

\$~

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

Reserved on : 20th May, 2019

Date of decision : 2nd July, 2019

+

O.M.P. 728/2009

UNION OF INDIA

.....Petitioners

Through: Mr. Angad Mehta, Advocate
(M:9560956484)

versus

M/S OM CONSTRUCTION CO.

.... Defendant

Through: Mr. Sandeep Sharma, Mr. Amit
Choudhary, Mr. Sarthak Mannan &
Ms. Kanchan Semwal, Advocates
(M:9650279943).

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The present petition under Section 34 of the Arbitration and Conciliation Act challenges award dated 3rd May, 2009 passed by the Ld. Sole Arbitrator.

2. The Respondent – M/s. Om Construction Co. (*hereinafter* ‘Contractor’) was awarded a contract for construction of Government Senior Secondary School at Anand Vihar, Delhi vide agreement no. 13/EE/DC&LC/DA/2001-02. As per the contract, the value of the work was estimated at approximately Rs.2.93 crores. The date of commencement of work was 19th October, 2001 and stipulated date of completion was 18th April, 2003. However, the actual date, when the completion of work took place, was 15th May, 2004. The Contractor raised various claims before the Ld. Arbitrator which have been decided in favour of the Contractor. The

objections in this petition are restricted by Ld. Counsel for Petitioner - Union of India (hereinafter '*Union of India*') to Claims No.2 (sub-items 2 and 3), Claim No.7, Claim No.8, Claim No.9 and Claim No.10.

Submissions of the Petitioner - Union of India

3. Mr. Angad Mehta, ld. counsel for Union of India has taken the Court through award dated 3rd May, 2009.

4. In respect of claim no.2, sub items 2 & 3, the submission of ld. counsel for Union of India is that the Contractor had voluntarily agreed for reduction of 30% on the deviation items. The same was clear from a perusal of documents R-18 & R-19. However, despite the Contractor's agreement, the Ld. Arbitrator has ignored the same and has arrived at a finding that the said letters were not issued by the Contractor of its own free will. It is further submitted by ld. counsel that this was not even a plea of the Contractor in the statement of claims and hence the Ld. Arbitrator's finding is completely contrary to the agreed position between the parties. The award on this count is challenged, accordingly.

5. Insofar as Claim No.7 is concerned, the submission of ld. counsel for Union of India is that the said claim was for a sum of Rs.10 lakhs raised by the Contractor. The same was claimed towards idle labour, machinery and fixed establishment cost. Ld. counsel has taken the Court through the statement of claim to show that the total calculation by the Contractor was for a sum of Rs.21,02,700/- over which 50% mitigation was adjusted and the claim was restricted to Rs.10 lakhs by the Contractor. It is submitted that the Contractor did not file any documentary evidence in support of this plea. Exhibits C-2 C-3, C-4 and C-5, which have been relied upon by the Ld.

Arbitrator, in fact, show that Ex.C-2 & 3 did not relate to this claim and Ex.C-4 & 5 give no figures to substantiate the said claim. It is further submitted that despite relying on the judgment of *Mcdermott International Inc. v. Burn Standard Co. Ltd. and Ors. (2006) AIR SCW 3276*, the Ld. Arbitrator has arbitrarily reduced the said amount and awarded a sum of Rs.8,25,000/-, which itself shows that the claim was not tenable. The awarded amount had no basis either in the statement of claims or in the evidence filed on record.

6. Insofar as Claim No.8 is concerned, the said claim was for Rs.12 lakhs against which the Ld. Arbitrator has awarded Rs.9 lakhs, again without any basis, whatsoever. It is further submitted that Claim Nos.7 & 8 are overlapping.

7. Ld. counsel for Union of India also impugns the award of loss of profits by applying the Hudson formula, under Claim no.9. It is submitted that there was no basis to award loss of profits due to prolongation of the contract. After applying Hudson formula, the Ld. Arbitrator has calculated the amount liable to be paid as approximately Rs.19.5 lakhs. However, the awarded amount is of Rs.10 lakhs, and there are no reasons given for reducing the claim by the Ld. Arbitrator which shows the awarded amount is arbitrary. The submission of ld. counsel for Union of India is that the loss of profit claim could not have been awarded in this manner as the same is overlapping with the other claims. It is also submitted that interest awarded at 9% is on the higher side.

