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

Date of Decision: 26th February, 2019

+ **O.M.P. 235/2009**

HARYANA STATE INDUSTRIAL DEVELOPMENT

CORPORATION LTD & ORS.

..... Petitioners

Through: Mr. Ravindra Bana and Mr. Satsheel
Sheokand, Advocates.
(M:9811141842 & 9990920276)

versus

SH. SHUSHIL KUMAR ROUT & ANR.

..... Respondents

Through: Mr. Abdhesh Chaudhary, Mr. Yogesh
Kumar Keshari, Mr. Apurva
Bharadwaj and Ms. Sakshi Arora,
Advocates. (M:7275432305)

AND

+ **O.M.P. 62/2012**

HARYANA STATE INDUSTRIAL DEVELOPMENT

CORPORATION LIMITED & ORS.

..... Petitioners

Through: Mr. Ravindra Bana and Mr. Satsheel
Sheokand, Advocates.

versus

M/S AAR ESS & COMPANY & ANR.

..... Respondents

Through: Mr. Abdhesh Chaudhary, Mr. Yogesh
Kumar Keshari, Mr. Apurva
Bharadwaj and Ms. Sakshi Arora,
Advocates.

AND

+ **O.M.P. 311/2012**

M/S AAR ESS & COMPANY THR SUSHIL

KUMAR RAUT

..... Petitioner

Through: Mr. Abdhesh Chaudhary, Mr. Yogesh
Kumar Keshari, Mr. Apurva
Bharadwaj and Ms. Sakshi Arora,
Advocates.

versus

HARYANA STATE INDUSTRIAL DEVELOPMENT
CORPORATION LIMITED & ORS.

..... Respondents

Through: Mr. Ravindra Bana and Mr. Satsheel
Sheokand, Advocates.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J.(Oral)

O.M.P. 62/2012 and O.M.P. 311/2012

1. The present petitions have been filed under section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter, 'the Act'*) challenging award dated 30th September, 2011, passed by the Ld. Sole Arbitrator. OMP 62/2012 has been filed by Haryana State Industrial Development Corporation Ltd. (*hereinafter, 'HSIDC'*), and OMP 311/2012 has been filed by the Contractor - Aar Ess & Co (*hereinafter, 'the Contractor'*), which is a sole proprietary concern of Shri Sushil Kumar Rout.

2. The Contractor was awarded a tender for construction of office complex cum exhibition halls, at IMT Manesar, vide agreement dated 16th May 2001. The value of the work was Rs. 8,28,13,773.61/- (approx.. Rs.828.14 lakhs). The date of commencement of work was 26th May, 2001 and the date of completion was to be 15 months for the complex building i.e. by 26th August, 2002, and date of completion was 26th February, 2003 for the entire work. The work was not concluded on the stipulated dates for various reasons and the first extension was granted till 26th November, 2002. Subsequently, several other extensions were granted and the final extension was granted up to 25th August, 2003.

Submissions in OMP 62/2012

3. It is the case of HSIDC that even after the extension, the work was not

completed. Reliance is placed on a large number of letters to submit that the progress of work was very slow. Finally, the contract was terminated on 4th April, 2005. By then, 76.18% of the work had been completed by the Contractor. Disputes arose between the parties and a Ld. Sole Arbitrator was appointed by this Court. The Contractor challenged the termination and raised several claims, which are as under:-

Claim No.	Nature of claim
01	Declaration, that, rescission of the agreement is illegal and void.
02	Declaration, that, any action of execution of work at their risk and cost is illegal and not recoverable from the Claimants
03	Declaration, that, levy of compensation is illegal and void and not recoverable from the Claimants
04	Forfeiture or any withheld amount of security deposit is illegal and void and claimants are entitled for refund of the same
05	Amount of security deposit forfeited/withheld.
06	Amount withheld on account of levy of compensation/LD
08	Amount withheld on AHR/ALR items (Abnormally High Rates and Abnormally Low Rates)
09	Amount withheld on account of excess work contract/sale tax.
10	For insurance
7 and 11	Extra items having sub 1 to 61
12 and 14	Agreement item having sub claim 62 to 79
13	Secured Advance material
15	Construction of site office

15	Construction of site office
16	Material lying at site
17	Expenditure of staff and establishment
18	Loss of profit
19	Interest @ 18% on awarded amount
20	Cost of arbitration

4. The Ld. Arbitrator came to the conclusion that the termination of the agreement was illegal and void and that the levy of compensation was also illegal. The arbitrator also held in favour of the Contractor that the security deposit could not be forfeited and awarded a total amount of Rs.78,44,946/- in favour of the Contractor including interest.

