M/S Gls Infratech Pvt Ltd vs M/S Radiance Infracon And Developers ... on 20 May, 2024

Author: Dinesh Kumar Sharma

Bench: Dinesh Kumar Sharma

$~48 & 19
* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ O.M.P. (COMM) 223/2024
M/S GLS INFRATECH PVT LTD . .
Through: Mr.Nakul Sachdeva
Mathur and Mr.Abh
Advts.
versus

M/S RADIANCE INFRACON AND DEVELOPERS PVT

Through: Mr.Jeevesh Nagrat
Gupta, Ms.Kritika
Gaur and Mr.Rajat

+ O.M.P.(I) (COMM.) 147/2024, I.A. 10735/2
RADIANCE INFRACON AND DEVELOPERS PVT LTD

Through: Mr.Jeevesh Nagrath
Gupta, Ms.Kritika
Gaur and Mr.Rajat
versus
GLS INFRATECH PVT LTD ..
Through: Mr.Nakul Sachdeva,
Mathur and Mr.Abhi
Advts
CORAM:
HON'BLE MR. JUSTICE DINESH KUMAR SHARMA
OR

% 20.05.2024 CAV 236/2024 in O.M.P. (COMM) 223/2024 Since, the caveator has put in appearance through counsel, the caveat stands discharged.

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1. Present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the impugned award dated 27.11.2023 (corrected by the award dated 22.02.2024)

passed by the learned arbitrator.

2. The learned counsel for the petitioner submits that the total award was Rs.16,27,50,000/-.Learned counsel submits out of this Rs.15,90,00,000/- was on account of mesne profit/damages.

3. Learned counsel for the petitioner further submits that a counter claim in the sum of Rs.7.5 crores was also passed in favour of the petitioner. Learned counsel on instructions submits that he is challenging the finding of the learned arbitrator regarding grant of Rs.15.9 Crores on account of mesne profit for withholding the possession for the period from 01.07.2019 to 30.11.2023 @ Rs.30 lakhs per month. Learned counsel for the petitioner submits that the learned arbitrator has mentioned that no evidence has been led in this behalf by either of the parties and therefore the learned arbitral tribunal has wrongly resorted to guess work for reaching the figure of Rs.30 lakhs per month. Learned counsel for the petitioner submits that therefore the award to this extent is liable to be set aside. Learned counsel for the petitioner in support of his contention has relied upon Board of Control for Cricket in India vs. Deccan Chronicle Holdings Ltd. 2021 SCC OnLine Bom 834, National Radio & Electronic Co.Ltd. vs. Motion Pictures Association 2005 SCC OnLine Del 675, Union of India vs. Banwrai Lal & sons (P) Ltd Appeal (Civil) 1531 of 1999 dated 12.04.2004 and Five Star Constructions Pvt.Ltd. vs. Orchid Infrastructure Developers This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 14/06/2024 at 20:45:46 Pvt. Ltd. FAO (OS) (Comm) 324/2022 dated 04.01.2024.

4. Learned counsel for the respondent has submitted that the arguments advanced by learned counsel for the petitioner is without any basis. Learned counsel has referred that the petitioner had produced the report of Colliers International and examined Mr.Pankaj Tekchandari, CW2 in this regard. However, learned tribunal had rejected this statement and accepted the testimony of RW-2 Mr.Amit Chawla who was the Director of Colliers International (India) Property Services Pvt. Ltd. Learned counsel submits that in this evidence, RW2 produced the report Ex.RW2/1. Learned counsel submits that it was upon going through this report that learned tribunal reached the figure of Rs.30 lakhs. Learned counsel submits that therefore the petitioner now cannot resile from the evidence led by them before learned trial court. Learned counsel submits that the guess work is permissible and the same has rightly been used by learned tribunal.

