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

IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION PETITION NO. 1445 OF 2019

Shri Balaji Sugars And Chemicals Pvt. Ltd

...Petitioner

Versus

Tamhankar Patil And Associates

...Respondent

WITH

INTERIM APPLICATION NO. 2512 OF 2025

IN

COMMERCIAL ARBITRATION PETITION NO. 1445 OF 2019

Tamhankar Patil And Associates

...Applicant

Versus

Shri Balaji Sugars And Chemicals Pvt. Ltd

...Respondent

WITH

INTERIM APPLICATION (L) NO. 24385 OF 2022

IN

COMMERCIAL ARBITRATION PETITION NO. 227 OF 2023

Shri Balaji Sugars And Chemicals Pvt. Ltd

...Petitioner

Versus

Tamhankar Patil And Associates

...Respondent

Mr. Zubin Behramkamdin, Senior Advocate a/w Mr. Vyom Shah, Mr. Ashok Kulkarni, Ms. Rashna Khan, Ms. Poorva Garg, Mr. Simon Mascarenhas and Gauri Kadam i/b Mulla & Mulla and Cragie Blunt & Caroe, for Petitioner.

Mr. Sangramsingh R. Bhonsle, a/w. *Mr. Siddharth A. Mehta, Nrupal A. Dingankar, Ms. Pushkara A. Bhonsle, Naman Sherstra, Ms. Sneha S. Bhonsle, Sanmitra Pol, Ms. Harshada V. Shrikhande, and Mr. Vaibhav Kaushish i/b Vidhii Partners, for Respondent.*

CORAM: **SOMASEKHAR SUNDARESAN, J.**
RESERVED ON: **MARCH 16, 2026**
PRONOUNCED ON: **JUNE 8, 2026**

JUDGEMENT:

Context and Factual Background:

1. This Petition under Section 34 of the Arbitration and Conciliation Act, 1996 (“***the Act***”) assails an arbitral award dated August 6, 2019 and a supplemental award dated May 5, 2022 (collectively, “***Impugned Award***”). The Respondent, Tamhankar Patil & Associates (“***TPA***”) was the Claimant in the arbitration proceedings while the Petitioner, Shri Balaji Sugars & Chemicals Pvt Ltd (“***Balaji***”) was the Respondent.

2. TPA is a partnership firm and is engaged *inter alia* in the construction of buildings for sugar factories. Balaji floated a tender on February 13, 2013 for construction of a sugar factory in Bijapur District in Karnataka. TPA put in its bid and was awarded the work pursuant to a work

order dated March 22, 2013. On July 8, 2013, an agreement governing the work was executed (***“Agreement”***).

3. Disputes and differences arose, with Balaji claiming that TPA was slow in performing its work and that the contract had run its course and also contending that TPA had abandoned the work. TPA claimed that Balaji unfairly cancelled the work allocated, changed the Engineer-in-Charge mid-course and did not adhere to the procedures for inspection and certification provided for in the Agreement.

4. Nine claims were raised by TPA in the arbitration proceedings. In the course of the proceedings, TPA withdrew Claims Nos. 2, 5, 7 and 9. By an arbitral award dated August 6, 2019 (***“First Arbitral Award”***), the Learned Arbitral Tribunal rejected Claim No. 6 and allowed the rest to varying degree – Claim No. 1 (fully, at Rs. ~8.40 lakh), Claim No. 3 (fully, at Rs. ~93.12 lakh), Claim No. 4 (partly, at Rs. ~1.81 lakh) and Claim No. 8 (fully, at Rs. ~1.49 crore).

5. By an order dated February 27, 2020, a Learned Single Judge of this Court was pleased to accept a proposal from Balaji to adjourn the hearing of this Petition and enable Balaji to approach the Learned Arbitral Tribunal under Section 34(4) to address what was contended to be a finding under Claim No. 8 that was based on no evidence at all, in order to eliminate the

grounds for setting aside the Impugned Award. Balaji's focus of attack was primarily on Claim Nos. 3 and 8, which were relatively more sizeable. TPA contended that there was more than enough proof in the findings rendered on Claim No. 3 and agreed that in view of the approach being proposed, it would not pursue execution of the Impugned Award.

6. On May 5, 2022, the Learned Arbitral Tribunal passed a supplemental award ("***Second Arbitral Award***"), setting out its reasons as to why no changes are being made to the First Arbitral Award, while also dealing with further evidence led by the parties. Balaji is aggrieved by the Learned Arbitral Tribunal having restricted the scope of leading further evidence to Claim No. 8 alone, contending that evidence ought to have been permitted on all claims. Indeed, the Learned Arbitral Tribunal permitted submissions to be made on all four claims but did not allow further evidence to be recorded in relation to claims other than Claim No. 8, on the premise that the First Arbitral Award had not been set aside and that, in respect of Claim No. 8, there was a contention that it had been allowed with no evidence at all.

7. This Petition was amended to bring on record the Second Arbitral Award and the contentions raised in relation thereto.

Analysis and Findings:

8. I have heard at length, Mr. Zubin Behramkandin, Learned Senior Advocate on behalf of Balaji and Mr. Sangramsingh Bhonsale, Learned Advocate on behalf of TPA. The parties were given liberty to file post-hearing written submissions. The matter was listed afresh given the efflux of time and the parties made fresh submissions. With the assistance of their verbal submissions and their well-referenced written submissions, I have had the benefit of examining the record to appreciate the challenge to, and the defence of, the Impugned Award.

