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Arb.O.P(Com.Div)No.112 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	02.11.2022
Judgment pronounced on	15.11.2022

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THE HONOURABLE **MR.JUSTICE SENTHILKUMAR
RAMAMOORTHY**

Arb.O.P.(Com.Div)No.112 of 2021
and
Application No.2968 of 2021

1. The General Manager,
Southern Railway,
Head Quarters Office,
Park Town, Chennai-600 003.

2. The Chief Engineer/Central
Construction, Southern Railway,
Periyar E.V.High Road,
Egmore, chennai-600 008.

... Petitioners

vs.

URC Construction (P) Ltd.
No.119, Power House Road,
Erode – 638 001,Tamil Nadu, India.

... Respondent

PRAYER: Petition filed under Section 34(2)(a)(iv), (b)(ii) of the



Arb.O.P(Com.Div)No.112 of 2021

Arbitration and Conciliation Act, 1996 as amended by Amendment Act 2015, pleaded to set aside the Arbitral Award passed by the Learned Arbitrator herein dated 12.12.2019 and Order dated 21.01.2020 made in rectification petition in relation to disputes arising out of Agreement No.31/CN/2014 dated 07.04.2014 in so far as Claim Nos.3,4 costs (Claim No.5) & interest.

For Petitioners : Mr.P.T.Ramkumar, Standing Counsel
for Railways

For Respondent : Mrs.K.Aparna Devi for
M/s.P.Subba Reddy

ORDER

The petitioners assail the arbitral award dated 12.12.2019 and the order dated 21.01.2020 (collectively the Award) insofar as the Award relates to the grant of disruption/idling and loss of profit claims, in part, and costs.

2. The petitioners awarded a contract to the respondent for earth work for forming a bank between kilometres 139 – 130, Reach IIIB, in relation to the gauge conversion of Mayiladuthurai - Karaikudi section. The contract also included the construction of a limited use subway (LUS). The estimated contract price was Rs.22,14,12,498/-. Pursuant to the award of the contract to the respondent, a letter of acceptance was issued on 10.10.2013 and an



agreement was executed on 07.04.2014. The said agreement specified that work had to be completed within a period of 15 months from the date of issuance of the letter of acceptance. On or about 17.04.2014, it appears that a decision was taken to eliminate the construction of the LUS from the scope of work. This was communicated to the respondent on or about 14.01.2015. Both prior and subsequent thereto, several extensions of time were granted and work was eventually completed on 30.09.2017.

3. After completion of the work, the respondent made several monetary claims. Since the said claims could not be resolved between the parties, the dispute was referred for arbitration. Before the arbitral tribunal, the respondent submitted a statement of claims and made about 8 claims. These claims pertained to: amounts due under the final bill; release and return of the bank guarantee; hire charges in respect of machinery; loss of profit for the un-executed value of work; damages towards head office overheads for the extended contract period; damages as interest at 12% p.a. from 01.10.2017; post award interest at 15% p.a. from the date of the Award; and costs of arbitration. The petitioners herein opposed these claims



by filing a reply statement. In response to the said reply statement, a rejoinder statement was filed.

4. Upon considering the pleadings and submissions, the arbitral tribunal formulated the points for determination which are set out at paragraph 5 of the Award. Eventually, by the Award, the petitioners herein were directed to pay a sum of Rs.27,84,807/- as regards claim No.1 (Final Bill); a sum of Rs.92,00,000/- towards release and return of bank guarantee (Claim No.2); a sum of Rs.20,00,000/- towards loss of hire charges for machinery (Claim No.3); a sum of Rs.1,30,50,090/- towards loss of profit for unexecuted contract value (Claim No.4); and a sum of Rs.25,00,000/- as costs of the arbitration (Claim No.8). Further interest on the amounts set out above at the rate of 15% per annum was awarded from the date of Award until realization. Claim Nos.5 and 6 were rejected. The petitioners have challenged the Award only with regard to amounts awarded towards claim Nos.3, 4 and 8. Amounts awarded in respect of Claims 1 and 2 were paid by the petitioners.



5. Oral submissions on behalf of the petitioners were made by Mr.P.T.Ramkumar, learned standing counsel; and on behalf of the respondent by Mrs.Aparna Devi, learned counsel.