8. Ld. Counsel for the Union of India, further, submits that the Contractor had given a hand written undertaking that no extra amounts would be claimed for the delay in project. This was duly pointed out to the

Ld. Arbitrator. However, despite this, the Ld. Arbitrator arrived at the conclusion that the said note was given without free will.

9. Mr. Mehta relies on the following judgments, in support of his submissions:

- ***Kailash Nath Associates v. Delhi Development Authority (2015) 4 SCC 136*** (hereinafter, '*Kailash Nath*');;
- ***Mahanagar Telephone Nigam Ltd. v. Tata Communications Ltd. 2019 (3) SCALE 864*** (hereinafter, '*MTNL v. Tata Communications*');;
- ***Essar Procurement Services Ltd. v. Paramount Constructions 2016 SCC OnLine Bom 9697*** (hereinafter, '*Essar Procurement*').

Submissions of the Respondent

10. Mr. Sandeep Sharma Ld. Counsel, on behalf of the Respondent – Contractor, submits that insofar as claim No.7 is concerned, the same has been granted on account of salaries, extra expenditure incurred during the extended period of the contract. Since the delay in the completion of the project is attributable to the employer, the expenditure incurred on idle machinery and staff is liable to be compensated. Insofar as claim No.8 is concerned, it is submitted by Mr. Sharma that though Clause 10CC is not applied, the Ld. Arbitrator has taken Clause 26 and determined the escalation. Since the costs for the materials is notified by the Government itself, the Arbitrator is justified in awarding the said claim.

11. In respect of Claim 9 and the objection as to overlapping nature of all the claim Nos. 7, 8 and 9 are concerned, he relied upon the Division Bench judgement in ***DDA v. P.C. Sharma [FAO(OS) No. 143/2006 decided on 2nd February, 2009]*** (hereinafter, '*DDA v. PC Sharma DB*'). According to him,

this very issue was considered by the learned Division Bench, and it was held that these three heads namely idle machinery/staff, escalation and loss of profit are distinct heads of damages which the Contractor is entitled to claim.

12. It is submitted that a perusal of the statement of claim shows that the work which was to be completed within 18 months took 30 months and 27 days and hence the claim of idle machinery, labour and manpower is completely justified. Monthly expenses for fixed establishment of Rs.73,500/- per month and the cost of machinery T&P machines was Rs.90,000/- per month was claimed. Thus, for the period of 12 months and 27 days, the amount works out to Rs.21,02,700/- and by applying mitigation at 50%, the Contractor had restricted it to Rs.10 lakhs. The award by the Ld. Arbitrator is, thus, completely justified.

13. Insofar as Claim No.8 is concerned, it is submitted that the cost of material and labour had risen during this period. The Contractor did not apply clause 10CC of the contract, but claimed escalation only for the period beyond the date of completion. This claim was originally for Rs.15,10,958/-, however, was restricted to Rs.12 lakhs.

14. Insofar as loss of profits was concerned, the claim was calculated at Rs.21,06,986/-, but was restricted to Rs.15 lakhs. This claim is liable to be awarded in view of the finding of the Ld. Arbitrator that delay was attributable to the Department. On interest, it is submitted that the claim of interest @ 18% per annum, but only interest @ 9% per annum was awarded from date of commencement of arbitration to date of payment, which is also reasonable in the facts of the case.

15. Mr. Sharma relies on the following judgments in support of his

arguments:

- *D.D.A. v. P.C. Sharma DB (supra);*
- *Sanyukt Nirmata v. DDA & Ors. 125 (2005) DLT 550;*

Analysis and Findings

16. At the time when notice was issued in the present petition, Union of India had only pressed the objections in respect of Claim Nos.7, 8, 9 and 10. The order dated 25th March, 2010 issuing notice in the petition is relevant and is set out herein below:

“Counsel for the petitioner pressed for issuance of notice only with respect to Claims Nos.7, 8, 9, and 10 as decided by the Award.

