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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment Pronounced on : 13.05.2025**

+ **O.M.P. (COMM) 446/2024 and IA No.43025/2024**

PUERTO LIFE SCIENCES PVT. LTD.Petitioner
Through: Mr. Preetam Singh, Advocate.
versus

ANCON INFRATECHRespondent
Through: Mr. Shantanu Parashar, Mr. Shaurya
Chourasiya and Mr. Rohan Malik,
Advocates.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA
JUDGMENT

1. The present petition has been filed by the petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “A&C Act”) assailing an arbitral award dated 15.05.2024, read with order dated 23.07.2024 passed under section 33 of the A&C Act.
2. The arbitral proceedings took place in the backdrop of a tender dated 04.12.2018 being issued by the petitioner for the purpose of setting up its factory at Neemrana, Rajasthan. The respondent submitted its bid and pursuant to negotiations, a Letter of Intent dated 25.12.2018 was issued by the petitioner to the respondent.
3. A purchase order came to be issued thereafter on 17.03.2019. The said purchase order sets out the total amount of work based on the Bill of Quantities (BOQ). The Conditions of Contract were appended to the



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purchase order. The same contains an arbitration clause which is in the following terms :-

“j) Arbitration Act :

i) *All disputes regarding the specifications, designs, drawing instructions and quality of work or quality of materials used for the work or any other matter relating to the work shall be referred to the sole arbitration to be appointed by Consultant.*

ii) *The party invoking arbitration shall specify the dispute or disputes to be referred to arbitration under this together with the amount or amounts claimed in respect of each such dispute.*

iii) *The arbitrator may from time to time with consent of the parties extend the time, for making and publishing the award.*

iv) *If possible, the work under the contract shall be continued during the arbitration proceedings and no payment due or payable to the contractor shall be with held on account of such proceedings.*

v) *The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties fixing the date of the first hearing. The arbitrator shall give a separate award in respect of each dispute of difference referred to him.*

vi) *The venue of arbitration shall be at **PUERTO LIFE SCIENCES PVT LTD** office at New Delhi.*

vii) *The award of the Arbitrator shall be final, conclusive and binding on all parties relating to this contract.*

viii) *The cost of arbitration shall be as decided by arbitrator.”*

4. The case set out by the claimant/respondent in the Statement of Claim is that it commenced the work of Plain Cement Concrete (PCC) and Reinforced Cement Concrete (RCC) footings in January, 2019 and continued the same till March, 2019. However, at this time, the claimant/respondent became apprehensive about the quality of raw materials supplied by the petitioner. Thereafter, upon the quality of the Ready Mix



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Concrete (RMC) being found to be not of requisite standard, further work was stopped and the process of dismantling the PCC and RCC footings work was initiated on 19.03.2019. While initially the dismantling work was stated to have been performed by the claimant/respondent, since the petitioner found it conducive to get the said dismantling work executed at a lower cost/s through some other agency, the same was subsequently awarded to a third party. The dismantling work continued till June/July, 2019.

5. On account thereof, the claimant/respondent could resume its work only in June/July 2019 and started reconstructing the PCC and RCC footings. According to the claimant/respondent, the construction proceeded in right earnest upto March 2020 whereupon it was impeded on account of the Covid-19 pandemic. Thereafter, the work resumed only in May/June, 2020. However, the claimant/respondent was constrained to stop the work in March 2021 due to defaults on the part of the petitioner in making timely payments of RA Bills.

6. In this background, disputes arose between the parties. The same having been remained unresolved, a legal notice / notice invoking arbitration was sent by the claimant/respondent on 08.08.2022 to the petitioner. Since the same was not responded to by the petitioner, the claimant/respondent filed a petition under Section 11 of the A&C Act, in which, *vide* order dated 24.02.2023, this Court appointed a Sole Arbitrator to adjudicate the disputes between the parties.

7. The claims asserted by the claimant/respondent in the Statement of Claims were as under:-

- i. Rs. 1,27,91,826/-, being the principle amount under the bills raised by



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the claimant/respondent upon the petitioner including retention money at 5% and adjustment of taxes;

- ii. Interest of Rs.98,41,146/- reckoned at the rate of 24% per annum from the respective dates of default in payment of RA Bills from March 2019 till 15th July 2023 [the latter being the date till which the interest was computed];
- iii. An amount of Rs.54,08,344/- towards idling of machinery, staff and labour for the period 16.03.2019 to 20.06.2019;
- iv. A sum of Rs.3,18,178/- towards GST;
- v. Claim for cost overrun/material rate difference for material amounting to Rs.38,68,498/ and for labour, staff, machinery and transportation amounting to Rs.14,87,883/-.