5. The primary finding of the Ld. Arbitrator is that in view of the repeated extensions given by HSIDC, time was not the essence of the contract. Since repeated extensions were given without regard to the provisions of the contract, the date of completion fixed in the contract was not a rigid date. Thus, the Ld. Arbitrator directed refund of the security deposit and other withheld amounts. Ld. Arbitrator also awarded loss of profits for the remaining portion of the unexecuted portion of the work.

6. Mr. Ravindra Bana, appearing for HSIDC, submits that the basic challenge is to the finding of the Ld. Arbitrator that the termination of the contract was illegal. The Contractor did not ensure a steady progress of the work with due diligence. In fact, as on the stipulated date of completion of the work which was 26th February, 2003 only 53.89% work was completed. He submits that when extensions are granted, it was with mutual consent and hence, time continues to be the essence of the contract. He, however, admits

that after 25th August, 2003 no extension was granted, though the termination took place only on 4th April, 2005. He relies on various letters to show that the progress of work was very slow and the Contractor was to blame for the delay in the work and for non-execution of the remaining work. Under such circumstances, the award of loss of profits to the Contractor, amounts to giving a double benefit to the Contractor.

7. It is further submitted that a perusal of the award, especially, in respect of claim 1 shows that the Arbitrator has come to the conclusion that the agreement is not operative or in existence on the date of passing of the award. Despite holding so, the Arbitrator has applied the agreement and granted refund of the security deposit and the withheld amounts. This, according to the Ld. Counsel, is a contradictory finding by the Arbitrator. He relies on the following paragraphs to show the contradictions in the award:

“(v) After the expiry of the original time limit/ extended time limit i.e., 26-02-2003/ 25-08-2003, the Respondents were expected to fix a new date of completion with the mutual consent of the Claimants, in order to make time as essence of the agreement, which the Respondents failed to do.

.....

(vii) On the date of termination of agreement i.e. on 04-04-2005, there was neither any request of time extension from the Claimants, nor it was extended by the Respondents by mutual consent with the Claimants. Therefore, the agreement can not be said to be operative or in existence on this date.”

8. Ld. counsel further submits that insofar as the refund of the security deposit is concerned, the termination being legal, the refund could not have been awarded. The award of loss of profits is also a mere calculation by the Arbitrator without any evidence having being led on this. He, thus, submits

that the award of the amount under security deposit and withheld amount as also loss of profits is untenable.

9. Learned counsel for the Contractor first submits that the nature of intervention in an Award by a Technical Arbitrator ought to be limited, keeping in mind that Technical Arbitrators do not have the same legal training. He relies upon ***Municipal Corporation of Greater Mumbai v Prestress Products 2003 (2) ARB LR 624 Bom***, wherein a Ld. Single Judge of the Bombay High Court had dealt with the role and nature of Technical Arbitrators, in arbitration proceedings. He specifically relies upon paragraph 5 and 16 of the said judgement.

“5. At the outset, before considering the submissions which have been urged on behalf of the petitioner, it would be necessary to advert to the fact that in the present case, the petitioner and the respondent agreed to refer the disputes which had arisen between them after the Award and the subsequent termination of a contract for carrying out civil, electrical and mechanical work for a Waste Water Treatment Facility to an arbitrator who is an Engineer. The arbitrator has been a Chief Engineer and a General Manager (Technical) at C.I.D.C.O. The parties, therefore, entrusted the resolution of their disputes to a ‘Technical’ Arbitrator; ‘Technical’ in the sense that he would be expected to bear upon his work the expertise which he had acquired out of his knowledge and long years of experience in matters of Engineering and Civil Construction. The arbitrator has heard the parties extensively and the Court has been informed that during the 49 meetings that were held before the arbitrator, the parties submitted voluminous documentation and urged their respective submissions in respect of the B.O.Q. and extra items. The respondent has stated in its written submissions filed in

Court that the parties submitted a joint statement in two volumes identifying the disputes and differences regarding the playability of each claim and the rates of the B.O.Q. items and extra items. The arbitrator himself makes the following observations in the concluding part of his Award:

“The Award as finalised is in the form of decisions of the arbitrator on various points. As a result of thorough discussions in as many as 49 arbitration meetings, the difference of opinion between the parties narrowed down considerably and to that extent grey areas have been reduced. The final tabulation in Volume VI(R) Annexure “C” is therefore, the basis on which this Award is founded. I have meticulously examined the submissions made by the parties, exhibits, depositions, arguments made by each party and having given full and equal opportunity to each of the party, I have, as a sole arbitrator, declared this Award. The Award shall not prejudice rights of both the parties to argue their respective contentions touching the claims related to the final bill,”

