

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.1060 OF 2010

Municipal Corporation of Greater Mumbai Petitioner
vs.
S.N. Thakkar Construction
Company Private Limited Respondents

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Mr. P.G. Lad, a/w. Mr. R.Y. Sirsikar and Mr. D.S. Shingade, for the
Petitioner.

Mr. Nikhil Wadikar, a/w. Mr. Pradip Zende, i/b. Mr. S.S. Phadke, for the
Respondent.

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CORAM: S.C.GUPTE, J.

DATED : FEBRUARY 13, 2019

(Oral Judgement):

. This arbitration petition challenges an award passed by a sole arbitrator in the matter of disputes and differences between the parties arising out of a contract for construction for the Petitioner Municipal Corporation.

2. In 2002, the Petitioner invited tenders for providing and constructing diversion chambers for diverting sewage from SWD to sewerage system at seven locations in the city of Mumbai. The Respondents submitted their offer. The Petitioner accepted the offer and issued a work order directing the Respondents to commence the work from 01.10.2003 and complete the same by 31.05.2004. The

Respondents were directed to get the work drawings approved before commencing the work and also to submit a PERT program and seek approval thereof. On 08.10.2003, the Respondents submitted a bar chart and cash flow statement. (This was after the due date of commencement of work.) During the course of the work, the Petitioner wrote several letters to the Respondents complaining of slow progress as also breaches of contract on the part of the Respondents and asking the latter for expediting the work. It is the case of the Petitioner that on 31.05.2004, the contract came to an end by efflux of time. On 09.08.2004, the Respondents applied for extension of time proposing various conditions, which, according to the Petitioner, were contrary to the terms of the contract. In the alternative, the Respondents requested for finalisation of accounts on "as is where is" basis. The Petitioner asked the Respondents to submit the list of compensatory events with documentary evidence without prejudice to the right of the Petitioner to grant extension, if any. It is the Petitioner's case that the Respondents did not submit any details in response and instead alleged that these details were already available with the Petitioner. The Respondents made several allegations claiming that hindrances were caused to the work by the Petitioner. In these circumstances, when the Petitioner sought to invoke the bank guarantees submitted for mobilisation advance as also for performance, the Respondents offered to pay the amount of the mobilisation advance bank guarantee after deducting the sum already recovered from their running account bills. The Respondents also submitted a pay order to the Petitioner in lieu of performance bank guarantee. The Respondents thereafter raised several claims including a claim for wrongful encashment of bank guarantees under economic duress and financial

pressure. Differences and disputes arose between the parties as a result, which were referred to the learned arbitrator. The Respondents were the claimants before the arbitrator, whereas the Petitioner was the respondent/counter claimant. The Respondents filed in all nine claims. The learned arbitrator, by this impugned award dated 04.02.2010, allowed Claim No.1 (partly), Claims Nos.2 and 3(fully), Claim No.4 (partly), Claim No.8 (partly) and Claim No.9 (partly) and rejected the counter claim of the Petitioner.

3. The award of the Respondents' claims as above has been challenged by the Petitioner on various grounds. Learned Counsel for the Petitioner, however, mainly submitted that the award was based on no evidence and also was contrary to the documents submitted by the Petitioner. Learned Counsel submitted that the findings of the learned arbitrator on the alleged breaches of contract by the Petitioner and in particular, the delay in issuance of detailed construction drawings, were contrary to the record as well as the stipulations of the contract. Learned Counsel also submitted that the finding of the arbitrator that there was delay on the part of the Petitioner in making the site available for contract work or removing obstructions as also stoppage of work, etc. were either without evidence or contrary to the record. In particular reference to the Respondents' claim for loss of profits, learned Counsel submitted that the award was contrary to public policy of India, since it wholly disregarded fundamental principles of Indian Law on award of damages. It was submitted that out of the contract work of about Rs.2.70 crores, the Respondents had hardly completed work of about Rs.16 lakhs. Learned Counsel contended that in the absence of evidence

to suggest that the Respondents were in fact in a position and had kept themselves ready to complete the contract work, damages for loss of profits arising from the balance work could not have been awarded by the arbitrator. Besides, learned Counsel argued the arbitrator's finding that the Petitioner was responsible for stoppage of work and had committed breach of contract by not permitting the Respondent contractor to complete the work, is clearly perverse and not supported by any evidence.