6. Mr.P.T.Ram Kumar submitted that the respondent was informed about the reduction in scope of the contract by letter dated 14.01.2015. After being informed about the deletion of the LUS from the scope of work, he submitted that the applicant applied for and obtained several extensions of time. He first referred to the request for extension on 11.04.2014 and the grant of such extension up to 30.09.2015 on condition that no increase in rates would be granted on account of such extension. He also pointed out that the extension was granted under clause 17 A (ii) of the General Conditions of Contract (GCC). He referred thereafter to subsequent requests for and grant of extensions, up to the last extension on 11.10.2017 until 31.10.2017, and contended that each extension was subject to the condition that no increase in rates would be granted on account of such extension. He also pointed out that a rider agreement was executed by and between the parties on 28.09.2016, but conceded that the said rider agreement was not placed before the arbitral tribunal.



7. In the above factual context, learned counsel submitted that the claims made by the respondent towards alleged losses on account of hire charges towards machinery and loss of profits should have been rejected by the arbitral tribunal. He thereafter proceeded to deal with the Award in respect of the three claims which are the subject of the petition. As regards the claim for idling, by drawing reference to paragraphs 53.1 to 53.6 of the statement of claim and the rejoinder, he submitted that the respondent did not provide any evidence in relation to idling of machinery but made a claim of Rs.30,50,000/-. He submitted that the arbitral tribunal dealt with this claim in paragraph 9 of the Award. After expressly recording that no details were provided by the respondent in relation to this claim, he contended that the arbitral tribunal committed a patent error in awarding a sum of Rs.20 lacs without any basis.

8. As regards the claim of Rs.1,80,00,000/- towards alleged loss of profit, he submitted that the pleadings in respect thereof are contained in the sub-paragraphs of paragraph 54 of the statement of claim. He pointed out that the claim was made by relying on Sections 73 and 74 of the Indian



Contract Act 1872 (the Contract Act). The claim of Rs.1,80,00,000/- was computed at approximately 15% of the unexecuted value of the work by adopting the original estimated contract value of Rs.22,14,12,419/-. By turning to the discussion in the Award on this issue, learned counsel submitted that the arbitral tribunal examined clauses 41 and 42 (i) of the GCC. After concluding that the contract value was reduced unilaterally by the petitioners, the arbitral tribunal enumerated several judgments. On that basis, in paragraph 11 of the Award, the arbitral tribunal concluded that the contractor is entitled to 10-15% of the contract value as loss of profit without establishing actual loss. Thus, he submitted that 10% of Rs.13,05,00,900/- [un-executed contract value] was awarded.

9. By referring to clauses 17.3 and 43.5 of the Special Conditions of Contract(SCC) and clause 17-A(ii) of the GCC, learned counsel contended that the contract prohibits the grant of loss of profits as regards the un-executed portion of work. In support of these submissions, he referred to and relied upon the following judgments:



(i) *Bharat Coking Coal Ltd. v. L.K.Ahuja (Bharat Coking Coal)* (2004) 5 SCC 109, particularly paragraph 24 thereof, for the proposition that a loss of profit claim should not be awarded in the absence of evidence that the contractor could have earned such profit.

(ii) *Ramnath International Construction (P) Ltd. v. Union of India* (2007) 2 SCC 453, particularly paragraphs 8, 9, 12 and 18. In the said judgment, the Hon'ble Supreme Court interfered with the Award on the ground that the relevant contract contained a bar against the award of damages for delay.

(iii) *Sree Kamatchi Amman Constructions v. The Divisional Railway Manager-Works* 2007 (5) CTC 17, particularly paragraphs 18, 25 and 32, for the proposition that the arbitral tribunal shall decide the dispute in accordance with the terms of the contract.

(iv) *The Chief Engineer, Southern Railway v. M/s.M.R.K.R. Rail One (J.V) in O.P.No.1072 of 2018*, particularly paragraph 13 thereof.

(v) *The Chief Engineer (Construction), Southern Railway and Another v. Sri Swarna and Co., O.P.Nos.87 and 88 of 2014, O.P.No.168 of 2015 & O.P.No.446 of 2016*, particularly paragraphs 18 and 21 thereof, for



the proposition that a disruption/idling claim should be proved by adducing evidence of disruption during the contract period for reasons attributable to the employer and by providing evidence of expenditure incurred towards labour and machinery during such period.