16. The next important aspect which needs emphasis, particularly in a matter such as the present, is the nature of the reasons which the reviewing Court would expect the arbitrator to furnish. The Arbitration and Conciliation Act, 1996, does not impose the requirement of a qualification in law or of experience in judicial office as a condition for appointment as an arbitrator. The appointment of an arbitrator essentially partakes of a consensual character. The experience of arbitral proceedings in India would show that in a significant number of disputes parties do prefer the appointment of a retired Judge as an arbitrator. The reasons for this may not be far to be seek. A person who has held judicial office may be perceived by parties as possessing the ability of bringing to bear upon arbitral proceedings the tradition of independence, detachment and objectivity which

characterizes the work associated with judicial office. A person who has held judicial office in the past, therefore, brings to his or her work as an arbitrator, the experience garnered over the years in writing and delivering judgments on the basis of a marshaling of facts, interpreting contracts and in the application of law. Over the years, an increasing number of Advocates have also discharged duties as arbitrators in arbitral disputes. However, as the facts of the present would show, parties very often agree to the appointment of a 'technical' arbitrator particularly in matters such as the present, where a large part of the dispute revolves around technical expertise. The dispute in the present case related to a contract for the construction of a Waste Water Treatment Facility and parties considered it appropriate to appoint a retired Engineer who would have the requisite knowledge and experience to deal with a dispute relating to civil, mechanical and electrical work that was required to be carried out in the contract. Now there can be no doubt that whatever be the background of the arbitrator—whether in the law or otherwise, the arbitrator is bound by the Arbitration and Conciliation Act, 1996. The arbitrator is bound to give reasons under the Act. Equally, parties who agree to the appointment of an arbitrator in view of his technical expertise, must only be conscious of the fact that the reasons which he formulates in deciding upon a dispute in relation to an engineering contract would be such as would, to a person of prudence in his position, be reasons as would be sufficient to unravel the nature of the dispute before him. The requirement of reasons cannot be stretched to unrealistic limits. In every case, the test is whether the arbitrator has indicated the basis of his decision. The arbitrator has of course, to consider the submissions which have been urged before him and to assess the facts which he will then apply to the governing law. The arbitrator cannot ignore the

contract. However, in assessing the typical issues which arise in a matter such as the present involving a civil construction contract, it will be unrealistic to expect that the arbitrator must give detailed reasons relating to every minute aspect relating to the excavation of earth, the utilization of stones and mortar, the choice of a rate analysis or of the extent of the wastage of steel that he considered appropriate. The arbitrator has to apply the provisions made in the contract because he is not free to travel beyond the field of the contract which has been arrived at between the parties. But having done that and having construed the provisions of the contract, the arbitrator is expected only to record reasons which would be indicative of his approach and the basis of the decision. The expectation that a 'technical' arbitrator must formulate his Award much in the nature of the judgment of the Court is unrealistic. To impose such a restriction would only lead to stultifying the process of arbitration. The adequacy of the reasons has, therefore, to be assessed by the reviewing Court having regard to the nature of the arbitral dispute. There can be no absolute rule, As in life, there are few, if any, absolutes in the law. The approach of the Court has to be to sustain the Award unless a specific ground as contemplated by the Act has been established for the interference of the Court."

10. It is, thus, submitted that though there is no absolute rule that an award by a Technical Arbitrator ought not to be interfered with, but so long as the Technical Arbitrator has applied his mind and has fairly considered the documents on record which forms the basis of the decision, the challenge ought not to be entertained.

11. On merits, in respect of the question as to whether time was the essence of the contract, Ld. counsel for the Contractor relies upon the fact

that the last extension was given by HSIDC only till 25th August, 2003. Thereafter, he urges that it is the admitted position on record that the contractor remained on the site until the termination of the contract on 4th April, 2005. It is further submitted that prior to the termination, on 25th November, 2004 HSIDC had issued a letter directing the contractor to restart the work within seven days. However, even in this letter, there was no outer limit fixed for completion of the project. Thus, he submits that time was not the essence of the contract and the termination was rightly held to be illegal by the Ld. Arbitrator. Ld. counsel relies upon the judgement in ***M/s Hind Constructions versus State of Maharashtra, AIR 1979 SC 720*** wherein it has been observed as under:

“10.....In our view, the question would not be whether the rescission of the contract was unreasonable and, therefore, unjustified but whether the rescission of the contract in the circumstances of the case was wrongful and illegal. If time was not of the essence of the contract or if the stipulation as to the time fixed for completion had, by reason of waiver, ceased to be applicable then the only course open to the respondent-defendant was to fix some time making it the essence and if within the time so fixed the appellant-plaintiff had failed to complete the work the respondent-defendant could have rescinded the contract.”

12. It is, thus, submitted that the Ld. Arbitrator has rightly held that the termination is illegal and directed refund of the security deposit. Apart from letter dated 25th November, 2004, the 32nd RA bill was also cleared on 22nd January, 2005 which also shows that while clearing the bill, HSIDC had no objection with the Contractor continuing to execute the work.

