Award is neither against the public policy of India nor shock the judicial conscience warranting interference under Section 34 of the Act.”

6. The respondent challenged the above order by way of an appeal being FAO(OS) No.243/2015. The same was dismissed by the Division Bench of this Court vide its judgment dated 1st May, 2015, *inter alia* holding as under:-

“5. Insofar as the present appeal is concerned, we do not find any infirmity either in the conclusion arrived at by the learned arbitrator or by the learned Single Judge. It is very clear that there is no dispute with the finding that there was a loss of profit occasioned on account of the acts of omission/commission on the part of the appellant. The only dispute is with regard to the quantum of the loss of profit. As pointed out above, the respondent’s claim of 10% of the contract value that has been rejected by the learned arbitrator on the ground that the stand taken by the respondent is ambivalent in the sense that at one point the respondent had even gone to the extent of claiming 20% of the contract value. Therefore, the learned Arbitrator rejected the claim of percentage of loss of profit as set forth by the respondent. There being no other quantifiable measures for arriving at a figure, the learned Arbitrator then estimated a figure on the basis of 2% of the contract value assuming that normally the profit margins were within the range of 5% to 7%. We feel that the appellant cannot have a grouse with the quantification of 2% of the contract value as the loss of profit. The figure arrived at by the learned Arbitrator and confirmed by the learned Single Judge is not unreasonable and, as such, would

not shock the conscience of this Court. Therefore, in our view, no interference is called for.”

7. Counsel for the petitioner submits that the Arbitrator having found that the termination of the contract by the respondent was illegal and unjustified, there was no need to further prove actual losses suffered by the petitioner and, relying upon the judgment of the Supreme Court in ***A.T. Brij Paul Singh and Ors. vs. State of Gujarat*** (1984) 4 SCC 59, he submits that 10% of the contractual value is a reasonable and proper amount to be awarded with respect to loss of profit. He also placed reliance on the judgment dated 12th February, 2014 of this Court in OMP 774/2013 DSIIDC vs. Rama Construction Company and the judgment of the Division Bench in DSIIDC vs. Rama Construction Co. 2014 (3) Arb.LR 116.

8. I have considered the submissions made by the counsel for the petitioner, however, I am unable to agree with the same.

9. Though, it may be correct that even in absence of actual loss of profit, the Arbitrator can award nominal damages in favour of the party not in breach of the agreement, however, such damages can only be nominal in nature. As far as construction contracts are concerned, the Courts have tended to award 10% of the contractual value as damages in favour of a contractor in cases of wrongful termination of contracts, however, this cannot be as a hard and fast rule. It would always depend on facts and circumstances of each case.

10. In the present case, the Arbitrator, with respect to the claim of damages has taken into account the fact that the claimant had quoted lesser amount than the tendered amount, almost by 3.5% below the estimated cost (though counsel for the petitioner disputes the same, which contention I

shall deal in later part of my order); the fact that full financial investment/locking of work capital was not made by the petitioner, except for Earnest Money and Performance Guarantee; and that full deployment of personnel/managerial inputs were not required to be made by the petitioner.

11. Having considered the above factors, the Arbitrator concluded that 2% of the contract value would be a reasonable compensation/damages to be granted in favour of the petitioner for the premature foreclosure of the contract by the respondent. I do not find the award of such damages to be arbitrary or so low so as to shock my conscience.

12. As noted above, the respondent was also aggrieved of the award of these damages and this Court, both the learned Single Judge and the Division Bench found the award of damages to be reasonable. The petitioner having succeeded in that petition, cannot now turn around and say that the damages awarded are shockingly low and, therefore, are to be set aside.

13. As far as the submission of the counsel for the petitioner that the Arbitrator has taken wrong figures as far as the tender value and the contract value is concerned, in my opinion, the same would, in fact, go against the interest of the petitioner. The Arbitrator has recorded that the difference between the tender value and the contract value was 3.51%. As per the petitioner, the tender amount was approx. Rs.32 crores while the contractual value was approx. Rs.27 crores. If these figures are taken the percentage would in fact be almost 18.51%. A higher percentage would show that the profit margin on which the petitioner was working and had tendered was, in fact, lower and, therefore, consequently would have been entitled to lower margins as far as loss of profit is concerned. However, I need not dwell any

further on this issue as the Division Bench has already found that 2% of the contractual value is a reasonable loss of profit awarded in favour of the petitioner and I find no reason to disagree with the quantification of damages/loss of profit by the Arbitrator.

14. In ***Associate Builders vs. Delhi Development Authority***, (2015) 3 SCC 49, Supreme Court has held as under:-

“56. 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.”

15. In view of the above, I find no merit in the present petition and the same is accordingly dismissed with no order as to costs.

NAVIN CHAWLA, J

MARCH 15, 2018
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