



O.P.No.501 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.12.2021

C O R A M

THE HONOURABLE Mr. JUSTICE SENTHILKUMAR RAMAMOORTHY

O.P.No.501 of 2017

Union of India rep by

1.The Chief Engineer Chennai Zone,
Island Grounds,
Chennai - 600 009.

...Petitioner/Respondent No.1

2.The Garrison Engineer (I),
Laxmi Tek Camp,
Belgaum - 590 009.

...Petitioner/Respondent No.2

-Vs.-

M/s.Amulya Constructions
rep.by its Partner,
No.567, 2nd Cross, 2nd Block,
R.T. Nagar,
Bangalore - 560 032.

... Respondent/Claimant

Prayer: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the Award dated 15.12.2016 made in Arbitration C.A.No.CECZ/BEL.24 of 2010-11 and to direct the respondent to pay costs.



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For Petitioners : Mr.R.Sankaranarayanan
Additional Solicitor General
assisted by
Mr.Venkataswamy Babu

For Respondent : Mr.R. Yashod Vardhan
Senior Counsel
for M/s.Rajinish Pathiyil

ORDER

The petitioners assail an arbitral award dated 15.12.2016 (the Award). In the arbitral proceedings, the petitioners herein were the respondents and the respondent herein was the claimant.

2. A contract was entered into between the first petitioner and the respondent on 07.03.2011 for the construction of residential quarters for the employees of the petitioners (the Contract). The term of Contract was twenty months for completion of the two phases thereof. The first petitioner was under an obligation to provide the site for construction after clearing the trees standing thereon. On account of the fact that the first



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petitioner was unable to provide a vacant site to the respondent until 29.10.2012 (Exhibit C-41) and other reasons such as failure to provide electricity supply, the respondent issued a notice dated 19.12.2012(Exhibit C-50) informing the petitioners that it had mobilized its men and material and that the said resources were idling at site. On such basis, a claim for escalation was made. In addition, the petitioners were put on notice that the respondent is entitled to overhead charges and loss of profit. The petitioners were also informed that the Contract would stand rescinded if such escalation is not agreed to by the petitioner. Pursuant thereto, it appears that the petitioners also issued a termination notice dated 23.01.2013. In these facts and circumstances, the respondent initiated arbitration proceedings. In such arbitration, the respondent claimed amounts due and payable towards the final bill. In addition, reimbursement claims were made as well as a claim for loss of profit. In oral arguments, the petitioners confined the challenge to the loss of profit claim and the Award in relation thereto. The claim for loss of profit was for a sum of



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Rs.2,01,92,002/-. As against the said claim, the Arbitral Tribunal awarded a sum of Rs.66,71,000/-.

3. The petitioners assail this part of the Award on the principal ground that a loss of profit claim is a claim for unliquidated damages. Such claim is required to be proved by adducing evidence. The petitioners referred to paragraph 105 of the Award and contended on such basis that it had requested the Arbitral Tribunal to direct the respondent/Contractor to submit the audited income tax returns for the previous ten years so as to ascertain the profit percentage derived by the Contractor from previous projects executed by it. In spite of such specific request, it is stated that the Arbitral Tribunal did not direct the respondent to produce such evidence. The petitioners also referred to paragraph 110 of the Award and pointed out that there was no basis at all to the conclusion in the Award that the respondent is entitled to loss of profit at 5% of the balance value of the Contract.



4. In support of this contention, the petitioners relied upon the following judgments:

(i) *Bharat Coking Coal Limited v. L.K. Ahuja [(2014) 5 Supreme Court Cases 109] (Bharat Coking Coal)*, wherein, at paragraph 24, the Hon'ble Supreme Court held that a person claiming loss of profit should establish that he could have utilised the resources deployed on the contract on some other business through which he could have earned the profit claimed.

(ii) *MSK Projects India (JV) Limited v. State of Rajasthan and another [(2011) 10 Supreme Court Cases 573] (MSK Projects)*, wherein, at paragraphs 38 and 39, the Hon'ble Supreme Court referred to the meaning of the expression “reimbursement” and, thereafter, at paragraphs 45 to 47, rejected the claim on the basis that a person cannot be permitted to claim damages in respect of amounts not spent in terms of the contract.



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(iii) *Oil and Natural Gas Corporation v. Off-Shore*

Enterprises Inc. [(2011) 14 Supreme Court Cases 147](Off-shore

Enterprises), wherein, at paragraphs 16 and 20, the Hon'ble Supreme Court rejected a claim for cost of repair work based on estimates which were revised upwards from time to time.

(iv) *Kailash Nath Associates v. Delhi Development Authority*

and another [(2015) 4 Supreme Court Cases 136], wherein the

Hon'ble Supreme Court considered the law on the award of damages and held that even for a claim for liquidated damages, a person aggrieved is required to prove actual loss unless actual loss would be impossible or difficult to prove in view of the nature of the contract.

5. These contentions were refuted by the respondent. At the outset, the respondent emphasised that the Arbitral Tribunal recorded the categorical finding that the petitioners had committed a fundamental breach of Contract. On such basis, it was contended



that the Arbitral Tribunal accepted the plea of the respondent that its rescission was valid. The respondent referred to paragraph 107 of the Award and pointed out that the Arbitral Tribunal recorded therein that every business is undertaken with a view to receive profit. In addition, the respondent pointed out that the Arbitral Tribunal took note of the fact that Condition 62(G) of the relevant General Conditions of Contract provided for the Contractor's profit margin at 15% of the value of the Contract. The respondent also adverted to the notice dated 19.12.2012 from the respondent to the petitioners. By referring to paragraphs 12 and III (a) and (b) of such notice, the respondent contended that it had established that its men and equipments were mobilized in order to perform the Contract and that it had incurred substantial losses on such account.