Analysis and Findings

13. Almost all the facts and dates are admitted between the parties in the present case. It is clear that initially there was a time stipulation for the execution of the work and, thereafter, HSIDC gave extension till 25th August, 2003. On 25th November, 2004, a letter was issued by HSIDC directing the Contractor to restart the work within seven days. The letter dated 25th November, 2004 reads as under:

*“NO/HSIDC/IMT/2004/
Dated: 25/11/04*

To
M/S Aar Ess & Co.
222, 227, L Block Market,
Sriniwaspuri,
New Delhi – 110 065.

***Sub:- Construction of HSIDC office complex cum
Exhibition Halls at IMT Manesar – Final notice
under clause-2.2 of contract agreement.***

Dear Sir,

This has in reference to subject cited above. In this connection it is informed that during the meeting held on dated 28.10.2004 at our Head Office, it was promised by you that balance works of HSIDC office complex cum exhibition halls will be restarted by you immediately after release of payment of 31st R.A. Bill and will be completed at the earliest. Accordingly the payment of 31st R.A. Bill was released to you on dated 11.11.2004. But it is regretted that no activity has been started by you at the site till date. This is in your own interest to restart the work & complete the same at the earliest. You are finally advised to restart the balance work within seven days of issue of this notice otherwise same shall be executed by HSIDC at your risk & cost

without any further notice.

This notice is served upon you under clause-2.2 of contract agreement.

Thanking you,

*Yours faithfully,
For Hr State Ind. Dev. Corp. Ltd.
Asstt. General Manager (IA)
Ch. Devilal IMT-Manesar. ”*

14. A perusal of the above letter shows that the Contractor had stopped the work and HSIDC called upon it to restart the work. In this period, HSIDC continued to pay all the RA Bills that were being raised by the Contractor. Prior to this letter, a meeting was also held on 28th October, 2004 after payment of the amounts due under the 31st RA Bill. Further, this letter called upon the Contractor to restart the balance work within seven days. Admittedly, the final bill was the 32nd RA Bill. Thus, it appears that after November, 2004, the Contractor had not restarted the work, and accordingly, the termination letter dated 4th April, 2005 was then served on the Contractor, which reads as under:

*“To
M/s Aar Ess & Co.
222, 227, L-Block Market,
Sriniwaspuri,
New Delhi – 110065.*

***Sub:- Construction of HSIDC Office Complex cum
Exhibition Halls at IMT Manesar.***

Dear Sir,

This has reference to subject sited above. In this regard it is informed that the work of office complex cum exhibition halls was allotted to you vide our letter No. HSIDC/IMT/01/453 dated 16.05.2001. as per the

work order construction of office building was to be completed by you within 15 months from the designated date of start of work and the work of auditorium, cafeteria building and exhibition halls was to be completed within 21 months from the aforesaid date of start. In other words, the office building was agreed to be completed upto 25.08.2002 and other buildings were agreed to be completed upto 25.02.2003, however on your request & keeping in view the reasonable grounds the time period for completion was extended upto 25.08.2003. but the work could not be completed by you even in the extended time period. The slow progress of work at site has been intimated to you time to time vide our various letters Nos. viz. 3188 dated 01/01/03, 3548 dated 17/02/03, 3627 dated 20/02/03, 3745 dated 06/03/03, 4036 dated 27.03.2003, 838 dated 27.06.2003, 1486 dated 28.08.2003, 1542 dated 04.09.2003, 1555 dated 05.09.2003, 2843 dated 24.12.2003, 3013 dated 12.01.2004, 3810 dated 09.03.2004, 4053 dated 26.03.2004, 518 dated 19.05.2004, 1299 dated 23.07.2004, 1347 dated 27.07.2004, 1626 dated 17.08.2004 and 1919 dated 15.09.2004. Finally vide our letter No. HSIDC/IMT 042608 dated 26.11.2004 notice under clause-2.2 of contract agreement has been served upon you to restart the balance work within 7 days of issue of the notice otherwise same shall be executed by HSIDC at your risk and cost, but you did not start the balance work. Inspite of our various directions given in writing and verbally during various meetings at Head Office and at site, you have not started the balance work and delayed the same on one excuse or the other.

Hence after observing your attitude during various meetings and as per the correspondence made with us, it has been concluded that you are deliberately avoiding execution of balance work which makes you liable for penal action under clause-2 of the contract

agreement, for which notices with a sufficient time period have already been served upon you vide our various letters.

Therefore in view of clause 2.2 of the contract, the contract is hereby rescinded and the balance works shall now be executed at your risk and cost and difference of amount shall be deducted from your security deposited with the department. You are further advised to visit this office with 15 days of issue of this letter for the final measurements of the work otherwise same shall be measured departmentally.

*Thanking you.
Yours faithfully,*

For Hr. State Ind. Dev. Corp. Ltd.

