

IN THE HIGH COURT OF ORISSA AT CUTTACK

**ARBA No.20 of 2012
(Through hybrid mode)**

State of Odisha and others *Appellants*

Mr. Tarun Patnaik, ASC

-versus-

Rani Construction Private Ltd. *Respondent*

Mr. S. Rajan, Advocate

CORAM: JUSTICE ARINDAM SINHA

**ORDER
27.09.2022**

**Order No.
22.**

1. The appeal was moved on 20th September, 2022. On behalf of appellant it was submitted that, award dated 11th December, 2005 was challenged in the Court below. Said Court by judgment dated 15th December, 2011 rejected the challenge. Therefore, the appeal.
2. Mr. Patnaik, learned advocate, Additional Standing Counsel appears on behalf of appellant and draws attention to paragraph 11 and its sub-paragraphs dealing with claim no.1 on loss of overheads. He submits, there is no dispute that there was delay of 45 months in completing the project, not attributable to respondent. He places sub-paragraph 11.2 and submits, no evidence was laid for purpose of the arbitrator to ascertain the loss, to award general damages on account of loss of overheads.

3. He demonstrates from the award, claim no.1 was for loss of overheads and amount awarded Rs.57,13,322/-. He submits, this was done simply on applying Hudson formula. On top of that claim no.3 was for idle charges, also awarded at Rs.12,40,477/-. He submits, both the claims were in nature of damages and by awarding them the arbitrator went beyond contract clause-44. On both claims, the contractor had not given early warning by raising them in terms of clause-32. No evidence was laid, particularly in respect of claim for loss of overheads especially where, he reiterates, idle charges claim had also been awarded.

4. He relies on view taken by a learned Single Judge in the High Court of Himachal Pradesh on **decision dated 23rd August, 2019 in Arbitration Case no.71 of 2017 (Tarun Mahindroo v. H.P Power Corporation Limited)**, paragraph 5 (Manupatra print). A passage therefrom is extracted and reproduced below.

“... .. Hon’ble Apex Court in MANU/SC/8177/2006 : (2006) 11 SCC 181 titled as Mcdermot International Inc. v. Burn Standard Co. Ltd. and others, relied upon by learned counsel for the claimant, has not held that in a case of instant nature, without there being any proof of any actual damage having been caused to the claimant/contractor, in absence of any oral or documentary evidence in this regard, he has to be held entitled to 15% of the contracted amount on the basis of

Hudson formula.”

He also relies on view taken in **decision dated 7th September, 1999** of a Division Bench in the High Court of Madhya Pradesh in **C.R. no.2136 of 1995(J) (Saluja Construction Co. vs. State of M.P.)**. A passage in page 5 of Manupatra Print is extracted and reproduced below.

“So far as this claim by the contractor is concerned no separate amount for loss of profit was claimed. As is clear from Schedule-A of the Claim Petition consolidated amount restricted to Rs.27.72 lacs was claimed on a formula jointly for infructuous ‘overhead expenses’ and ‘loss of profit’. The question before us is whether in the absence of any supporting evidence for such a claim can it be awarded only on a basis of a formula or fixed percentage. In the case of M/s Recando Ltd. (supra) by examining the legal question this Court expressed a view that the contractor is expected to lead evidence of estimated loss of profit and if he fails to do so, even if the department is found to be in breach, the contractor would be entitled to only nominal damages. The claim for loss of profit and overhead expenses may arise in different contingencies. There may be a case of fundamental breach of contract on the part of department at the very initial stage of the contract. The breach may be committed by the department in the midst of a contract and in other cases it may be committed at the fag end of the contract. The other contingency may be whether there is mere prolongation of the period of

*contract and the contractor is allowed to complete the work although in the extended period. In such cases the quantum of overhead expenses and loss of profit would vary. All kinds of such claims cannot be awarded on a fixed percentage. On such claim the contractor is not expected to prove the actual loss towards profit. **It can, however, prove actual loss of infructuous overheads by producing its accounts and leading other evidence.** So far as loss of profit is concerned, the contractor can certainly place material to show on what basis he estimated a particular percentage of profit and was disabled from gaining it. Evidence only with regard to the anticipated loss of profits is expected from the contractor **which may be in the shape of its account books calculations made in the office before submitting its tender** and income tax assessments made in similar works contract of the Petitioner or others”*

(Emphasis supplied)

5. Mr. Rajan, learned advocate appears on behalf of respondent contractor. He submits, appellants’ contention in appeal appears to be directed at only claim no.1 on loss of overheads, awarded. He refers to paragraph 11 in the award, dealing with the claim under several subparagraphs therein. He stresses on the arbitrator having found there was delay of 45 months in completing the project and the delay was caused by hindrance not attributable to his client. In between he refers to the statement of claim, regarding loss of overheads. He points out,

the statement referred to audited balance sheets of previous years of his client, for overhead percentage to be realized within original contract period. He submits, the audited balance sheets were tendered in the reference to become exhibit-C70. Clear notice of case relying on Hudson Building and Engineering Contracts for the formula to quantify loss of overheads in the extended period, was stated in the statement. He adds, the balance sheets were tendered in evidence without objection.

