

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(COMMERCIAL DIVISION)

BEFORE:

The Hon'ble Justice Soumen Sen

and

The Hon'ble Justice Biswaroop Chowdhury

FMA 573 of 2024

State of West Bengal & Ors.

Vs.

M/s. S.K. Maji

For the Appellants	:	Mr. Arindam Mondal, Adv., Ms. Srijani Mukherjee. Adv.
For the Respondent.	:	Mr. Soumik Ganguly, Adv., Mr. Tanmoy Mukherjee, Adv., Mr. Souvik Das, Adv., Ms. Chandana Chakraborty, Adv.
Hearing concluded on	:	25 th February, 2025
Judgment on	:	5 th March, 2025

Soumen Sen, J.

1. The present appeal arises out of an impugned judgment and order dated 25th February, 2021 passed by the learned Commercial Court at Asansol under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the said Act').

2. Shorn of details the facts of the case enumerate that the respondent contractor carries on business under the trade name and style of M/s. S.K. Maji having its principal place of business in Tamruk, Purba Medinipur, executing various engineering works under contract with various

departments including the state of West Bengal, which is the appellant herein.

3. The Government of West Bengal through the Superintending Engineer, Public Works Department, Paschim Medinipur published a notice inviting tender being N.I.T. No.15 of 2009-2010 on 24th February, 2010 for construction of District Health Administrative Building at Bankura at an estimated sum of Rs.1,69,25,089/-. Time for submission of tender was fixed on 29th March, 2010. The respondent contractor participated in the said tender and submitted his tender on the same date and within the stipulated time. The tender of the respondent contractor was accepted and the acceptance was communicated by letter dated 29th June, 2010. The contractor was requested to take up work immediately and complete it in conformity with the terms and conditions of the contract within a stipulated period of 18 months with effect from 6th July, 2010 i.e. within 5th June, 2012. The aforementioned memo dated 29th June, 2010 was treated as a formal work order and the contractor was directed to proceed with the work only after having conducted from assessment and pre-determination of the tender quantity and was also allowed to visit the site of work.

4. Disputes having arisen between the parties, by letter dated 13th January, 2014 the executive engineer terminated the work order and the tender was rescinded under Clause 3(a) of the agreement no.02 of 2010 and 2011. Subsequently, the respondent contractor invoked arbitration for settling of such disputes between the parties. Shri Tapan Kumar Roy Chowdhury, Superintending Engineer was appointed as the sole arbitrator in

this matter and he passed the arbitral award dated 3rd July, 2017 as follows in respect of the 9 claims of the claimant/respondent:

Sl. No.	<u>Amount as per Claimant's claim</u>	<u>Awarded amount</u>
1	Claim No.1 of Rs.4,51,462/-	Rs.4,23,615.00 paisa
2	Claim No.2 of Rs.2,50,000/-	Rs.1,88,665.00 paisa
3	Claim No.3 of Rs.16,92,489/-	Rs.9,66,711.00 paisa
4	Claim No.4 of Rs.18,90,060/-	Rejected, Rs. Nil
5	Claim No.5 of Rs.21,06,384/-	Rejected, Rs. Nil
6	Claim No.6 of Rs.7,14,227/-	Rejected, Rs. Nil
7	Claim No.7 of Rs.1,43,250/-	Rejected, Rs. Nil
8	Claim No.8 of Rs.15,17,750/-	Rs.5,11,000.00 paisa
9	Claim No.9 of Rs.1,50,000/-	Rejected, Rs. Nil

5. In the impugned judgement and order dated 25th February, 2021 passed by the learned Commercial Court, the learned Judge found no reason for interference with the findings of the learned arbitrator for Claim Nos. 1 to 7 and 9 but set aside the Claim no.8 relating to payments towards labour force and establishment during the stoppage of work for which the claimant had claimed a sum of Rs.15,17,750/-. Considering the fact that the arbitrator had allowed this claim with reference to the prevailing labour wages during stoppage of work and awarded Rs.5,11,000/- even after noting that the contractor had not submitted any document being the labour licence from the labour department in terms of the contract during the arbitral process, the learned judge held that the actual loss suffered by the contractor in this regard could not have been ascertained in the absence of the requisite documents. The learned Commercial Court held that in the present facts and

circumstances awarding this amount tantamounted to wandering outside the terms of the contract and awarding such sum in convention thereof had shocked the conscience of the court and hence the award on such ground was set aside.