***Asst. General Manager (IA)
Ch. Devilal IMT-Manesar***

***CC:- The D.G.M. (IA),
HSIDC / Panchkula: For information w.r.t. H.O. letter
No. HSIDC/IA/RB/05/6971
dated 01.03.2005."***

15. Thus, between November, 2004 to April, 2005 the work was not re-commenced despite notice being issued under Clause 2.2 of the General Conditions of Contract.

16. A perusal of the above termination letter also shows that the Contractor, for whatever reasons, was deliberately avoiding execution of the balance work which led to the rescission/termination of the contract. It cannot, therefore, be held that time was not the essence of the contract. The contract was for construction of IMT, Manesar which is an educational institution and this was well within the knowledge of the Contractor. Under Clause 2.2(a) of the GCC, if due diligence was not shown by the Contractor, the contract could be rescinded. The Contractor replied to the termination by

generally stating that the delay was on account of HSIDC. In its reply, it did not give any reason as to what were the breaches by the HSIDC. It merely stated that HSIDC was guilty of breach. The relevant portion of the reply dated 20th May, 2005 is set out herein below:

“That clause 2.1 of the agreement shows that the time is essence of contract. The last date of the completion of the work was 25.02.2003 but could not be completed as there was a breach of contract on your part. We were allow to continue of the work after the stipulated date of completion without taking any action clause 2.1 & 2.2 or any other clause of the agreement. The time was enlarge and no time and no new date was fixed for completion of the work with the consent of both the parties. This show that the time was never made essence of the contract after expiry of the stipulated period of the agreement.”

17. A perusal of the above extract itself shows that the termination letter dated 4th April, 2005 was replied to after more than one year. The Contractor was merely concerned with getting its pending bills cleared and did not have any intention to re-commence the work. Under these circumstances, the finding that time was not the essence of the contract is contrary to the record and is not sustainable. While there is no dispute to the legal proposition that technical arbitrators' awards ought to be recognised, in the present case, the facts show that the Contractor has clearly been recalcitrant in his approach and almost abandoned the work. Accordingly, the finding of the Ld. Arbitrator that the termination is illegal is set aside.

18. Under Clause 2.2(a), HSIDC was entitled to forfeit the security deposit, however, it is the settled position in ***Kailash Nath Associates v. DDA (2015) 4 SCC 136*** that loss has to be established for forfeiting the

security deposit. No risk and cost execution of work has taken place in the present case and no evidence as to losses incurred has been led. Under these circumstances, the security deposit is liable to be refunded, however, without any interest.

19. On the question of award of loss of profits due to illegal termination, Ld. counsel for the Contractor submits that the award deals with loss of profits in paragraph 113 which reads as under:

“113. Arbitrator’s Observations, Findings & Award:

(i) it has been held in earlier claims, that, the termination of agreement by the Respondents on 04-04-2005 is illegal.

(ii) Correct amounts of agreement and final bill are Rs.828.14 lacs & Rs. 631 lacs, respectively, meaning thereby the amount of unexecuted work as Rs.197.14 lacs.

(iii) The office block has been completed by the Claimants except minor finishing. The RCC framed structure in Exhibition halls and Cafeteria is incomplete. Therefore, in the absence of very precise details for left out, it will be quite fair to assume that, %age cost of cement and steel for left out work will be the same as that in work executed so far i.e. Rs. 631 lacs.

The cost of cement and steel is 30% as worked out under Claim no.17, which is to be supplied by the Respondents at fixed issue rate as per agreement. Thus, deleting 30% cost of cement and steel (i.e. Rs. 59.12 lacs), the amount of unexecuted items remains as Rs.138.02 lacs say Rs. 138 lacs.

(iv) in finishing items of building work, the contractor is expected to earn about 8% profit. Thus, 8% of Rs. 138 lacs works out as Rs.11,04,000/-, which is considered reasonable amount of loss of profit (which would have been otherwise earned by the Claimants, but prevented by the Respondents) and awarded to the

Claimants against this claim.”

20. The above, according to the Ld. Counsel for the Contractor, is not a guess work by the Arbitrator. In fact, he submits that both the amounts of Rs.828 lakhs and Rs.625 lakhs are clearly admitted on record. Thus, for the unexecuted portion, while the Contractor claimed 10% to 15% as profit, the Ld. Arbitrator has awarded 8% profits. The counsel further submits that even from 8% profits, the Ld. Arbitrator has reduced the amount to almost 5% to 6%, by subtracting the material which had to be supplied by HSIDC. He further relies on the judgment of the Supreme Court in ***A.T. Brijpaul Singh and Ors v State of Gujarat AIR 1984 SC 1703*** and the judgments followed thereafter, as also the recent judgment of this Court in ***Roshan Real Estate Pvt. Ltd. v. DSIDC OMP 44/2015, Decided on 15th March, 2018***, in support of his case that it is not in every case of loss of profits that actual evidence needs to be led for proving loss. If the Arbitrator can come to a conclusion on loss of profits on the basis of the evidence available, the Ld. Arbitrator is free to arrive at a figure on the basis of the admitted amounts.