10. With regard to the award of a sum of Rs.25,00,000/- as costs, Mr.Ramkumar submitted that the petitioners are not challenging the same as regards the fees of the arbitral tribunal. By drawing reference to paragraph 18 of the Award, learned counsel pointed out that the arbitral tribunal referred to a bill of costs for a sum of Rs.17,75,053/- excluding arbitrator's fees and expenses, which is said to have been submitted by respondent herein. He submitted that the said bill of costs was not served on the petitioners herein and that the Award is vitiated because the said bill of costs was relied on to grant Rs.17,75,053. Therefore, he submitted that the grant of a sum of Rs.25,00,000/- as costs is impugned only with regard to the said sum of Rs.17,75,053/-.



11. Before concluding, learned counsel dealt with the defence set up by the respondent on the ground of limitation. He pointed out that a request for rectification of errors was made under Section 33 of the Arbitration and Conciliation Act 1996 (the Arbitration Act) on 07.01.2020. By order dated 21.01.2020, the arbitral tribunal concluded that the request for rectification is not warranted. The Section 34 petition was filed on 10.11.2020. If reckoned from 21.01.2020 (the date of disposal of the Section 33 petition), the period of limitation would have expired on 20.04.2020. As a result of the exclusion of the period extending from 15.03.2020 to 28.02.2022 by the orders of the Hon'ble Supreme Court, the petition filed on 10.11.2020 is within the period of limitation.

12. Mrs.Aparna Devi, learned counsel for the respondent, made submissions in response and to the contrary. She opened her submissions by focusing on limitation. By drawing reference to the purported petition under Section 33 of the Arbitration Act, she submitted that it is evident on examining the same, that it is not within the scope of Section 33. Learned counsel submitted that Section 33 is intended for the correction of clerical,



typographical or computational errors in the Award. The request made by the petitioners on 07.01.2020 was for a review of the Award as regards the grant of post-award interest at 15% p.a. By turning to the order dated 21.01.2020 of the arbitral tribunal, learned counsel pointed out that the arbitral tribunal had used the expression “purported exercise of power under Section 33(1)”. Therefore, she submitted that the arbitral tribunal concluded that it was not a petition that falls within the scope of Section 33. She further pointed out that the arbitral tribunal held that the parties admitted that the Award does not contain computational, clerical or typographical errors or any other errors of a similar nature.

13. Since the petition does not fall within the scope of Section 33 of the Arbitration Act, learned counsel submitted that the limitation period should be computed from the date of receipt of the Award on 12.12.2019. If so computed, the limitation period expired on 11.03.2020. Such limitation period ended before the advent of the COVID-19 pandemic and the exclusion of time in its wake under orders of the Supreme Court. Consequently, learned counsel contended that the petitioners are not entitled



to the exclusion of the COVID 19 period. Hence, the petition is barred by limitation.

14. In support of these submissions, learned counsel referred to and relied upon the following judgments:

(i) *State of Arunachal Pradesh v. Dhamani Constructions (State of Arunachal Pradesh)*(2007) 10 SCC 742, particularly paragraphs 8 and 9 thereof, for the proposition that a person challenging the arbitral award is not entitled to compute the period of limitation from the date of disposal of the application under Section 33 of the Arbitration Act unless the application falls within the scope of Section 33.

(ii) *Nirmal Singh v. Horizon Crest India Real Estate and Others (Nirmal Singh)*MANU/DE/1422/2020, particularly paragraphs 29 and 32 thereof, for the same proposition as laid down by *State of Arunachal Pradesh*.

(iii) *Gyan Prakash Arya v. Titan Industries Limited (Gyan Prakash Arya)*, 2021 SCC Online SC 1100, particularly paragraphs 16 and 17



thereof, for the proposition that the award cannot be modified under Section 33 of the Arbitration Act.

(iv) *Union of India v. Popular Constructions Company* (2001) 8 SCC 470.

(v) *Simplex Infrastructure v. Union of India* (2019) 2 SCC 455.

(vi) *Anilkumar Jinabhai Patel v. Pravinchandra Jinabhai Patel* (2018) 15 SCC 175.

(vii) *Assam Urban Water Supply and Sewerage Board v. Subash Projects And Marketing Limited* (2012) 2 SCC 624.