8. The claims raised by the claimant/respondent were refuted by the petitioner. The petitioner also raised counter-claims viz. an amount of Rs.50,18,912/- for the amount adjusted against the final bill of the claimant/respondent due to rate, proof and quality issues .

9. Further, an amount of Rs.51,32,409/- was sought to be claimed on account of deficiency in the work performed by the claimant/respondent and being the cost incurred for rectification work etc.

THE AWARD

10. The Arbitral Tribunal after taking note of the respective claims and counter-claims, framed the following issues:-

“i. Whether there was breach by either party and, if so, to what extent would the other party be entitled to compensation?”



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ii. Which party was responsible for the delay and whether the other party would be entitled to be compensated therefor?

iii. To what relief, if any, is the claimant entitled?

iv. To what extent, if at all, should the counter-claim succeed, including for works apparently got done by the respondent by third parties?

v. In the event the claimant is entitled to interest, would the statutory rate in the Micro, Small and Medium Enterprises Act, 2006 be applicable?"

11. The award proceeds to copiously discuss the oral and documentary evidence adduced by the parties. It is noticed in paragraph 17 of the award that the claimant/respondent gave up its claim for Rs.3,18,378/- on account of GST.

12. Paragraph 24 takes notes of the fact that the claim on account of idling of machinery and labour during the period when the PCC and RCC footings constructed with sub-standard ready mix concrete were being dismantled, was given up in the hearing held on 09.05.2024.

13. Paragraph 25 of the award notes that the surviving heads of claim which were required to be adjudicated were as under :-

"25. Thus, the heads of claim pressed by the claimant are as follows:

(i) On account of unpaid final bills for scheduled and non-scheduled items of work: Rs.1,27,91,826

(ii) On account of interest for delayed payment of RA bills: Rs. 98,41,146

(iii) On account of cost overrun for materials: Rs.38,68,498

(iv) On account of cost overrun for labour: Rs.14,87,883

(v) Interest at the rate of 24% per annum"

14. The award proceeds to notice that the final bill raised by the respondent claimant for a sum of Rs.60,93,767.23/-, inclusive of Central and



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State GST was duly accompanied by full description of the entire works undertaken, the rates thereof and the measurements. Further, the same was duly signed by the Project Management Consultant (PMC) engaged by the petitioner.

15. It is also noticed in the award that the Project Management Consultant of the petitioner had also sought to deduct an amount of Rs.28,43,402/- from the final bill for want of acceptable documents with respect to the works of (a) removal of excavated material in terms of a particular clause of the purchase order; (b) removal of excavated material in terms of another clause of the contract; and (c) dismantling of footings.

16. Paragraph 29 of the award notes that in respect of non-scheduled items for which a sum of Rs.32,55,764.30/- inclusive of central and state GST, was claimed in the Statement of Claim, the PMC of the petitioner sought to deduct a sum of Rs.4,98,960/-.

17. In Paragraph 30 of the award, it is noticed as under :-

“30. The claimant asserts that the payments on account of excavation of earth and the removal thereof as also on account of dismantling the footings constructed with sub-standard concrete had been previously made as such amounts were included in one or more of the running account bills that were submitted by the claimant from time to time. The claimant contends that since the final bill must include all that has gone under the previous running account bills, details of all the work done by the claimant in terms of the purchase order were furnished along with the final bill. While the claimant accepts that it was the claimant's obligation to furnish all the details in its final bill, the claimant maintains that past payments that had been made could not be reopened by the employer upon receipt of the final bill. In other words, it is the claimant's argument that when payments are made against running account bills, there is an element of finality to such payments and, notwithstanding the final bill providing details of the entire work done, no issue can be raised in respect of the payments already released.”



