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

% *Judgment reserved on: 22nd November, 2019*
Judgment pronounced on: 9 December, 2019

\+ **FAO(OS) 229/2010**

UNIBROS ..... Appellant

Through: Mr. Chetan Sharma, Senior Advocate with Mr. Jagdish Vatsa, Advocate.

Versus

ALL INDIA RADIO & ANR. ..... Respondents

Through: Mr. Vikrant Yadav, Mr. Rajeev Chhetri and Ms. Meenakshi Rawat, Advocates for respondent no.1 Advocates.

CORAM:
HON'BLE MR. JUSTICE G.S. SISTANI
HON'BLE MS. JUSTICE JYOTI SINGH

G.S. SISTANI, J.

1. The present appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') is directed against the judgment dated 25.02.2010 passed by a learned Single Judge of this Court by which objections filed by respondent No.1 to the Award dated 15.07.2002 have been allowed, and also costs of Rs.50,000/- have been granted in favour of respondent No.1.

2. Some necessary facts required to be noticed for the disposal of this appeal are that the parties entered into an agreement for construction of Doordarshan Bhawan, Mandi House, Phase-II SH: Sub Structure upto plinth level including RCC foundation and double basement. As per the agreement, the stipulated date for commencement of work was

12.04.1990 with the stipulated date of completion as 11.04.1991. The actual completion of work was done by the appellant on 30.10.1994. Some disputes arose between the parties. The matter was referred to an Arbitrator, who vide Award dated 11.02.1999 (hereinafter referred to as 'First Award'), decided Claim No.12 in favour of the appellant by which Rs.1,44,83,830/- was awarded to the appellant on account of the loss of profit. It is the case of the appellant that the following reasons were given by the learned Arbitrator while deciding claim No.12:

i) It is an admitted position that the complete site and drawings were not handed over by respondent No.1 due to which the work could not be completed on time;

ii) Non-availability of funds with respondent No.1;

iii) Non laying of electric conduits caused hindrance in execution of work;

iv) A reading of documents available on record shows that the delay was caused by respondent No.1.

3. Aggrieved by the aforesaid findings, a petition was filed by respondent No.1 bearing OMP No.162/2019 under Section 34 of the Act before the learned Single Judge of this Court. The learned Single Judge vide order dated 20.05.2002, remanded the matter back to the Arbitrator for reconsideration. The Arbitrator vide Award dated 15.07.2002 (hereinafter referred to as 'Second Award') reiterated the First Award and held that the material available on record is sufficient to establish the loss of profit.

4. Respondent No.1 again approached the Single Judge of this Court and filed a petition being OMP No.331/2002 under Section 34 of the Act, wherein the learned Single Judge vide judgment dated 25.02.2010 set aside the Second Award with respect to Claim No.12 and also imposed a cost of Rs.50,000/- upon the appellant.

5. Mr. Chetan Sharma, learned Senior Counsel appearing for the appellant, submits that the impugned judgment is contrary to law as well as material available on record. The counsel for the appellant submits that the learned Single Judge has failed to appreciate that there is no infirmity in the findings returned by the Arbitrator vide the Second Award by which it held that the appellant has placed sufficient evidence on record to enable assessment of the loss of profit, on the other hand, respondent No.1 has led no evidence to rebut the plea of loss of profit before the Arbitrator. Mr. Sharma contends that the appellant is an established contractor and is capable of earning profit but could not complete the work for the reason that all the resources were blocked by respondent No.1 due to work being prolonged. It is also the case of the appellant that though, it was held by the learned Single Judge that there is no dispute with regard to respondent No.1 being guilty of causing delay, however, the Court did not appreciate the material available on record as well as the findings rendered by the Arbitrator.

6. Mr. Sharma further submits that the learned Single Judge has wrongly relied upon the judgment in the case of ***Bharat Engg. Enterprises v. Delhi Development Authority*** reported at ***2006 SCC OnLine Del 829***, as the facts of the present case are different from those of the judgment

relied upon. It is further submitted that identical issues relating to loss of profit and the scope of interference have been dealt with in the case of ***Delhi State Industrial and Infrastructure Development Corporation Limited v. M/s Rama Construction Limited*** reported at ***2014 SCC OnLine Del 3470***, more particularly paras 3, 4, 5, 7 and 8 wherein a Division Bench of this Court in the absence of proof of loss of profit upheld the damages awarded to the claimant by the learned Arbitrator on account of loss of profit. Thus, in view of the aforementioned judgments, the claim of loss of profit could not have been disallowed by the learned Single Judge.