*So far as Claim Nos.7 & 8 are concerned, prima facie, the Award is a non-speaking Award because how the amounts granted to the respondent under these claims is not stated. Further, I find that no proof of actual expenditure incurred by the contractor is discussed in this part of the Award. Even as regards Claim no.9, not only is the Award, prima facie, a non-speaking Award, further, loss of profitability can only be allowed if it is found that the contractor had extra men, machinery, capital, etc. so as to employ elsewhere and which it was forced to employ in the present contract. However, the Award with respect to Claim no.9 does not discuss this aspect as required by law. So far as the issue of interest is concerned, I find that the Arbitrator has given interest on the Award whereas the Supreme Court in the judgment reported as **State of Haryana Vs. S.L. Arora, MANU/SC/0132/2010** has held that interest has to be granted on the principal amount due and not on the amount due as on the date of the Award. Notice. Counsel for the respondent appears and accepts service of notice. Reply be filed within four weeks. Rejoinder be filed within four weeks thereafter.*

.....”

17. This order was challenged in appeal by the Contractor and vide order dated 4th May, 2010, the Ld. Division Bench had dismissed the appeal as withdrawn. Thus, the objections qua claim no.2 are not liable to be entertained.

18. A perusal of the award shows that apart from capturing the dates in the initial paras, it dives into a discussion on each of the claims straight away. In respect of the various works done and expenditure incurred, and the incorrect deductions, the Ld. Arbitrator has awarded amounts and the same are not challenged. The present order deals with the objections only in respect of those claims which have been challenged, as per the above order.

A. Claim No.7 – For a sum of Rs.10,00,000/- on account of salary of staff, establishment and underutilization of T&P due to prolongation of contract beyond the stipulated date of completion due to non-fulfillment of contractual obligation by the Department

19. In Claim No.7 relating to idle labour, establishment costs and machinery, the Ld. Arbitrator mentions documents Ex.C-2, C-3, C-4 and C-5 and the pleadings. The Ld. Arbitrator, then, concludes as under:

“From the pleadings of the parties and facts of the case, there is no doubt that the titl (sic tilt) towards the cause for delay is heavily towards the Employer. The trade practices are such that in a competitive tendering the contractors have to necessarily bid taking into account optimal utilization of the various inputs. 3 Ms: money, men and machine. The Party responsible for the wastage of the resources is liable to compensate. Question is what should be the amount of compensation.”

20. A perusal of the above paragraph shows that the Ld. Arbitrator after setting out the pleadings of the parties, simply arrives at the conclusion that

the cause for the delay is heavily tilted towards Union of India. The case of Union of India was that the cause for the delay was default by both parties whereas the Contractor alleged that the delay was due to Union of India. A perusal of the letters exhibited as Ex.C-2 and C-3 clearly shows that they vaguely relate to the issue in question. In Ex.C-2, the contractor vide letter dated 19th March, 2002, seeks supply of the various drawings and concludes the letter as under:

*“Please supply these drawings as early as possible so work is going on smoothly and please noted in hindrance register.
Please also noted that out labour & site staff is idle to be increase financial burden on us.”*

21. In Ex.-C4 also, the contractor concludes as under:

“This is breach of contract non fullfilment of necessary conditions not only delay the execution and completion of work, but also cause huge amount of the extra expenses, looses (sic losses) and damages due to not utilization of establishment resources, staff, T&P machinery and equipment’s and extra interest for mobilization.

We have already incurred huge amounts on idle staff and machinery. It is requested that necessary drawings, designs may be made available immediately to save us from the further looses (sic losses) and financial burden.

So we requested you to please make the availability of drawing as soon as possible at your personal level so that the work, may. Kindly take stock of the hindrances and make suitable entries in the hindrance register.”

22. In Ex.C-5, the letter concludes as under:

“We have already incurred huge amount on idle staff and machinery. It is requested that necessary

drawings, designs may be made available immediately to save us from the further losses and financial burden.”

23. The statements in these letters are general in nature and do not give any details as to what is the extent of idle staff and machinery. In the statement of claim, the Contractor has quantified Claim No.7 as under:

“9.05 The Claimants have thus been put to a financial loss of Rs.50,000/- per month as detailed below which the Respondents should be made to pay and the learned Arbitrator may kindly order its payment in its award.