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18. Paragraph 47 of the award explains the rationale adopted by the learned Arbitrator for working out the final outstanding liability pursuant to the submissions of final bill. The same reads as under :-

“47. It is necessary at this stage to understand why building contracts or works contracts provide for running account bills being raised and payments being made thereagainst even while the project is underway and far from completion. A construction project takes a long time to be completed and it would be unreasonable to expect the contractor to spend money from the contractor’s pocket and get paid only after the completion of the work. It is for such purpose that on-account payments are made against running account bills to ensure that the entire project does not require to be financed by the contractor. It is equally possible that a bar chart is prepared by the parties or milestones are set to indicate when running account bills maybe raised and payments claimed thereunder. While it is the norm in contracts as the present one for a degree of verification to be made of the work conducted for which running account bills are raised, it is open to the employer to make on-account payments without verification since measurements can be taken after the completion of the work, depending on the nature of the work involved. However, when payment is made at a particular rate as claimed in the running account bills, at a subsequent stage the rate cannot be questioned. The quantum of work performed may be subject to final measurements, but once payment is released at a particular rate, the rate at which the bill has been raised for the particular item is deemed to have been conclusively accepted. It is, thus, that the dispute raised by the respondent, pertaining to the dismantling work undertaken by the claimant and already paid for, has to be distinguished qualitatively from the dispute pertaining to the quantum of work done which is the basis for the deductions claimed on account of excavation of earth and the removal thereof. If the payment on account of the dismantling work undertaken by the claimant had not been previously made, it would have been open to the respondent to question the rate. But once the payment was made at the rate quoted, no issue can be raised regarding the rate. Accordingly, the deduction sought by the respondent on account of the alleged high rate charged by the claimant for the dismantling work fails and the claimant is found entitled to the sum of Rs 9,77,241/- on such account.”

19. Thus, Arbitrator proceeded on the basis that it would not be apposite to reopen the rates which have been mutually adopted by the parties for the



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purpose of the payment of running account bills; the rate at which the bill has been raised for a particular item is deemed to have been conclusively accepted on the payment thereof by the petitioner/employer.

20. Thus, Arbitrator took the final bill amount for Rs.60,93,767.23/- as the starting point for assessing the entitlement of the respondent claimant. From the said amount, the Arbitrator assessed the deductions that were required to be made, based on the material on record.

21. Thus, the Arbitrator assessed the entitlement of the respondent claimant under the final bill in respect of scheduled items to the tune of Rs.43,71,381.23/-.

22. For non-scheduled items, the award works out the entitlement of the respondent claimant to the tune of Rs.26,66,979/- after accepting the deduction made by the PMC of the petitioner.

23. Thus, the total principle amount awarded to the respondent as outstanding payment for the work performed is tune of Rs.70,38,360.59/-. On the said amount, interest at the rate of 15% per annum was awarded till the date of the award. In addition, the Arbitrator awarded a sum of Rs.14 lakhs to the claimant/respondent towards loss of profit. The rationale for working out the said amount is contained in paragraph 62 of the award, which reads as under:-

“62. It may be observed at this stage that notwithstanding the correspondence exchanged between the parties, the transaction under the agreement was carried out in a rather informal manner as is the wont in contracts between smaller parties in this country. The difficulty that is faced in such a scenario is that when disputes arise and it comes to formal proof of any claim or the denial of any head of claim, there may not be adequate material. The escalation clause above can be said to be an embargo on the rate of material cost and the rate of labour cost, but



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would not altogether disentitle the claimant from seeking damages on account of loss of profit for an extended period. The claimant has contended that a minimum profit margin of about 10% ought to be read into the claimant's bid. Since the purchase order of March 17, 2019 appearing at page 36 of the statement of claim indicates the total amount of job based on the BOQ to be of value of approximately Rs.5.66 crore, an approximate estimation of the damages suffered by the claimant because of the project running into more than 26 months against the contemplated nine, may be made. It is clarified that in assessing damages there is always an element of approximation or guesswork that is involved, particularly, if there is no genuine pre-estimation thereof by way of liquidated damages or the like. There is no doubt that a dispassionate assessment of the rival conduct of the parties would lead to the conclusion that it was the respondent that was largely to blame for the delay. It has also to be taken into consideration that though the work continued through the year 2020, for most part there was a lockdown in place due to the pandemic and neither party can be held responsible on such account. On a rough estimation after discounting any claim on account of rise in labour cost, a quarter of the quantum of profit that the claimant expected to earn from the project must be awarded by way of damages for the delay in the completion of the project between October, 2019 and the middle of March, 2021. Since it is the claimant's case that the profit component would have been a tenth of the value of the agreement or about Rs.14 lakh would appear to be a justified measure of damages to compensate the claimant for the extended period of work. It is recorded that no document has been shown by either party of the nature of a formal request for extension of time or of unilateral extension by the employer. At the same time, it is unmissable that the claimant continued to carry on the construction beyond the stipulated date and the respondent acquiesced therein."