9. The contentions about each of the four claims (Claim Nos. 1, 3, 4 and 8) and my analysis and findings on them are set out in the following paragraphs.

Claim No.1: - towards murrum filling – Rs. ~8.40 lakhs:

10. The core issue under this claim is about the work undertaken for the filling of *murrum* (minor mineral i.e. earth used for filling the excavated land to lay the base for the construction). The Learned Arbitral Tribunal has examined the material on record and the evidence led by the parties. A key issue that arose was whether the “Proctor Density Test” had been carried out in respect of assessing the extent of *murrum* filling. It appears that the Running Account Bill (“**RA Bill**”) for filling was at variance with the tender rate of Rs.338 per cubic metre. The Learned Arbitral Tribunal returned a

finding that the fact that TPA had carried out the work for *murrum* filling was an admitted position. The Engineer-in-Charge indeed directed release of an amount of Rs.300 per cubic metre immediately, with the balance of Rs. 38 per cubic metre meant to be released after the conduct of the Proctor Density Test.

11. However, it appeared to be unclear as to who was required to carry out the Proctor Density Test. Balaji did not conduct it, nor did TPA conduct it. Admittedly, Balaji did not lead evidence of the Engineer-in-Charge in support of its contention that the sole obligation to carry out such a test was on TPA. Neither the Tender Document nor the Agreement contains any provision obligating TPA to carry out the Proctor Density Test of 95% compaction. In this view of the matter, the Learned Arbitral Tribunal held that there was no basis to deny payment for the *murrum* filling work that had actually been carried out at the agreed rate of Rs. 338 per cubic metre.

12. Having examined the record and having considered the analysis by the Learned Arbitral Tribunal, in my opinion, the ruling on Claim No. 1 cannot be faulted. The Learned Arbitral Tribunal is the master of the evidence and is the best judge of the quantity and quality of evidence. On examination of the approach of the Learned Arbitral Tribunal to appreciating the evidence, including the correspondence between the parties and indeed the role of the Engineer-in-Charge, it would not be possible to conclude that the Learned

Arbitral Tribunal either ignored vital evidence or factored in irrelevant evidence. The Learned Arbitral Tribunal has well explained the factual matrix of the evidence in this regard and set out its reasons for why the view has been taken. The view taken is quite logical, commonsensical and plausible, calling for no interference by this Court under Section 34 of the Act.

Claim No.3 – RA Bills beyond certification – Rs. ~93.12 lakh

13. This is the second largest claim that has been allowed.

14. The grant of this amount by the Learned Arbitral Tribunal is objected to by Balaji, contending that TPA had not contemporaneously disputed any of the certified amounts under the RA Bills. According to Balaji, the Agreement expired on December 31, 2013. The Statement of Claim was filed on June 4, 2018.

15. Measurements were jointly taken by the engineers of the respective parties, based on which, the RA Bills were raised by TPA and certified by Balaji. Seven such RA Bills had been raised on various dates. Pursuant to their certification, payments had also been made which had been accepted without protest. According to Balaji, the Impugned Award disregards the evidence of Balaji's witness who deposed that every bill had been checked and that the measurement had been assessed in the presence of the Project

Engineer. Therefore, Balaji contends that the Impugned Award wrongly concludes that the work of verification of measurements and the RA Bills had not been carried out by the Engineer-in-Charge.

16. Balaji also contends that TPA refused to produce its own audited Books of Accounts which would have been the best evidence to prove what had been incurred by TPA. Without TPA producing its own Books of Accounts, Balaji would contend, the Learned Arbitral Tribunal was entirely in error in allowing the claim made by TPA, with TPA not even pointing out which of the deductions from the RA Bills were incorrect and the evidence on the basis of which such deductions ought to be held as being incorrect.

17. On the other hand, it is submitted on behalf of TPA that the RA Bills were in fact based on joint inspections conducted by the parties and certified by the Engineer-in-Charge. Yet, the Engineer-in-Charge simply effected deductions arbitrarily without giving any reasons or explanation for effecting the deductions. The scrutiny and verification of the RA Bills necessitated payment of a sum of Rs.~93.12 lakhs. TPA contends that the onus for providing reasons for the deductions lay on Balaji and not on TPA, and that the Learned Arbitral Tribunal has rightly held that the deduction of the amounts from the RA Bills had been arbitrary, to disallow such deductions.

18. On a careful perusal of the analysis by the Learned Arbitral Tribunal, it is clear that the Learned Arbitral Tribunal has indeed examined the material before it in respect of each of the RA Bills. The manner in which they were raised, the dates of the underlying certification and the dates on which they were raised and paid, *albeit* subject to a deduction, have been thoroughly examined by the Learned Arbitral Tribunal. On this basis, the Learned Arbitral Tribunal has also noticed that there was a substantial time gap between the raising of the RA Bills and the certification of the payment carried out by the Engineer-in-Charge.

19. The Engineer-in-Charge was appointed by Balaji for the purpose of verification of the work carried out and certification of payment on such RA Bills. It was apparent to the Learned Arbitral Tribunal that the Engineer-in-Charge did not provide any explanation with regard to certifying the claimant's RA Bills for what he believed to be an approximate value. Balaji had neither pleaded nor brought any evidence on record to justify the reduction in the amount by the Engineer-in-Charge before their certification. This is stark simply because no evidence had been brought on record disputing the measurement sheets annexed to each RA Bill. With no evidence being brought on record to justify any reduction of rates of certain items of material carried out by the Engineer-in-Charge, the Learned Arbitral Tribunal held that

the onus for justifying the reduction was on Balaji, which it had simply not discharged.