A. FIXED ESTABLISHMENT		
1.	Engineer Graduate 1 No.@ 10,000/- per month	Rs.10000.00
2.	Engineer Diploma holder 1 No.@ 8000/ per month	Rs.8000.00
3.	Supervisor 1 No.@ 5000/- p.m.	Rs.5000.00
4.	Head Mistry 1 No.@ Rs.7500/- p.m.	Rs.7500.00
5.	Foreman 1 No.@ Rs.5000/- per month	Rs.5000.00
6.	Munshi/Indentor 1 No.@Rs.3000/ p.m.	Rs.3000.00
7.	Chowkidars for watch & ward 6 Nos @Rs.2500/- each (per month)	Rs.15000.00
8.	Sundries and Misc. expenditure	Rs.10000.00
9.	Office Estt. O.H. site conveyance visit of Contractor	Rs.10000.00
	Total:	Rs.73,500 (A)
B. FOR MACHINERY AND T&P		
1.	Mixers 2 Nos.@ Rs.300 per day	Rs.600.00
2.	Vibrators 2 Nos.@ Rs.150/- per day	Rs.300.00

3.	<i>Pumps/Motors etc. 1 No.@ Rs.100/- per day</i>	<i>Rs.100.00</i>
4.	<i>Steel plates 1000 Nos. @Re. 1.00 per day</i>	<i>Rs.1000.00</i>
5.	<i>Planks/phattas 500 Nos. @ Rs.0.50 per day each</i>	<i>Rs.250.00</i>
6.	<i>Props 1500 Nos. @Rs.0.50 per day</i>	<i>Rs.750.00</i>
	<i>Total:</i>	<i>Rs.3000.00 p.d.</i>
	<i>For 30 days = 30 x 3000.00</i>	<i>Rs.90000.00</i>
	<i>Add (A) + (B) = Rs.1,63,500.00 Say</i>	<i>Rs.1,63,000.00</i>
	<i>For 12 months & 27 days = 12.9 x 1,63,000 =</i>	<i>Rs.21,02,700.00</i>
	<i>Mitigation @ 50% =</i>	<i>Rs.10,50,000.00</i>
	<i>However, the claim is restricted to Rs.10,00,000.00</i>	

24. No documents have been filed on record to show that actual salaries were in fact disbursed during this period and rental for machinery was paid.

25. On the other hand, Union of India, in its response before the Ld. Arbitrator, relied upon various documents - Ex.R-3, R-4, R-5, R-7, R-8, R-9, R-10, R-11 and R-14. In letter dated 13th December, 2002 exhibited as Ex.R-4, the department informed the contractor as under:

“The work was inspected on 9.12.02. The progress of work is very slow. Cement is not available in the store. There is shortage of steel of various diameters. The quantity of shuttering available with you at site is very much less than required to complete work timely. There is no hindrance from department side. You are requested to make proper arrangement of men and materials to complete work timely otherwise action as per terms & conditions of agreement will be taken.”

26. In Ex.R-3 dated 17th December, 2002, the department clearly stated
O.M.P. 728/2009

that there is no hindrance from its side. Again in Ex.R-5 dated 21st January 2003, the department has complained that the progress of construction was very slow. The said letter reads as under:

“TO
OM Construction Company,
50, Chatterpur New Delhi,
Name of work:- C/o Govt. Sr. Sec. School at
Anand Vihar Delhi.
Agmt No.:- 13/EE/DC&LC/DA/2001-02

The work has been inspected on 20.01.03. It has been observed that progress of work is slow particularly for the last one month. There was shortage of steel and cement in the period. One raft for which lean concrete was laid more than fortnight ago, has not been casted yet. The delay is entirely on your part. You had promised to complete the structure of part-I, by 31.01.03 by only three slabs have been casted and multipurpose hall slab also remains. The progress of work has been review by Hon'ble Minister of Education on 20.01.03 and he expressed dissatisfaction over slow progress at work. Part-I block for which there was no hinderance has to be completed in all respect along with development works by 18.04.03 i.e. date of completion as stipulated in the agreement. It must be ensured that whole work is completed by 15.06.03 otherwise action for delayed completion will be taken as per agreement condition.

*Executive Engineer,
DC & LC Project Div.,
Karkardooma Court,
Shahdara, Delhi ”*

27. Similar is the position in Ex.R-7 dated 26th February, 2003 which reads as under:

“TO

OM Construction Company,

50, Chatterpur New Delhi,

Name of work:- C/o Govt. Sr. Sec. School at
Anand Vihar Delhi.

Agmt No.:- 13/EE/DC&LC/DA/2001-02.