21. This Court has upheld the termination as being in accordance with the contract. The Contractor having been in breach and having not executed the work with diligence and having almost abandoned the site since 2003-04, cannot claim loss of profits due in respect of the unexecuted part of the work. The termination being in accordance with the contract, the loss of profit claim is not tenable and the award of loss of profit is accordingly set aside.

Submissions in OMP 311/2012

22. Coming now to the contentions raised by the Contractor in OMP 311/2012, the submission of the Ld. Counsel for the Contractor is that there is an error in the calculation by the Ld. Arbitrator in para 95 of the award, while the outstanding amount in the final bill is being directed to be paid. He submits that the already paid sum has been taken by the Ld. Arbitrator as Rs. 3,72,55,956/- whereas only a sum of Rs. 3,52,69,253 ought to have been considered. He submits that the learned Arbitrator has wrongly taken a sum of Rs. 19,86,703/- paid on 18th October, 2001 as mobilisation advance and added the same to the amount already paid. He submits that the mobilisation advance has been adjusted in the second, third and fourth RA bills as is evident from page 153 which is part of Annexure R-15. He, thus, submits that this sum of Rs 20 lakh (approx.) has been wrongly deducted.

23. In response, Ld. Counsel for HSIDC points out that in the award itself, the Ld. Arbitrator has recorded that detailed discussions were held with the parties from the 30th and 35th hearing in respect of the final bill. The figures were duly reconciled by the parties and were reported correctly. He submits that the amount of Rs. 19,86,703/- has been correctly added by the Arbitrator as the amount already paid. This is evident from the calculation done by the Arbitrator at page 61 of Volume C 7 of the Arbitral record.

24. He submits that the mobilization advance paid vide cheque No. 086842 was not added into the amounts paid which ought to have been done and hence by calculating the final amount, this amount has been credited. He submits that since the Arbitrator had held the discussion with the parties and no objection was raised at that time, today the said ground cannot be

urged by the Contractor.

25. Further, it is submitted that the amounts of Rs. 5,07,065/-; Rs.3,74,107/- and Rs. 11,89,137/- which are shown as having been adjusted do not include the entire mobilization advance. He has given the calculation chart which is as under:-

<i>Bill No.</i>	<i>Gross Amount payable (Rs.)</i>	<i>Adjustment of mobilization advance (Rs.)</i>	<i>Net adjustment of mobilization advance (Rs.)</i>	<i>Gross amount payable after adjustment of mobilization advance (Rs.)</i>	<i>Statutory recoveries on Column-5 (Rs.)</i>	<i>Net Paid (Rs.)</i>
<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5=(2-3)</i>	<i>6</i>	<i>7=(5-6)</i>
<i>2nd R.A.</i>	5212287	507065		4705222	3251921	1453301
<i>3rd R.A.</i>	4567525	374107		4193418	2152891	2040527
<i>4th R.A.</i>	4354647	1189173		3165474	2216362	949111
<i>Total</i>	14134459	2070345	1986703	12064114	7621174	4442939

26. It is submitted that the net adjustment which was outstanding was a sum of Rs 19,86,703/-, after taking into account, the three amounts which were already adjusted as per the final bill. Accordingly, there is no discrepancy or calculation error in the amount. On the other hand, Ld. Counsel for the Contractor submits that these points were not discussed in the arbitral proceedings and the error deserves to be rectified. He further submits that this figure was added by the Ld. Arbitrator after the meeting was held by the Ld. Arbitrator.

27. A perusal of the award shows that the Ld. Arbitrator had re-conciled

the amounts which were paid and payable. This is clear from the extract of the award which reads as under:

“95. Arbitrator’s Observations, Findings & Award :

(i) *The Claimants submitted final bill on 09-07-2010 during 29th hearing (bound in spiral form) & running from pages 1 to 61, on the basis of joint measurements at site. A copy of the same was supplied to the Respondents on 09-07-2010 as well for their verification & comments.*

The Claimants had originally indicated the net amount of final bill in this submission as Rs. 31,92,153.59 (at page 57) payable by Respondents. This net amount was after effecting all recoveries on account of cement, steel, L.D. amount, testing charges etc. & TDS and S. Tax upto 32nd running bills (i.e pre-final bill).