6. With regard to claim No. 1 regarding refund of Security Deposit, the respondent contractor had contended in the statement of claim that total Security Deposit of Rs. 4,51,462/- had been withheld by the appellant. From the documents, the learned Arbitrator found having regard to the Measurement Books and Bill copy that a sum of Rs. 3,03,112/- was deducted from 1st R.A. Bill and a sum of Rs. 1,20,503/- was deducted towards security deposit from 2nd R.A. Bill, thus totalling to a sum of Rs. 4,23,615/- which was awarded towards security deposit under claim No. 1.

7. As for claim No. 2 regarding outstanding dues against the value of the work executed, the respondent contractor had claimed a sum of Rs. 2,50,000/-. The learned Arbitrator duly considered the Measurements Books, Store Indent and Bill copies to form the conclusion that the claimant was entitled to a sum of Rs. 1,88,665/-. Such conclusion did not suffer from surmise and speculation in the view of the learned judge, Commercial Court in the instant case wherein the respondent contractor was not held responsible for non-execution of the job in totality.

8. The learned Commercial Court found no reason for interference with the said findings of the sole arbitrator with respect to the Award made on these two claims and such findings being well-reasoned and not illegal, perverse or arbitrary we do not find any reason to intervene on such grounds as well.

9. The primary issue raised in this instant appeal is whether the claim for loss of profit at 15% amounting to Rs. 16,92,289/- raised in the statement of claim (Claim no.3) could have been awarded by the learned sole arbitrator in the absence of any proof either oral or documentary.

10. Mr. Arindam Mondal, the learned Counsel on behalf of the appellant has submitted that the statement of claim did not contain the necessary pleadings for establishing loss of profit. Unless loss was pleaded and established by proof, an award on loss of anticipated profit could not have been passed. Such submissions have been buttressed with the aid of ***Unibros v All India Radio***¹, ***Bharat Coking Coal Ltd. v L.K. Ahuja***², ***Batliboi Environmental Engineers Limited v Hindustan Petroleum Corporation Limited and Another***³ and ***H.J. Baker and Brothers Inc v Minerals and Metals Trade Corporation Limited (MMTC)***⁴ which have been discussed hereinbelow. The learned Counsel has stressed on the fact that even in the case of anticipated loss, the same has to be established as the same is a sine qua non for claiming loss of profit. In this regard, reliance was placed on the case of ***Kanchan Udyog Limited v. United Spirits Limited***⁵. It was strenuously argued that the claimant was not interested in proceeding with the work beyond the stipulated period of the contract and had never sought for even a single extension of time and had expressed willingness to leave the work. Instead, the claimant had himself sought for honourable termination of the contract as would be apparent from the letters of the

¹ 2023 SCC OnLine SC 1366

² 2004 (5) SCC 109

³ 2024 (2) SCC 375

⁴ 2023 (9) SCC 424

⁵ 2017 (8) SCC 237

contractor dated 30th May 2012, 11th June 2013, 26th July 2013 and 13th November 2013.

11. Per contra, Mr. Soumik Ganguly, on behalf of the respondent contractor has submitted that there was a delay on the part of the appellant in supplying the necessary drawings, issuing steel materials of required quantities, giving the specific instructions for progress of work in absence of structural drawings and the presence of an electric post at the site of work which hampered the progress of work in question. In this regard the learned Counsel for the contractor placed reliance on the observation of the learned Commercial Court to the effect that the appellant in spite of having sufficient authority under the contract had neither issued any instructions regarding the work nor made any attempt to overcome the difficulties of construction and had not even replied to the claimant's written information. They could have avoided the unpleasant situation and the work could have been completed. Furthermore, due to such substantial delay in progress of work the price of the job work had escalated substantially for which the present claimant/respondent had asked for honourable termination of the work order or in the alternative to allow the claimant to complete the job work at the new price rate apropos the escalation of the work schedule. In this regard our attention has been drawn to the letter dated 30th May 2012 and 11th June, 2013 whereby the contractor brought the attention of the executive engineering to the fact that the price of materials and wages of labourers had increased during the long delay of work and considering the fact that tender was of the year 2008 it was not possible for the claimant contractor to continue the work in the year 2013-14 at the earlier rate of work for which

they had already prayed for honourable termination of the tender and to be relieved of the contract.