7. Learned counsel for the appellant further submits that the view taken by the learned Arbitrator is plausible, as the Arbitrator who dealt with the instant case was well versed with construction matters. He further submits that the Arbitrator is arbiter of proceedings and can award damages for loss of profit to the claimant even in the absence of evidence available on record. However, in the present case, there is enough material to establish that there was loss of profit on account of the delay admittedly caused by respondent No.1. It is contended by the learned Senior Counsel for the appellant that in the present case, the onus is upon respondent No.1 to prove that the work of similar nature and magnitude was available in the market at the relevant period. To buttress his arguments, reliance has been placed on ***MTNL vs. Unibros & Anr.*** reported at ***2017 SCC OnLine Del 6453***, (paras 17, 26 and 32).

8. Lastly, it is contended by the learned Senior Counsel for the appellant that the scope of interference by Courts under Section 34 of the Act is

narrow and it is only if the award is contrary to the substantive provisions of law or against the terms of the contract, that the Court can interfere in the award. It is also contended that if two views are possible, the view taken by the Arbitrator would prevail. Reliance is placed on a decision rendered by the Supreme Court in the case of ***Bharat Coking Coal Limited vs. L.K. Ahuja*** reported at ***(2004) 5 SCC 109*** (paras 23, 24, 110, 111, 114 and 118). It is further contended that in the present case, no reason was given by the learned Single Judge to deny the claim of Rs.1,44,83,830/- and simply held that the Arbitrator through his Award has shaken the judicial conscience by awarding a huge amount of Rs. 1,44,83,830/-. Reliance has been also placed on ***Associate Builders vs. DDA*** reported at ***(2015) 3 SCC 49*** to contend that in the absence of perversity, the Court cannot interfere with the Award and interference is permissible only when the act of the Arbitrator is capricious or perverse. The learned Single Judge has failed to point out any perversity in the findings arrived by the Arbitrator other than the quantification of loss of profit.

9. Additionally, it was urged by the counsel for the appellant that assuming that the appellant was not entitled to any amount against the claim of loss of profit, the learned Single Judge, in O.M.P No. 162/1999, would not have set aside the first Award and would not have remanded the matter back for reconsideration on the basis of material already available on record. The Arbitrator has duly complied with the directions issued by the learned Single Judge and has rendered the Second Award after giving his thoughtful consideration on the basis of the documents filed by the appellant. In this backdrop,

there are not one but two Awards in favour of the claim of the appellant on account of loss of profit.

10. Per contra, Mr. Vikrant Yadav, learned counsel appearing on behalf of respondent No.1 submits that there is no infirmity or illegality in the judgment dated 20.05.2010 passed by the learned Single Judge. It is further submitted that the appellant failed to lead cogent or credible evidence on record to prove the loss of profit suffered by the appellant in performance of the contract. Learned counsel further submits that the appellant has neither pleaded nor argued that sufficient evidence is available in support of his claim for loss of profit. Learned counsel has placed reliance on a judgment of the Division Bench of this Court in the case of ***Mahanagar Telephone Nigam Ltd v. Finolex Cables Limited,*** **FAO(OS) 227/2017** reported at 2017(166) DRJ1, to submit that scope of interference of the Court with the arbitral award under Section 37 of the Act is limited and the Court would interfere only if the judgment in appeal and the award is perverse or palpably erroneous on facts or in law.

11. We have heard learned counsels for the parties and perused the material available on record.

12. We may note that by virtue of judgment dated 20.05.2002, passed by this Court in OMP No.162/1999, the learned Single Judge of this Court set aside the First Award and remitted the matter back to the Arbitrator for reconsideration and directed him to pass a fresh award in respect of Claim No.12. The reasons for remitting the matter back to the Arbitrator stand recorded in para 24 of the judgment dated 20.05.2002, which reads as under:

"24. In the light of the aforesaid factual and legal preposition, I may now proceed to consider whether the award passed by the arbitrator as against Claim No.12 could be set aside under the provisions of Section 34 of the Arbitration and Conciliation Act, 1996. The arbitrator disallowed the claim Nos. 10 & 11 of the respondent on the ground that there is no sufficient evidence placed by the respondent on record in support of the aforesaid claims. Even so far claim No.12 is concerned, the same is the case. Except for placing on record the Hudson's Formula and a passage from the book law on Building and Engineering Contracts, no other evidence is placed on record by the respondent to show that the profit percentage as claimed towards loss of profit was a realistic one at that time and consequently there was no change in the market and also that the work of at least the same general level of profitability would have been available to the respondent at the end of the stipulated contract period. Therefore, evidence in respect of the said claim appears to be definitely not available on record. In absence of any credible evidence and when claims under Claim Nos. 10 & 11 were rejected on the ground that no sufficient evidence had been placed on record by the respondent indicating increase in the prices/rates for the work executed after the stipulated contract period and also on account of establishment, machinery, centering/shuttering etc., Claim No.12 was allowed by the arbitrator without even considering whether the respondent has placed credible and reliable evidence as required to be proved. There is no discussion of any such evidence in the award except for reference to Hudson's Formula. Even in respect of acceptability of Hudson's Formula the very book on which reliance is placed by the respondent provides that such Formula could be applied only when there is sufficient evidence on record of the nature required to justify applicability of the Formula."