20. On examination of the relevant material and the reasoning of the Learned Arbitral Tribunal, indeed the Impugned Award cannot be faulted on this count. The very process agreed by the parties to carry out a joint measurement is to avoid any ambiguity and dispute on the work actually done. Where the parties have indeed complied with the process agreed and even had jointly certified measurements, it would only follow that the RA Bills that are in conformity with the measurements ought to be paid at the agreed rates. Even then, if there were a reason to disagree on the rate or on the quantity (despite the measurement), it would be for Balaji to explain why any reduction was warranted. In the absence of such reasoning, that too with a significant time gap, the reduction is simply arbitrary.

21. In this view of the matter, the analysis by the Learned Arbitral Tribunal is reasonable and plausible and does not call for any interference by the Section 34 Court. The Learned Arbitral Tribunal has found that the work of verification of measurements in the RA Bills had not been carried out by the Engineer-in-Charge and that a subsequent incumbent has simply sought to impose his will on the amount to be paid. The certification of payment made by the Engineer-in-Charge expressly states that the same was for an

approximate value. The deliberate omission and failure on the part of Balaji to lead evidence to explain the deductions weighed with the Learned Arbitral Tribunal in drawing an adverse inference against Balaji in respect of the arbitrary deductions made on behalf of Balaji.

22. In this view of the matter, in my opinion, there is no reasonable basis to contest the finding of the Learned Arbitral Tribunal. The submissions made by the Petitioner in this regard do not inspire confidence of an order that would permit the Section 34 Court to interfere with what is squarely in the domain of the Learned Arbitral Tribunal. The Section 34 Court cannot reappreciate evidence or substitute one plausible view for another. The approach of the Learned Arbitral Tribunal is objective, fair and judicious. It stands to reason that without explaining why a jointly-measured work is not being paid for in terms of objectively empirical measurements, Balaji cannot pitch its entire case on the purported absence of a contemporaneous dispute when the RA Bills were paid.

23. The contention appears to be one of acquiescence by a service provider if a customer pays a lower amount, despite disputes being raised within limitation. That is not an acceptable proposition – in the least within the Section 34 jurisdiction. If the First Arbitral Award on its own showing was justifiable, and after the due process under Section 34(4) of the Act, the

Second Arbitral Award adequately explains why this claim was allowed, in my view, no fault can be found with the decision not to permit the recording of fresh evidence. The Learned Arbitral Tribunal was not wrong in its view that the First Arbitral Award was not set aside and that the matter was not a fresh arbitration by the same Arbitral Tribunal. For convenience, since this is an abiding theme, I will deal with Section 34(4) of the Act in more detail separately at the end of the judgement.

Claim No. 8 – Loss of Profits – Rs ~1.49 crores:

24. This is the largest claim that has been allowed. Balaji was seriously aggrieved by Claim No. 8 being allowed in the First Arbitral Award, particularly on the premise that it had been allowed with no evidence at all. By consent, the parties agreed to go back to the Learned Arbitral Tribunal. Indeed, there is now a dispute on whether all claims should have been adjudicated afresh. As stated above, I will deal with Section 34(4) at the end of this judgement.

25. Claim No. 8 relates to loss of profits. The First Arbitral Award had granted loss of profits in the sum of Rs.~1.49 crores. The Second Arbitral Award is a product of permitting additional evidence to be led in this regard. The Learned Arbitral Tribunal returned a finding that a case for the grant of

loss of profits had indeed been made out, and accordingly has allowed the claim in its entirety for the same amount.

26. The attack by Balaji on this part of the Impugned Award is essentially based on the ground that TPA had not sought any relief seeking a declaration that the termination was illegal. TPA had also not contemporaneously sought any relief in the form of an extension of time to complete the work under the contract. The admitted position recorded in the Second Arbitral Award is that the terms of the contract came to an end on December 31, 2013 and Balaji did not extend the term of the contract. Therefore, according to Balaji, once a contract comes to an end by sheer efflux of time, there could be no vested right to continue with the unfinished and untouched work under the expired contract. Therefore, it would contend, no claim for loss of profits could at all be made. Balaji's grievance is that this fundamental facet has not been dealt with in the Second Arbitral Award as well.

27. Balaji would also point to various components of the material on record to show TPA's admission that the contract expired on December 31, 2013. On January 20, 2014, even while admitting that the time for carrying out the work was over, TPA asked for a revision of rates to carry out the remaining items of work. Since the contract had ended, Balaji contends, there was no question of revising the rates under an expired contract. Likewise, Balaji would submit

that TPA had admitted that it was no longer required to be present at the site. It also did not provide a fresh bank guarantee should there be a modicum of continuation of the contract. No letter showing any claim for loss of profits, contemporaneous with the expiry of the contract or for the period thereafter until the Statement of Claim was filed, was ever brought to bear in the course of the arbitral proceedings. Therefore, it is contended by Balaji that TPA was simply unable to show that TPA was unemployed resulting in suffering a loss of profits. That apart, Balaji would also contend that TPA had admitted that it was working at a sugar factory in Nashik during 2014 and therefore, there is also contrary evidence to indicate that it was gainfully employed and could not have suffered any loss of profits.