The above work has been inspected by the undersigned on 13.02.03 along with Superintending Engineer. It has been observed that the work is slow compared to quantum of work to be completed by 18.04.03 for part-I and by 15.06.03 for part-II. The part-II work has not been taken up even though there is no hinderance. The structural & architectural drawings are available. You had assured that work will be completed as above.

Now on inspecting the work on 25.02.03, along with Superintending Engineer, it has been noticed that progress of work is still very slow. Shuttering for ground floor roof slab has not been started. One part of raft is yet to be casted in part-II. You are requested to increase the labour and arrange for additional shuttering to start shuttering for part-II, G.F. slab. The delay, if any, in completion of the work, as per the dates given above, shall be on your part and action will taken as for term and conditions of the agreement against you. You are also requested to attend to defects pointed by SE during the inspections and submits samples of fittings and other materials to be used on the work for approval. The pointing on terracotta tiles be done with cement mortar 1:2 (1Cement : 2line sand) along with necessary pigment with 6mm deep grooves.

Executive Engineer,
DC & LC Project Div.,
Karkardooma Court,
Shahdara, Delhi ”

28. In Ex.R-8 dated 2nd June, 2003, the department again emphasizes on the fact that the delay is completely due to the Contractor and considering

that the school is supposed to open after summer vacation on 1st July, 2003, students would be facing hardships. These facts are reiterated in Ex.R-10 dated 30th June, 2003 wherein the various defect are also pointed out by the department.

29. Similar are the contents of Ex.R-11 dated 2nd July, 2004 and Ex.R-14 dated 9th May, 2002. In the letter exhibited as R-11, the department informs the Contractor as under:

*“To,
M/s Om Construction Co.,
50, Chatterpur,
New Delhi. 110030.*

***Sub:- C/o Govt. Sr. Sec. School at Anand Vihar,
Delhi***

Agreement No. 13/EE/DC & LC/DA/2001-02

Ref:- Your Letter No. Nil dt. 17.05.04

With reference to your above mentioned letter, it is informed that many defects are still pending which be rectified at early possible. It is not accepted that rates were low at time of tendering and high at time of execution. You have not submitted any documentary evidence in support of your claim. Please submit all your documents so that the case if any could be prepared and submitted to competent authority for sanction.

It is after thought and time barred point to raise issue of claiming market rate since the items were completed long back when the rates were low compared to your quoted rates. No rates or documentary evident or any claim was raised at time of deviation of quantities as per terms and conditions of the agreement. Therefore any revision of rates can not be considered at this time.

Sd/-

*Executive Engineer
PWD, DC & LC Project Div.,
Karkardooma Court Complex, Delhi”*

30. The Ld. Arbitrator however fails to consider any of the letters written by the department which were on record but merely relies on Ex.C-2, C-3, C-4 and C-5. Further, the contractor made an application for extension of time for a total period of 201 days and in the said extension application, the contractor stated as under:

“I will not claim anything extra for this delay”

31. In response to this, the Contractor stated in its rejoinder as under:

“2.03..... It is further stated that the certificate as obtained by the respondents on the E.O.T, part -I that “I will not claim any thing extra for the delay”. This statement was obtained by the respondent from the claimant under duress and same is not willful undertaking of claimant.”

32. None of these documents finds a mention in the award. The Ld. Arbitrator simply concludes that the notation in the application for extension cannot be considered as consent with free will. There is no basis for such a conclusion by the Ld. Arbitrator.

33. In order for the Contractor to be entitled to the claim of idle machinery, staff, etc. it had to prove that the delay was only attributable to the department and was not attributable to the Contractor. The Department has repeatedly expressed anguish over the fact that the project involved a school and delay was hurting the interest of students. There may have been some delays by the Department, but there were huge delays even by the Contractor. Thus, the correspondence actually establishes that both parties were liable for the delay, as pleaded by the UOI. The Ld. Arbitrator holds that the reasons for delay are tilted heavily towards the department, without giving any reasons. Moreover, there was no evidence to show that the actual

payments were made to the employees and money was disbursed for renting of machinery. In one of the letters, the department actually states that some of the labour was utilized in some other project. This is clear from Ex. R-9 where the department informed the contractor as under:

“4. The shuttering and placing of reinforcement in part-II started after a gap and workers of electrical contractor were idle for the period and were shifted to other work. There was no hold up of casting for such a long period mentioned in your letter.”