12. Before the arbitral tribunal, the respondent contractor had claimed an amount of Rs.16,92,489/- towards profit at a rate of 15% over the unexecuted value of work. While adjudicating such claim the arbitrator recorded that the contractor (claimant therein) had time and again written letters to the appellant about difficulties in continuing the work due to late availability of drawings, requirement of steel materials, non-removal of the electric post, payment of bills but neither had the Engineer in Charge responded to such letters nor was there any vigilance of the work by the departmental officers. Long after the expiry of the stipulated period of the contract, the Engineer in Charge recorded the fact of suspension of work and requested the claimant to complete the work within the extended date of validity of the tender.

13. The arbitrator noted that the contractor's duty to be discharged was dependent upon the appellant's duty under the contract especially when the contractor had informed him about the hindrances at the worksite and hence the appellant had failed in discharging the duties conferred upon them under the contract for completion of a time bound government project. In this regard the learned arbitrator has observed:

“Due to failure from the part of the respondent, claimant was restrained for completing the entire work and as such the claimant failed to earn his profit over the unexecuted value of the work. the claimant as per his calculation recorded the value of the unexecuted work is for a sum of Rs. 1,12,83,262.14 paisa, whereas, according to the respondents after considering the

documents and also the financial statement the value of the unexecuted work comes at Rs. 1,14,58,486/-. But after considering all the documents disclosed by respondents, according to my calculation while considering the value of the outstanding dues, total value of the unexecuted value of the work comes at for a sum of Rs. 1,13,73,069/-. This amount includes cost of construction, overhead and profit to the contractor. The claimant has claimed profit as 15% but there is no mention about cost of establishment and in my considered view this should be 5% as such the claimant is entitled to 10% profit over the unexecuted value of the work which comes at Rs. 9,66,711/-. That apart, the decision cited by the Ld. Advocate of the claimant supports 10% profit as also the paragraph placed from the book of G.T. Gajria on Building & Engineering Contract in India. As such the claimant is entitled to a sum of Rs. 966711/- account.) on this account.”

14. There lies a fundamental difference between claims raised by contractors against employers for loss of profit and loss of profitability. While loss of profit indicates claims for loss of expected profit due to unexecuted work resulting from an illegal or premature termination of the contract, loss of profitability of loss of business signifies claims for reduction in the estimated profit margin due to prolongation of the contract or claims for loss of opportunity to take up other projects during the extended period where the contractor could have earned a profit. Loss of profit and loss of profitability are often mistakenly used interchangeably which has been noted by the Delhi High Court in **Shri Ajay Kalra v Delhi Development Authority & Ors.**⁶ as follows:

⁶ 2023:DHC: 9476

““Loss of Profits” and “Loss of Profitability” has often been interchangeably used in recovery cases. The former stands for the loss incurred due to the non-completion/ prevention from completing of the contract on account of breach committed by the respondent. The latter refers to the loss incurred due to the delay in the project attributable to the respondent, due to which the claimant has lost the opportunity to earn profits through other projects after the contractual period.”

15. It is now an established position of law that claims for loss of profitability are not generally allowed in the absence of evidence to prove such loss. The view of the courts on this issue is explicit through judgments like **Unibros** (*supra*), **Bharat Coking Coal** (*supra*), and **Batliboi** (*supra*), as has also been relied upon by the appellants in this matter. However, reliance on such cases is not apposite in the present case since those conflate the concepts of loss of profit and loss of business. It is pertinent to note here that even though the Apex court used the expression 'loss of profits' in essence the claim was that of 'loss of profitability' and thus the requirement to prove actual loss was mandated only for losses arising out of delay and should not be misunderstood to be applicable to loss of profits for unexecuted works.

16. In **Unibros** (*supra*) the Supreme Court was faced with a similar situation wherein the appellant's claim for loss of profit stemmed from the delay attributable to the respondent in completing the project. It had also been established that the loss of profit claimed was based on the ground that the appellant having been retained longer than the period stipulated in the contract and its resources being blocked for execution of the work relatable to

the contract in question, it could have taken up any other work order and earned profit elsewhere. The Court observed as under:

“15. Considering the aforesaid reasons, even though little else remains to be decided, we would like to briefly address the appellant's claim of loss of profit. In Bharat Cooking Coal (supra), this Court reaffirmed the principle that a claim for such loss of profit will only be considered when supported by adequate evidence. It was observed:

“24. ... It is not unusual for the contractors to claim loss of profit arising out of diminution in turnover on account of delay in the matter of completion of the work. What he should establish in such a situation is that had he received the amount due under the contract, he could have utilised the same for some other business in which he could have earned profit. Unless such a plea is raised and established, claim for loss of profits could not have been granted. In this case, no such material is available on record. In the absence of any evidence, the arbitrator could not have awarded the same.”
(emphasis ours)

16. To support a claim for loss of profit arising from a delayed contract or missed opportunities from other available contracts that the appellant could have earned elsewhere by taking up any, it becomes imperative for the claimant to substantiate the presence of a viable opportunity through compelling evidence. This evidence should convincingly demonstrate that had the contract been executed promptly, the contractor could have secured supplementary profits utilizing its existing resources elsewhere.

17. One might ask, what would be the nature and quality of such evidence? In our opinion, it will be contingent upon the facts and circumstances of each case. However, it may generally include independent contemporaneous evidence such as other potential

projects that the contractor had in the pipeline that could have been undertaken if not for the delays, the total number of tendering opportunities that the contractor received and declined owing to the prolongation of the contract, financial statements, or any clauses in the contract related to delays, extensions of time, and compensation for loss of profit. While this list is not exhaustive and may include any other piece of evidence that the court may find relevant, what is cut and dried is that in adjudging a claim towards loss of profits, the court may not make a guess in the dark; the credibility of the evidence, therefore, is the evidence of the credibility of such claim.

18. Hudson's formula, while attained acceptability and is well understood in trade, does not, however, apply in a vacuum. Hudson's formula, as well as other methods used to calculate claims for loss of off-site overheads and profit, do not directly measure the contractor's exact costs. Instead, they provide an estimate of the losses the contractor may have suffered. While these formulae are helpful when needed, they alone cannot prove the contractor's loss of profit. They are useful in assessing losses, but only if the contractor has shown with evidence the loss of profits and opportunities it suffered owing to the prolongation.

19. The law, as it should stand thus, is that for claims related to loss of profit, profitability or opportunities to succeed, one would be required to establish the following conditions : first, there was a delay in the completion of the contract; second, such delay is not attributable to the claimant; third, the claimant's status as an established contractor, handling substantial projects; and fourth, credible evidence to substantiate the claim of loss of profitability. On perusal of the records, we are satisfied that the fourth condition, namely, the evidence to substantiate the claim of loss of profitability remains unfulfilled in the present case.

20. The First Award was interfered with by the High Court for the reasons noted above. The Arbitrator, in view of such previous determination made by the High Court, could have granted damages to the appellant based on the evidence on record. There was, so to say, none which on proof could have translated into an award for damages towards loss of profit. A claim for damages, whether general or special, cannot as a matter of course result in an award without proof of the claimant having suffered injury. The arbitral award in question, in our opinion, is patently illegal in that it is based on no evidence and is, thus, outrightly perverse; therefore, again, it is in conflict with the “public policy of India” as contemplated by section 34(2)(b) of the Act.” (emphasis supplied)

17. The Apex Court in the case of **Unibros** (*supra*) placed reliance on the case of **Bharat Coking Coal** (*supra*), wherein the Court on similar lines had observed that it was not uncommon for contractors to claim loss of profit as a result of reduced turnover due to work completion delays. In such cases however, they should prove that if they had received the sum due under the contract, they could have used it to fund another business venture in which they could have profited. Unless such a plea was raised and substantiated, the claim for loss of profits could not be granted.

18. Furthermore, in **Batliboi** (*supra*) another division bench of the Apex Court observed in paragraph 23 as follows:

“23. Ordinarily, when the completion of a contract is delayed and the contractor claims that s/he has suffered a loss arising from depletion of her/his income from the job and hence turnover of her/his business, and also for the overheads in the form of workforce expenses which could have been deployed in other contracts, the claims to bear any persuasion before the arbitrator or a court of law, the builder/contractor has to prove that there

was other work available that he would have secured if not for the delay, by producing invitations to tender which was declined due to insufficient capacity to undertake other work. The same may also be proven from the books of accounts to demonstrate a drop in turnover and establish that this result is from the particular delay rather than from extraneous causes. If loss of turnover resulting from delay is not established, it is merely a delay in receipt of money, and as such, the builder/contractor is only entitled to interest on the capital employed and not the profit, which should be paid." (emphasis supplied)

19. However, if the contract is delayed due to breaches on the part of the employer the contractor would be entitled to recover his profit on the basis of reasonable expectation of profits which could be earned if not for the illegal termination of the contract.