(ii) *Detailed discussions were held with the parties from 30th to 35th hearings exclusively on this final bill.*

Final figures duly reconciled & reported by the parties are as under:

(a) *Amount of total work done : Rs. 6,30,92,499.80*

(b) *Recovery amount : Rs. 2,53,22,752.00
(Material & TDS & Sales Tax upto 32nd R. Bill i.e. pre final bill)*

(c) *Payable amount : Rs. 3,77,69,748.00*

(d) *Already Paid : Rs. 3,72,55,956.00*

(e) *Balance payable to the Claimants: Rs. 5,13,792.00
(T.D.S. & Sales Tax to be deducted on this amount while releasing the payment to the Claimants).*

This amount of Rs. 5,13,792/- is thus payable to the Claimants & awarded in their favour against these 34 sub-claims. However, Respondents may effect recovery of T.D.S & Sales Tax on this amount at the time of making this payment to the Claimants at specified rates & as prescribed by the Govt. ”

Thus, the amounts which were already paid were based on the reconciliation which was reported by the parties. The same is not liable to be interfered with.

28. Next submission of the Contractor is in respect of sub claim no.7 relating to Centering and shuttering for suspended floors/roofs over trusses in the auditorium. The amount claimed by the Contractor is Rs.14,64,450/-. The submission of the Contractor on this is that BOQ items, which cover roofing being serial no.12(j) only deals with height of 3.5 metres and did not contemplate any rates for shuttering at the height from 13.2 to 13.5 metres. It is, thus, submitted by Ld. counsel for the Contractor that the rate fixed in BOQ items cannot be taken into consideration, as the height is not matching with BOQ items. The Contractor analysed the cost for this shuttering and claimed an average rate of Rs.3,000/- per square metre as per his own rate analysis. Ld. counsel has taken the Court through paragraphs 55 to 57 of the award to submit that the Ld. Arbitrator has not given any reasoning to reject the sub claim.

29. On the other hand, Ld. counsel for HSIIDC submits that the average rate, at which the payment is being made, is Rs.294.90 per square metre and this is as per serial no.12(c) and 12(j)(1), which deal with roofs. After taking the average height on three occasions, payment has already been made. It is further submitted that since the model of the building was accepted by the Contractor prior to submitting the Bid, it was well aware of the height of the dome, which was to be constructed. Ld. counsel further submits that the variation in the overall contract is permissible to the extent of 25% and not more. Thus, the payment has been made as per the BOQ items and no fault can be found with the same.

30. Ld. counsel for the Contractor submits that variation being more than 300%, the BOQ rate cannot be applied.

31. The Ld. Arbitrator has taken into consideration the submissions made by the parties and has held as under:

“55. Claimant’s Submissions

(i) Roof in an auditorium block over an area of 488.15 sqm having varying height (13.2, mtrs to 13.5 mts) with average height as 13.35 mtrs. from ground level was laid & average rate claimed is Rs.3000/- per sqm as per rate analysis submitted to the Respondents (C-43 i.e. Pages 634 & 635 of Vol III) & for this area & rate, the amount claimed is Rs.14,64,450/-.

(ii) As the entire cost of centering and shuttering has been included in the final bill by the Respondents, we are unable to state at what rate it has been paid to us?

(iii) The increase in rate for every additional one metre height be added cumulatively i.e. by adding lower one also.

56. Respondent’s Submissions

(i) Total amount paid to the Claimants against this item is Rs.1,43,960/- & an for roofing area of 488.15 sqm, the average rate works out to be Rs.294.90 per sqm (approx).

This payment has been made according to item 12(c) & 12(j) I of the agreement (Pages 64 & 65) and by taking average height of roof at 3 locations.

(ii) Model of the buildings were available for inspection by the perspective bidders to examine the same at the stage of pre-bid conference.

(iii) N.S. rate submitted by the Claimants as Rs.3000/- per sqm is for 120 days period of shuttering. However, for roofing system shuttering is required for only about 20 days. Thus, this NS rate is exorbitant & not based upon technical provisions/ requirements.

57. Arbitrator's Observations, Finding and Award

By going through the submissions made by the parties, the A.T. tends to agree with the arguments advanced by the Respondents & that the payment has been correctly made to the Claimants as per agreemental provisions & nothing more is payable to the Claimants against this item.

*In view of the above, **NIL** amount is awarded to the Claimants against the sub-claim."*

32. It is not in dispute that the height of the auditorium was well within the knowledge of the Contractor at the time when the Bid was submitted and the contract was awarded. A perusal of the description of civil works at points 12(c) and 12(j)(1) shows that these were part of the BOQ items. The same are described herein below:

<i>S.No.</i>	<i>Description</i>	<i>Unit</i>	<i>Qty</i>	<i>Rate</i>	<i>Amount</i>
<i>12 c)</i>	<i>Suspended floors, roofs, landings, balconies and access platform.</i>	<i>Sqm.</i>	<i>14195</i>	<i>85/- (Eighty five only)</i>	<i>1206575=00</i>
<i>12 j 1)</i>	<i>Suspended floors,roofs,landing,beams and balconies colms (sic columns) & walls (Plan area/surface area to be measured</i>	<i>sqm</i>	<i>12400</i>	<i>35/- (Thirty five only)</i>	<i>434000=00</i>