(emphasis added)

13. After the matter was remanded back to the Arbitrator, Award dated 15.07.2002 was rendered allowing Claim No.12 in favour of the

appellant. Therefore, the short question which arises for our consideration is as to what are the circumstances under which a claim of loss of profit can be allowed.

14. At this stage, it would be useful to extract the relevant paras to analyze the findings returned by the learned Arbitrator in the Second Award with respect to the loss of profit amounting to Rs. 2.00 Cr. The relevant para reads as under:

> *"Claim No.12 Loss of Profit Rs.2.00 Crores*
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> *In my award dated 11/2/1999 the claims Nos. 10, 11 and 12 under Section 73 of the Contract Act were collectively dealt since the basis of all the claims was the reasons of delay and consequently the claims of damages/losses preferred by the claimants. On consideration of facts on record it was found to be established that the reasons of delay rest on the Respondents and the Claimants cannot be blamed for the same. On due adjudication of the claims, inspite of the fact that the Respondent was held responsible for the delay caused, while agreeing that the Claimant's Claim No. 10 & 11 are admissible/due in principle on the basis of documents/exhibits on record viz. correspondence exchanged, no specific amount was awarded against the same because no evidence was furnished by the Claimants for establishing and proving the quantum of the amounts claimed under the Claims No.10 and 11. There is no conflict in the award made earlier for the Claims No. 10 and 11 on one hand and the award for loss of profit under Claim No.12 on the other hand which is otherwise based on evidence on record and made as per normal practice followed for quantifying such loss.*
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> *Claim No.12 is by way of compensation on account of loss of profit due to Claimants having been retained longer on the contract in question without any corresponding increase in monetary benefit earned.*

In terms of agreement stipulated date of start for the work was 12/4/1990 with stipulated date of completion as 11/4/1991. The actual completion of the work has been recorded on 30/10/1994. While according to the Claimants the reasons for delay in execution of work solely rested on the Respondents, the Respondents denied that they alone had caused the breach. It is an undisputed fact borne out of the record that the full she was not handed over by the Respondents to the Claimants so that the work could be completed within the stipulated contract period. Even around August, 1994 the demolition of a building occupied by the bank as well as barracks on the site of work was yet to be carried out.

The reasons for delay are otherwise borne out from the correspondence exchanged between the parties during the execution of work, which have been ultimately summarized in an application for extension of time which is enclosed to letter dated 18/7/1994 (C-35). The letter dated 23/11/1990 (R-28) relied upon by the Respondents along with other letters on record to say that quite sufficient site had been made available is really of not much substance on consideration of undisputed facts available on record by way of Ex.C-17, C-19, C-20, C-24, C-28 and C-29 besides other documents. The sequence and tenor of the correspondence available on record leave no doubt in my mind that the Respondents are quality of a clear and severe breach of the contract. The facts speak for themselves that the complete site and drawings had not been made available by the Respondents to the Claimants within the stipulated contract period. Non-handing over of site certainly constitutes fundamental breach of contract which vitiates the entire contract as such. The doctrine of fundamental breach of contract is espoused by Hudson and is standard text in all engineering and building contracts.

Besides hindrance free site having not been made available for quite sufficient time i.e. about 18 months, the progress of work also suffered on account of non-availability of funds with the Respondents (Refer C-30). In addition, the speed of execution of work suffered because of delay caused on

account of non laying of electric conduits which was to be laid by other agency engaged by the Respondent thereby not making it possible for the Claimants to plan their execution of work systematically and speedily which ultimately resulted in prolongation of work much beyond the stipulated contract. The documents C-21, C-27, C-32, C-34 and C-36 besides other documents establish the delay caused on account of non laying of electric conduits.

On consideration of complete facts of the case, it has been held that prolongation of work beyond the stipulated contract period i.e. from 11/4/1991 to 30/10/1994 was on account of reasons resting on the Respondents and the Claimants are not to be blamed for the same. Against the stipulated contract period of 12 months the Claimants were retained by the Respondents for execution of work for additional period of 42.5 months.