20. The case of **A.T. Brij Paul Singh and Others v State of Gujarat**⁷, which has also been relied upon by the respondent contractor, concerned a works contract wherein the contractor had claimed damages for loss of expected profit on the remaining work on account of wrongful termination of the contract by the government. The Supreme Court observed that where in a works contract the party entrusting the work committed a breach of the contract, the contractor would be entitled to claim damages for loss of profit which he expected to earn by undertaking the works contract. What would be the measure of profit and what proof should be tendered to sustain the claim are different matters but the claim under this head is certainly admissible. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of

⁷ 1984 (4) SCC 59: 1984 SCC OnLine SC 147

damages if the other party to the contract is guilty of breach of contract cannot be gainsaid. [**Also see Satyendra Nath Bose v Bibhuti Bhusan Bhar & Ors.**^{8]} It was observed in this regard that:

“What would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid. In this case we have the additional reason for rejecting the contention that for the same type of work, the work site being in the vicinity of each other and for identical type of work between the same parties, a Division Bench of the same High Court has accepted 15 per cent of the value of the balance of the works contract would not be an unreasonable measure of damages for loss of profit.

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 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 works contract, the damages for loss of profit can be measured.”

This decision was also followed by the Apex Court in the case of **Dwarka Das v State of M.P. & Anr.**⁹

21. To the same effect is the judgment in **Mohd. Salamatullah and Ors. v. Government of Andhra Pradesh**¹⁰. After approving the grant of

⁸ AIR 1963 Cal 163

⁹ 1999(3) SCC 500

damages in case of breach of contract, the Court further held that the appellate court was not justified to interfere with finding of fact given by the trial court regarding quantification of the damages even if it was based upon guess work.

22. A division bench of the Delhi High Court in ***Cobra Instalaciones Y Servicios, S.A. & Shyam Indus Power Solution Pvt Ltd. v. Haryana Vidyut Prasaran Nigam Ltd.***¹¹ upheld the quantification of damages by an arbitrator through “honest guesswork” or a “rough and ready method” since it was difficult to quantify the precise amount of loss suffered by the party.

23. Subsequently, in ***MSK Projects India (JV) Limited v. State of Rajasthan & Another***¹², the Apex Court clearly stated that a claim of expected profits is legally admissible on proof of the breach of contract by the erring party, as a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages once the breach on part of the other party is established and no other proof of loss shall be required. It was observed therein as follows:

“38. In common parlance, “reimbursement” means and implies restoration of an equivalent for something paid or expended. Similarly, “compensation” means anything given to make the equivalent. (See State of Gujarat v. Shantilal Mangaldas [(1969) 1 SCC 509 : AIR 1969 SC 634] , Tisco Ltd. v. Union of India [(2001) 2 SCC 41 : AIR 2000 SC 3706] , GDA [(2004) 5 SCC 65 : AIR 2004 SC 2141] and HUDA v. Raj Singh Rana [(2009) 17 SCC 199 : (2011) 2 SCC (Civ) 136 : AIR 2008 SC 3035] .) However, in Dwaraka Das v. State of M.P. [(1999) 3 SCC 500 : AIR 1999 SC

¹⁰ AIR 1977 SC 1481

¹¹ 2024 SCC OnLine Del 2755

¹² 2011(10) SCC 573

1031] it was held that a claim by a contractor for recovery of amount as damages as expected profit out of contract cannot be disallowed on ground that there was no proof that he suffered actual loss to the extent of amount claimed on account of breach of contract.

39. In *A.T. Brij Paul Singh v. State of Gujarat* [(1984) 4 SCC 59 : AIR 1984 SC 1703] , while interpreting the provisions of Section 73 of the Contract Act, 1972, this Court held that damages can be claimed by a contractor where the Government is proved to have committed breach by improperly rescinding the contract and for estimating the amount of damages, the court should make a broad evaluation instead of going into minute details. It was specifically held that where in the works contract, the party entrusting the work committed breach of contract, the contractor is entitled to claim the damages for loss of profit which he expected to earn by undertaking the works contract. Claim of expected profits is legally admissible on proof of the breach of contract by the erring party. It was further observed that : (SCC pp. 64-65, para 10)

“10. ... What would be the measure of profit would depend upon the facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid.” (emphasis supplied)

