

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

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Reserved on: March 28, 2019

Pronounced on: April 15, 2019

O.M.P. (COMM) 127/2019

THE BRAITHWAITE BURN AND JESSOP CONSTRUCTION
COMPANY LIMITED (BBJ)

..... Petitioner

Through: Mr. Jayant Mehta, Ms. Sayaree Basu
Mallik and Mr. Atanu Ray
Chaudhary, Advocates.

versus

RAIL VIKAS NIGAM LTD (RVNL)

..... Respondent

Through: Mr. Saurabh Mishra, Advocate

JUDGMENT

SANJEEV NARULA, J

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as the 'Act') impugns the Arbitral Award dated 11th October 2018 (hereafter the impugned award), passed by the Arbitral Tribunal comprising of three Arbitrators (hereinafter the Arbitral Tribunal).

2. By the impugned award, the Arbitral Tribunal has adjudicated the disputes that had arisen between the parties in respect of the contract agreement dated 4th June 2010 for fabrication, assembly and launching of 16 x 45.7m triangulated open web welded steel through girder conforming to MBG Loading Over Br. No. 553 (Kathjodi River) in connection with

Cuttack-Barang doubling in Khurda road division of East Coast Railway in the state of Orissa, India.

3. The seven claims raised by the Petitioner, have been decided by the Arbitral Tribunal as follows:

S.No.	Claim	Amount (Rs.)	Decision
1.	Reimbursement of amount recovered as ground rent of fabrication yard	21,15,078	Rejected
2	Refund of delay damages deducted from various bills	1,11 ,84,669	Allowed, with interest 12% from the date of recovery till payment.
3.	Price adjustment (bill no-02) upto 12.12.2014	2,16,62,211	Rejected
4.	Reimbursement of bank charges for extension of bank guarantee on account of RVNL	18,61,891	Allowed, refund of guarantee extension charges beyond 31.07.2013 along with interest @12% per annum.
5.	Extended stay compensation	5, 95,000,00	Rejected
	Aggregated amount	9,63,23,849	
6.	Compensation @18% for amount on unpaid sum of Rs9,63,23,849 from 08.10.2016 till realisation of claim	As accrued	Allowed to the extent of on delayed damages and

			refund of bank guarantee charge
7.	Cost of arbitration	As per actual	Divided equally.

Petitioner challenges the award in respect of findings on Claims No.1,3 &5.

Analysis and Findings

4. The controversy in the arbitration and the present proceedings centers around the question of delay in completion of the contract. The project was to be completed within a period of nine months. However, it was delayed by 45 months and was completed after several extensions on 12th December 2014.

5. Petitioner holds the Respondent responsible for the delay. On the other hand, Respondent alleges that the Petitioner is accountable for not completing the project within the stipulated period. The question of attributability of delay was the pivot of dispute between the parties. The Arbitral tribunal has concluded that both the Petitioner and the Respondent were at fault and responsible for the delay.

6. The Court has heard Mr. Jayant Mehta learned counsel appearing for the Petitioner and Mr. Saurabh Mishra, learned counsel for the Respondent.

Claim No.1 - Reimbursement of amount recovered as ground rent of fabrication yard

7. The ground rent of fabrication yard amounting to Rs. 21,15,078/- (Twenty One Lakh Fifteen Thousand and Seventy-Eight Rupees) has been recovered from the final Bill of the Petitioner.