28. On this count too, Balaji would point to the failure on the part of TPA to produce its books of account for the relevant period, which would have indicated the income earned from the Nashik project to enable Balaji to disprove the claim for loss of profit. Balaji sought a direction against TPA to produce its books of account in the arbitration, but that was refused. According to Balaji, this would indicate that the findings in relation to loss of profit are perverse and that the claim awarded was completely contrary to the facts and not borne out by the material on record.

29. Balaji would also contend that the Learned Arbitral Tribunal wrongly held that TPA did not abandon the project. Since the machinery was removed before January 24, 2014, as recorded in a letter of that date, and no objections were taken by TPA to a third party being engaged to carry out the work on site, Balaji would contend that the grant of the claim for loss of profits was based on a perverse reading of the evidence on record. Equally, Balaji would point to Clause 15 and Clause 44 of the Agreement to indicate that if any work was taken away from TPA, or if any part of the work were to be de-scoped, the contractor would need to accept the same and no claim on that ground would be permitted. Therefore, no claim for a loss of profits could ever be made by the contractor in the facts of this case.

30. Against this backdrop, when one examines the findings of the Learned Arbitral Tribunal in the context of Claim No. 8 for loss of profits, it can be seen that the Second Arbitral Award deals with the facet of loss of profits in significant detail. The Learned Arbitral Tribunal has noticed each contention in this regard and dealt with it to indicate that the claim for loss of profit was maintainable and justified. Noticing Paragraphs 76 to 81 of the First Arbitral Award, and Balaji's contentions in that regard, the Learned Arbitral Tribunal has summarised the opposition to the grant of loss of profit under the following heads :-

A] The work had been left incomplete and abandoned by TPA, discrediting its claim for any loss of profits. If anything, a fresh agreement between the parties, namely, that the contract no longer needed to be performed, is discernible – thereby disallowing any grant of relief towards loss of profits;

B] Even the basic *murrum* filling for the sugar godown had not been done and therefore there is no question of TPA having been ready to perform the residual work to have incurred any loss of profits;

C] A claim towards loss of profits was not arbitrable *per se* under the Agreement;

D] The claim for loss of profits could not be allowed unless rudimentary evidence or material indicating the loss suffered was brought to bear. Even if the claim is not rebutted, the burden of proof in a claim for loss of profits would still be on the party making the claim to establish that in the normal course the work would have yielded profit to the extent claimed; and

E] Finally, in any case, the claim for loss of profits appears to be grossly inflated.

31. The question to ask is whether the Learned Arbitral Tribunal dealt with empirical and objective evidence to return a reasonable finding on the claim for loss of profits or whether the Learned Arbitral Tribunal had simply gone ahead without any evidence at all to award a claim towards loss of profits. In particular, the law declared in **Batliboi**¹ that is relied upon by Balaji needs to be considered to see if the award of the claim for loss of profits has been simply granted without any evidence of loss of profits. In particular, the following extracts are noteworthy:

“20. We have briefly referred to the principle applicable for computing the claim for compensation/damages in case of partial prevention i.e. where the breach by the employer is not fundamental and does not entitle the builder/contractor to cease the work, or, being fundamental, is not treated as repudiation by the builder/contractor. Measure of compensation/damages in such cases is the loss of profit arising from reduced profitability or added expense of the work carried out. [See Hudson's Building and Engineering Contracts (10th Edn.) pp. 450, 596.] In a given case, where there is a fundamental breach by the employer, albeit, the builder/contractor does not immediately elect to treat the contract as repudiated, he may still be entitled to raise a claim for loss of profit on the uncompleted work. Offsite expenses or overheads are all administrative or executive costs incidental to the management supervision or capital outlay as distinguished from operating charges. These charges cannot be fairly charged to one stream of work or job, and rather be distributed as they relate to the general business or the work of the contractor/builder being undertaken or to be undertaken, as the overheads are relatable to the builder/contractor's business in entirety.

¹ *Batliboi Environmental Engineers Ltd. v. Hindustan Petroleum Corpn. Ltd.* – **(2024) 2 SCC 375**

21. The usage of formulae such as Hudson's, Emden's, or Eichleay's formulae to ascertain the loss of overheads and profits has been judicially approved in the English cases of *Peak Construction (Liverpool) Ltd. v. McKinney Foundations Ltd.* [*Peak Construction (Liverpool) Ltd. v. McKinney Foundations Ltd.*, (1970) 1 BLR 114] , *Whittall Builders v. Chester-le-Street District Council* [*Whittall Builders v. Chester-le-Street District Council*, (1987) 40 BLR 82] and *JF Finnegan v. Sheffield City Council* [*JF Finnegan v. Sheffield City Council*, (1988) 43 BLR 124] and in the Canadian case of *Ellis-Don Ltd. v. Parking Authority of Toronto* [*Ellis-Don Ltd. v. Parking Authority of Toronto*, (1978) 28 BLR 98]. The three formulae deal with theoretical mathematical equations, but are based on factual assumptions, and therefore can produce three different and unrelated compensation/damages. Therefore, while applying a particular equation or method, the assumptions should be examined, and the satisfaction of the assumption(s) ascertained in the facts and circumstances.