24. In ***Deo Kumar Saraf v Union of India***¹³, this Court on the issue of awarding loss of profits in a case of wrongful termination of the contract by the respondent had held as follows:

“7. The ratio of the two decisions reported in AIR 1963 Cal 163 and (1984) 4 SCC 59 : AIR 1984 SC 1703 is that once the Court has held that there is a breach of works contract the contractor

¹³ 1988 SCC OnLine Cal 324: (1988) 2 Cal LJ 325

would be entitled to damages by way of loss of profit and the measure of damages if proved, the damage would be awarded on that basis. But if the damage is not satisfactorily proved, still the contractor would be accorded the benefit of every reasonable presumption as to loss of damages. The Court's jurisdiction to award damages cannot be confined to the evidence on records only. The Court is entitled to allow damages on any other reasonable basis, even on the basis of mere guess work. In the present case, the petitioner had claimed 11% profit. The arbitrator, if he has not satisfied as to the rate claimed, certainly had the jurisdiction to reduce the rate on the basis of pure guess work or on the basis of average rate of profit allowed to the contractor by the respondent in respect of works contracts. As the arbitrator was satisfied regarding the wrongful termination of the contract by the respondent, it was his duty to find out the average rate of profit allowed by the respondent in respect of works contracts to accord all reasonable benefit to the petitioner for loss of profit for compensating the contractor for glaring breach of contract committed by the respondent in the present case. In view of the law as laid down by the aforesaid two cases, the finding of the arbitrator that in spite of termination of contract being wrongful, the damage could not be awarded due to unsatisfactory evidence on record, is a clear error of law apparent on the face of the record, as the arbitrator was bound to compensate the loss of profit even on the basis of his pure guess work. The arbitrator also legally misconducted himself and the proceeding by his failure to exercise his jurisdiction to award damages on the facts of this case resulting in miscarriage of justice." (emphasis supplied)

25. It is a general principle of law of contract that in case of breach of contract, the injured must be put back in the same position that he would have been if he had not sustained the wrong. Once the contractor has

established an illegal and unjustified termination of contract and a breach thereof on the part of the employer, which was also a finding of fact by the sole arbitrator in the present case, the contractor cannot be further obligated to establish a loss suffered on account of such breach, because a reasonable expectation of profit is implicit in a works contract. [**See MSK Projects India (supra)**]. Therefore, any loss occasioned due to illegal termination of works contract, has to be compensated by way of damages once the breach on part of the erring party is established. This is obviously subject to the caveat that the compensation must be reasonable and the parties should not be allowed to make a windfall profit, by a mere allegation of breach of contract. However, it is a settled position of law that for estimating damages, courts are not required to go into the minute details; a broad evaluation of the same would suffice.

26. In **JG Engineers Private Limited v. Union of India and Anr.**¹⁴ the Supreme Court upheld the award of loss of profits measured at 10% of the value of the remaining part of the contract which could not be performed due to illegal termination of the contract. The measure of profit was assessed at 15% of the value of the remaining part of the work in **A.T. Brij Paul (supra)**. The Delhi High Court in **RK Aneja v Delhi Development Authority**¹⁵ was of the view that the petitioner was entitled to 10% loss of profit on the balance amount of work left undone without proof of loss of profit which he expected to earn by executing the balance work.

¹⁴ 2011 (5) SCC 758

¹⁵ 1998 SCC OnLine Del 501: 1998 (2) Arb LR 341

27. In the statement of claim, it has been stated that the respondent contractor had submitted the tender after considering the profit as 15% over the entire value of the work and considering the period of the work as 18 months. Owing to failure and negligence on the part of the appellants herein in discharging their contractual obligation and further by illegal termination of the contract when time was no longer as of essence the appellants had restrained the contractor from executing the work valued at Rs.1,12,83,262.14/- and thus the claimant had suffered loss to the tune of Rs.16,92,489/- being the 15% profit over the unexecuted value of the work.

28. In the facts of the present case, the arbitrator has given his reasons for not accepting the said rate of 15% as claimed by the respondent contractor and instead have awarded loss of profit at the rate of 10% amounting to Rs.9,66,711/- based on the decisions cited by the claimant as well as the books of G.T. Gajaria. This seems to be a rational, plausible and possible approach that has been adopted by the learned arbitrator. The Award is also in sync with the authorities and judicial pronouncements on similar issues.