8. Facts giving rise to the present claim are that during the pre-bid meeting held on 30th November 2009, Petitioner had enquired from the Respondent if it could utilise the infrastructure setup at Jagatpur end of 2nd Mahanadi Bridge, Cuttack for fabrication, inspection metalizing, painting, etc. The Respondent permitted the use of the abovementioned site, however, it informed the Petitioner that the necessary ground rent will have to be paid to East Coast Railway to whom the land belonged. The abovementioned fabrication yard was occupied by the Petitioner from 25th May 2010 and it continued to occupy it till the completion of the work. Petitioner impugns the recovery of ground rent from 25th May 2010 till 1st April 2013, relying upon a letter of the Respondent dated 4th July 2014. Mr. Mehta argues that as per the said communication, Petitioner was informed that the ground rent would be charged from 1st April 2013 and deductions could not have been made w.e.f. 25th May 2010 (date of initiation of the Project). The Respondent does not deny the said letter. However during the arbitration proceedings it has been their stand that the recovery date mentioned in the letter was a typographical error. The learned Arbitrator has accepted the plea and decided this issue against the claimant. Mr. Mehta, relying upon the letter dated 4th July 2013 argues that Respondents are estopped from charging ground rent for the period from 25th May 2010 to 4th July 2013, in view of the acknowledgment made by them that ground rent shall be charged only from 1st April 2013. Mr. Mehta argues that the Arbitral

Tribunal has proceeded on an erroneous reading of the letter for arriving at the conclusion that is contradictory to the admission made by the Respondent. He emphasized that at no time after 4th July 2013 till the adjudication of the disputes by the arbitrator have the Respondents rectified its alleged typographical error. Petitioner being unaware of the typographical error cannot be made to suffer for the mistake of the Respondent.

9. These submissions are completely unmerited. It is conspicuous to note that the Petitioner does not dispute that they came into occupation of the land from 25th May 2010. On 31st August 2013, a portion of the land was surrendered to the Respondent. Thereafter, the Respondent levied the ground rent on the reduced area. Taking note of these facts, the Arbitral Tribunal came to the conclusion that the letter dated 4th July 2013 cannot be the sole basis for claiming refund of ground rent recovered from the final bill of the claimant for the period from 25th May 2010 till 1st April 2013. The finding of the Arbitral Tribunal is thus not resting on the aforementioned letter alone. It has taken into consideration other aspects as well. Petitioner's argument leaning solely on the letter dated 4th July 2013 cannot sustain. The letter of 4th July 2013, cannot be read in isolation. The claimant occupied the land subject to the terms contained in the contract. During the pre-bid conference held on 31st November 2009 claimant had inquired from the Respondent about the use of the above noted fabrication yard. This use was permitted, subject to the payment of necessary ground rent by the claimant. In this background, the land was occupied and used by the Petitioner. In the opinion of the court the said communication has been rightly appreciated by the Arbitral Tribunal, in view of the explanation given by the Respondent in

line with the discussions in the pre-bid meeting. This being a finding of fact based on the material placed on record does not warrant any interference. In *McDermott International Inc. v. Burn Standard Co. Ltd.* (2006) 11 SCC 181, this Court held as under:

“112. It is trite that the terms of the contract can be express or implied. *The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties.* It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. (See *Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission* (2003) 8 SCC 593: 2003 Supp (4) SCR 561 and *D.D. Sharma v. Union of India* (2004) 5 SCC 325.)”

10. Further, this court in *M/s. Indian Oil Corporation Ltd. v. M/s. Teltech Instrumentation Pvt. Ltd.* reported in (2013) 202 DLT (CN A) 23, has held that Award is not open to challenge on the ground that the Arbitral Tribunal has reached a wrong conclusion or that the interpretation given by the Arbitral Tribunal to the provisions of the contract is not correct. Hence, in view of the well-defined scope of judicial interference under section 34 of the Act, the court finds no infirmity in the findings of the Tribunal on Claim No. 1 and accordingly the objection of the Petitioner on this claim is rejected.

Claim No. 3-Price adjustment (bill no-02) upto 12.12.2014

11. Petitioner claims price adjustment for the period from 1st September 2011 to 12th December 2014 amounting to Rs. 2,16,62,211/- (Two Crore Sixteen Lakh Sixty Two Thousand Two Hundred and Eleven) in respect of the rise in the index to costs for labour, contractors equipment and the plant materials and other inputs to the works by the addition of amounts determined by the Emden's formula. Mr. Mehta submits that the Project was delayed for a total period of 45 months for which necessary extensions were granted by the Respondents. In granting these extensions the Respondents have imposed delay damages on the Petitioner only for the first 7 months. This according to Mr. Mehta implies that the Respondents do not hold the Petitioner responsible for the remaining period of 38 months and the Petitioner is entitled to price adjustment for the period from 1st September 2011 to 12th December 2014.