22. The formula suggested by Hudson in his 10th edition of the book *Building and Engineering Contracts* for the computation of damages takes the head office and profit percentage as a proportion of the contract value. The formula assumes that the profit judged by the builder/contractor is in fact capable of being earned by her/him elsewhere had the builder/contractor been free to leave the contract at the proper time. The formula is couched on three assumptions. First, that the contractor is not habitually or otherwise underestimating the cost when pricing; secondly the profit element was realistic at that time; and lastly, there was no fluctuation in the market conditions and the work of the same general level of profitability would be available to her/him at the end of the contract period. Satisfaction of these assumptions should be ascertained when we apply Hudson's formula for computing the damages. Material should be furnished by the claimant to justify and assure that the assumptions for applying Hudson's formula are met.

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]

32. Based on the foregoing, the contention is that there is no analysis of any formula for loss of profits and the principles declared (indeed later by the Supreme Court) present a non-compliant Impugned Award.

33. I have carefully examined the Impugned Award. In the instant case, what TPA has done is present a precise computation of the expected work for which it had prepared itself and in coordination with Balaji. The Learned Arbitral Tribunal has already examined various other elements in the relationship between the parties and ruled on them – for example, the arbitrary conduct in the oversight of the work, with RA Bills being certified late and with *ad hoc* deductions; ambiguous retentions on *murrum* filling and the like. With that conduct established, the Learned Arbitral Tribunal has

examined the precise manner of computation of the claim by TPA under Claim No. 8 for loss of profits.

34. The Learned Arbitral Tribunal first noticed that the balance work remaining to be completed centred around work relating to the main sugar factory building, its roofing and cladding, and the sugar godown. The Learned Arbitral Tribunal dealt with the contention of a fresh agreement having come into existence between the parties and that both parties agreed that the contract no longer needed to be performed. The Learned Arbitral Tribunal held that in the absence of any foundational pleadings in this regard i.e that there was a novation of contract to the effect that no further work needed to be done, it would not be permissible to let such an argument to be made.

35. The Learned Arbitral Tribunal dealt with Balaji's contention that TPA had unilaterally chosen to vacate the site, leave the work incomplete and abandon the contract in 2014 and that it was only over two years thereafter in 2016, that TPA reappeared with a notice invoking arbitration. The contention that this pointed to the contract having been abandoned by TPA or mutually set aside by the parties, leading to no claim for loss of profits being maintainable, was then taken up by the Learned Arbitral Tribunal. The Learned Arbitral Tribunal found that the invocation of the arbitration was well within limitation. Delay in invocation of arbitration, so long as it is within a

limitation, could, in the view of the Learned Arbitral Tribunal never defeat a rightful claim so long as the claim is made within limitation. That apart, there is a clear finding that even after December 31, 2013, demonstrated conduct by Balaji pointed to the contract not having come to an end by sheer efflux of time. Instead, the Learned Arbitral Tribunal found that the parties had engaged and the work was meant to continue. A change of rates was attempted and that broke down, resulting in the contract not being extended. It is in this context that the reasonable expectation of completing work already contracted was to be assessed by the Learned Arbitral Tribunal.

36. The Learned Arbitral Tribunal went on to deal with the contention that even rudimentary evidence was absent in the instant case and that the burden of bringing to bear a demonstration of loss of profits was on TPA. Towards this end, the Learned Arbitral Tribunal alluded to the evidence led by TPA's witness and in the form of the Examination-in-Chief, the Additional Examination-in-Chief, and the Affidavits filed in this regard. The scope of work for five specific items of work that had been withdrawn by Balaji had been dealt with in these Affidavits. It is in respect of these five items of work that the claim for loss of profits had been made. The amount claimed was a sum of Rs.~1.68 crores, and in the course of the proceedings, Balaji had accepted the correctness of the quantities for the roofing and cladding work pertaining to the main factory building and the sugar godown and indeed the

tender rates for all the five items of work. However, the Learned Arbitral Tribunal did notice that Balaji had disputed the market rate for acquisition of *murrum*; the material costs for GI pre-coated sheets for roofing and cladding of the main factory building and the sugar godown; and the labour costs for fixation of the GI pre-coated sheets for the roofing and cladding of the main factory building and the sugar godown.

37. Towards this end, the Learned Arbitral Tribunal examined the area measurement that had been set out in minute detail by TPA in respect of each of the aforesaid structures and noted that these measurements were based on drawings supplied by none other than the Engineer on behalf of Balaji to TPA. The correctness of the drawings and thereby the correctness of the area measurement weighed with the Learned Arbitral Tribunal. The total excavated area of the main factory building at 13,865.47 cubic metres had also been accepted by Balaji. It is on this basis that the calculation of the volume of *murrum* filling for the plinth of the specific units and the total volume of *murrum* filling was identified by the Learned Arbitral Tribunal.

38. Noticing that Balaji did not cross-examine the witness of TPA on any of the aforesaid area calculations, the Learned Arbitral Tribunal noticed that except for putting to the witness in a bland manner that the figures and calculations are incorrect, no evidence was brought to bear to contradict the

calculations, and therefore, the Learned Arbitral Tribunal accepted the calculations made in this regard. The Learned Arbitral Tribunal also dealt with the contention that the quantity of soil excavation does not equate to the quantity of murrum that would be required to fill the excavated area. This is a contention that was indeed accepted by TPA as well. Therefore, the Learned Arbitral Tribunal noticed that for every cubic metre of excavated area, 1.3 cubic metres of loose *murrum* are required to achieve the same level upon compaction during re-filling. Therefore, applying the aforesaid formula, the Learned Arbitral Tribunal held that Balaji had erroneously contended that the tender rate for compacted murrum would be inapplicable to such *murrum*.

