

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION**

**ARBITRATION PETITION NO.90 OF 2013**

|                                               |     |            |
|-----------------------------------------------|-----|------------|
| Municipal Corporation of Greater<br>Bombay    | ... | Petitioner |
| Versus                                        |     |            |
| M/s Nagarjuna Construction<br>Company Limited | ... | Respondent |

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Mr. P. G. Lad a/w Ms. Aparna M. Kalathil & Mr. D.S. Shingade, for the  
Petitioner-MCGM.  
Mr. Kishore M. Jawle, for the Respondent.

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**CORAM : S.C. GUPTE, J.**

**DATE : 22 JANUARY 2019**

**(Oral Judgement)**

. This arbitration petition challenges an award passed by an arbitral tribunal of three arbitrators in a reference arising out of a construction contract.

2 In June 2004, the Petitioner-corporation invited tenders for construction of grade separators at Gadkari Chowk, Mumbai. The Respondent-contractor submitted its bid. The same was accepted by the Petitioner and accordingly, on 2 December 2004, a contract was entered into between the parties. Following the contract, on 3 December 2014, the site was handed over by the Petitioner to the Respondent, whereupon

the latter claimed to have started the work on the project. On 26 February 2005, the Petitioner wrote a letter to the Respondent demanding suspension of work. It is an admission position that this suspension was never revoked. During the continuance of the suspension, the Petitioner, by its letter dated 22 November 2007, claimed that the contract had come to an end by efflux of time. Finally, by its consultant's letter dated 17 April 2008, the Petitioner informed the Respondent that the contract was deemed to have been terminated. The Respondent raised several claims. Since these were not accepted by the Petitioner, disputes arose between the parties, which were referred to arbitration. The arbitral tribunal, by its award dated 24 March 2012 (corrected on 12 September 2012), allowed three claims of the Respondent, namely, (i) claim for reimbursement of expenses incurred by the Respondent to fulfill its contractual obligations (Claim No.1), (ii) claim for compensation for infructuous expenses incurred for preparation of casting yard and fabricating moulds for pre-cast unit (Claim No.5) and (iii) claim for loss of overheads and profits (Claim No.8). Each of these three claims was awarded partly, claim No.1 in the sum of Rs.1,35,880, Claim No.5 sum of Rs. 1,36,421 and claim no.8 of Rs.1,17,53,180.

3 The amount of Rs.1,35,880 for Claim No.1 was said to be the expenditure actually incurred for performance guarantee, whereas the sum of Rs.1,36,421, awarded under claim No.5, was actually the payment made to a consultant firm, one Structon Consultants. These payments were found by the arbitral tribunal to be genuine and payable accordingly. None of these claims admits of any acceptable challenge under the provisions of Section 34 of the Arbitration and Conciliation Act, 1996 ("Act"). These are

matters of assessment of evidence, on which the arbitrators have come to possible views. The views are supported by evidence on record. The award on these claims cannot be termed as an award not supported by any evidence; no irrelevant or non-germane material has been considered by the the arbitrators; and no relevant or germane material has been disregarded for arriving at these conclusions. The award on these two claims accordingly does not merit any interference.

4 The main submissions made by learned Counsel for the Petitioner pertain to the award of loss of profit (Claim No.8). Learned Counsel submits that, in the first place, the Petitioner-corporation was justified in first suspending and then terminating the contract on account of public outcry. Learned Counsel submits that the contract work was meant to be for the benefit of public and since the public themselves had serious objection to the work, the Petitioner-corporation was constrained to first suspend and later terminate the contract work. Learned Counsel submits that the corporation's act in this behalf is effectively covered by Section 56 of the Contract Act. Learned Counsel secondly submits that not having carried out the contract work or produced any evidence of loss of profits, the Respondent-contractor could not have claimed any amount towards loss of overheads or profits and that the award for loss of profits is vitiated by breach of public policy of India as well as patent illegality appearing on the face of the award. None of the contentions has any merit, as I shall presently point out.

5 What the arbitrators have awarded here is the Respondent's claim for loss of profits and not for loss of overheads. Considering the Indian law of