4. So far as Claim Nos.1, 2 and 3 are concerned, these are for actual work done as also extra work performed by the Respondent contractor and refund of performance security and retention amount based on actuals. The arbitrator, after taking into account the provisions of the contract and submissions of the parties in the light of evidence placed before him, came to a conclusion that the actual work done as per B.O.Q. and extra items of work done were reflected in the 5th RA Bill submitted by the Respondents. The arbitrator noted that some of these items were admitted by the Petitioner. The arbitrator considered the difference between the parties in respect of the other items of work concerning individual work sites. After considering the rival cases set up by the parties, the arbitrator determined that the claim should be worked out on the basis of measurements recorded by the Petitioner at B.O.Q. rates plus admissible extra items, with appropriate deductions. The individual deductions contested between the parties were duly considered by the arbitrator. Wherever there were no joint measurements, those items were deducted. So also, wherever any rate or extra item was to be treated as B.O.Q. rate or item, the arbitrator deleted

the same. Thus, after arriving at the total amount of work done including extra items and giving credit for the amount paid by the Petitioner to the contractor prior to the 5th R.A. Bill, the arbitrator worked out the balance payable to the Respondents in the sum of Rs.26,27,361/-. These are clearly possible views supported by evidence. Neither the approach of the learned arbitrator for working out the balance amount payable to the Respondents for work done nor the actual findings arrived at by the learned arbitrator could be said to be impossible views, or views which no fair or judiciously minded person would take, or views that would shock the conscience of the court. The award on these claims, therefore, does not merit any interference.

5. So far as the enforcement of performance bank guarantee and withholding of retention amount are concerned, which were the subject matters of Claim Nos.2 and 3, the arbitrator came to the conclusion that there was no case for the Petitioner to either encash the performance bank guarantee or withhold the retention amount from R.A. Bills due and payable to the Respondents. No fault can be found with the award on these two claims. The Petitioner, having failed to show that the Respondents were responsible for breach of contract, the refund of performance security and retention amount ordered by the learned arbitrator cannot be faulted. These are all assessments of fact and the arbitrator's views on these matters are possible views, which do not merit any interference.

6. When we come to the loss of profit claimed by the Respondents, i.e. the subject matter of Claim No.4, the arbitrator's

conclusion that the Petitioner had abandoned the balance work is, in the very first place, contrary to the record and based on practically no evidence. The documents considered by the learned arbitrator for arriving at this conclusion, namely, Exhibits C-55, C-56, C-57, C-58, C-60, C-64 and C-67, do not suggest or support the inference drawn by the learned arbitrator. Exhibit C-55 is minutes of a review meeting between the parties. It merely shows that the contractor was instructed to mobilise for work at Haji Ali immediately after the scheduled marathon race and pursue the matter of NOC with Traffic Department for commencing the work. This is treated by the arbitrator as stoppage of work by the Petitioner in the name of the marathon race. It is strange that express instructions for taking up the contract work immediately after the marathon race, which was scheduled to be held in a couple of days, and keeping itself ready with all permissions including traffic permission by that time so as to commence the work immediately after the race, are considered to be a breach on the part of the Petitioner by terming them as instructions for stoppage of work. There is no indication in the evidence adduced before the arbitrator that the work was stopped as a result of the marathon race. Exhibit C-56 is a letter addressed by the Respondents. In this letter, the Respondents had claimed that at Kirti College site, no sewer line was found and arrangements for diverting of flow were required to be made by provision of P.V.C. pipes and blocking the arch drain on both sides. It is not the contractor's case that the work could not be completed as a result. This letter also claims that at P. Balu site, a large size arch drain was wet, which resulted in a more laborious and time consuming work. This letter was treated as evidence by the arbitrator of the Petitioner's misrepresentation in drawings. The whole