(viii) *Sagufa Ahmed v. Upper Assam Plywood Projects Pvt. Ltd.* (2021) 2 SCC 317 as regards exclusion of the COVID 19 period.

(ix) *General Manager Southern Railway v. Eagle-Omega KR and Co.* 2020 SCC OnLine Mad 24354.

15. On the merits of the adjudication, learned counsel referred to the Award and pointed out that the arbitral tribunal examined clause 17.3 of the SCC and interpreted the same. The arbitral tribunal concluded, upon such interpretation, that clause 17.3 does not preclude a claim if the reasons for



delay are mainly attributable to the employer. Since this is a reasonable interpretation of the contract, she submitted that no interference is warranted. In the context of the conclusion, in paragraph 9 of the Award, that the employer failed to perform obligations in time and thereby impeded performance of obligations by the contractor, she submitted that the grant of a sum of Rs.20 lacs towards hire charges for machinery is justified. As regards the claim for loss of profit, she relied upon the following judgments in support of the submission that it is not necessary to lead evidence on such claim:

(i) Mohd. Salamathullah and Others v. Government of Andhra Pradesh (1977) 3 SCC 590, particularly paragraph 4.

(ii) M/s.A.T.Brij Pal Singh v. State of Gujarat (Brij Pal Singh) (1984) 4 SCC 59, particularly paragraphs 10, 11 and 14.

(iii) Dwarka Das v. State of Madhya Pradesh and another, (1999) 3 SCC 500, particularly paragraph 9.

(iv) MSK Projects India (JV) Limited v. State of Rajasthan and another (2011) 10 SCC 573, particularly paragraphs 38,39,40,41 and 42.

(v) The Chairman, Guindy Industrial Estate Infrastructure Upgradation Company v. Gurumurthy Engineering Enterprises v. Nehru Enterprises 2012 (2) MWN (Civil) 179, particularly paragraphs 20.2 to 20.8.



16. With regard to the grant of costs, learned counsel for the respondent referred to paragraph 11 of the written arguments and pointed out that the components of and manner of computation of the sum of Rs.17,75,053/- is set out therein. She subsequently filed the bill of costs for the above sum and the email by which the bill of costs was served on learned counsel for the petitioners. Therefore, she submitted that the grant of Rs.25,00,000/- as costs merely reimburses the respondent for expenditure incurred towards the conduct of arbitral proceedings. As such, no interference is warranted.

Discussion, analysis and findings:

17. Apart from addressing the contentions on merits, learned counsel for the respondent contended that the petition under Section 34 of the Arbitration Act is barred by limitation. Therefore, the said submission should be addressed first. The facts are not in dispute: the Award was pronounced on 12.12.2019; and the petitioners admit receipt of the Award on the date of pronouncement. Consequently, ordinarily, the period of limitation of three months would commence from 12.12.2019 and end on 11.03.2020. About 25 days after the Award was pronounced, the petitioners



filed a petition for rectification. The said rectification petition is in the form of a letter dated 07.01.2020, which was addressed to the learned Arbitrator under copy to the respondent herein. The operative portion of the said letter is set out below:

“The interest awarded by the arbitrator is not in accordance with the Act as per Section 31(7) (b) of the Main Act 1996. Further, as per Section 33(1) of the Arbitration & Conciliation Act 1996 any corrections in the Award has to be submitted within 30 days from the date of Award”. As such, you are requested to consider the same as early as possible.

Necessary notice has also been served to the claimant contractor”(emphasis added).

18. From the above, it appears that the petitioners requested the arbitral tribunal to reconsider the grant of interest under the Award by pointing out that it is not in accordance with Section 31(7)(b) of the Arbitration Act. The request for rectification makes an express reference to Section 33(1) of the Arbitration Act. Section 33 (1) of the Arbitration Act is set out below:



“(1) Within thirty days from the receipt of the arbitral Award, unless another period of time has been agreed upon by the parties—

(a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the Award;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the Award.”

19. Section 34(3) of the Arbitration Act prescribes the limitation period for filing a petition under Section 34 of the Arbitration Act. It reads as follows:

“(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral Award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:



Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.”

20. The text of sub-section 3 of Section 34 indicates that the limitation period of three months would run from the date on which the person challenging the award receives the arbitral award or, in cases where an application is made under Section 33, from the date on which the application under Section 33 was disposed of by the arbitral tribunal.