5. The scope of jurisdiction under Section 34 of the Arbitration and Conciliation Act is well settled. The grounds for setting aside the award as mentioned in Section 34 of the Arbitration and Conciliation Act are very clear. There cannot be any dispute to the proposition that the court cannot sit in appeal over the finding of learned arbitral tribunal. The learned arbitrator is final arbiter of facts. The court cannot substitute its own opinion with the opinion of learned arbitral tribunal even if another view is possible. In Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Limited 2003 SCC online SC 545, it was inter alia held that the award would be set aside if it is in contrast to the (a) fundamental policy of Indian law, or (b) the interest of India: or (c) justice or This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 14/06/2024 at 20:45:47 morality; or (d) in addition, if it is patently illegal. It was further inter alia held that illegality must go to the root of the matter. If the illegality is of trivial nature; the award cannot be perceived to be against the public policy. The Apex Court held that the arbitral award may also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court and the award is opposed to public policy and is required to be adjudged void.

6. Before proceedings further it is necessary to refer to the reports as relied upon by the parties. The respondent herein relied upon the report produced by Mr. Pankaj Tekchandani (CW-2) by CBRE which valued the revenue potential of the subject property to be at Rs.120 Crores and thus, the petitioner claimed Rs.2.1 Crores per month; the relevant portion of the report is as follows:

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7. On the other hand, the petitioner herein relied upon the report produced by Mr. Amit Chawla Ex.RW2/1 by Colliers International.

8. The plea of the learned counsel for the petitioner is that the learned arbitral tribunal, keeping in mind the aforementioned report, arrived at the value of Rs.30 Lakhs. In this regard it is also advantageous to refer to the finding of learned tribunal which are reproduced as follows:

> 142. While coming to this conclusion, the Tribunal also finds force in the submission of the Respondent that the Claimant has not been able to substantiate this claim. Had the Respondent completed the Project, it would have got 54% share therein.

Now, with the termination of the Contract, the Claimant is in a more advantageous position as it is not required to part with the said share. The Claimant is, therefore, is in a better position than it would have been in the event the terms of the Contract had been performed. There is another aspect highlighted by the Respondent which cannot be ignored. Even as per the Valuation Report relied upon by the Claimant, the revenue potential of the Subject Land, after all construction is presumed to be completed, was to be INR 120.00 crore. The Claimant has admitted that the Claimant would only be entitled to INR 55.00 crore of the aforesaid alleged amount of INR 120.00 crore had the contract been performed and not terminated. While the Respondent categorically denies the valuation report relied upon by the Claimant and all of its findings, if the same is accepted on a demurrer, the market value of the subject land as on date is This is a digitally signed order.

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143. The Claimant has, however, also raised the claim for the period from 01.06.2020 as well till the date of actual hand-over of the Project land by the Respondent to the Claimant. This claim is also preferred @ INR 2.10 crore. It may be mentioned that in the Termination Notice dated 15.06.2019, the Claimant had asked for re-possession of the land of which the Claimant is the owner. The Respondent refused to do so forcing the Claimant to initiate the present arbitration proceeding where the claim for handing over the possession of land is also made. The same has been allowed. Since this demand was made in the Termination Notice and is found to be justified, the Respondent was supposed to handover the possession within a reasonable period. The Claimant would be entitled to the loss on this account for the subsequent period. Giving an allowance of 15 (fifteen) days within which possession should have been handed over by the Respondent, the Claimant would be entitled to damages w.e.f. 01.07.2019. The Claimant has calculated losses @ INR 2.10 crore per month. For this purpose, the Claimant has produced Mr. Pankaj Tekchandani (CW-2) who has given his report about the land in question and its commercial prospects. As against that, the Respondent has produced Mr. Amit Chawla, RW-2 who has also deposed about the commercial viability of the property including its location, etc. Going by the considerations of location of the property, the fact that even the Claimant could not develop this property from 2006 to 2014 and ultimately, handed over the same to the Respondent for development, its marketability and other such considerations, the Tribunal is of the view that calculations of loss made by the Claimant for loss @ INR 2.10 crore per month is not justifiable.

144. As already mentioned above, the Respondent has disputed the validity of the valuation report (CBRE report) relied upon by This is a digitally signed order.

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145. Taking into consideration all the relevant facts and circumstances of the case, in the opinion of the Tribunal, interest of justice would be subserved in granting mesne profit for withholding the possession beyond 01.07.2019 @ INR 30.00 lakh per month from 01.07.2019 which would come to four years and five months i.e., 30.00 lakh X 53 = 15,90,00,000/- till 30.11.2013. The Claimant shall also be entitled to mesne profits at this rate with effect from 01.12.2023 till the possession of the land is handed over to it."