The award on this claim is not sustainable as there are no reasons and the conclusion that the Department was alone responsible for the delay is contrary to the record. Further, no evidence was led by the Contractor to show that there was any coercion by the Department in the giving of the undertaking by the Contractor. There was also no evidence to establish that any payments were actually made towards idle labour and machinery. The award under Claim 7 is, accordingly, set aside.

B. Claim No.8 – Claim for a sum of Rs.12,00,000/- on account of rise in prices of labour, materials etc. for the work done beyond stipulated date of completion

34. This is a claim for escalation. The basis of this claim is that the stipulated date of completion was 18th April, 2003 and the work was actually completed on 15th May, 2004. The only defence of the Union of India is that the hindrance caused by the department is about six months and that there was no loss suffered by the Contractor, during such period. Both parties are not relying on clause 10CC of the General Conditions of Contract, though the same is contained in the subject contract. On the basis of the claims of the Contractor, the Ld. Arbitrator awarded a sum of Rs.9 lakhs under this

claim. The claim of the Contractor was duly supported with various notifications by the CPWD and the indices which were relied upon. Even in the objection petition, Union of India states that escalation under clause 10CC is not applicable as per the agreement. There is sufficient reason for grant of this claim and the award of Rs.9 lakhs under this claim, towards escalation, is upheld.

C. Claim No.9 – Claim for a sum of Rs.15,00,000/- on account of loss of profitability due to prolongation of contract on account of non-fulfillment of contractual obligation by the Department

35. This claim is a claim for loss of profits. The submission of the Contractor is that it is entitled to a sum of Rs.15 lakhs “*due to prolongation of the contract*” on account of delay by Union of India. Under claim no.7, herein above, the Court has arrived at a conclusion that the delay was attributable to both parties. The mere execution of the work beyond the stipulated date of completion cannot be a ground to award loss of profits inasmuch as unless and until the delay is attributable wholly and solely on the department, especially when it is seen that both parties are liable for the delay, the Contractor cannot be awarded loss of profits. Moreover, the statement of claim proceeds on the presumption that profits are liable to be granted for the entire period of prolongation i.e. 12 months and 27 days i.e. from 18th April, 2003 to 15th May, 2004. The various exhibits and letters filed on record by the Respondent show that the contractor was also substantially responsible for the delay. The Ld. Arbitrator has held as under:

“The fact of prolongation of the Contract is admitted by both the parties. The reasons for the delays are also undisputed in as much as the Employer has granted extension of time with a symbolic compensation and

further the delays are heavily tilted towards the Employer as discussed in more details in the preceding paragraphs of this award.”

36. The Ld. Arbitrator thereafter observed as under:

“The argument put forth by the Employer is not valid as it is an established fact that for execution of a work the Contractor provides certain overheads for the period of the work. If the construction period extends the overheads also escalate. The matter has been examined by Courts and there are several judgments in this regard.”

37. A perusal of the above paragraph clearly shows that there is enormous confusion in the mind of the Ld. Arbitrator in respect of overheads, escalation and loss of profits. The Ld. Arbitrator has straight away applied the Hudson formula to grant profits. There is no discussion as to how much of the period of delay is attributable to the Contractor and what was the period attributable to the department.

38. Moreover, a question arises as to whether claims for idle machinery/labour, escalation and loss of profits could all be granted together for the same period. The contractor has relied upon the Division Bench judgment of this Court in ***D.D.A. v. P.C. Sharma DB (supra)***. The observation of the Division Bench therein is as under:

“In our view, the aforesaid form three distinct heads of damages that a contractor would be legally entitled to claim, subject, of course, to the same being duly established, where the work gets prolonged due to the fault of the employer and not the contractor.”

The Division Bench, even in this case holds that a Contractor would be legally entitled to these claims only if the same is duly established and work

is prolonged due to only default of the employer and not because of the contractor's delay.

39. Loss of profits is claimed in the form of damages under Section 73 of the Contract Act. In *Union of India v. Jain Associates and Ors. (1994) 4SCC 665*, the Supreme Court was dealing with a case where a Contractor had raised claims due to the delay of the department and the High Court in the said case had held that the two claims i.e. claim for delay, laches, negligence and default and the claim for loss of profits were overlapping. The High Court had restricted the amounts under the claims but the Supreme Court had set aside the complete award itself. In *P.C. Sharma & Anr. v. DDA 2006 (88) DRJ 171*, again a Ld. Single Judge of this Court was considering the question of award of escalation under clause 10CC and it was held that separate claims can be raised for idle machinery and loss of profits.