21. Since the Award was pronounced on 12.12.2019, the communication dated 07.01.2020 was undoubtedly submitted within the prescribed 30 days from the date of the Award. The said communication referred both to Section 33(1) of the Arbitration Act and the grant of interest under the Award and stated that the same was not in accordance with Section 31(7)(b) of the Arbitration Act. Therefore, the request is clearly not within the scope of Section 33(1)(a) of the Arbitration Act. Under Section



33(1)(b) of the Arbitration Act, a party to arbitral proceedings may request the arbitral tribunal to provide an interpretation of a specific point or part of the award. However, such request may be made only if so agreed by the parties. Here, notice of the application was given to the respondent herein but there is no evidence of agreement between the parties to seek the interpretation of the arbitral tribunal on a specific point or part of the Award.

22. In this factual context, the conclusion of the arbitral tribunal in the order dated 21.01.2020 that the Award does not require correction of computational, clerical or typographical errors is unexceptionable. Thereafter, in the second paragraph of the order dated 21.01.2020, the arbitral tribunal concluded as under:

“On bare perusal of Section 31(7)(b) of the Act 1996, it is evident that if the interest rate is not spelled out in the award, the statutory interest at the rate of 2% higher than the current rate of interest prevalent from the date of Award is applicable. In the instant case, the



Award itself has directed interest which is within competence and discretion of the Arbitral Tribunal. This view is fortified by several judicial pronouncements made in Hyder Consulting (UK) Ltd Vs State of Orissa (2015) 2 Supreme Court Cases 189 and Jaiprakash Associates Ltd. Vs Tehri Hydro Development Corporation India Ltd. (THDC) 2019 SCC Online SC 143. Thus, the request for rectification is not warranted and as such is rejected.”

In the above extract, the arbitral tribunal has provided reasons for rejecting the request of the petitioners for rectification by explaining and setting out the legal basis for the grant of interest. Thus, albeit without the parties' expressly agreeing thereto in accordance with Section 33(1)(b) of the Arbitration Act, the order of the arbitral tribunal interprets a part of the Award.

23. In these circumstances, the question that arises is whether the period of limitation should be computed from 21.01.2020 [the date of the Section 33 order] or 12.12.2019 [the date of the Award]. As adverted to above, if an application is filed under Section 33, sub-section 3 of Section 34



requires that the limitation period be computed from the date on which such application/request is disposed of by the arbitral tribunal. Significantly, subsection 3 does not prescribe that the limitation period should be computed from the date on which the Section 33 application was allowed. Put differently, in order to compute limitation from the date of disposal of the Section 33 application, it is not necessary that the applicant should succeed.

24. Learned counsel for the respondent contended that the applicant need not succeed but the application should be within the scope of Section 33 for a party to be entitled to the benefit of computing limitation from the date of disposal of the Section 33 application. Otherwise, as per the law laid down by the Hon'ble Supreme Court in *State of Arunachal Pradesh*, she contended that limitation should be computed from the date of the Award. In *State of Arunachal Pradesh*, the arbitrator pronounced an interim award on 12.10.2003. The limitation period for applying under Section 33 expired on 11.11.2003 and that for challenging the award expired on or about 11.01.2004. Much after those time limits expired, the appellant, by a letter dated 02.04.2004, requested the arbitral tribunal to review the



interim award. Such request was rejected by an order dated 10.04.2004. The award was challenged under Section 34 of the Arbitration Act on 06.08.2004. In the above factual situation, the Hon'ble Supreme Court concluded that the letter dated 02.04.2004 was not under Section 33 of the Arbitration Act. The Hon'ble Supreme Court further concluded that a review is not maintainable under Section 33 and, therefore, refused to interfere with the rejection of the petition on the ground of limitation.

25. **Gyan Prakash Arya** dealt with a challenge to an order under Section 33 of the Arbitration Act by which the award was modified. In paragraphs 16 and 17, the Hon'ble Supreme Court held that the arbitral tribunal is not entitled to modify the award under Section 33 of the Arbitration Act. On that basis, the order passed under Section 33 was interfered with. In **Nirmal Singh**, a single Judge of the Delhi High Court refused to compute the period of limitation from the date of disposal of the Section 33 application on the ground that the said application was not within the scope of Section 33.