29. In an application for setting aside of the award under Section 34 of the Arbitration and Conciliation Act, 1996 it is now well settled by catena of decisions that the Court does not act and function as a court of appeal over the arbitral award and may interfere on merits limited to the grounds mentioned in Section 34 (2) of the said Act. It is relevant to note that by way of amendment in 2016 Sub-section (2A) has been inserted in Section 34 which provided that in case of domestic arbitration violation of public policy of India would also include patent illegal ex facie must appear on the face of

the award. However, the ground of patent illegality would not be available in the event an application for setting aside of the award is filed prior to amendment in 2005 i.e. 23rd October, 2015 [***See Ssangyong Engineering and Construction Company Limited v National Highways Authority of India (NHAI)***]¹⁶. The application for setting aside of the award was filed on 1st November, 2017. By way of clarification in the amendment it was made clear that the award shall not be set aside merely on the ground of an erroneous application of law or by re-appreciation of evidence which is merely a reiteration of the earlier views expressed by the Hon'ble Supreme Court that in deciding the application for setting aside the award the court is not exercising its jurisdiction as an appellate authority and the powers of the appellate court would not be available to a court deciding such an application. The scope of jurisdiction under Section 34 and Section 37 of the Act is not akin to normal appellate jurisdiction. The powers of the Court are circumscribed by the limited grounds as mentioned in Section 34. The reason being that the arbitration proceedings are not considered and comparable to judicial proceedings before the Court and a party can opt for an arbitration before any person who is not required to have a degree in law or any prior legal experience. Once the parties have consented to an appointment of an arbitrator it should be presumed that they have bestowed their faith and trust on the arbitrator and wanted a decision in an informal manner. This was recognised in ***Dyna Technologies (p) Limited v. Crompton Greaves Ltd.***¹⁷ in which it is observed in paragraph 29: “*There is no gainsaying that*

¹⁶ 2019 (15) SCC 131

¹⁷ 2019 (20) SCC 1

*arbitration proceedings are not per se comparable to judicial proceedings before the Court. A party under the Indian Arbitration Law can opt for an arbitration before any person, even those who do not have prior legal experience as well. In this regard, we need to understand that the intention of the legislature to provide for a default rule, should be given rational meaning in light of commercial wisdom inherent in the choice of arbitration” and reiterated in **K.***

Suguman vs. Hindustan Corporation Limited¹⁸ in the following words:

“When parties have chosen to avail an alternate mechanism for dispute resolution, they must be left to reconcile themselves to the wisdom of the decision of the arbitrator and the role of the court should be restricted to the bare minimum”.

30. In **Vidya Drolia & Ors. v. Durga Trading Corporation**¹⁹ it is stated:

“18. Arbitration is a private dispute resolution mechanism whereby two or more parties agree to resolve their current or future disputes by an Arbitral Tribunal, as an alternative to adjudication by the Court or a public forum established by law. Parties by mutual agreement forgo their right in law to have their disputes adjudicated in the courts/public forum. Arbitration agreement gives contractual authority to the Arbitral Tribunal to adjudicate the disputes and bind the parties.” (emphasis supplied)

31. In **Konkan Railway Corporation Ltd v Chenab Bridge Project Undertaking**²⁰ a three-judge bench in paragraph 18 stated thus:

“Scope of interference by a court in an appeal under Section 37 of the Act in examining an order, setting aside or refusing to set

¹⁸2020(12) SCC 539 at 540

¹⁹2021(2) SCC 1

²⁰ 2023 (9) SCC 85

aside an award, is restricted and subject to the same grounds as the challenge under Section 34 of the Act.” (emphasis supplied)

32. The aforesaid view has been reiterated in paragraph 26 in ***Bombay Slum Redevelopment Corporation Pvt. Ltd. v. Samir Narain Bhojwani***²¹. It was held thus:

“26. The jurisdiction of the appellate court dealing with an appeal under Section 37 against the judgment in a petition under Section 34 is more constrained than the jurisdiction of the Court dealing with a petition under Section 34. It is the duty of the appellate court to consider whether Section 34 Court has remained confined to the grounds of challenge that are available in a petition under Section 34. The ultimate function of the appellate court under Section 37 is to decide whether the jurisdiction under Section 34 has been exercised rightly or wrongly. While doing so, the appellate court can exercise the same power and jurisdiction that Section 34 Court possesses with the same constraints.” (emphasis supplied)