39. Item 2(B) in the tender which applies to compacted murrum being applied to the quantity of 13,865.47 cubic metres of excavated soil, was sought to be divided by 1.3 for a valid calculation. This was dealt with by the Learned Arbitral Tribunal by holding that the tender rate of Rs. 338 per cubic metre of *murrum* was for carrying out the work described and not for the supply of the compacted *murrum*. The contention that the excavated area should be reduced was also held to be unfounded, as the scope of work was to fill up to the plinth and the floor areas with *murrum* up to the same level. Loose *murrum* is obviously required to be watered and compacted. Upon watering and compacting, a larger quantity of *murrum* is required to achieve the same level. Therefore, the Learned Arbitral Tribunal was of the view that it was

illogical to hold that the quantity of excavated area would need to be reduced. On the contrary, the volume of *murrum* required to refill the excavated area would increase to 1.3 times the excavated volume, and therefore, the *murrum* required for re-filling would have been 28,816 cubic metres.

40. Thereafter, the Learned Arbitral Tribunal went on to deal with the market rate for material coupled with labour for acquisition of the *murrum* and dealt with the dispute raised in this regard and went on to analyse the contention to hold that the royalty of Rs. 61.53 per cubic metre is applicable to all *murrum* excavated in Karnataka, but no documentary evidence was brought to bear by Balaji in support of such contention. So also, upon examining the schedule to the Local Minor Mineral Concession Rules, the Learned Arbitral Tribunal noticed that the stipulated rate is Rs. 10 per metric tonne towards royalty payable on *murrum* and therefore, there was no question of claiming an amount of Rs. 61.53 per cubic metre as royalty, as contended by Balaji.

41. The reliance by Balaji on another RA Bill issued by one Shri Sai Construction for work carried out for a hotel in the region indicated a rate of *murrum* at Rs. 340 per cubic metre, but no evidence was led from anyone representing such firm to put the document to test. Likewise, the Learned Arbitral Tribunal found that TPA had actually procured the *murrum* for filling

up the sugar godown from one Mr. Siddappa Meti from Vasco, Goa, with an actual bill for a sum of Rs. 10 lakhs, and the proof of payment of the same had also been brought to bear. TPA had paid Mr. Meti the said sum towards 2,500 brass of *murrum* and that *murrum* had been procured at the rate of Rs. 400 per brass. Therefore, this was extrapolated to arrive at the value expended by TPA and it was proven that material cost for the sum of Rs. 141.1 per cubic metre had actually been incurred by TPA in support of its claim for costs incurred in this regard.

42. Likewise, the Learned Arbitral Tribunal relied upon the daily schedule of rates in respect of labour charges for *murrum* filling from the website of the Central Public Works Department and also noticed that the rates, although challenged in the course of cross-examination, were not disputed in a manner that would show that the labour rates in a rural area in Karnataka would be lower than the rates stipulated on the website of the Central Public Works Department, which is the Delhi Schedule of Rates. The Learned Arbitral Tribunal found that no additional evidence had been brought in support of this contention. Likewise, the Learned Arbitral Tribunal held that Balaji failed to produce any evidence on material costs either on *murrum* or the labour costs or compaction of *murrum* to support its case and therefore was pleased to draw an adverse inference against Balaji in this regard.

43. I have gone into the aforesaid degree of detail only as an illustrative basis to examine the manner of approach by the Learned Arbitral Tribunal to the computation of the loss of profits and compensation claimed by TPA and awarded by the Learned Arbitral Tribunal. To avoid prolixity, I do not think it necessary to get into each and every facet of the element of loss of profits that has been dealt with by the Learned Arbitral Tribunal in this judgement. I find that the Learned Arbitral Tribunal has meticulously and methodically assessed evidence and made computations in respect of each sub-ingredient of the claim made towards loss of profits.

44. Suffice it to say, the Learned Arbitral Tribunal has given a detailed and thorough consideration to each and every element contained in the computation of the loss of profits claimed by TPA against Balaji and, against each facet, the Learned Arbitral Tribunal has meticulously dealt with each and every element of the five heads under which the claim for loss of profits was demanded by TPA against Balaji. Therefore, the contention that the claim for loss of profits has been allowed without even rudimentary evidence being available is totally untenable.

45. Since the term of the contract came to an end on December 31, 2013 and Balaji did not extend the term of the contract, the Learned Arbitral Tribunal looked at the material on record to return a finding that TPA had indeed

continued on site until March 31, 2014, which is itself way beyond the term of the contract. Appreciating the evidence before it, the Learned Arbitral Tribunal came to a finding that TPA had not abandoned the work as contended by Balaji. Indeed, Balaji went on to engage a third party. The First Arbitral Award contains findings on the aspect of requests made by TPA to Balaji to provide specifications of the sheets to be used for the work of roofing and cladding, which Balaji indeed agreed to provide. However, Balaji did not eventually provide the aforesaid specifications. This left open the issue of whether Balaji had made up its mind not to renew the contract or whether it had engaged in a manner that indicated that there had been or would have arisen a formal extension of time. Therefore, the appreciation of evidence and assessment by the Learned Arbitral Tribunal as to whether a case had been made out for TPA having suffered a loss of profits is a reasonable one.