40. Though, these three heads of idle machinery/labour, escalation and loss of profits are distinct and separate heads, the award of damages under these three heads requires evidence and has to be established by the Contractor. The Arbitrator/Court has to consider as to whether damages are liable to be awarded under all the three heads and whether there is evidence on record to support such an award. There cannot merely be an *ipse dixit* of calculations without any foundational events and documents. The Contractor in the present case has simply relied upon documents Ex. C-2 to C-5. In rejoinder though, despite the fact that the Union of India had highlighted Ex.R-3 to R-11, R-14 in their Counter Statement of Facts, there is no response to the same by the Contractor. This is indeed strange inasmuch as the Contractor had a duty to deal with these documents and to give a

response as to why the stand of the Union of India in these letters was wrong. The Contractor does not even make an iota of effort in the rejoinder to deal with these letters. Ex. R-14 dated 9th May, 2002 which is contemporaneous with Ex. C-2 to C-5, clearly states the progress of the work by the Contractor was very slow and there was no hindrance from the department's side. The relevant portion of the said letter reads as under:

*"To
M/s Om Construction Co.
50. Chhattarpur
New Delhi*

*Name of Work: C/o Govt. Sr. Sec. School at Anand
Vihar, Delhi.
Agmt. No. : 13/EE/DC&LC/GCD/2001-02*

**Regarding the above work, it is stated that 50%
time has been spent up but the progress of work is
only 25%. The progress of work is very slow, while
there is no hindrance on department side except the
dismantling of eight rooms.**

*The programme chart has not been submitted yet
today. So take action firstly so that work can be
completed within time.*

....."

41. There can be no justification for the Ld. Arbitrator to rely on the Contractor's letters and to completely ignore the department's letters. On a perusal of the arbitral record, it is clear that the Ld. Arbitrator has severely erred in granting of loss of profits in the present case as the contractor has failed to establish either factually or otherwise the basis for grant of any profits. Loss of profits requires evidence and the same cannot be granted until factum of loss is proved. This is settled in the decision of the Supreme

Court in *Kailash Nath (supra)*. The relevant portions of the said judgments are extracted herein below:

“Kailash Nath Associates v. DDA (2015) 4 SCC 136

43. *On a conspectus of the above authorities, the law on compensation for breach of contract Under Section 74 can be stated to be as follows:*

1. *Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.*
2. *Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.*
3. *Since Section 74 awards reasonable compensation for damage or loss, caused by a breach of contract, damage or loss caused is a sine qua non for applicability of the Section.*
4. *The Section applies whether a person is a Plaintiff or a Defendant in a suit.*
5. *The sum spoken of may already be paid or payable in future.*
6. *The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or*

loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss can be awarded.

7. *Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.*

This view has recently been reiterated by the Supreme Court in ***MTNL. v. TATA Communications (supra)***.

42. Further, the Bombay High Court, recently in ***Essar Procurement Services (supra)***, on the question of giving reasons for passing of award and the distinction between a claim for overheads and loss of profits held as under:

“106. In my view the impugned award rendered by the arbitral tribunal allowing the claim for overhead merely on the basis of the Hudson Formula and not based on any evidence is contrary to the principles of law laid down by this court in case of Edifice Developers and Project Engineers Ltd. (supra) and shows patent illegality and is in conflict with public policy.

107. Supreme Court in case of Kailash Nath Associates (supra) has laid down the principles to be followed by the court or by the arbitrator while considering the claim for compensation under sections 73 and 74 of the Contract Act, 1872. It is held that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is held that compensation can only be given for damage or loss suffered. If damage or loss is not suffered, the law does not provide for a windfall.