9. Perusal of the finding of the learned arbitral tribunal makes it clear that learned tribunal itself was at pains to note that no evidence was led by the parties on this behalf and learned arbitral tribunal in absence of any other alternative, resorted to guess work. It is pertinent to refer to Section 28 of the Arbitration and Conciliation Act which provides as under:

> 28 (2): The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.

10. Learned arbitrator is a creation arising out of the agreement between the parties. In absence of any agreement between the parties, the learned tribunal cannot resort to principle of equity. In Airwil JKM Infracon (P) Ltd. v. Cadillac Infotech (P) Ltd., 2021 SCC OnLine Del 5126, in the impugned award AJIPL had been directed to hand over vacant and physical possession of the property bearing plot nos. 1, 2, 10, 11 and 12 measuring 20,000 sq. meters situated in Sector 135, Noida, District Gautam Budh Nagar, Uttar Pradesh to the respondent/CIPL within a period of four weeks from the date of the award. Learned arbitral tribunal had awarded CIPL an amount of 20,00,000/- per month with effect from 18.07.2015 till the date of payment along with simple interest at the rate of 9%, as damages resulting from AJIPL retaining possession of the Subject Land. The coordinate bench of this court after taking into account the facts and circumstances inter alia held as under:

> "48. The last question to be examined is whether the decision of the Arbitral Tribunal to award loss quantified at Rs. 20 lacs per month in favour of CIPL is patently illegal. The Arbitral Tribunal had returned a clear finding that CIPL had not taken any care to substantiate its claim and yet the Arbitral Tribunal had awarded a sum of Rs. 20 lacs per month as damages for the loss suffered by it. Paragraph 21 of the impugned award reads as under:
>
> "21. The Claimant has claimed charges for unauthorised use and occupation charges for the five plots at the rate of Rs. seventy-five lacs w.e.f. 18.07.2015, the date on which the claimant terminated PDA. But the claimant has not taken care to substantiate the claim. There cannot be any doubt about the two-fold position that the land is very valuable, has immense commercial potential, the claimant has surely

been wronged, This is a digitally signed order.

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49. Clearly, the aforesaid decision is unsustainable. After having concluded that CIPL had failed to substantiate its claim, there was no occasion for the Arbitral Tribunal to suo motu assess a sum of Rs. 20 lacs per month as the quantum of loss suffered by CIPL on account of being deprived of possession of the Subject Land. This Court had pointedly asked Mr. Malhotra, learned counsel appearing for CIPL, whether there was any material on record which could support the quantification of loss of Rs. 20 lacs per month. He had fairly stated in the negative.

50. The Arbitral Tribunal had observed that it was assessing the loss by borrowing from the concept of Best Judgment Assessment. Clearly, the concept of Best Judgment Assessment has no relevance of assessing a claim for damages. Under the provisions for Best Judgment Assessment under the Income Tax Act, 1961, an Assessing Officer is required to assess the income chargeable to tax on the material as available before him. As the taxman, he has a duty to assess and recover the tax for the State. There is no duty for an Arbitral Tribunal to embark on an exercise of determining the loss especially when the party has failed to prove the same. It is relevant to refer to Section 28(2) of the A&C Act which expressly provides that the Arbitral Tribunal shall decide "ex aequo et bono or as amiable compositeur" only if the parties have expressly authorized it to do so and not otherwise. The phrase "ex aecquo et bono" means according to equity and conscience. It empowers the arbitrator to dispense with consideration of the law This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 14/06/2024 at 20:45:47 and to take decisions on notions of fairness and equity. The term „amiable compositeur is a French term and means an unbiased third party who is not bound to apply strict rules of law and who may decide a dispute according to justice and fairness.