24. Both the counter-claims were rejected. Counter-Claim No.1 was rejected on the premise that the deductions to which the petitioner was entitled were duly accounted for while assessing the total outstanding amount payable to the petitioner.

25. Counter-claim No.2 was rejected on the premise that (i) the claimant/respondent did not bill for any work which it had not done; (ii) the petitioner had not been able to adduce evidence to the effect that the



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unfinished work was done at rates higher than what had been stipulated in the BOQ (the reasoning in this regard is contained in paragraph 56 of the Award).

APPLICATION UNDER SECTION 33 OF THE A&C ACT

26. An application under Section 33 of the A&C Act came to be filed before the Arbitrator on the basis that the amount of retention money to which the claimant/respondent was entitled had been omitted from the award. The said application came to be disposed of by the learned Arbitrator vide order dated 23.07.2024 holding as under:-

“3. There is no doubt – and as would be evident from paragraph 40 of the award – that the practice while releasing on-account payments against running accounts bills was for the respondent to retain five per cent thereof which would and act as a kind of warranty and would be payable after the expiry of the defect liability period. There is no dispute in such regard and paragraph 40 of the award brings this out clearly.

4. However, while dealing with the final bill raised by the claimant on the respondent, a copy whereof appears at pages 98 to 104 of the statement of claim, the award presumed that the claim on account of the retention money was incorporated in the final bill. This would appear from the following sentences at paragraphs 40 and 54 of the award :

“... However, it cannot be lost sight of that the final bill in respect of the scheduled items of work raised by the claimant and which appears at pages 98 to 104 of the statement of claim contains the entirety of the claim of the claimant in terms of the purchase order, including the amounts covered by the running account bills previously raised...” (paragraph 40)

“... Secondly, the retention money component is included in the final bill and if the principal amount due in respect of the final bill, after providing for permissible deductions, is allowed, the retention money would have been allowed...” (paragraph 54).

5. It is evident from page 98 of the statement of claim, which is the



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summary of the final bill, that the final bill value is said to be Rs. 5,84,53,916.89 p and from such sum the value of the previous bills of Rs. 5,32,89,707.37 p has been deducted to arrive at the net final bill value of Rs. 51,64,209.52 p. To such net amount goods and services tax, both central and local, have been added to arrive at the total final bill value of Rs. 60,93,767.23 p. It is apparent that the total value of the works executed was indicated in the final bill and the total value of the previous bills raised deducted from such amount to arrive at a net figure.

6. Thus, the retention money which would have been a part of the value of the previous bills was not included in the net amount claimed in the final bill. It was a clear error of computation that was committed while rendering the award. As the aforesaid two sentences quoted from the award would reveal, the erroneous understanding was that the retention money was part of the net amount claimed in the final bill. It has now been demonstrated that the retention money was not included in the net amount claimed in the final bill. Accordingly, the award is liable to be corrected by awarding the amount on account of retention money to the claimant.

7. In further support of the claim on account of retention money, the claimant refers to page 29 of the statement of defence and the table appearing there at where there is clear reference of five per cent of retention money of Rs. 35,03,195/-.

8. According to the respondent, if at all, the alleged error may be said to be an error of judgment and not a computation error that is capable of correction under Section 33 of the Act. The respondent asserts that minor corrections, arithmetical errors and claims not considered may be taken up under Section 33 of the Act but an error of judgment cannot be corrected under such provision. The respondent submits that it was the Arbitrator's understanding that the retention money was included in the final bill and if it was an error of understanding, that would be an error of a judgment and not a computation error. Such argument is not tenable since the error appears from the face of the record and cries out loud to be corrected.

9. In the application, the amount claimed on account of retention amount is Rs. 31,26,502/-. Though five per cent of the value of the previous bills as indicated in the final bill at page 98 of the statement of claim would come to a lesser figure, it has also to be taken into account that there would be a goods and services tax component in respect thereof. Further, since the amount of retention money appearing at page 29 of the statement of defence is shown to be in excess of Rs. 35 lakh, the claim of



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Rs. 31,26,502/- on account of retention money is allowed and is added to the amount already awarded on May 15, 2024. Interest will also operate on such amount in terms of the award. The 60-day period to make the payment in terms of the award will begin after today.