12. Mr. Mehta's objections on this claim are two-fold. Firstly, he submits that the Tribunal has wrongly relied on the factual premises recorded in respect of Claim no. 2 to conclude that the Petitioner is relatively more responsible for the delay and has thus wrongly held the Petitioner accountable for the same. Secondly, he submits that the Tribunal has erred and misconstrued the relevant provision provided in the contract for determining the price adjustment. He referred to clause 13.8 of the Particular Conditions of Contract (PCC) which reads as under:

" 13.8: Adjustment for changes in cost.

(H) Limit of Price Adjustment

Provided that, in determining all such price adjustment in accordance with the aforesaid sub-clauses:

- a. No account will be taken of any amount by which any cost incurred by the contractor has been increased by default or negligence of the contractor.

If the Contractor fails to complete the work within time for completion, prescribed under Clause 8.2, the adjustment of prices thereafter until the completion of the works shall be made using either the index or price whichever be more favourable to the Employer, provided that if an extension of time is granted pursuant to Sub-Clause 8.4, the above position shall apply to the adjustments made after expiry of such extension of time."

(underlining added)

13. Relying upon the aforesaid clause of the PCC, the learned counsel urged that this clause cannot be interpreted in a manner so as to disentitle the Petitioner's price adjustment for the entire delay in completion of the contract. He submitted that only a marginal delay is attributable to the Petitioner and Respondent is majorly responsible for the delay. The extensions for completion of works were granted without any delay damages. The findings of the Tribunal on this issue are as under:

"Claim No. 3

Price adjustment (Bill No. 2) upto 12.12.2014 for Rs 2,16,62,211

39. The claimant had raised a bill on respondent (Annexure 3 to Statement of Claim) towards price adjustment from September 2011 to December 2014 amounting to Rs 2,

16,62,211.00. It admits that the first price adjustment bill (Exh. C-41) raised for the period November 2010 to August 2011 for a sum of Rs 1,62,38,727.5.7 was duly certified by the respondent and a net amount of Rs 1,42,90,081.00 was paid. However, post September 2011, no further price adjustment was allowed and this is what the claim is about. The claimant has relied upon clause 1.1.42, clause 14.1 and clause 13.8 to buttress its claim for price adjustment. It has also contended that the contract does not restrict the applicability of price variation to only the original period of contract and that the same also applies to the extended period of contract.

40. In so far as the clauses relied upon by the claimant are concerned there is no quarrel with regard thereto. However what is also, relevant in the context of price variation and to which no reference has been made by the claimant is clause 13.8 of 'Particular conditions of Contract' (PCC), specially, sub clauses A & H of the same, which are as under:

13.8 Adjustment for changes in cost.

(A) Price Adjustment

The amounts payable to the contractor and valued at base rates and prices pursuant to Sub-Clause 14.3 (a) hereof shall be adjusted in respect of the rise or fall in the indexed costs for labour, Contractor's Equipment and plant, materials and other inputs to the Works, by the addition or subtraction of the amounts determined by the formula prescribed in this clause.

(H) Limit of Price Adjustment

Provided that, in determining all such price adjustment in accordance with the aforesaid sub-clauses:

a. No account will be taken of any amount by which any cost incurred by the contractor has been increased by default or negligence of the

contractor.

41. It is clear from the above two clauses that the claimant would become entitled to benefit of price adjustment, only and only, if there has been no default or negligence on its part in completion of the contract.

42. The Tribunal while deciding issue of delayed damages has in great length largely pointed out claimant's inaction or delayed action resulting in the over-all delay of the project. In view of that finding, and also, having regard to clause H of 13.8 of PCC, the claimant does not become entitled to any benefit on account of price variation. It is a different matter that it has received benefit of price variation from November 2010 to August 2011 but that is courtesy of respondent.”

