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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION**

**APPEAL NO. 98 OF 2022  
IN  
ARBITRATION PETITION NO. 1060 OF 2010**

S.N. Thakkar Construction Company  
Private Limited ....Appellant

V/s.  
Municipal Corporation of Greater  
Mumbai ...Respondent

**ALONGWITH  
APPEAL (L) NO. 25697 OF 2021  
IN  
ARBITRATION PETITION NO. 1060 OF 2010**

Municipal Corporation of Greater  
Mumbai ....Appellant

V/s.  
S.N. Thakkar Construction Company  
Private Limited ...Respondent

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Mr. Nikhil Wadikar a/w Mr. Niranjana Kandade, Mr. Malhar Pawar i/b  
Mr. Nandu Pawar for Appellant in Appeal No. 98 of 2022 and for Respondent  
in Appeal (L) No. 25697 of 2021.

Mr. P.G. Lad a/w Mr. K.H. Mastakar for Appellant in Appeal (L) No. 25697 of  
2021 and for Respondent in Appeal No. 98 of 2022.

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**CORAM : K.R. SHRIRAM &  
RAJESH S. PATIL, JJ.  
DATED : 27<sup>th</sup> MARCH 2023**

**P.C. :**

**APPEAL NO. 98 OF 2022**

1. Appellant is impugning a judgment dated 13<sup>th</sup> February 2019  
passed by the learned single Judge of this court under Section 34 of The  
Arbitration and Conciliation Act, 1996 (the Act).

2. It is settled law that the jurisdiction conferred on courts under Section 34 of the Act is fairly narrow. When it comes to the scope of an appeal under Section 37 of the Act, the jurisdiction of an Appellate Court in examining an order setting aside or refusing to set aside an award is all the more circumscribed (*UHL Power Company Ltd. vs. The State of Himachal Pradesh*<sup>1</sup>).

3. Facts in brief are :

Respondent had invited tenders for providing and constructing diversion chambers for diverting sewage from SWD (Storm Water Drain) to sewerage system at seven locations in the city of Mumbai. Appellant submitted their offer and the same was accepted by issuance of work order. Appellant was to complete the work between 01/10/2003 and 31/05/2004. The contract provided for various obligations on both parties. Disputes arose and the matter was referred to arbitration before Sole Arbitrator one Mr. G.B. Naik, an Engineer. Appellant raised seven heads of claims. Two were allowed fully with interest. One partly allowed with interest on that part sum. One partly allowed without interest. Remaining three were rejected. The counter claims of Respondent/Corporation was rejected.

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<sup>1</sup> 2022 (4) SCC 116

### Summary of Awards

| Claim No. | Claim in Brief                                      | Amount claimed by Claimants | Amount awarded by Arbitrator | Past interest awarded by Arbitrator |
|-----------|-----------------------------------------------------|-----------------------------|------------------------------|-------------------------------------|
| 1.        | Claim for work done + Excess and extra items.       | 60,80,326/-                 | 9,76,068/-                   | 2,44,017/-                          |
| 2.        | Refund of amount of performance security            | 13,51,984/-                 | 13,51,984/-                  | 81,119/-                            |
| 3.        | Release of retention amount                         | 1,01,466/-                  | 1,04,466/-                   | 25,366/-                            |
| 4.        | Claim of Loss of Profit                             | 50,42,936/-                 | 29,29,478/-                  | NIL                                 |
| 5.        | Claim of compensations for OH machinery and labour. | 34,12,500/-                 | NIL                          | NIL                                 |
| 6.        | Arranging visit of Respondent's                     | 1,10,000/-                  | NIL                          | NIL                                 |
| 7.        | Claim for refund of security deposit                | 2,61,000/-                  | NIL                          | NIL                                 |
|           | Total Rs.                                           |                             | 53,58,996/-                  | 3,50,502/-                          |

Total sum = Rs.57,09,498/-

The counter claim was basically for encashing the bank guarantee of Rs.13,51,984/- which is appellant's Claim No.2 – refund of amount of performance security – Rs.13,51,984/-. The subject of the appeal by the contractor is setting aside the amount of claim for loss of profit. Learned Arbitrator had awarded a sum of Rs.29,29,478/- as loss of profit suffered by appellant. The learned Arbitrator had observed that the contract price after certain deduction was Rs.2,44,12,314/- that appellant was not allowed to execute and awarded 12% of that value as loss of profit suffered by appellant. Appellant had claimed 20% of that value but the arbitrator

found that the rate analysis that appellant had submitted for excess items contained profit element of 12% and respondent's without prejudice rate analysis that they submitted to the Arbitrator also indicated 12%. Hence, 12% was taken as thumb rule to award the loss of profit.

4. Respondent challenged the award impugning the amounts awarded by the Arbitrator in favour of Appellant by filing Arbitration Petition No. 1060 of 2010. Appellant was satisfied with the award. The learned single Judge by the impugned judgment dated 13<sup>th</sup> February 2019, partly allowed the petition by setting aside the award of damages – claim for loss of profit (Claim No.4) and consequently modified the quantum of interest awarded by the Arbitrator. The rest of the award was sustained.