idea of the letter was to show that there was extra work involved, for which the Respondents might charge extra. There was no case of misrepresentation even alleged by the Respondents in this letter. Exhibit C-60 is a letter by the Respondents. It is said to be for the Haji Ali site. Even this letter does not show that there was any case set up by the Respondents of any misrepresentation by the Petitioner. All that it suggests is that due to site conditions, the drawing had to be revised (in this case due to the drain being of a larger size as noticed at the site). There is no indication in the award as to what was the impact of the particular site condition or need for revised drawings - whether or not the revised drawings were forwarded and when, and whether this particular grievance resulted into any actionable delay on the part of the Petitioner employer. Exhibit C-57 is another letter addressed by the Respondents. It merely reports that there was no place for storing of excavated material at Haji Ali site and as per conditions of traffic NOC, the excavated material had to be immediately removed from the site. What was claimed was that this item therefore should be treated as an extra item, to be paid for separately. One is at a loss to understand as to how this amounts to any stoppage of work or actionable delay or breach of contract on the part of Petitioner. Exhibit C-58 is another communication addressed by the Respondents, which again talks about variations necessitated by site conditions. This obviously cannot be treated as evidence of any breach on the part of the Petitioner. Even the letters at Exhibits C-64 and C-67 do not suggest any breach on the part of the Petitioner as a result of which the Respondents were prevented from carrying out the contract work. These are letters addressed in the course of the work. It is natural to expect actual site conditions to be different

at times from the suggested drawings and revisions would have to be made, some of these even entailing extra work, but that is no ground to show that the Petitioner thereby committed breach of contract, which resulted in Respondents being denied the opportunity to complete the work. The very basis, therefore, for awarding loss of profit is untenable. There is nothing to suggest that it was the Petitioner, who had abandoned the balance work or denied opportunity to the Respondents to complete the same. On these facts, there was no way the learned arbitrator could have awarded compensation towards loss of profit.

7. There is one more serious challenge to the award of damages. This challenge is on the ground of determination of quantum of damages in a rough and ready manner, and by a simplistic thumb rule. Damages by way of loss of profits were calculated on a simple mathematical calculation of 12 % anticipated profit on the entire balance work, on the basis of a rate analysis submitted by the Petitioner without prejudice to its contentions. Learned Counsel for the Respondents relies on the Supreme Court decisions in **Dwaraka Das vs. State of M.P.**¹, **M/s. A.T. Brij Paul Singh vs. State of Gujarat**² and **MSK Projects India (JV) Limited vs. State of Rajasthan**.³ Learned Counsel submits that these cases establish that whenever the employer is guilty of breach of contract or whenever rescission of contract by the employer is held to be unjustified and the contractor has executed a part of the works contract, the contractor would be entitled to damages by way of loss of profits; such claim is legally admissible on proof of breach of contract by

1 (1999) 3 SCC 500

2 (1984) 4 SCC 59

3 (2011) 10 SCC 573

the erring employer and without insisting on any strict proof of actual damages incurred towards such loss of profits. Learned Counsel submits that such damages have been awarded on a thumb rule on the basis that reasonable expectation of profit is implicit in any works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of its breach.

8. The cases cited by learned Counsel do not suggest any inflexible or absolute rule or proposition of law. Any award towards loss of profit would always depend on the facts and circumstances of each case. In a case, where the contractor has merely done a negligible part of his contract work and there is nothing to suggest that the contractor had kept himself ready with engagement of capital and labour to complete the entire work and yet he was prevented from carrying out the balance work on account of a breach on the part of his employer, there is no case for awarding loss of profit on a thumb rule such as this. Profit is usually an incidence of capital and labour; deployment of these results into or gives rise to profit. In this particular case, the learned arbitrator has not gone into the facts of employment of capital or engagement of labour by the contractor, which was really the subject matter of Claim No.5 (for idling of resources), because the arbitrator was of the view that claim for loss of profit could be awarded on a thumb rule. It is not in serious dispute that a very negligible percentage of work was actually carried out by the contractor at the stage when the work was stopped. Out of the total contract worth of about Rs.2.70 crores, a mere Rs.16 lakhs worth of work was accomplished out of the B.O.Q. work. There is no evidence to suggest that contractor had kept himself ready and in fact was in a

position to complete the entire balance work as per the schedule of work assured to the employer. This is besides the point that there is no case here, as noticed above, that it was the Petitioner who was actually responsible for preventing the Respondents from carrying out the balance work by reason of a breach of contract.

9. In the circumstances, there was really no case for any claim of loss of profit. What the learned arbitrator could instead have done was to consider the contractor's claim for compensation for infructuous capital and labour expenses. This the learned arbitrator did not consider, as noted above, since he was considering the case of loss of profit and awarding the same to the contractor. The arbitrator's award on Claim No.4, thus, cannot be sustained and will have to be interfered with on the ground of a perverse conclusion, i.e. a conclusion not supported by any evidence and also a conclusion in patent breach of Indian law on damages.