51. In the present case, the Arbitral Tribunal was required to decide CIPL's claim on the principles of law and not as an „amiable compositeur . Admittedly, CIPL could have established the loss incurred by it by placing material and evidence on record. It is not CIPL's case that such a loss could not be established. In these circumstances, the finding of the Arbitral Tribunal that CIPL had not taken care to substantiate its claim would be fatal to CIPL's claim for compensatory damages for the loss

incurred by it.

52. In Union of India v. Zeman Technogroup : OMP (COMM) 28/2015, decided on 02.03.2017, a Co-ordinate Bench of this Court has held as under:

> "24. It requires to be noticed that there is a very categorical finding in the majority Award about the failure of the Respondent to lead evidence to prove its loss. The extracted paragraphs of the majority Award unambiguously conclude that "the Claimant has made no averments nor led any evidence to prove that the boots produced by them were incapable of being sold to a third party. They also did not place any material on record to show that the boots got wasted lying in the warehouse.
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> 27. In light of the above findings of the majority, and its conclusion that "the Claimant has not been able to set out its case insofar as the actual loss suffered by the Claimant is concerned" it is inexplicable how it proceeded to allow 25% of the total amount of $7,494,480 as claimed by the Respondent. This part of the Award suffers from a patent illegality and is opposed to the fundamental policy of Indian This is a digitally signed order.
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> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 14/06/2024 at 20:45:47 law inasmuch as it is based on no evidence and is not supported by reasons. It is contrary to the statutory requirement under Section 31(3) of the Act which mandates that the conclusions of the AT have to be supported by reasons. In the present case, the reasons given by the majority of the AT far from supporting the above conclusion, contradict it. Consequently, the Court has no hesitation in setting aside the impugned majority Award to the extent that it awards to the Respondent 25% of the total amount of $7,494,480."

53. In view of the above, the impugned award is set aside to the limited extent that it directs payment of a sum of Rs. 20 lacs per month from 18.07.2015, in favour of CIPL and against AJIPL for the unauthorized use and occupation of the Subject Land."

11. Learned counsel for the petitioner has submitted that the present judgment is squarely applicable on the facts and circumstances of the present case.

12. Learned counsel for the respondent has relied upon Cobra Instalaciones Y Servicios , S.A. & Shyam Indus Power Solutions (P) Ltd. vs. Haryana Vidyut Prasaran Nigam Ltd. 2024 SCC OnLIne Del 2755 and Construction & Design Services v. DDA, (2015) 14 SCC 263 to emphasise the point that „guess work in certain circumstances can be resorted to by the learned tribunal. In Construction & Design Services (ibid) it has been held as under:

"13. We have given due consideration to the rival submissions.

14. There is no dispute that the appellant failed to execute the work of construction of sewerage pumping station within the stipulated or extended time. The said pumping station certainly was of public utility to maintain and preserve clean environment, absence of which could result in environmental degradation by stagnation of water in low lying areas. Delay also resulted in loss of interest on blocked capital as rightly observed in para 7 of the This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 14/06/2024 at 20:45:47 impugned judgment [DDA v. Construction & Design Services, U.P. Jal Nigam, RFA (OS) No. 35 of 2010, decided on 10-2-2012 (Del)] of the High Court. In these circumstances, loss could be assumed, even without proof and burden was on the appellant who committed breach to show that no loss was caused by delay or that the amount stipulated as damages for breach of contract was in the nature of penalty. Even if technically the time was not of essence, it could not be presumed that delay was of no consequence. Thus, even if there is no specific evidence of loss suffered by the respondent-plaintiff, the observations in the order of the Division Bench that the project being a public utility project, the delay itself can be taken to have resulted in loss in the form of environmental degradation and loss of interest on the capital are not without any basis.

15. Once it is held that even in the absence of specific evidence, the respondent could be held to have suffered loss on account of breach of contract, and it is entitled to compensation to the extent of loss suffered, it is for the appellant to show that stipulated damages are by way of penalty. In a given case, when the highest limit is stipulated instead of a fixed sum, in the absence of evidence of loss, part of it can be held to be reasonable compensation and the remaining by way of penalty. The party complaining of breach can certainly be allowed reasonable compensation out of the said amount if not the entire amount. If the entire amount stipulated is genuine pre-estimate of loss, the actual loss need not be proved. Burden to prove that no loss was likely to be suffered is on the party committing breach, as already observed.