Both the contractor (Appeal No.98 of 2022) and Corporation (Appeal (L) No.25697 of 2021) have filed appeals under Section 37 of the Act impugning the judgment dated 13<sup>th</sup> February 2019 of the learned single Judge. Contractor is referred to herein as Appellant and Corporation as Respondent.

5. The learned single Judge has dealt with this claim for loss of profit from paragraph no.6 to paragraph no.20 out of 21 paragraphs in the judgment. The learned single Judge in our view was correct in interfering.

6. The learned Arbitrator has proceeded on the basis that

whenever an employer is guilty of breach of contract or whenever rescission of contract by the employer is held to be justified and the contractor has executed a part of the works contract, the contractor might be entitled to damages by way of loss of profits. In every case, however, such damages cannot be awarded on a thumb rule basis that reasonable expectation of profit is implicit in any works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of its breach.

7. Mr. Wadikar submitted that it is settled law that damages by way of loss of profit should be calculated on a simple mathematical calculation of a fixed percentage of anticipated profit and in this case the learned Arbitrator has fixed it at 12% per annum and the learned single Judge should not have interfered.

8. In our view the judgments which were cited before the learned single Judge do not suggest any inflexible or absolute rule or proposition of law. Any award towards loss of profit would always depend on the facts and circumstances of each case. In a case, where the contractor has merely done a negligible part of the contracted work and there is nothing to suggest that the contractor had kept himself ready with engagement of capital and labour to complete the entire work and yet he was prevented from carrying out the balance work on account of a breach on the part of his employer, he cannot expect to be awarded loss of profit on

a thumb rule basis. In the case at hand, the Arbitrator has done exactly that. The Arbitrator has not even gone into the facts of employment of capital or engagement of labour by appellant because the Arbitrator was of the view that claim for loss of profit could be awarded on a thumb rule basis. Admittedly, a very negligible percentage of work was actually carried out by appellant at the stage when the work was stopped. The total contract was worth about Rs.2.70 Crores and mere Rs.16 Lakhs worth of work was accomplished by appellant. There is no evidence to suggest that appellant had kept himself ready and in fact was in a position to complete the entire balance work as per the schedule of work assured to respondent. In fact, the learned Arbitrator does not even discuss any of this in the award.

9. The learned single Judge has analysed all the judgments relied upon by the counsel for appellant and in our view the learned single Judge has correctly concluded that in a claim for loss of profit the measure of such profit is essentially a matter of evidence. No evidence has been led in this case so as to arrive at what could have been the profit. Though in every case the contractor would bid for a job with a hope of making profit, it is not in every case, the contractor would end up making a profit. Even where profit as a proportion of total contract value actually used may be demonstrable, there may still be difficulties in establishing a claim for loss of profit on incomplete work. These are not matters of any thumb rule but have to be individually assessed in every given case and are essentially

matters of facts. Since there is no evidence whatsoever, we agree with the learned single Judge that awarding 12% of the contract value as profit was not correct when hardly 8% of the work contracted had been done. It suffers from perversity.

10. In the circumstances, appeal dismissed with no order as to costs.

#### **APPEAL (L) NO. 25697 OF 2021**

11. Respondent/Corporation is the Appellant herein who had challenged the four heads of claim awarded by the Sole Arbitrator to the contractor. As regards Claim No.4 for loss of profit, the learned single Judge had interfered and we have already dealt with the same in the appeal filed by the contractor namely Appeal No. 98 of 2022.

12. As regards first three claims are concerned, Mr. Lad submitted that the finding of the Arbitrator that there was delay on the part of the Respondent (Corporation) in making the site available for contract work or removing obstructions as also stoppage of work etc. were either without evidence or contrary to the record. Mr. Lad also submitted that the Arbitrator's finding on the alleged breach of contract by Respondent like, for e.g., delay in issuance of detailed construction drawings were contrary to the record as well as stipulation of the contract.

But Claim Nos. 1, 2 and 3 are for actual work done as also extra work performed by Appellant. It is also for refund of amount of performance security and release of retention amount based on actuals. The learned single Judge has rejected this challenge to the award holding that the Arbitrator after hearing the parties determined that the claim should be worked out on the basis of measurements recorded by respondent at B.O.Q. rates plus admissible extra items with appropriate deductions. The Arbitrator considered the individual deductions contested between the parties. Wherever there was no joint measurements those items were deducted. The Arbitrator has arrived that the total amount of the work done and after considering all the documents worked out the balance payable to appellant. The learned single Judge has correctly concluded that these are clearly possible views supported by evidence and the learned Arbitrator's views cannot be stated to be impossible view or views which no fair or judiciously minded person would take, or views that would shock the conscience of the court. The learned single Judge rightly refused to interfere.

13. In the circumstances, we find no merit in this appeal as well.

14. Appeal dismissed with no order as to costs.

**(RAJESH S. PATIL, J.)**

**(K.R. SHRIRAM, J.)**