33. For both these items, the rate was prescribed in the contract itself and by taking the average, HSIDC had made the payment. The amount claimed by the Contractor of Rs.3,000/- was rightly disallowed as the rates were there in the BOQ. A perusal of the description of Serial Nos. 12(c) and 12(j)(1) shows that they deal with suspended floors, beams and balconies,

which are part of any auditorium. Moreover, the payment was to be made based on the measurements which were to be taken after conclusion of the work. Since the Contractor has been paid the entire amount for the work executed, no further amounts are liable to be awarded.

34. Accordingly, OMP 62/2012 and OMP 311/2012 are disposed of in the above terms.

OMP 235/2012

35. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter the 'Act'*) challenging the award dated 28th November, 2008 passed by the Ld. Sole Arbitrator. HSIDC had awarded a contract for construction for office complex/exhibition halls at IMT, Manesar on 16th May, 2001. The scheduled date of completion of the said contract was 25th February, 2003. Under the presumption that the said contract would be completed in time, a second contract was awarded during the subsistence of the first contract for construction of Tubular Roof Trusses of exhibition halls, on 28th August, 2002.

36. Disputes arose between the parties under the first contract itself, which were referred to arbitration before the Ld. Sole Arbitrator. Since the exhibition halls were themselves not completed, the stage of construction of Tubular Roof Trusses never arose. The HSIDC, however, rescinded the contract on 14th January, 2005 and forfeited the earnest money of Rs.1.5 lakhs deposited by the Contractor. The same Arbitrator, who was appointed under the earlier contract, was appointed as the Sole Arbitrator for the present contract as well. The Ld. Arbitrator held that rescission was illegal and void and accordingly, Ld. Arbitrator awarded refund of the security deposit of Rs.1.5 lakhs and also awarded loss of profits for a sum of Rs.1.50

lakhs against the claimed amount of Rs.24 lakhs, later curtailed to Rs.14.5 lakhs.

37. HSIDC has challenged the award. It is submitted by Mr. Ravindra Bana, Ld. counsel appearing for HSIDC that the Contractor cannot be allowed to take advantage of its own wrong. The Contractor, having failed to construct the exhibition halls under the first contract, cannot be allowed to be benefit from the breaches committed by it. He submits that the Contractor being in breach and no work having been commenced, the security deposit was rightly forfeited. He further submits that the award of loss of profits would result in double benefit to the Contractor i.e. the Contractor would be able to make profit despite being in breach in the first contract. Ld. counsel submits that the award is wholly illogical and is, therefore, liable to be set aside.

38. On the other hand, Mr. Abdhesh Chaudhary, ld. counsel appearing for the Contractor submits that though HSIDC was fully aware of the progress of the work under the first contract, it ought not to have awarded the second contract to the Contractor. Further, the security deposit of Rs.1.5 lakhs had been accepted by the HSIDC despite the knowledge of the fact that the exhibition halls were still under construction. The Contractor was not in breach under the first contract and hence, since no work had commenced, the Arbitrator was reasonable in award of the profits and the award of refund of security deposit of Rs.1.5 lakhs is also wholly justified. He relies upon the judgement of Ld. Single Judge of this Court in ***Devender Kumar Sharma v. Airport Authority of India, FAO 289/2006 Decided on 21st May, 2008.***

39. Insofar the conduct of the parties is concerned, it is clear from the

nature of progress of work made under the first contract that the second contract was awarded in a premature manner. Before the exhibition halls were ready, or there was a reasonable expectation of them being ready, the HSIDC ought to not have been even awarded the second contract. The second contract did not even take off as the Tubular Roof Trusses could only have been constructed once the exhibition halls were ready. Since no part of the contract even commenced, either from the Contractor's side or from the side of the HSIDC, the contract was a complete non-starter. The second contract, though dependent upon the progress of the first contract, is an independent contract by itself. Since the exhibition halls were not ready, the Contractor cannot be held to be in breach of this contract, which would justify the illegal forfeiture of the security deposit. Accordingly, the same is liable to be refunded.

40. Insofar as the loss of profits is concerned, the contract itself being a non-starter, which was well within the knowledge of the Contractor, who was awarded the first contract, there was no reasonable expectation as to the profits that the Contractor itself could have had. Further, under the first contract, the Court has come to the conclusion above that the termination was valid and in view thereof, the award with regard to loss of profits is wholly unjustified. The same is, accordingly, set aside.

41. OMP is, accordingly, disposed of, in the above terms.

PRATHIBA M. SINGH, J.

FEBRUARY 26, 2019/dk

(corrected and released on 15th March, 2019)