6. Appellant in the counter statement dealt with this claim in two sentences. The two sentences are extracted from the counter statement and reproduced below.

“The Learned Arbitrator should reject the claim in accordance with clause 44.2 of conditions of contract. The details have also been mentioned in counter statement.”

7. He hands up extract of clause 44 to demonstrate that, inter alia, clauses (a),(f) and (g) thereunder undisputedly were compensation events occurred on extension of time to complete the work. Therefore, compensation was payable. He submits, loss of overhead is claimed in nature of damages and can be measured by applying the formula. He submits further, claim for idle charges has no bearing on claim for loss of overheads inasmuch as claim for idle charges is on machinery and

equipment deployed at site and the claim was duly quantified by the arbitrator on looking into, inter alia, capital expenditure, depreciation and running hours.

8. He relies on judgment of the Supreme Court in **Associate Builders v. Delhi Development Authority**, reported in (2015) 3 SCC 49. He submits, said Court's earlier judgment in **Mcdermott International Inc. v. Burn Standard Co. Ltd.**, reported in (2006) 11 SCC 181 was referred to. Several paragraphs from **Mcdermott** (supra) were extracted and reproduced in the judgment, of which he relies on paragraph 106, reproduced below.

"106. We do not intend to delve deep into the matter as it is an accepted position that different formulae can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the arbitrator."

He submits, though his client had claimed at 25% of contract value, the arbitrator took 12.5% in calculating loss of overheads per Hudson formula. It is a possible view and there should not be interference in appeal under section 37, Arbitration and Conciliation Act, 1996, scope of which is limited to grounds in section 34.

9. On submissions made by the parties, there appears to be

audited balance sheets of respondent, tendered in evidence in the reference. No dispute was raised regarding such tender being without objection. Hudson formula was applied by the arbitrator in calculating this claim, taking into account audited balance sheets of previous years of respondent. The arbitrator reduced percentage taken of contract value, to 12.5. In **Saluja Construction Co.**(supra) the Division Bench expressed view that actual loss of overheads could be proved by producing accounts and leading other evidence. The contractor can certainly place materials to show, on what basis the estimate was made. Evidence may be in the shape of account books and calculation made in the office before submitting tender.

10. The learned Single Judge in **Tarun Mahindroo** (supra) took view that the Supreme Court in **Medermott** (supra) had not held that in a case of the nature before the learned Single Judge, without there being any proof any actual damage having been caused to claimant/contractor, in absence or documentary evidence in this regard, he has to be held entitled to 15% of the contracted amount on basis of Hudson formula. The nature of work was construction of bachelor accommodation at Sunder Nagar, District Mandi. Claimant before said Court did not lead either oral or documentary evidence and claimed loss of overheads on basis of Hudson formula. In those

circumstances, the view was taken.

11. The Supreme Court in **Mcdermott** (supra) said, a claim for overhead costs resulting in decrease in profit or additional management cost is a claim for damages. Once such claim was made prior to invocation, it became a dispute within meaning of provisions in the 1996 Act. While claiming damages, the amount, therefore, was not required to be quantified. Quantification of a claim is merely a matter of proof. In that case Mcdermott International Inc. (MII) had examined a witness to prove the claim. Said witness calculated increased overhead and loss of profit on basis of formula laid down in a manual, known as Emden Formula. The Court also said, Hudson formula has received judicial support as well as criticism, principally because it adopts head office overhead percentage from the contract as the factor for calculating the costs and that may bear little or no relation to the actual head office costs of the contractor.

12. Paragraph 106 in **Mcdermott** (supra) has already been extracted above. Paragraph 107 is reproduced below.

“107. If the learned Arbitrator, therefore, applied the Emden Formula in assessing the amount of damages, he cannot be said to have committed an error warranting interference by this Court.”

Paragraph 109 is also reproduced below.

“109. Sections 55 and 73 of the Indian Contract Act do not lay down the mode and manner as to how and in what manner the computation of damages or compensation has to be made. There is nothing in Indian law to show that any of the formulae adopted in other countries is prohibited in law or the same would be inconsistent with the law prevailing in India.”

13. It transpires that respondent had adduced evidence in shape of its audited balance sheets of previous years, to found its claim for loss of overheads by applying Hudson formula, taking 25% of the contract value. The balance sheets were not disputed in the reference. They do not also appear to be any dispute that loss of overheads would constitute damages for the compensation events referred to above. The arbitrator calculated damages to be awarded by applying Hudson formula taking 12.5% of the contract value over period of 45 months extension to complete it. The Supreme Court in **Mcdermott** (supra) declared the law regarding such calculation, in the facts and circumstances of the case, to fall within domain of the arbitrator. Furthermore, said Court has also declared that sections 55 and 73 in Contract Act, 1872 do not lay down mode or manner as to how or in what manner computation of damages or compensation has to be made and there is nothing in Indian law to show that any of the formulae adopted in other countries is prohibited in law or inconsistent with

Indian law.

14. For reasons aforesaid, no merit is found in the appeal.

Impugned judgment is confirmed.

15. The appeal is dismissed.

(Arindam Sinha)
Judge

Prasant