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26. As is evident from the above discussion, the judgments of the Hon'ble Supreme Court in *State of Arunachal Pradesh* and *Gyan Prakash Arya* are clearly distinguishable because, in the former, the letter evidently sought review and was issued about six months after the relevant interim award was pronounced; and, in the latter, an arbitral award was modified in an application under Section 33.

27. As noticed earlier, the application by the petitioners was filed within the prescribed period of 30 days under Section 33(1) of the Arbitration Act and appears to be broadly within the scope of Section 33(1)(b), albeit the petitioners did not obtain the consent of the counter party. The order passed by the arbitral tribunal on 21.01.2020 recorded that the application was not within the scope of Section 33(1)(a) but paragraph 2 of the said order appears to be an order interpreting or clarifying the Award in relation to interest. In the above circumstances, I am of the view that the petitioners are entitled to compute the limitation period from the date of disposal of the Section 33 application. If so computed, the limitation period



would expire on 20.04.2020. By virtue of orders passed by the Hon'ble Supreme Court in the wake of the COVID 19 pandemic, the period commencing from 15.03.2020 and ending on 28.02.2022 was directed to be excluded. The present petition was filed on 10.11.2020. Therefore, the petition is not barred by limitation.

28. Turning to the merits of the dispute, the petitioners assailed the Award only in respect of claim Nos.3, 4 and 8. Claim No.3 relates to hire charges for machinery during the disruption period. In construction contracts, a disruption claim is made on the basis that the contractor concerned mobilised manpower and equipment to perform obligations under the contract, but such manpower and equipment could not be put to use during the disruption period for reasons attributable to the employer. Compensation is claimed by establishing that expenditure was incurred towards manpower and equipment during the disruption period. From the above, it follows that the contractor seeking compensation from the employer should establish the following: (i) specifically identify the disruption period and prove that the employer was responsible for non- performance during



that period; and (ii) provide evidence of the expenditure incurred towards man power and / or equipment, as the case may be, during such period. In this case, paragraph 53 of the statement of claim deals with the disruption claim. In sub-paragraph 53.2, the respondent identified the equipment which could not be put to use. In sub-paragraph 53.3, reference was made to the elongation of the contract period from 15 to 47 months. This would be relevant for a prolongation claim, subject to establishing that the employer is responsible for prolongation, but not for a disruption claim. In sub-paragraph 53.4, it is stated that there was idling on several occasions but such periods are not identified and specified. In sub-paragraphs 53.4 – 53.5, some explanation is provided as to why the equipment could not be demobilized. However, there is neither pleading nor evidence with regard to the claim of Rs.30,50,000/-.

29. While dealing with this claim, the arbitral tribunal noticed in paragraph 9 that no details were provided. The relevant portion in paragraph 9 is set out below:

“.... the claimant has claimed under this head



an amount to the tune of Rs.30,50,000/- but no details are submitted. For want of details, though it is held that the claim of the claimant is justified, a reasonable sum of Rs.20,00,000/- (Rupees Twenty Lakhs only) is awarded.”

From the above extract of paragraph 9, it is evident that the arbitral tribunal awarded a sum of Rs.20,00,000/- without any justification or basis. Other than the conclusion that the petitioners herein failed to perform their obligations, no other reasons are provided to justify the grant of a sum of Rs.20,00,000/-.

30. As stated above, a claim for losses caused on account of disruption can and should be proved through hard evidence of expenditure incurred during such disruption period. In paragraph 31 of the SCC report of *Associate Builders v. DDA*, (2015) 3 SCC 49, the Hon'ble Supreme Court held that an award which is based on no evidence is contrary to public policy. Even after the amendment to the Arbitration Act under Act 3 of 2016, this was recognized in paragraph 41 of the SCC report in *Ssangyong Engineering and Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131, as





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32. With regard to the loss of profit claim, in its discussion relating to this claim, the arbitral tribunal reproduced clause 41 and 42 of the GCC.

Clause 41 and 42(1) of the GCC are set out below:

“41. Modification to contract to be in writing:- In the event of any of the provisions of the contract requiring to be modified after the contract documents have been signed, the modifications shall be made in writing and signed by the Railway and the contractor and no work shall proceed under such modification until this has been done. Any verbal or written arrangement abandoning, modifying, extending, reducing or supplementing the contract or any of the terms thereof shall be deemed conditional and shall not be binding on the Railway unless and until the same is incorporated in a formal instrument and signed by the Railway and the contractor, and till then the Railway shall have the right to repudiate such arrangements.