10. The claimant's application under Section 33 of the Act, 1996 is allowed to the extent indicated. The error on the part of the Arbitrator should not have happened and is regretted."

SUBMISSIONS:-

27. In the above conspectus, the present petition under Section 34 of the A&C Act has been filed by the petitioner. The learned counsel for the petitioner has submitted as under:-

- i. There is no basis for awarding a sum of Rs.14 lakhs to the claimant/respondent on account of alleged loss of profit due to the protracted/extended performance of the Contract;
- ii. It is submitted that the learned Arbitrator in the guise of exercising jurisdiction under Section 33 of the A&C Act has substantially added to the amount awarded to the claimant/respondent. It is submitted that while purporting to deal with an application under Section 33 of the A&C Act, it is not permissible to modify the award in the manner sought to be done;
- iii. It is contended that the award suffers from patent illegality inasmuch as it fails to notice that in respect of the debit note of Rs. 51,32,409/- (counter-claim no.2) elaborate evidence was submitted in the form of documents showing that the claimed amounts were duly incurred by the petitioner. Yet, the said documentary evidence is stated to have been ignored/disregarded in the impugned award.



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28. Learned counsel for the respondent has refuted the said submissions. It is submitted that the impugned award discloses a cogent basis for adjudicating/ working out the amounts to which the claimant/respondent is entitled. It is pointed out that bulk of the amount claimed by the claimant/respondent has not been awarded by the learned Arbitrator. It is emphasized that no infirmity can be found with the learned Arbitrator working out the entitlement of the parties based on the running account bills (on the basis of which the final bill was drawn up).

29. Further, it is submitted that the award particularly paragraph 40 and 54 reveals that the Arbitrator returned a finding in favour of the claimant/respondent as regards the entitlement towards the retention money, however, the same was inadvertently not accounted for in the final award. Hence, appropriate directions were issued while disposing of the application under Section 33 of the A&C Act.

30. It is submitted that the learned Arbitrator is well within its power to rectify the inadvertent error while exercising jurisdiction under Section 33 of the A&C Act.

31. It is further submitted that the learned Arbitrator has rightly applied the principle of approximation and guess work for the purpose of awarding damages to the extent of Rs.14 lakhs to the claimant/ respondent.

REASONING AND ANALYSIS

32. It can be seen from a perusal of the award that the same analyses threadbare the respective claims and counter-claims of the parties. The award discloses the basis for adjudging the entitlement of the



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claimant/respondent.

33. The rationale for working out the respective entitlement of the parties has been disclosed in paragraph 47 of the award. The same clearly states that when payment has been made at a particular rate in the running account bills, it is impermissible for either party to question the said rate at a subsequent stage.

34. It was noticed that all the running account bills were accounted for in the final bill that was raised by the claimant/respondent.

35. The Arbitrator took cognizance of the deduction that was sought to be contemporaneously made by the PMC of the petitioner, from the amount claimed in the final bill and has largely allowed the same except for a sum of Rs.8,800/- plus Rs.1,34,975/- (the rationale for which has been explained in paragraph 49 of the award).

36. Likewise, with regard to the non-scheduled items, the impugned award takes note of the deduction sought to be contemporaneously made by the PMC of the petitioner and has awarded the balance amount.

37. Nothing untoward or perverse can be found in the manner in which the learned Arbitrator has proceeded in the matter.

38. Likewise, the award of interest at the rate of 15% per annum on the principle amounts so assessed (with effect from February 01, 2022 till the date of award) is within the domain of the Arbitrator and does not brook any interference.

39. There is no gain saying that the scope of interference with an arbitral award in these proceedings is quite narrow and circumscribed. Recently, the Supreme Court in **OPG Power Generation Private Limited v. Enexio Power**



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Cooling Solutions India Private Limited & Anr, 2024 INSC 711 has observed as under –

“Scope of interference with an arbitral award”

68. *The aforesaid judicial precedents make it clear that while exercising power under Section 34 of the 1996 Act the Court does not sit in appeal over the arbitral award. Interference with an arbitral award is only on limited grounds as set out in Section 34 of the 1996 Act. A possible view by the arbitrator on facts is to be respected as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. It is only when an arbitral award could be categorized as perverse, that on an error of fact an arbitral award may be set aside. Further, a mere erroneous application of the law or wrong appreciation of evidence by itself is not a ground to set aside an award as is clear from the provisions of subsection (2-A) of Section 34 of the 1996 Act.*