14. On the question of delay, the Arbitral Tribunal has elaborately examined the facts and evidence and has held that both the parties are responsible for the delay. These findings are based on the evidence on record and are not liable to be interfered with. (*P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd., (2012) 1 SCC 594*).

15. The claim of price adjustment pertains to the period post September 2011. The price adjustment bill raised for the period of November 2010 to August 2011 has been granted to the Petitioner. The extension for completion of the project specifically provided for freezing price variation as on 30th June 2011. The said letter reads as under:

“In reference to your letter referred above, competent authority of RVNL has granted extension of completion period upto 30.06.2011 without LD under Clause 8.4 General Conditions of Contract and thereafter with delay damage under Clause of 8.7 up to 30.09.2011 by freezing price variation as on 30.09.2011. However, if the various indices of PV formula vary after

30.09.2011 in a way that there is a reduction in the contract prices, benefit of such variation shall accrue to RVNL.”

16. The subsequent communication dated 29th December 2011 also categorically provided that price variation will be payable by freezing the indices up to 31st August 2011. The said communication reads as under:

“With reference to your letter referred above, the competent authority of RVNL has granted the extension of date of completion up to 31.03.2012 in supersession of earlier order with some modification,

(a) Delay damage has been reviewed and it is decided that beyond 31.08.2011 (i.e. from 01 .09 2011) delay damage as per clause 8.7 of GCC will be recoverable instead of 30.06.2011 (i.e. from 01.07.2011).

(b) Price variation will be payable by freezing the indices as applicable for works executed upto 31.08.2011, Price variation beyond 31.08.2011 will not be payable. However, if there is decrease in the indices thereafter resulting into negative price variation, the benefit of the same will be availed by RVNL

(c) In the interest of the Project and keeping contractor's representation about cash flow problem in view, recovery of delay damage is to be deferred till Feb 1012.

This is for your information and necessary action please.”

17. It becomes clear from the aforesaid communications that while granting extension of time, the question of price variation was also reviewed and freezed. Concededly, beyond 31st August 2011, there is no price fixation granted and the Petitioner accepted the said condition and continued to complete the project. The Supreme Court in *Northern Railway v. Sarvesh Chopra*, reported in (2002) 4 SCC 45, held as under:

“15. If, instead of avoiding the contract, the contractor accepts the belated performance of reciprocal obligation on the part of the employer, the innocent party i.e. the contractor, cannot claim compensation for any loss occasioned by the non-performance of the reciprocal promise by the employer at the time agreed, “unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so”. Thus, it appears that under the Indian law, in spite of there being a contract between the parties where under the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (i) if the contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act, (ii) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms.”

(emphasis supplied)

18. Therefore at this stage, the Petitioner cannot be permitted to turn around and claim benefit of price variation, which was never agreed to at the time of extension of completion period. Clause 13.8 of the PCC deals with changes in cost of overheads, labour, material etc. and provides for price adjustment. Sub-clause H, which deals with ‘Limit of Price Adjustment’ also stipulates that no account will be taken of any amount by which any cost incurred by the contractor has been increased by default or negligence of the contractor. The Tribunal has rightly concluded that in view of the delayed action on part of the claimant resulting in the overall delay of the project, the Petitioner is disentitled from claiming the benefit accruing on account of price variation.

More relevantly, since price variation was not agreed to between the parties at the time of granting extension, the Petitioner has no ground to make a claim on this account. The objection of the Petitioner on this issue is rejected.

Claim No. 5-Extended stay compensation.

19. Petitioner claims extended stay compensation of Rs. 5,95,00,000/- (Five Crore Ninety-Five Lakh Only), on account of increased overheads resulting in reduced profits owing to delays not attributable to it. The Petitioner does not dispute that it was responsible for the delay in completion of the project, although they contend that the delay attributable to them is inconsequential in comparison to the overall delay in completion of the project. The findings of the Tribunal on this issue are as under:

“Claim No 5

Extended stay compensation for Rs. 5,95,00,00/-.