10. Under Indian law, contained in Section 73 of the Contract Act, in every case of breach of contract, the only compensation receivable by the party suffering by such breach is for any loss or damage which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

11. Learned Counsel for the Respondents relies on the cases of **Dwaraka Das, A.T. Brij Paul Singh and MSK Projects India (JV) Ltd.** (supra), and submits that the contractor would be entitled to claim

damages for loss of profit which he expected to earn by undertaking the works contract, where the party entrusting the work commits a breach of the contract. No doubt the contractor is entitled to do so. Entitlement, as a matter of law, is one thing, but the measure of profit and the proof to be tendered to sustain such claim of profit are quite another. These are not matters of any thumb rule; these have to be individually assessed in every given case, and these are essentially matters of facts. In **Dwaraka Das**, the Supreme Court upheld the legal entitlement of the aggrieved contractor to be compensated by the erring party. In **A.T. Brij Singh**, the Division Bench of High Court found 15 per cent of the value of the balance of the works contract as a reasonable measure of damages for loss of profit. That was on the basis of the facts of that case. The High Court had earlier considered 15 per cent as reasonable profit for another portion of the same road in the vicinity and that was accepted by the employer State as a fair measure of damages in that case. The plea in **A.T. Brij Paul Singh** that the cognate appeal could not be looked into was, in the premises, found unacceptable by the Supreme Court. The Court was of the view that it would be too technical; the work sites being in the vicinity of each other and the work being of an identical type between the same parties, the same measure, namely, 15 per cent of the balance value of the contract found by the High Court could not be said to be unreasonable. Even in **MSK Projects India (JV) Ltd.** (supra), the Supreme Court has reiterated the same principle as stated in **A.T. Brij Paul Singh**. The Court held that a claim by a contractor for recovery of damages as expected profit out of the contract cannot be disallowed on the ground that there was no proof that he suffered actual loss to the extent of the amount claimed for loss of profits. In any event, though the

Court did say that whilst estimating such damages, the Court should rather make a broad evaluation than going into minute details, it nevertheless reiterated that what would be the measure of profit would depend upon the facts and circumstances of each case. In none of these cases, the Supreme Court has found 15 per cent or indeed any other percentage as a reasonable measure of damages as a thumb rule. Besides, there is no authority in these, or indeed any other, cases to support the proposition that just because, whilst accepting the contract work, the contractor expected to earn a reasonable amount of profit, in all cases of breach of contract by the employer, without consideration of peculiar facts and circumstances of the case, and on the basis of the breach alone, loss of profit ought to be awarded to the contractor as damages by applying a thumb rule of percentage.

12. On the other hand, the authorities seem to clearly suggest that the correct measure of damages is in every case a question of assessment of evidence in the light of the pleas raised. In **Bharat Coking Coal Ltd. vs. L.K. Ahuja**⁴, the arbitrator had awarded 15 per cent of works contract value as compensation towards loss of profits on account of prolongation of works. It was in addition to escalation of wage bills and price of materials and interest for delayed payments. The Supreme Court found it difficult to accept that in addition to escalation and interest, 15 percent towards loss of profit could be awarded. The Court observed that it was not unusual for contractors to claim loss of profit arising out of diminution of turnover on account of delay in the matter of completion of work. The Court held that what should be established in

⁴ (2004) 5 SCC 109

such a situation was that had the contractor received the amount due under the contract, he could have utilised the same for some other business in which he would have earned profits; unless such a plea was raised and established, claim for loss of profits could not have been granted. The Court referred to the case of Appeal Court in **Sunley (B.) and Company Limited vs. Cunard White Star Ltd.**⁵, discussed below, in this context.

13. In **Sunley (B.) and Company's** case, the plaintiffs were public works contractors. As a result of the defendant's breach, their machine could not reach the site of work in time. For this delay they claimed damages. The plaintiffs had failed to prove any facts on which their damages could be estimated. They nevertheless relied on law. The trial judge accepted their case and gave them damages for loss by making a guesswork of the profit which the machine could have earned for the plaintiffs for the period of delay relying on a variety of cases. The Appeal Court, reversing the order, held that those cases were no authority for the proposition that, if the owner of a profit – earning chattel does not prove the loss he has sustained, the judge may make a guess in the dark and award him some arbitrary sum. The Appeal Court instead assessed the damages in the following manner : The machine was a chattel of commercial value, but on the facts before the court there were only four possible heads of damage - (1) depreciation which was running on, (2) interest on the money invested which was being wasted, (3) some trivial amount of maintenance which was no doubt involved, and (4) some expenditure of wages which were thrown away. The Court accordingly

⁵ (1940) 1 KB 740; (1940) 2 ALL ER 97(CA)

estimated the depreciation (for a machine having a life of three years) and added some amount on the three other heads, whilst making allowance for receipts, and worked out the total claim.