69. *In Dyna Technologies (supra), a three-Judge Bench of this Court held that Courts need to be cognizant of the fact that arbitral awards are not to be interfered with in a casual and cavalier manner, unless the court concludes that the perversity of the award goes to the root of the matter and there is no possibility of an alternative interpretation that may sustain the arbitral award. It was observed that jurisdiction under Section 34 cannot be equated with the normal appellate jurisdiction. Rather, the approach ought to be to respect the finality of the arbitral award as well as party's autonomy to get their dispute adjudicated by an alternative forum as provided under the law.”*

40. The same principle has also been reiterated in numerous other judgments¹.

41. The contention that the learned Arbitrator has modified the award while dealing with an application under Section 33 of the A&C Act and, thereby, transgressed the limits of Section 33 of the A&C Act also appears to be without any substance.

42. A perusal of the award, particularly paragraph 54 thereof, reveals that

¹ Punjab State Civil Supplies Corporation Limited & Anr. V. M/S Sanman Rice Mills & Ors., 2024 INSC 742, Associate Builders v. DDA, (2015) 3 SCC 49



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for the purpose of the *inter-se* accounting, the impugned award unmistakably purported to account for the retention money component. The award proceeds on the basis that the retention money component is included in the final bill and restitution thereof is taken care of by awarding the principle amount due to the respondent claimant. It has been specifically observed in paragraph 54 as under :-

“54. Secondly, the retention money component is included in the final bill and if the principal amount due in respect of the final bill, after providing for permissible deductions, is allowed, the retention money would have been allowed.”

43. While disposing the application under Section 33 of A&C Act, the learned sole Arbitrator notes that the final bill value of Rs.60,93,767.23/- (which was a starting point for assessing the entitlement of the claimant/respondent) was arrived at by working out the difference between the final bill value of Rs.5,84,53,916.89/- and the total value of previous bills amounting to Rs.5,32,89,707.37/- (resulting in the net final bill value of Rs.51,64,209.52/-) and adding Goods and Service Tax both central and local to the said net final bill value. In this manner, the final bill amount of Rs. 60,93,767.23/- was worked out.

44. From the said amount, the learned Arbitrator proceeds to work out the deductions which are to be made. However, the award dated 15.05.2024 omits to take note of the fact that the amount of Rs.5,32,89,707.37 would also include the retention money which is liable to be refunded to the respondent claimant. The same was not accounted for while working out the entitlement of the claimant/respondent in the award dated 15.05.2024.

45. The same was duly taken note of while disposing of the Section 33



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application and the retention money amount claim was added to the amount awarded to the claimant/respondent. In doing so, the learned Arbitrator merely corrected an arithmetical / computational/clerical error. It cannot be said that the order under Section 33 awards an altogether new claim to the claimant/respondent. The unmistakable intent to include the retention money as part of the entitlement of the respondent claimant is evident from paragraph 54 of the award.

46. The Supreme Court in **Gyan Prakash Arya V. Titan Industries Limited**, 2021 SCC OnLine SC 1100 while determining the scope of power under Section 33 of A & C Act has clarified that the arbitrator has power to rectify clerical/ arithmetical errors. The relevant portion of the judgment is reproduced as under –

“....Only in a case of arithmetical and/or clerical error, the award can be modified and such errors only can be corrected....”

47. In **State of Arunachal Pradesh v. Damani Construction Co**, (2007) 10 SCC 742, the Supreme Court has observed as under -

“8. Firstly, the letter had been designed not strictly under Section 33 of the Act because under Section 33 of the Act a party can seek certain correction in computation of errors, or clerical or typographical errors or any other errors of a similar nature occurring in the award with notice to the other party or if agreed between the parties, a party may request the Arbitral Tribunal to give an interpretation of a specific point or part of the award.....”

48. This Court in **Great Eastern Energy Corporation Limited v. Sopan Projects**, 2023 SCC OnLine Del 2555 has observed as under –

“15. It cannot be disputed that the power of the Arbitrator under Section 33 of the Act is rather limited and can be invoked only to correct any computational errors, clerical or typographical errors, or other errors of a similar nature occurring in the Award, or where the parties were



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aggrieved, give an interpretation of a specific point or part of the Award. The Arbitral Tribunal may also make an additional Award on the claim presented in the arbitral proceedings but omitted from the Arbitral Award. The said power, however, does extend to review of the Award on merit.”