42(1) Powers of modification to contract:-The



Engineer on behalf of the Railway shall be entitled by order in writing to enlarge or extend, diminish or reduce the works or make any alterations in their design, character, position, site, quantities, dimensions or in the method of their execution or in the combination and use of materials for the execution thereof or to order any additional work to be done or any works not to be done and the contractor will not be entitled to any compensation for any increase/reduction in the quantities of work but will be paid only for the actual amount of work done and for approved materials supplied against a specific order.”

33. The arbitral tribunal construed the above clauses and concluded that the contractor would not be entitled to compensation for reduction in the scope of work provided the requirements of clause 41 had been complied with. Since the requirements of clause 41 had not been complied with, the arbitral tribunal proceeded to consider the claim for loss of profit. Especially in the context of the rider agreement not being placed before the arbitral tribunal, the interpretation of clauses 41 and 42 appears reasonable and certainly plausible. Whether any other clause of the contract



prohibits a loss of profit claim remains to be considered. The last sentence of clause 17-A (ii) of the GCC provides for the payment for work carried out by the contractor during the extended period at the same rate and on the same terms and expressly prohibits a claim for any other compensation. The said last sentence is as under:

“.... No other compensation shall be payable for works so carried forward to the extended period of time, the same rates, terms and conditions of contract being applicable as if such extended period of time was originally provided in the original contract itself.”

As a result of the above clause, the contractor would not be entitled to any prolongation claim relating to the extended period of contract. However, this clause does not prohibit a claim for loss of profit. As regards clause 17.3 of the SCC, the said clause deals with drawings. It precludes any claim relating to delay in approval of drawings, changes, modifications, etc. but does not preclude a loss of profit claim arising out of reduction in the scope of work.

34. There is another aspect to be noticed. The petitioners pointed out



that clause 43.5 of the SCC deals with reduction in the quantity of work to be executed . The said clause reads as under:

“43.5 In the event of any reduction in the quantities to be executed for any reason whatsoever, the contractor shall not be entitled for any compensation but shall be paid only for the actual quantity of work done, at the agreemental rates.”

On perusal of the Award, the above mentioned clause has not been noticed by the arbitral tribunal. It is unclear as to whether the said clause was specifically brought to the notice of the arbitral tribunal. This clause deals with the reduction in the quantities of work for any reason whatsoever. It is arguable that this clause would apply only if quantities are reduced within the original scope of work and not when the scope of work is reduced by novation of the contract. In any event, the relief granted in respect of the loss of profit claim should be seen in this contractual context.

35. The arbitral tribunal awarded a sum of Rs.1,30,50,090/- towards loss of profit. The computation in respect of the grant of the above



mentioned sum is contained in paragraph 11 of the Award. The arbitral tribunal took into account the original contract value of Rs.22,14,12,498/- and the executed contract value of Rs.9,09,11,598/- was deducted there from. By this process, the value of unexecuted work was arrived at in a sum of Rs.13,05,00,900/-. The claim was made at 15% of the value of unexecuted work but the arbitral tribunal awarded the claim at 10% of Rs.13,05,00,900/-.

36. Loss of profit was awarded by the arbitral tribunal by referring to several judgments. After referring to the said judgments, the arbitral tribunal recorded, in relevant part, in paragraph 11, as under:

“11. It is also well settled that the contractor earns 10-15% profit on the contracted amount and in such an event it is not necessary to establish actual loss to receive reasonable compensation.... “

From the above extract, it is evident that the arbitral tribunal proceeded on the assumption that it is not necessary to establish actual loss to receive reasonable compensation in a loss of profit claim. A loss of profit claim is a



claim for loss of anticipated profits. Given the nature of the claim, it is not possible to provide evidence that the contractor actually incurred a loss of a specific sum of money. To that extent, the conclusion of the arbitral tribunal that actual loss of profit need not be established is correct. However, that does not mean that a contractor/claimant is absolved of the obligation to adduce evidence in support of such claim. It is certainly possible for the contractor to provide evidence of the profit margin reckoned or factored by the contractor while submitting the bid. In fact, in the statement of claim at paragraph 54.4, the respondent / contractor stated that a profit margin of about 15% was reckoned while submitting the bid. However, the respondent failed to produce any evidence to establish the said statement. In the alternative, the respondent/contractor was in a position to adduce evidence of the profit earned by executing similar projects previously. Such evidence was also not tendered. Instead, the respondent relied on Sections 73 and 74 of the Contract Act. Section 74 of the Contract Act deals with stipulated compensation and penalty. In this case, the contract does not stipulate the compensation or penalty to be paid to the contractor. Therefore, Section 74 is irrelevant. As regards Section 73, a person making a claim for



compensation under Section 73 is required to establish the following:

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- (i) breach of contract by the counter party;
- (ii) direct losses caused by such breach; and
- (iii) the quantum of such losses.

37. Thus, a claim under Section 73 of the Contract Act is required to be established or proved through evidence. The respondent relied upon several judgments of the Hon'ble Supreme Court to contend that evidence is unnecessary. The primary judgment is ***Brij Pal Singh***. This judgment is not an authority for the proposition that a claim for loss of profit may be made without any evidence. From paragraph 10 of the said judgment, it is clear that the Division Bench of the same High Court had accepted 15% of the value of unexecuted work as a reasonable measure of loss of profit in relation to the same type of work at a work site adjacent to the work site in respect of which the claim was made. In those circumstances, the Hon'ble Supreme Court held as follows:

“11. Now if it is well-established that the respondent was guilty of breach of contract inasmuch as the rescission of contract by the respondent is held to be



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unjustified, and the plaintiff-contractor had executed a part of the works contract, the contractor would be entitled to damages by way of loss of profit. Adopting the measure accepted by the High Court in the facts and circumstances of the case between the same parties and for the same type of work at 15 per cent of the value of the remaining parts of the work contract, the damages for loss of profit can be measured.”

38. It should also be noticed that the Hon'ble Supreme Court held in ***Bharat Coking Coal*** that evidence should be adduced by the contractor and that in the absence of evidence, a loss of profit claim should not be awarded.

39. Especially in the context of contracts awarded by government departments or public sector undertakings, it is not uncommon for contractors to submit bids with little or no profit margin. This is done for various reasons such as the prestigious nature of the contract, to gain experience or develop expertise in executing a particular type of project or even to build the contractor's profile. It is also fairly common for even anticipated profit margins to be adversely impacted in course of execution by



factors such as rise in prices of materials used in construction, especially in fixed price contracts without a price variation clause. Therefore, both relevant pleading and evidence, albeit not evidence of actual loss, is necessary to succeed in such claim. Hence, the arbitral tribunal committed a patent error in awarding a sum of about Rs.1.3 crore without any evidence either in the form of evidence of profit margin reckoned while submitting the bid or in the form of profit earned by the contractor for similar work previously. As in the case of the disruption claim, the Award is vitiated because it is based on no evidence.

40. The petitioners assailed a portion of the Award with respect to costs. While admitting that the grant of a sum of about Rs.7,25,000/- towards arbitrator's fees is acceptable, learned counsel for the petitioners stated that the grant of a sum of Rs.17,75,053/- is unsustainable. In particular, he pointed out that the Award refers to the bill of costs and that such bill of costs was not provided to the petitioners. This contention was countered by submitting the bill of costs. On perusal of the email attaching the bill of costs, it is evident that a copy thereof was provided to learned



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counsel who represented the petitioners herein before the arbitral tribunal.

The bill of costs clearly indicates the heads of expenditure, such as arbitration hall rent, board and lodging, car rent, flight charges, site inspection fee and Award preparation fee. All these heads of expenditure are directly related to the arbitral proceedings. The aggregate expenditure across these heads is Rs.17,75,053. Therefore, the grant of a sum of Rs.25 lacs against this claim is entirely in order and no interference is called for.

41. In the result, the Award is partly set aside as regards amounts awarded on claim Nos.3 (loss of hire charges) and 4(loss of profit). Consequently, the interest awarded on claim Nos.3 and 4 is also set aside. In the circumstances, there will be no order as to costs. Consequently, connected application is closed.

15.11.2022

Speaking Order

Index : Yes/No

Internet : Yes/No

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J

SENTHILKUMAR RAMAMOORTHY,

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Pre-delivery order
in
Arb.O.P.(Com.Div)No.112 of 2021 &
Application No.2968 of 2021



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