16. It is not necessary to refer to all the judgments on the point in view of categorical pronouncement of this Court in Saw Pipes [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] , laying down as follows: (SCC pp. 740-42, paras 64 & 67) "64. It is apparent from the aforesaid reasoning recorded by the Arbitral Tribunal that it failed to consider Sections 73 and 74 of the Indian Contract Act and the ratio laid down in Fateh Chand case [Fateh Chand v. Balkishan Dass, AIR 1963 SC 1405 : (1964) 1 SCR 515] wherein it is specifically held that jurisdiction of the court to award compensation in case of breach of contract is unqualified except This is a digitally signed order.

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in the contract, inter alia (relevant for the present case) provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasises that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach. Take for illustration: if the parties have agreed to purchase cotton bales and the same were only to be kept as a stock-in-trade. Such bales are not delivered on the due date and thereafter the bales are delivered beyond the stipulated time, hence there is breach of the contract. The question which would arise for consideration is -- whether by such breach the party has suffered any loss. If the price of cotton bales fluctuated during that time, loss or gain could easily be proved. But if cotton bales are to be purchased for manufacturing yarn, consideration would be different.

67. Take for illustration construction of a road or a bridge. If there is delay in completing the construction of road or bridge within the stipulated time, then it would be difficult to prove how much loss is suffered by the society/State. Similarly, in the present case, delay took place in deployment of rigs and on that basis actual production of gas from platform B-121 had to be changed. It is undoubtedly true that the witness has stated that redeployment plan was made keeping in mind several constraints including shortage of casing pipes. The Arbitral Tribunal, therefore, took into consideration the aforesaid statement volunteered by the witness that shortage of casing pipes was only one of the several reasons and not the only reason which led to change in deployment of plan or redeployment of rigs Trident II platform B-121. In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that the party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provisions of Sections 73 and 74 of the Contract Act, 1872. There was nothing on record that compensation contemplated by the parties was in any way unreasonable. It has been specifically mentioned that it was an agreed genuine pre- estimate of damages duly agreed by the parties. It was also mentioned that the liquidated damages are not by way of penalty. It was also provided in the contract that such damages are to be recovered by the purchaser from the bills for payment of the cost of material submitted by the contractor. No evidence is led by the claimant to establish that the stipulated condition was by way of penalty or the compensation contemplated was, in any way, unreasonable. There was no reason for the Tribunal

not to rely upon the clear and unambiguous terms of agreement stipulating pre- estimate damages because of delay in supply of goods. Further, while extending the time for delivery of the goods, the respondent was informed that it would be required to pay stipulated damages."

17. Applying the above principle to the present case, it could certainly be presumed that delay in executing the work resulted in loss for which the respondent was entitled to reasonable compensation. Evidence of precise amount of loss may not be possible but in the absence of any evidence by the party committing breach that no loss was suffered by the party complaining of breach, the court has to proceed on guesswork as to the quantum of compensation to be allowed in the given circumstances. Since the respondent also could have led evidence to show the extent of higher amount paid for the work got done or produce any other specific material but it did not do so, we are of the view that it will be fair to award half of the amount claimed as reasonable compensation."

13. Learned counsel has submitted that if evidence of precise amount of loss is not possible and in absence of any evidence by the party committing breach that no loss was suffered by the party complaining of breach, the Court has to proceed on guess work as to the quantum of compensation is to be allowed in the given circumstances.

14. Before proceeding further, it is pertinent to take a look of the relevant clauses of the agreement:-

> 11. The Collaborator shall adhere to the following time schedule for the purpose of this Agreement:
>
> In the event, that the Collaborator fails to perform its obligations within the agreed time, then, the Owner shall be entitled to forfeit 50% (fifty percent) of the consideration amount mentioned in clause 12 below and this Agreement, at the option of the Owner shall, (a) be terminated by the Owner, or (b) the Owner may complete the work at the risk and costs of the Collaborator and the Owner may recover the same from the sale proceeds from the share of the Collaborator including all losses, damages, etc. that may be suffered or incurred by the Owner.
>
> 12. The Collaborator shall pay to the Owner a non-refundable and non- adjustable consideration amount of Rs.5.50 Crores (Rupees Five Crores Fifty Lacs only) in the

following manner:

a) Rs.1.0 Crore (rupees one crore) on signing of the Agreement.