47. The claimant has rested its case for compensation, on the ground, that because of its prolonged stay on the project site, it had to incur increased overheads resulting in reduced profits owing to delays not attributable to it.

48. In view of the fact that the Tribunal has largely found the claimant responsible for delays, even if the claimant suffered loss on account of increased overheads, it has itself to blame. Assuming for a moment without conceding that the claimant did suffer some loss on account of overheads, it has failed to substantiate the same. Nothing has been stated about the deployment of men, skilled or unskilled or regarding machinery and tools deployed during the extended period. The claimant has not given any details of loss of opportunity by way of availability of alternative work where its men and machinery could have

been gainfully employed. Its claimant's own case that it had finished the work at the site by 15.02.2013 except load testing which essentially means that there was no requirement of further establishment at work site, since the load testing was to be done by railway engine. The claim has no basis and is rejected.”

20. Mr. Mehta argued that on account of prolonged and indefinite stay of the project, Petitioner had to maintain their resources until substantial completion of the works. Petitioner was not allowed to demobilize their resources and this prevented the Petitioner from mitigating their loss on account of overheads and loss of profits. Thus, Petitioner is entitled to quantification of damages adopting the well established formula used in the trade, known as Emden's Formula. He then refers to the Statement of claim where the computation of the Over Head cost has been worked out. The Petitioner has relied upon Annexure 5, relevant portion whereof is as under:

“ Calculation for Head Office Over-Head Cost during the prolongation period of the contract

The above calculation has been made based on Emden’s formula which helps to extract the contractor's HO overhead percentage from the audited accounts of the contractor.

Emden’s formula

$$\frac{\text{HO Over Head Percentage}}{100} \times \frac{\text{Contract Sum}}{\text{Contract Period}} \times \text{Period of Delay}$$

- HO Over Head Percentage + (Total overhead cost of the contractor’s organization as a whole + Total amount of Turn over) x 100
- Contract Sum = Rs. 26,25,50,926/- i.e. 26.25 Crores
- Contract Period = 275 days (06.05.2010 to 05.02.2011)
- Period of Delay= 784 days (06.02.2011 to 31.0.1.2013)

*The date 31.03.13 has been taken as we had substantially demobilized our manpower and machinery at the said date.

HO over-head amount is calculated in a separate sheet attached.”

21. The said calculation reads as under:

“CALCULATION FOR HEAD OFFICE OVERHEAD
AMOUNT FROM AUDITED ACCOUNTS”

S.No.	DESCRIPTION	FIG. AS PER BBJ's Annual Report (RS. IN CRORES)		
		<u>2010-11</u>	<u>2011-12</u>	<u>2012-13</u>
1.	Total Sales Turnover including escalation	152.6	200.33	302.21
2.	Less Escalation	0	10.12	35.58
3.	Net Sales Turnover excluding escalation	152.6	190.21	266.63
4.	Less expenditure on materials and subcontracting	116.94	157.15	198.58
5.	Less employment cost	10.48	15.84	20.10
6.	Less Expenditure on Power and Fuel	1.10	2.05	2.88
7.	Less Sales Tax & Service Tax	6.29	10.10	15.91
8.	Total Overhead [Sl. No. 1 - (Summation of Sl. No. 2to 7) of each individual colum]	17.79	5.07	29.16
9.	H.O. Overhead Percentage [(Sl. No. 8 / Sl.No.1) of each individual column x 100]	11.66	2.53	9.65
10.	Average H.O. Overhead Percentage [(11.66 + 2.53+9.65) / 3]	7.95		
11.	Applying Emden's Formula, Head Office Over-Head Cost During the prolongation period of the contract: Rs. Cr.	5.95		