6. In this factual context, the respondent contended that the award of loss of profit at 5% of the value of the balance work does not call for interference under Section 34 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act). The respondent



relied upon the judgment of the Hon'ble Supreme Court in *Maharashtra State Electricity Distribution Company Limited v. Datar Switchgear Limited and others [(2018) 3 Supreme Court Cases 133]*. With specific reference to paragraphs 51 and 67 thereof, the respondent contended that a party which was held to have been always ready and willing to perform its contractual obligations but was prevented by the counter party from doing so is entitled to damages. The respondent also distinguished the judgments that were relied upon by the petitioners. With reference to the judgment in *Bharat Coking Coal*, the respondent submitted that the conclusion in paragraph 24 thereof turned on the fact that the prolongation claim and the claim for escalation had been paid in that case. Therefore, the Hon'ble Supreme Court rejected the claim of loss of profit at 15%. Similarly, with reference to the judgment in *MSK Projects*, the respondent pointed out that the Hon'ble Supreme Court rejected the claim because the contract had not been performed by the private appellant therein in respect of the second phase. As regards the judgment in *Off-Shore*



Enterprises, the respondent pointed out that the claim therein pertained to repair work. Given the nature of the claim, the actual expenditure for repair work could and should have been proved through hard evidence. Therefore, the respondent concluded that all the above judgments are distinguishable.

7. Upon considering the rival submissions, it should be noticed at the outset that the Award is challenged only insofar as the decision on the claim for loss of profit is concerned. A claim for loss of profit is distinguishable from other types of claim which are typically made in construction contract disputes by a contractor. Typically, claims are made for: payment for work done, including additional work; disruption (otherwise called idling); price variation (otherwise called escalation); prolongation (otherwise called extended stay compensation); and loss of profit. Other than a loss of profit claim, as regards all the other types of claim outlined above, it is possible for a claimant to prove loss by adducing evidence of actual loss. A qualification should be made,



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however, in respect of the portion of the prolongation claim towards head office overheads because the overall head office overheads should be apportioned across all the projects of the contractor and, therefore, various formulae are adopted. A claim for loss of profit, by contrast, falls into a distinct category. Such claim is made towards profit which was not earned but which could possibly have been earned but for the termination or breach by the employer. Therefore, such claim cannot be proved by showing actual loss of profit. The merits of this petition should be considered by bearing the nature of a loss of profit claim in mind.

8. The respondent adverted to the notice dated 19.12.2012 and, in particular, paragraph 12 thereof to defend the Award on this aspect. In such paragraph, the respondent categorically stated that it had mobilized its men and material so as to perform the Contract. Such men and material appear to have been deployed for about 19 months of the contractual term of twenty months. A claim was made in such communication towards overhead charges and loss of



profit. Ideally, in such situation, a claim towards non-utilisation of men and material on account of prevention by the employer could have been made as a disruption claim. However, except for claiming reimbursement for tools and infrastructure, which were retained by the petitioner-employer, no disruption claim was made. Equally, no claim for price variation or escalation was made before the Arbitral Tribunal. The admitted position is that the Contract was initially rescinded by the respondent herein and, thereafter, purportedly terminated by the petitioner.

9. The findings of the Arbitral Tribunal on loss of profit should be considered next against this backdrop. The Arbitral Tribunal recorded that the respondent/claimant therein was ready and willing to perform its contractual obligations. The Arbitral Tribunal also recorded that the petitioners herein did not perform the prior contractual obligation of, *inter alia*, providing the vacant site. Thus, the first condition for any claim for damages, namely, breach of contract was undoubtedly established. The question of



proof of damages remains to be examined. At paragraph 107, the Arbitral Tribunal recorded that every business is carried on in order to gain profit there from. Thereafter, significantly, the Arbitral Tribunal noticed that Condition 62(G) of the General Conditions of Contract provides for Contractor's profit at 15% of the value of the Contract. Then, after noticing the judgment of the Hon'ble Supreme Court in **Brij Paul Singh** , at paragraph 110, the Arbitral Tribunal awarded loss of profit at 5% of the balance value of work by taking into account the level of competition in the market.

10. In a loss of profit claim, the best evidence that the respondent could have been adduced would have been by producing its bid document indicating the profit margin which was assumed therein or by adducing evidence of other similar contracts awarded to the respondent or any other contractor. Even such assumption could turn out to be completely off the mark, especially in a fixed price contract, due to price escalation and its impact on margins. Even as regards other contracts, no two contracts are



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identical and actual profit margins tend to vary as many variables impact such margins. The petitioners contended that the Arbitral Tribunal should have called for the income tax returns of the respondent. Such income tax returns would, in all likelihood, have not indicated project-specific profit margins although an average profit margin could, arguably, have been computed. As set out at the inception of the analysis, unlike in the case of other claims, no proof of actual loss of profit could have been adduced. Another significant aspect is that the Arbitral Tribunal awarded 5%, which is lower than the typical 10%-15% profit margin factored in construction contracts as judicially noticed not only in *Brij Paul Singh* but also *Government of Andhra Pradesh and others v. V.Satyam Rao, AIR 1996 AP 288 (DB)*, and *The Superintending Engineer, T.N.U.D.P., Madras Circle v. A.V.Rangaraju AIR 1994 Mad 217*. As correctly pointed out by the respondent, *Bharat Coking Coal* is distinguishable. In this context and bearing in mind that the Arbitral Tribunal took note of Condition 62(G) of the General Conditions of Contract, I am of the view that the



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Award cannot be said to be either against public policy or patently illegal so as to warrant interference under Section 34 of the Arbitration Act.

11. For reasons set out above, O.P.No.501 of 2017 is dismissed without any order as to costs.

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SENTHILKUMAR RAMAMOORTHY, J.

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