46. As regards the contention that the claim for loss of profits could simply cover roofing and cladding, the Learned Arbitral Tribunal took note of the submission that cladding work was not a part of the contract, but that drawings for the cladding work of the sugar factory had indeed been given by Balaji to TPA. Therefore, the Learned Arbitral Tribunal examined Clause 45(A) and Clause 45(B) of the contract and returned a clear finding that the work of roofing and cladding of the main factory building was an integral part of the contract. Likewise, the work of roofing of the sugar factory was also part

of the contract. The Learned Arbitral Tribunal held that it was unclear as to the existence of any particular reason for omitting a reference in the contract to the work of cladding of the sugar factory. The Learned Arbitral Tribunal was pleased to return a finding that in all probability there was an error in not mentioning the work of cladding of the sugar factory in the contract.

47. Therefore, the Learned Arbitral Tribunal then examined the evidence led by the witnesses to find that the tender rate of Rs. 737 per square metre for cladding of the main factory would have been made applicable for the work of cladding the sugar godown. Balaji chose not to cross-examine the witness of the claimant or dispute the fact that drawings for such cladding work had been handed over to TPA or that the applicable rate would not have been Rs. 737 per square metre. On a reading of the contract, the Engineer having been given the authority to give instructions to carry out additional work, which the TPA was bound to carry out. The Learned Arbitral Tribunal held that the Engineer having specifically instructed TPA to carry out the work of cladding the sugar godown which was established by the handover of drawings for such work by the Engineer to TPA.

48. From the correspondence in the Minutes of the Meetings, the Learned Arbitral Tribunal recorded that Balaji had agreed to provide even additional specifications to TPA for carrying out such work. Therefore, the Learned

Arbitral Tribunal was pleased to squarely hold that the work of cladding the sugar godown was indeed part of the work envisaged under the contract and therefore became arbitrable and would not qualify as extraneous to the contract.

49. As regards the contention that all matters that are left by contract to be determined by the factory or any officer designated in the contract would be excluded from the scope of arbitration, the Learned Arbitral Tribunal analysed the contents of Clause 16 of the contract which also provides that the contractor would not be entitled to any compensation unless a claim had been submitted in writing to the Engineer-in-Charge within a month of the occurrence of such claim. In this regard, the Learned Arbitral Tribunal related back to paragraphs 39 to 41 of the First Arbitral Award and pointed out that the contention of the claim for loss of profits being an unforeseen claim had already been rejected. Clause 16, according to the Learned Arbitral Tribunal pertains to claims for unforeseen work, and could never bring within its fold a claim for loss of profits. An unenforceable claim would have to relate to any activity that is carried out in the course of the contract as opposed to a claim for termination or removal as the facts worked out, after being led on to incur expense and effort.

50. Therefore, the Learned Arbitral Tribunal held that a claim for loss of profits would never be considered as being covered by an unenforceable claim and therefore, refused to accept this contention of Balaji upon reconsideration pursuant to Section 34(4) of the Act.

51. Referring to the judgement of **Brij Paul Singh**², the Learned Arbitral Tribunal noted that a contractor would be entitled to claim damages for loss of profits which he expected to earn by undertaking the work entrusted to him. The Learned Arbitral Tribunal held that the Supreme Court found that there is a reasonable expectation of profit which is implicit in a works contract, and its loss has to be compensated by way of damages. It would be unnecessary to go into the minutest details of the work executed in relation to the value of the works contract.

52. Likewise, relying upon **MSK Projects**³, the Learned Arbitral Tribunal held that a claim for loss of profits cannot be disallowed merely on the ground that there was no proof that the contractor suffered actual loss to the extent of the amount claimed. The Learned Arbitral Tribunal was also pleased to refer to a similar view expressed by a Division Bench of this Court in the case of **Mahanagar Gas Ltd**⁴. Relying on these judgements, the Learned Arbitral Tribunal rejected the contention that TPA was required to provide minutest

2 *A.T. Brij Paul Singh v. State of Gujarat* - **(1984) 4 SCC 59**

3 *MSK Projects (I) (JV) Ltd. v. State of Rajasthan* - **(2011) 10 SCC 573**

4 *Mahanagar Gas Ltd. v. Babulal Uttamchand and Co.* - **2012 SCC OnLine Bom 1254**

evidence of loss of profits and monetary damages suffered by it and that failure to do so disentitled TPA from claiming loss of profits.

53. Therefore, having examined the meticulous and detailed manner in which the Second Arbitral Award has examined the claim for loss of profits in thorough detail, in my opinion, the award of the amount as claimed by TPA and granted by the Learned Arbitral Tribunal cannot be faulted. Indeed, this degree of methodical computation of every component of the loss of profits was not found in the First Arbitral Award. But upon remand under Section 34 (4) of the Act, the Learned Arbitral Tribunal has gone into it with meticulous detail and explained why this component of the First Arbitral Award does not require any review or amendment.

54. On the contrary, by the extremely detailed findings rendered in the Second Arbitral Award, the vulnerability of the First Arbitral Award with particular regard to Claim No. 8 dealing with loss of profits has squarely been dealt with by the Learned Arbitral Tribunal, and I am not inclined to interfere with the same.