108. This court in case of *Ajay Singh (Sunny Deol)* (supra) has after adverting to the judgment of Supreme Court in case of *Kailash Nath Associates* (supra), judgment of this court in case of *Maharashtra State Electricity Board v. Sterlite Industries (India) Ltd.*, MANU/MH/0300/2000 : 2000(3) Bom.C.R. 347, judgment of Division Bench of this court in case of *Edifice Developers and Project Engineers Ltd.* (supra) has held that if a party has not suffered any losses, even if the respondent has committed breaches, such party cannot be awarded any compensation under section 73 of the Contract Act. When loss in terms of money is prayed, the party claiming compensation has to prove such loss or damages suffered by him. It is held that unless and until the damages or loss was actually suffered, damages cannot be awarded, otherwise section 73 of the Contract Act would become nugatory and the party would be penalised though the other party suffered no loss. In my view the party who has not suffered any loss or damages cannot be awarded any compensation or damages, otherwise it would amount to unjust enrichment in favour of such party.

109. In my view, the principles laid down by the Supreme Court in case of *McDermott International INC.* (supra), in case of *Kailash Nath Associates* (supra) and judgment of this court in case of *Ajay Singh (Sunny Deol)* (supra) squarely applies to the facts of this case. The impugned award rendered by the arbitral tribunal is contrary to and in violation of the principles of law laid down by the Supreme Court and this court and thus deserves to be set aside on that ground alone.

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.

114. A perusal of the impugned award indicates that though the petitioner had raised an objection that the claim for overheads and loss of profit were overlapping with each other, the arbitral tribunal has not considered this plea of the petitioner in the impugned award at all. In my view, the profit can be earned only if expenditure on various heads including overhead are incurred. The learned arbitrator thus could not have allowed both the claims i.e. claim for loss of overhead and also claim for loss of profit simultaneously which were overlapping with each other. Both the claims thus deserves to be set aside on this ground also.”

43. Under these circumstances, the award of loss of profits under this claim is set aside.

D. Claim no.10 – Claim of interest @18% p.a. on all above claims with effect from its due date till actual date of payment

44. Interest has been awarded @ 9% by the Ld. Arbitrator from date of commencement of arbitration to date of payment.

45. The total awarded sum, as per each claim, and subject to the above modification is as under:

Claim no.	Claim	Amount (in Rs.)
1.	For a sum of Rs.50,000 on account of amount withheld illegally in various bills	Claim was settled and amounts already received

2.	For a sum of Rs.61,500/- on account of amount illegally deducted on the plea of deduction/reduction items of the bills	
	Sub-item 1 – Deduction for not providing cement concrete	Nil award
	Sub-item 2 – Deduction in agreement item No. 3.04(d) on account of quantity deviated beyond agreement quantity	39,747.85/-
	Sub-item 3 – Deduction in rates for the exceeding the agreement quantity against item no.7.08	18,601.38/-
	Sub-item 4 – Deduction on account of anodized aluminium butt hinges in the agreement item no. 5.01	Nil award
3.	For a sum of Rs.10,95,000/- under clause 12A of the Agreement for the quantities deviated beyond the deviation limit	10,95,000/-
4.	For a sum of Rs.15,05,000/- towards payment due to change in price of cement and/or steel reinforcement bars under Clause 10CA	Nil Award
5.	For a sum of Rs.3,75,000/- towards works done but not paid, short paid, not measured etc.	Nil Award
6.	For a sum of Rs.1,50,000/- on account of expenditure incurred on all columns shuttering procured.	Nil Award
7.	For a sum of Rs. 10,00,000 on account of salary of staff, establishment and underutilization of T&P due to prolongation of contract beyond stipulated date of completion	Awarded sum is set aside.
8.	For a sum of Rs.12,00,000 on account of rise in prices of labour, materials etc., for the work done beyond stipulated date of completion	9,00,000/- [The award is upheld]
9.	For a sum of Rs.15,00,000/- on account of loss of profitability due to prolongation of	Awarded sum is set aside.

	contract on account of non-fulfilment of contractual obligation by the Department	
	TOTAL PRINCIPAL AMOUNT PAYABLE	20,53,349.23

46. The Ld. Arbitrator has barely given reasons in the Award. Further, the claims raised by the Contractor in the arbitration proceedings, required proper adjudication. According interest is awarded on the sum of Rs.20,53,349.23/- @ 9% simple interest per annum, from the date of award till date of payment.

47. The OMP stands disposed of in the above terms. All pending applications also stand disposed of.

**PRATHIBA M. SINGH, J.
JUDGE**

JULY 2, 2019/Rahul