22. Mr. Mehta further argued that on 28th February 2013, the Respondent had asked the Petitioner to wait to do the load testing till the channel sleepers were installed. Therefore the delay attributable to the Petitioner, if

any, was only prior to 28th February 2013. The Respondent on the other hand have argued that the Petitioner had completed the work on 15th February 2013 but they kept procuring material until 8th May 2013. Petitioners also delayed in submitting the methodology of load testing, and the deflection test was done on 13th December 2014. It is further argued that the deflection test need not have been done by train load and the Petitioner could have conducted static load test. There is no clause in the agreement prescribing that load test should be done only by train load. Petitioner found it convenient to opt for train load and kept waiting until linking of the track by the Respondent and the arrangement of the engine by the Respondent. Respondent further relies on the letter dated 26th August 2014 which indicates that the Petitioner didn't take load testing as part of its obligation. When the Respondent made it clear to the Petitioner that load testing is their responsibility, it was ultimately done on 13th December 2014.

23. Though there maybe merit in the contentions of the Respondent however, the vital question is that the extended stay compensation is essentially a claim of damage. Proof of loss is thus indispensable. It was necessary for the Petitioner to have proved the loss it suffered on account of the overheads which forms the basis of the claim. The Tribunal has noted that nothing was brought on record to substantiate the claim. It is trite law that for an award of loss of profits to be passed, injury has to be established. In ***Bharat Coking Coal Ltd. v. L K Ahuja (2004) 5 SCC 109***, the Supreme Court had observed as under:

“It is not unusual for the contractors to claim loss of profit arising out of diminution in turnover on account of delay in the

matter of completion of the work. What he should establish in such a situation is that had he received the amount due under the contract, he could have utilized the same for some other business in which he could have earned profit. Unless such a plea is raised and established, claim for loss of profits could not have been granted.”

24. Petitioner has based its claim of compensation solely on the basis of Emden's Formula. The said formula is used for computing the head office overhead percentage by dividing the total overhead cost and profit of the contractor's organization as a whole by the total turnover. The aforesaid calculation remained unsubstantiated. In absence of proof of loss, the Petitioner cannot claim compensation merely on the strength of Emden's formula, applied on the basis of figures as per its annual report. Petitioner has not furnished any evidence that it had incurred additional overhead cost during the extended period. Petitioner has also not produced any material to establish the quantum of profits it expected to earn. The arbitral tribunal taking note of the above considerations has rejected the claim on the ground that the Petitioner has failed to produce any material and evidence to establish the claim. Petitioner was required to produce some material to justify the norms adopted in the Emden's Formula. The Arbitral tribunal is entitled to take the view which it holds to be correct after considering the material before it in view of the provisions of the agreement. It is well settled that an arbitrator is the final adjudicator of the sufficiency and the extent of the evidence and this decision is not amenable to judicial review under Section 34 of the Arbitration and Conciliation Act, 1996 unless any of the grounds therein are established. The question as to whether Emden's formula or another such formula could be applied is primarily within the

domain of the arbitral tribunal. In absence of independent evidence led by the Petitioner, to prove that Petitioner had indeed suffered loss so as to be entitled to compensation, it could not be entitled to compensation solely on the basis of the Emden's formula. It is equally settled law that court while considering a challenge to the arbitral award, doesn't sit in appeal over the findings and observations of the arbitral award. The tribunal has rightly rejected the claim in absence of any credible evidence. There is no ground for interference on this issue.

25. In this regard it is pertinent to refer to the judgment of this court in O.M.P. (COMM) 140 of 2018 dated 4th April 2018 in ***Indo Nabin Projects Ltd. v. Powergrid Corporation of India Ltd.*** The relevant portion of which is reproduced hereinafter:

"10. Admittedly, the petitioner had not furnished any evidence or material to establish that it had incurred additional expenditure on account of overheads during the extended period. The petitioner had also not produced any material to establish the quantum of profit that it expected to earn during the said period. The Arbitral Tribunal had not accepted the aforesaid claim on account of charges and loss of profits solely on the ground that the petitioner had not produced any material and evidence to establish the same. The contention that such damages could be awarded on the basis of standard formula was also not accepted by the Arbitral Tribunal.