55. Indeed, the Learned Arbitral Tribunal has returned a plausible finding that there was no fresh agreement to terminate the existing agreement. TPA was made to linger on and was on site way beyond December 31, 2013. TPA had incurred expenses and had led evidence on what was incurred. In the

assessment by the Learned Arbitral Tribunal, the cross-examination did not confront and destabilise the evidence. The contentions on *murrum* have been squarely dealt with and the findings are reasonable. The absence of arbitrability over this claim has been dealt with squarely in a reasonable manner. It is well settled that under Section 28 of the Act, the Learned Arbitral Tribunal has to have regard to the terms of the contract and to custom and usage. The Learned Arbitral Tribunal has done that, and as a master of the interpretation of contract, the Learned Arbitral Tribunal has returned a reasonable outcome. The approach of Balaji appears to be more in the zone of attempting to create reasonable doubt, whereas the approach that ought to be adopted by an Arbitral Tribunal is to return a finding based on preponderance of probabilities i.e. what a reasonable mind would hold was most likely to have happened.

56. Far from the contention that even rudimentary evidence or material indicating the loss suffered being absent, the affidavits filed by TPA indicated to the Learned Arbitral Tribunal with a cogent, empirical and meticulous mathematical substantiation of the claim of Rs. ~1.49 crores. This has been tested by the Learned Arbitral Tribunal (and for reasons set out above) to meticulously explain each and every facet of the five heads under which this claim is pursued. I am satisfied that no case for interference is made out.

57. Merely being at work in another premises in that year is no excuse for being denied loss of profits. It is not necessary to assume that profitably working in another site would be a license to deny profitable and contractually compliant work in the site under dispute. A contractor may be able to pursue two projects in parallel and is entitled to earn from both, subject to compliance with contract. It is no excuse to hold a party ineligible to reasonably be compensated in one project because he was gainfully employed in another – whether he had no capacity to operate both contracts is a matter that could arise and the party contending that working on the other site would necessarily mean that work could not have been carried out in the disputed site, would have the burden of showing that.

58. Be that as it may, considering the limited scope for interference under Section 34, Balaji has not made out a case convincing enough to attract the stringent grounds of patent illegality or perversity within the meaning of these terms under that provision. The Petition deserves to be dismissed.

59. The articulation in **Batliboi** on loss of profits is related to the facts of that case and is distinguishable. In the instant case, the Learned Arbitral Tribunal has, in essence, found that while the contract had an expiry date, the parties had continued to engage beyond that date; the work was suddenly withdrawn when expenses had been incurred; there was evidence of the rate at

which expense had been incurred; the cross-examination did not confront such data head-on; and therefore, the Learned Arbitral Tribunal, on facts and appreciation of evidence found that a case had been made out for grant of the claim. This is not such an unreasonable view that the Section 34 Court needs to make an intervention.

Section 34(4) of the Act:

60. Finally, there is one facet that needs mention. Balaji would contend that despite the remand, the grounds to eliminate any basis for setting aside the First Arbitral Award were not dealt with. According to Balaji, the Second Arbitral Award wrongly interprets the order of a Learned Single Judge passed on February 27, 2020 as restraining the Learned Arbitral Tribunal from addressing any claim other than Claim No. 8. The core contention is that once the matter went back to the Learned Arbitral Tribunal under Section 34(4) of the Act, each and every element of the First Arbitral Award was up for review and ought to have been re-examined and reconsidered with full evidence being permitted to be conducted.

61. I am afraid that would not be an appropriate reading of Section 34. For clarity, Section 34(4) is extracted below:-

“34(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a

period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.”

[Emphasis Supplied]

62. From a plain reading of the foregoing, it would be seen that this provision only enables the removal of any grounds that may render an arbitral award vulnerable for it to be corrected. The opinion on vulnerability is that of the Learned Arbitral Tribunal, which has to decide whether the vulnerability perceived by it necessitates any specific course of action. The party that believes that vulnerability persists, would still be able to assail the arbitral award in the Section 34 proceedings, but such party cannot insist that the entire arbitration be conducted afresh, with evidence being led afresh on every claim. The Second Arbitral Award cannot be faulted in this regard. The First Arbitral Award would stand or fall on the merits of its original findings on the other components of the Impugned Award.

63. It is with this perspective that I have examined the Impugned Award and its components i.e. the First Arbitral Award and the Second Arbitral Award, from the perspective of the opposition to the findings under Claim Nos. 1, 3 and 8. For the reasons set out above, no interference is called for in relation to the outcome of the Impugned Award. The level of scrutiny to which the findings in Claim No. 8 are to be subjected was of a higher degree because

at first blush, the reliance upon **Batliboi** indicated the need to see how the Learned Arbitral Tribunal had examined and whether any evidence was available at all to support the findings. For the reasons set out above, I am convinced that as regards Claim No. 8 the grounds on which the findings are challenged are without merit.

64. In these circumstances, in my opinion, although at first blush the submissions made on behalf of Balaji appeared attractive, on a careful and meticulous examination of the Second Arbitral Award read with the findings in the First Arbitral Award on the three claims in respect of which Balaji is aggrieved, no case has been made out for any interference by this Court in exercise of its jurisdiction under Section 34 of the Act. Therefore, the Petition is **dismissed** and TPA shall be free to execute the Impugned Award as if it were a decree.

65. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[**SOMASEKHAR SUNDARESAN, J.**]