49. Given that the order under Section 33 seeks to rectify only an arithmetical/ clerical omission, it cannot be said that the same is beyond the the scope and ambit of the statutory prescription. As such, the challenge to the order dated 23.07.2024 passed by the learned sole Arbitrator under Section 33 of the A&C Act is rejected.

50. Lastly, comes the award in respect of “loss of profit”.

51. The impugned award itself notes the following contractual stipulations :-

“Escalation:

The rates quoted by the contractor in the contract documents shall be final and shall not be subjected to any change due to the increase in labour wages or inflation in the cost of materials or any other price variations due to any reason during the stipulated time period of the contract or during the extended time period of completion.”

52. On the basis of the aforesaid clause, it was noticed in the impugned award itself that the same is in the nature of embargo on claiming additional amounts in the guise of escalation in material cost or labour cost. However, the award proceeds to observe that the same does not preclude the claimant/respondent from claiming damages on account of loss of profit for extended period.

53. The award thereafter itself proceeds to work out the loss of profit based on “approximation or guess work”. Thereafter, the award notices that a tenth of the value of the agreement i.e., Rs. 56 lakhs can be reckoned to be



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profit component in respect of the Contract in question. Thereafter, the award proceeds to award 1/4th thereof to the claimant/respondent. There are several difficulties in the manner in which the aforesaid amount of Rs.14 lakhs has been awarded in the guise of loss of profit.

54. Firstly, a claim for loss of profit is materially different from a claim for compensation on account of escalation in the cost of work, what was claimed by the respondent claimant.

55. Secondly, the profitability of the instant contract does not necessarily have any nexus with the loss of profit (if any) of the amount of loss suffered by the respondent claimant. The same is a function of various things such as the number of contracts in the market for which the respondent claimant would have been able to bid but for protracted engagement in the instant Contract etc.

56. Thirdly, there is no basis for awarding Rs.14 lakhs to the respondent claimant; the same is essentially an *ad-hoc* amount which has no nexus with the claim actually advanced before the Tribunal nor has there any rationale for theoretically presuming that the same represents the amount of loss of profit suffered by the respondent claimant. As such, the award on this count is clearly unsustainable. In ***Five Star Construction Private Limited v. Orchid Infrastructure Developers Private Limited***, 2024 SCC OnLine Del 41, has observed as under -

“30. Neither was there any assertion nor any evidence led on behalf of Five Star to state that Rs 4,33,877 which was being claimed by them, was for the work done by the labour from 14-1-2013 till 7-5-2013. In fact, the appellant Five Star had made no separate claim for Rs 4,33,877 for any work allegedly continued by labour on site after termination of contract on 14-1-2013 till 7-5-2013, but it was an amount claimed as an interim



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relief. The learned arbitrator's conclusions could have been based only on the claims raised by the parties. An arbitrator cannot award an amount that he may feel is just to a party in the interest of justice, when there is no specific claim in that regard. The learned arbitrator thus, has exceeded his mandate and jurisdiction by awarding a sum of Rs 4,33,877.

31. Not only has the learned arbitrator given an award for a non-existent claim, but has also contrived a value and manufactured a claim for the work done from 14-1-2013 till 7-5-2013, for which no logic, rationale or calculation exists. It has been explained in SsangyongEngg. & Construction Co. Ltd. v. NHA that a decision which is perverse, may no longer be a ground for challenge under “public policy of India” but would certainly amount to patent illegality appearing on the face of the award. A finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.

32. Further, in PSA SICAL Terminals (P) Ltd. v. V.O. Chidambaranar Port Trust, the Supreme Court held that an award based on no evidence, shall be perverse.

33. Thus, even if for the sake of arguments; it is accepted that the claim for work done till 7-5-2013 had existed, there is no basis to presume that the value of the work allegedly performed from 14-1-2013 till 7-5-2013 would be Rs 4,33,877, especially when Five Star in its statement of claims had specifically made a claim of Rs 29,60,466 for the work executed till 14-1-2013 which included Rs 4,33,877.

34. In Satluj Jal Vidyut Nigam Ltd. v. Jaiprakash Hyundai Consortium, it was held that financial claims based on novel mathematical derivations without proper foundation in the pleadings and/or without any cogent evidence in support thereof can cause great prejudice to the opposite party, colouring the award with perversity. Therefore, the learned arbitrator, in the present case, had awarded a sum that was for a non-existing claim, based on no cogent reasoning or evidence.”