14. A Division Bench of our Court in **Edifice Developers and Project Engineers Ltd. vs. Essar Projects (India) Ltd.**⁶ did not countenance an award, where, without any evidence of damages, the arbitrator had awarded loss of overheads on the basis of Hudson's formula, which was considered by the Supreme Court in **McDermott International Inc. vs. Burn Standard Co. Ltd.**⁷ as one of the many formulae used for assessing loss of overheads in case of a works contract. The Division Bench observed that in **McDermott International**, the Supreme Court had held that it was an accepted position that different formulae could be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or other formula, having regard to the facts and circumstances of a particular case, would fall within the domain of the arbitrator. The arbitrator in the case before the Division Bench had found that though no direct evidence had been adduced on behalf of the contractor, he would nonetheless be entitled to damages measured with reference to Hudson's formula. This approach was found by the Division Bench manifestly in the teeth of the law laid down by the Supreme Court in **McDermott International**. The Division Bench made the following observations in this behalf:

“Section 28(1)(a) requires that the Arbitral Tribunal shall decide a

⁶ Appeal No. 11 of 2012 decided on 3 January 2013

⁷ 2006 (2) Arb.L.R. 498 (SC)

dispute submitted to arbitration in accordance with the substantive law for the time being in force in India. 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 Division Bench in **Edifice Developers** (supra) explained in this context the judgment of **A.T. Brij Paul Singh** (supra) in the following words :

"In Brij Paul Singh's case the Supreme Court noted that it was not disputed that where in a works contract a party entrusted with the work commits a breach of the contract, the contractor would be entitled to claim damages for loss of profit which he expected to earn by undertaking the contract. The Supreme Court, however, noted that what must be the measure of the profit and what evidence should be tendered to sustain the claim are different matters. The judgment of the Supreme Court adverts to the fact that in that case the High Court had referred to Hudson's treatise on Building and Engineering Contracts. Hudson states there that in major contracts subject to competitive tender on a national basis, the evidence given in litigation on many occasions suggests that head office overheads and profits are between 3 to 7% of the total price of cost which is added to the tender. The High Court in that case had rejected the claim of the contractor. The Supreme Court noted that in an identical contract with

regard to another portion of the same road and for the same type of work the High Court had accepted loss of profit at 15% of the price of the balance of work as a reasonable measure of damages if the State is guilty of a breach of contract. It was on this basis that the Supreme Court came to the conclusion that since for the same type of work, between the same parties involving a nearby portion of the same road a certain measure of damages had been adopted by the High Court, the same measure ought to have been adopted in that case as well.

Brij Paul Singh's case therefore does not stipulate as a doctrine of law that the formula which has been prescribed in Hudson's treatise must invariably be accepted in all cases as a measure of damages sustained on account of loss of overheads.”

15. Following this judgment, a learned Single Judge of our Court in **Essar Procurement Services Ltd. vs. Paramount Constructions**⁸ set aside an award which had allowed a claim for overheads merely on the basis of Hudson's formula without any evidence. The learned Judge found the approach to be contrary to the principles laid down by this Court in **Edifice Developers** (supra), holding the award to be patently illegal and in conflict with public policy. The learned Judge set aside even a loss of profit award given on the basis of Hudson's formula, holding as follows:

“113 The principles laid down by the Supreme Court and this court in the judgments referred to aforesaid while dealing with the claim for loss of overhead would also apply to the claim for loss of profit. A perusal of the impugned award indicates that the claim for loss of profit is also allowed by the arbitral tribunal simplicitor based on the Hudson Formula and not based on any evidence and thus the same also deserves to be set aside.”

16. As the Division Bench of Delhi High Court said in the case of

⁸ Arbitration Petition No.470 of 2012 decided on 25 November 2016

Ahluwalia Contract (India) Limited vs. Union of India⁹, 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 in every case unless some diligence is exercised by the party claiming it. The Court held that a claim for damages (general or special) cannot, as a matter of course, result in an award without proof of injury. The arbitral tribunal in that case was unable to discern any substantial material to justify the claim for damages towards loss of profits and accordingly denied the claim. The Court sustained the award, holding that no interference was warranted. The Court briefly explained the cases of **Bharat Coking Coal** (supra) and **A.T. Brij Paul Singh** (supra) thus:

“9. Bharat Coking (supra) and Brij Paul (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 Brij Paul (supra) clarifies that damages claimed cannot be granted as a matter of course; some material evidence is necessary.”