33. The award can be interfered only on the limited grounds as envisaged under the Act. Moreover, when the view taken by the arbitrator is a possible view the court in deciding an application for setting aside the award shall not interfere with such a view or substitute such view with its own view. Once the interpretation given by the arbitrators are backed by logic and are reasonable the same is required to be upheld as held in:

i) ***MMTC Ltd. v. Vedanta Ltd.*** reported in **2019(4) SCC 163 paragraph 14**

²¹ 2024 (7) SCC 218

- ii) ***UHL Power Company Ltd. v. State of Himachal Pradesh*** reported in **2022(4) SCC 116 paragraphs 18 and 22.**

34. The jurisdiction of the court under section 37 of the Act, as clarified in ***MMTC*** (*supra*) and reiterated in ***Konkan Railway Corporation Ltd.*** (*supra*) is akin to the jurisdiction of the court under Section 34 of the Act. The scope of interference by a court in an appeal under Section 37 of the Act, in examining an order setting aside or refusing to set aside an award, is restricted and subject to the same grounds as the challenge under Section 34 of the Act. The jurisdiction under Section 34 of the Act is exercised only to see if the Arbitral Tribunal's view is perverse or manifestly arbitrary. [See ***Konkan Railways Corporation Ltd.*** (*supra*)].

35. In ***Somdatt Builders*** (*supra*) the Hon'ble Supreme Court in referring to ***M/s. Larsen Air Conditioning and Refrigeration Company v. Union of India***²² and ***Reliance Infrastructure Ltd. v. State of Goa***²³ has observed that:

"It is necessary to remind the courts that a great deal of restraint is required to be shown while examining the validity of an arbitral award when such an award has been upheld, wholly or substantially, under Section 34 of the 1996 Act. Section 37 of the 1996 Act grants narrower scope to the appellate court to review the findings in an arbitral award if it has been upheld or substantially upheld under Section 34. Frequent interference with arbitral awards would defeat the very purpose of the 1996 Act." (emphasis supplied)

²² 2023 INSC 708

²³ 2024 (2) SCC 613

36. The aforesaid view has been reiterated in a fairly recent decision in **C & C Construction Ltd. v. Ircon International Ltd.**²⁴ in which it has been stated that “in appeal, Section 37 of the Act grants narrower scope to the appellate court to review the findings in an award, if it has been upheld, or substantially upheld under Section 34”. (emphasis supplied) The views expressed by the Arbitral Tribunal have been accepted by Commercial Court at Asansol and therefore the court under Section 37 would be extremely chary and circumspect in scrutinizing the award.

37. Though the underlying philosophy in arbitration law in this country has undergone a sea-change from what it was under the Arbitration Act, 1940 to what it is now under the 1996 Act and several Supreme Court judgments caution against interpreting the provisions of the 1996 Act by referring to the 1940 Act, the fundamental basis in dealing with a challenge to an arbitral award remains unaltered. In the most traditional approach, the court would not step in to correct every perceived wrong complained of by a challenger simply on the ground that since the challenger was a party to an agreement that took the assessment away from the sovereign forum to a private forum, the challenger had to live with the decision of the forum of its choice. The same proposition, put in a different form, is simply this: when there is a proper submission, whether of fact or of law, to arbitration, it is not for the court to sit as an ordinary court of appeal over an arbitral award because the arbitrator has taken a view of law or of fact which a court of law may not have taken if such court were trying the dispute. The everlasting principle, unaffected by the paradigm shift in the arbitration law in this

²⁴ 2025 SCC OnLine SC 218

country, is that except to the extent expressly or by necessary implication permitted by the governing statute, the court will not revise, remit or set aside an arbitral award. [***See State of West Bengal v Pam Developments Private Limited***²⁵].

38. In light of the distinction between loss of profits and loss of profitability/loss of business as elucidated hereinbefore and the fact that in cases of damages claimed by a contractor where the Government is proved to have committed breach by improperly rescinding the contract and for estimating the amount of damages, the court should make a broad evaluation instead of going into minute details, the respondent contractor in the present case should be entitled to loss of profit at the rate of 10% as awarded by the learned sole arbitrator.

39. Hence, the appeal fails and the judgment dated 25th February 2021 passed by the learned Commercial Court at Asansol is upheld.

40. There shall be no order as to costs.

I agree

(Soumen Sen, J.)

(Biswaroop Chowdhury, J.)

²⁵ 2017 SCC OnLine Cal 13272