57. Furthermore, the Supreme Court, in **Unibros v. All India Radio**, 2023 SCC OnLine SC 1366, has laid down specific conditions that must be satisfied for a claim of loss of profit to be granted. The relevant extract from the judgment is reproduced below-



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“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.”

58. Similarly, this Court in **Municipal Corporation Of Delhi v. Sh. Satya Pal Gupta**, 2024:DHC:8968DB, has observed as under –

“27. A plain reading of the claims indicates that the Contractor had based its computation on the assumption that his profit margin was 10% of the value of the Contract. He, accordingly, worked out the quantum of profit that he would have earned per month by dividing the value of the work over the term of the Contract. He then multiplied the hypothetical figure of monthly profit with the period of delay in completion of the Contract. According to the Contractor, the delay was for a period of sixty months. Therefore, he claimed that he was entitled to the quantum of monthly profit as worked out above multiplied by the period of sixty months. It is at once clear that the computation of quantum of damages as calculated is flawed. First of all, there is no evidence or material to indicate that the Contractor would have earned 10% profit on the value of the work. Secondly, there is no material to indicate that if the Contract had not been prolonged, the Contractor would have been gainfully employed in another profitable contract. In **Bharat Coking Coal Ltd. v. L.K. Ahuja**: (2004) 5 SCC 109, the Supreme Court had held as under:

“23. Claim 8 has been rejected by the arbitrator. Now we proceed to consider Claim 9 for loss arising out of turnover due to prolongation of work. The claim made under this head is in a sum of Rs 10 lakhs. The arbitrator rightly held that on account of escalation in wage and prices of materials compensation was obtained and, therefore, there is not much justification in asking for compensation for loss of profits on account of prolongation of works. However, he came to the conclusion that a sum of Rs 6,00,000 would be appropriate compensation in a matter of this nature being 15% of the total profit over the amount that has been agreed to be paid.



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While a sum of Rs 12,00,000 would be the appropriate entitlement, he held that a sum of Rs 6,00,000 would be appropriate. He also awarded interest on the amounts payable at 15% per annum.

24. Here when claim for escalation of wage bills and price for materials compensation has been paid and compensation for delay in the payment of the amount payable under the contract or for other extra works is to be paid with interest thereon, it is rather difficult for us to accept the proposition that in addition 15% of the total profit should be computed under the heading "Loss or Profit". **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.** This aspect was very well settled in *Sunley (B) & Co. Ltd. v. Cunard White Star Ltd.* [(1940) 1 KB 740 : (1940) 2 All ER 97 (CA)] by the Court of Appeal in England. Therefore, we have no hesitation in deleting a sum of Rs 6,00,000 awarded to the claimant."

28. **It is apparent from the above that the Arbitral Tribunal has awarded claim for loss of profit for the period the Contract was prolonged without any evidence or material to support the claim.** Thus, the impugned award is vitiated by patent illegality. In view of the above, the impugned award to the extent that the Arbitral Tribunal has awarded the Contractor's Claim No.5 is set aside."

As such, the award in respect of "loss of profit" cannot sustain.

59. As regards the contention of the petitioner that its counter-claim no.2 has been wrongly rejected, the same is found to be devoid of any merit.

60. The impugned award notices in paragraph 56 that "the claimant has not billed for the work that it has not done". Further, the award take note of



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the fact that there is no cogent evidence to establish that the unfinished work was got done by the respondent at rates higher than what has been stipulated under the BOQ appended to the purchase order.

61. In these proceedings, the petitioner has sought to contend that documents were placed to establish that additional work was performed which was the subject matter of counter-claim no.2, however, it is noticed that the said invoices sought to be referred to by the petitioner, although filed along with an application dated 13.04.2024 filed before the learned Arbitrator, the said application does not contain any detailed averment/s as regards the purport of the expenditure allegedly covered by the invoices sought to be relied upon. It has also been rightly pointed out by the learned counsel for the respondent that these documents were not referred to in the respondent's affidavit of evidence. As such, this Court is not inclined to interfere with the impugned arbitral award on the basis of the said additional documents.

62. In the circumstances, the impugned award is sustained except to the extent it awards a sum of Rs.14 lakhs to the respondent claimant under the head "loss of profit".

63. The petition is disposed of in the above terms. The pending application also stands disposed of.

SACHIN DATTA, J

MAY 13, 2025/r, sv