17. The upshot of the above discussion is that though, as a matter of law, in a works contract, where the contractor is prevented from completing the contract work for no fault of his, the contractor may be entitled to damages for reasonable profits which he expected to earn in the contract, the measure of such profits is essentially a matter of evidence. There are well known formulae, one or the other of which may be used by the adjudicators, having regard to the evidence before them, for working out such profits. It may be that in a given case, the employer

9 244 (2017) Delhi Law Times 360 (DB)

has been computing profit as a certain proportion of the total value of the works contract for awarding such contract or making or assessing tenders; it may be that there may be a particular industry practice for any such particular proportion; it may be that in the given contract, a particular proportion was actually assessed as may be established by evidence. These are, however, matters of evidence. Besides, even where profit as a proportion of total contract value actually used is demonstrable, there may still be difficulties in establishing a claim for loss of profit on uncompleted work in case of wrongful rescission of contract. We are, after all, concerned with the contract price of the remaining work. The profit element must be shown vis-a-vis such balance contract price. Particular industries (and even particular contractors in the same industry) are known to price their contracts differently; the profit percentage, stage-wise or pricing element-wise, may not be uniform. The earlier stages or elements of work may be more profitable, whereas the remaining stages or elements may be less profitable or even be non-profitable, though the contract itself as a whole may be profitable. So also, in every case where a contract is terminated for no fault of the contractor, he cannot claim profits on the entire balance amount of the unperformed contract. In the first place, at the moment the contract was rescinded or determined, he may not be in a state of readiness to perform the whole of the contract; he may not be in a position where his resources are fully committed for the whole of the balance work. This may particularly be so, where the performance of the contract, at the time of its rescission, is at a very early stage. At that stage, he may not have deployed capital or spent for labour for the whole of the balance work. Can he then claim profit for the whole of the

balance work without any commitment of capital and labour? Profit, as we have noted above, is derived from the employment of capital and labour; without these latter two, no profit can arise. Besides, depending on the stage at which the rescission takes place, there would be a duty on the part of the contractor, as the party suffering from a breach, to mitigate damages. Such mitigation would imply that he seeks other avenues to earn profits and employ his resources elsewhere. If there is plentiful work around, there is no reason he should not so divert his resources. In fact, in many cases he would have actually done so. Can he then seek loss of profit for the whole of the balance contract value? Will it not amount to his unjust enrichment?

18. These and such other elements are matters to be considered in any adjudication of damages. It is no doubt, firstly, for the parties to plead and prove these elements, consistent with the legal burden of proof and shifting onus of proof as part of the trial. It is then for the adjudicators to assess the evidence and arrive at a correct measure of damages.

19. In the present case, as noted above, none of these considerations appears to have been gone into by the arbitrator. The contract was abandoned at a much early stage of the anticipated contract work; only a miniscule percentage of work was accomplished by that time. There is no pleading, much less evidence, that the contractor had actually deployed resources or was even ready, or in a position, to do so. And yet, by a simple arithmetical calculation, loss of profits at the rate of 12 per cent of the whole of the balance work was awarded. Even this 12

per cent was on the basis of a rate analysis submitted by the employer without prejudice to his rights and contentions. This is a clear error, and an error of law at that, which goes to the root of the matter. It entails a breach of public policy of India, since Indian law only countenances compensatory damages. The fundamental idea behind the Indian conception of damages is placing the party suffering from the breach of contract in the same position in which he would have been had the breach not occurred; he must show what he was in a position to receive at the time the contract was broken, for it is only that which he would receive as compensation.

20. The impugned award on Claim No.4, accordingly, cannot be sustained and will have to be set aside. Award on Claim No.8, which was for interest, will also have to be accordingly modified, since the award on Claim No.4 is being set aside.

21. In the result, the arbitration petition partly succeeds. The impugned award dated 04.02.2000 in so far as it awards Claim No.4, and Claim No.8 to the extent it includes interest on Claim No.4, is set aside. The rest of the award is sustained. The petition is disposed of accordingly.

(S.C. GUPTE, J.)

Smita
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