damages for breach of contract, the court, tasked with adjudicating a contractor's claim for loss of profits on being denied the opportunity to carry out the work under a works contract by any act of the employer, has to see whether such denial was wrongful or whether the contractor was at fault justifying the denial. The court has to then consider the measure of loss or damage caused to the contractor as a result of his being denied the opportunity to carry out the contract work. As held by the Supreme Court in **A.T. Brij Paul Singh Vs. State of Gujarat**<sup>1</sup> it is well established that if rescission or termination of the contract by the employer is held to be unjustified and the plaintiff-contractor is shown to have executed a part of the works contract, the contractor would be entitled to claim damages for loss of profits, which he expected to earn by undertaking the works contract. Such claim of expected profits is legally admissible on proof of breach of the contract by the erring party. Though what would be a measure of such profits would depend upon facts and circumstances of each case, it is always accepted that a reasonable expectation of profit is implicit in a 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. In **A.T. Brij Paul**'s case, 15 per cent of the value of the balance work considered as reasonable damages towards loss of profits for the same type of work between the same parties at a nearby work site, was accepted as a reasonable measure of damages. Relying on the dicta in the case of **Dwarkadas Vs. State of MP**<sup>2</sup>, the Supreme Court in **MSK Projects India (JV) Limited Vs. State of Rajasthan**<sup>3</sup> held that a claim of a contractor for damages as expected profits out of the contract could not be disallowed on

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1 (1984) 4 S.C.C. 59

2 (1999) 3 S.S.C. 500

3(2011) 10 S..C.C. 573

the ground that there was no proof that he suffered actual loss to the extent of the amount claimed on account of breach of contract. Relying on these cases, a Division Bench of our court in **Mahanagar Gas Ltd Vs. Babulal Uttamchand & Co.**<sup>4</sup> considered 10 per cent of the value of balance work awarded towards loss of profits as a reasonable measure of damages.

6 We have to test the present award on the basis of the law stated above. The focus of our inquiry under Section 34 of the act is, as explained by the Supreme Court in case of **Associate Builders Vs. Delhi Development Authority**<sup>5</sup>, to see if the award under challenge is in contravention of public policy of India; in particular, if it contains an impossible view or a view which no fair or judicially minded person would take or a view that would shock the conscience of the court. The court has also to see if there is any patent illegality appearing on the face of the award; in particular, if the award is in accordance with the terms of the contract or contains any adjudication prohibited by the terms. In the present case, the arbitrators have come to a conclusion that there was no breach of contract on the part of the Respondent-contractor; the contractor was in no way responsible for suspension of work. The suspension was ordered unilaterally by the Petitioner-corporation on 26 February 2005 and it was never revoked thereafter. Though the suspension was not revoked or withdrawn within 28 days from the date of suspension, under Clause 59.2(b) of the contract, the Claimant did not treat the same as a “fundamental breach of contract” or treat the contract as voidable under Clause 59.1. It instead claimed damages for its breach by the employer.

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4 2013 (5) Bom.C.R.756

5 AIR 2015 SC 620

The Petitioner-corporation's argument in this behalf was that the case fell within the scope of Section 55 of the Contract Act (the third part of Section 55). The arbitrators were of the view that the case fell not within the third part of Section 55, but the second part of Section 55; though the contract did not become voidable for the employer's failure, the promisee was entitled to receive compensation from the promiser for any loss occasioned by such failure. The arbitrators also noted the stand of the Petitioner's engineer that the contract was deemed to have been terminated on the expiry of 28 days of suspension of work. The arbitrators held the stand to be incorrect and accordingly, ruled that the contract had come to an end by efflux of time, i.e. at the expiry of the contract period, without anyone terminating the same for any reason. Since the suspension of the contract during the entire period of its subsistence was entirely to the Petitioner-employer's account, the arbitrators held such unilateral act on the part of the Petitioner as a breach of contract and accordingly, considered the claim of the Respondent for loss of profits. The arbitrators held that (a) the claimant, having been prevented from carrying out the work awarded to it for no fault of it, was denied profits, and (b) under normal circumstances, 10 per cent amount of the value of work which was denied could be accepted as a reasonable measure of pure profits. After excluding profit attributable to the actual work executed at site, as certified by the engineer of the Petitioner, the arbitrators awarded a sum of Rs.1,17,53,180 towards loss of profits. In the light of the law stated and the evidence discussed above, the arbitrators' award of loss of profits can certainly be termed as a possible conclusion, which is supported by evidence. It cannot be termed as a conclusion, which is either impossible or a conclusion which no fair or judiciously minded person could have

arrived at or a conclusion that would shock the conscience of the court. In so far as the the terms of the contract are concerned, the interpretation of the arbitrators demonstrates a reasonable view and not an unreasonable or impossible view. The arbitrators have not taken into account any irrelevant or non-germane material or circumstance or disregarded any relevant or germane material or circumstance to arrive at the conclusion. It does not accordingly merit any interference under Section 34 of the Arbitration and Conciliation Act, 1996.

7 As for the submission of learned Counsel for the Petitioner under Section 56 of the Contract, no such ground was urged before the arbitrators or is even pleaded in the present petition. Besides, the mere fact that there were objections raised to the proposed work by the members of public does not signify that the construction work ordered under the contract was an impossible act.

8 In the premises, there is no merit in the arbitration petition. The petition is dismissed.

**(S.C. GUPTE, J.)**