Thus the Claimants were subjected to loss of profit earning capacity during the said extended period 11/4/1991 to 30/10/1994 without corresponding increase in monetary benefit earned without being free to move elsewhere to earn profit.

It is settled law that in case of breach of contract the party guilty of breach of contract is liable for reasonable foreseeable losses- those that a normally prudent person, standing in his place possessing his information when contracting would have had reason to foresee as probable consequences of future breach.

In the case of breach of works contract, the breach of contract prevents the gains of party wronged i.e. contractor and thereby he sustains loss. In other words, gains prevented qualify as loss sustained. The wronged party i.e. contractor is not obliged to prove with fatalistic sureness and mathematical exactitude the amount of gain or loss as a result of Respondents breach. Fairly persuasive evidence and best available under the particular circumstances of the case shall suffice.

Again, in the case of breach of contract, the party guilty of breach of contract is liable to compensate the other party in such a manner and to such an extent as if the breach had not occurred. In other words the party wronged has to be compensated for the extra time spent on the contract. Had the contractor been gainfully employed in this extra time, which he was prevented from so doing, he would have earned his normal profit.

The contractors (M/s UNIBROS) are established contractors and had been doing works of sizeable magnitude. It was reasonable to infer that on average the Claimants did not habitually underestimate or quote low price while quoting. Otherwise also there is nothing on record to prove to the contrary. It would be normal and reasonable to say that they were capable of earning expected profit in trade elsewhere. Evidently the contractors to the extent they were busy on the project, were not free to take any such projects elsewhere due to prolongation of this contract and their resources being blocked on this work/contract."

15. A reading of the impugned judgment dated 25.02.2010 would show that the learned Single Judge was satisfied on the following three aspects of the Second Award dealing with claim No.12:

    i) Respondent No.1 is guilty of delay in the performance of contract;

    ii) There is evidence available on record to show the rate of profit which would have been available to the contractor;

    iii) The quantification of the rate of profit.

16. The learned Single Judge did not agree with the fourth aspect of the Second Award and it was held that there is no evidence to establish that the loss of profit was caused by respondent No.1 on account of unnecessary retention of men, machinery, material and overheads at the site in question. On this ground alone, the Second Award was

rendered illegal and against the law of the land. The Second Award was held to be contrary to the settled legal position and also to the substantive law of land which is the Indian Contract Act, 1872 ('Contract Act') and was held as perverse and shocked the conscience of the Court.

17. We have reproduced the relevant paragraphs of the Second Award to show the manner in which the learned Arbitrator has dealt with the claim so made by the appellant. We do not find force in the submission made by the learned counsel for the appellant that there is sufficient evidence available on record to assess the loss of profits suffered by the appellant with regard to the retention of men, machinery, material and overheads at the site in question in spite of the fact that it has been held by the learned Single Judge that the delay was caused by respondent No.1.

18. As far as the contention of the appellant that the Single Judge has wrongly relied upon the judgment in the case of ***Bharat Engg. Enterprises*** (supra) is concerned, the said contention is without any merit and the Single Judge has rightly relied upon the same, for the reason that in the aforementioned case the Single Judge, while determining the sustainability of the amount awarded for the loss of profit, held the same to be patently illegal as the contractor therein neither contended nor placed any evidence pertaining to the fact that he could not undertake any other work as his manpower was deployed at site of the work in question. As regards the present case, a perusal of the award of the arbitrator dated 17.07.2012, clearly shows that no evidence was produced on behalf of the appellant which would prove

that the appellant incurred loss of profit during the period when the work was prolonged and actual loss was suffered on account of his workmen and resources being deployed for the construction work under the agreement between the parties.

19. With regard to the applicability of the judgment of ***Delhi State Industrial and Infrastructure Development Corporation Limited (Supra),*** we find that the facts of the present case are distinguishable for the reason that in the abovementioned case, the appellant had failed to show the plea of loss of profit to be perverse or contrary to the evidence brought on record or in ignorance of the evidence brought on record. However, in the present case, there is no evidence to support the plea of loss of profit. Thus, the findings returned by the Arbitrator are contrary to the law of the land, more particularly the Contract Act which deals with the loss of profit.

20. Resultantly, for the reasons stated above, we find no illegality or infirmity in the judgment passed by the learned Single Judge. The appeal is devoid of any merit. Accordingly, the same stands dismissed.

G.S.SISTANI, J.

JYOTI SINGH, J.

DECEMBER 9, 2019
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