11. Similarly, the petitioner's claim for loss of profits was also rejected on the ground that the petitioner had been unable to produce any material to establish the same. In arriving at its conclusion, the Arbitral Tribunal noticed the decision of the Bombay High Court in *Essar Procurement Services Ltd. v. Paramount Constructions*: MANU/MH/2511/2016, wherein the

Bombay High Court had after referring to various decisions, observed that a claim based on Hudson formula and not based on any evidence deserves to be set aside. The Arbitral Tribunal also referred to the decision of the Bombay High Court in Edifice Developers and Project Engineers Ltd. v. M/s. Essar Projects (India) Ltd.: Appeal No. 11 of 2012, decided on 03.01.2013 and the decision of this Court in Ahluwalia Contracts (India) Ltd. v. The Union of India, Ministry of Health & Family Welfare : O.M.P. (COMM) 283/2016, decided on 08.05.2017, wherein courts had rejected the challenge to an arbitral award whereby the claim of loss of profits based on standard formula had been rejected by the arbitral tribunal.

12. Standard formula adopted for computing loss of profits or overheads are essentially tools used for computing the extent of overheads in profits. Undoubtedly, in a given set of facts, the said formula may be effectively used for computing the amounts of overheads/profits. However, that cannot lead to the conclusion that in all cases, the Arbitral Tribunal would be bound to accept computation of overheads/loss of profits based on standard formula and the claimant is absolved from producing any other material to establish its claims of loss on account of overheads/loss of profits. Whether it is apposite to use the standard formula in a given case is also required to be established by the contractor. This would necessarily require the claimant to produce some material to justify norms as adopted in the standard formula relied upon by him. A claimant is also required to establish as a matter of fact that it had incurred expenditure on overheads attributable to the works executed during the extended period.

14. Although, Mr. Nandrajog had referred to the decision of the Supreme Court in M/s. A.T. Brij Paul Singh and Bros. (supra) in support of his contention. He is unable to dispute that there are several decisions where the courts have disallowed claim of damages, which are based only on standard formula without adducing any further evidence to establish the expenditure/loss. The Arbitral Tribunal had taken note of a view of those

decisions as well. It is also clear that the impugned award cannot be assailed to be perverse or contrary to the public policy."

26. Similar view has been expressed by this court in the decision dated 20th May 2002, in *OMP No. 162/1999 - All India Radio v. Unibros*, 29th March 2019, in *OMP 463 of 2011 – The Executive Engineer(c) DR- VI v. M/s Bhasin Associates* and by the Division Bench of the Punjab & Haryana High Court in *FAO Nos. 6130, 6202, 9063 and 9750 of 2014 (O&M)* dated 30th December 2016 in *State of Haryana and Ors. v. J.V. of Unitech Limited and Ors.*

27. Moreover, the law relating to damages and loss of profits is no longer *res integra*. As per Section 73 of the Contract Act, the Petitioner was required to prove damages. In view of the aforesaid discussion, the challenge on Claim No. 5 is also without merit and therefore rejected.

28. Lastly, relying on well-worn principles laid down by the Supreme Court in *Associate Builders v. Delhi Development Authority* reported in (2015) 3 SCC 49, *H.B. Gandhi, Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons* reported in 1992 Supp (2) SCC 312, *State of Orissa v. M/s. Samantary Constn. Pvt. Ltd.* reported in 2015 (9) SCALE 685 and *P.R. Shah, Shares and Stock Brokers Private Limited v. B.H.H. Securities Private Limited*, reported in (2012) 1 SCC 594 to the effect that a court exercising jurisdiction under Section 34 of Act does not sit in appeal over the award to re-assess or re-appreciate evidence; and that where there is nothing perverse or irrational, the Court will not interfere in an arbitral

award, this court holds that there is no ground for interference in the award.

29. In view of the above, the petition is dismissed with no order as to costs.

SANJEEV NARULA, J.

April 15, 2019

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