b) Rs.1.5 Crores (rupees one crore and fifty lakhs) on or before 15th of June 2016.

c) Rs.1.0 Crore (rupees one crore) on or before 6th October 2016.

d) Rs.1.0 Crore (rupees one crore) on or before 6th November 2016.

e) Rs.1.0 Crore (rupees one crore) on or before 6th December 2016.

13. Time for the purpose of construction and making of payment in terms of // clause 12 above is the essence of this Agreement. Under no circumstances, shall there be any extension of time save and except in the event of force ma1eure conditions on This is a digitally signed order.

 account of war, riots, floods, earthquake, fire and the like.

15. It is pertinent to mention that the contract did not contain clause regarding pre-estimated liquidated damages in case of breach.

16. I consider that on the facts and circumstances of the case, the judgments cited by the learned counsel for the petitioner is squarely applicable and judgments cited by the learned counsel for the respondent is respectfully distinguished on the facts and circumstances of the case. In Cobra Instalaciones Y Servicios (supra), the coordinate bench of this court upheld the "rough and ready" method to ascertain compensation in cases where there is material available to show damages are suffered but "granular details" are not available to the adjudicator. Similarly, reliance is also placed upon Construction & Design (supra) where there was no evidence led by the Respondent to show the higher extent of the damages incurred by it and therefore, half of claim amount was awarded. Further, in NHAI v. ITD Cementation India Ltd. 2010:DHC:404, the Arbitral tribunal allowed an estimated claim on the basis of the calculations of the two experts i.e. 2 engineers and 1 retired judge. Moreover, in Mohd. Amin v. Mohd. Iqbal, 2024 SCC OnLine Del 2395, the quantification of damages done by the tribunal on guesswork relying on little evidence was held to be sound as the same was reasonable. Lastly, in Mohan Lal Harbans Lal Bhayana & Co. v. Union of India 2010 SCC OnLine Del 699, the arbitrator, relying upon evidence produced, had applied percentage formula for escalation to arrive at the awarded sum; which was upheld by the court. However, in the present case, there exists no evidence This is a digitally signed order.

 produced as to actual damages suffered, neither did the tribunal examine any expert nor has relied upon any expert opinion nor has the tribunal given any reasoning for arriving at the figure of Rs. 30

Lakhs per month. The sum of Rs. 30 Lakhs per month is without basis as it does not coincide with any evidence led by either of the parties.

17. Learned counsel for the respondent has defended the impugned part of the award on the ground that the amount awarded by the learned arbitrator is on the basis of the report of EX-RW-1/A. However, this fact is conspicuously absent from the observation of the learned Arbitrator. Though, it is correct that the report Ex.-RW-1/A has been filed which contains certain calculations but the perusal of the testimony makes it clear that the same has not been proved in accordance with the law.

18. In Edifice Developers & Project Engineers Ltd. v. Essar Projects (India) Ltd., 2013 SCC OnLine Bom 5, the Division Bench of Bombay High Court was considering an appeal against the order of learned Single Judge. Learned Single Judge while deciding the challenge against the arbitral award, affirmed the award of Arbitral Tribunal in so far as it allowed the claim in respect of the retention money in the amount of Rs.1,01,43,000/- holding that the claim arose out of the contract and the conclusion which was arrived at by the learned arbitrator was a possible conclusion to be drawn on the basis of the material. Learned Single Judge while considering the challenge against the arbitral award besides affirming the award under the head of claim in respect of retention money, set aside the arbitral award in respect of remaining claims. It is pertinent to mention here that appellant claimed This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 14/06/2024 at 20:45:47 an amount of Rs.1,88,15,960/- towards overhead losses on the basis of Hudson Formula. Learned arbitrator while noting that the appellant had not revealed either the basis on the accounting or lead any oral evidence in support of any claim, nonetheless, allowed the claim on the basis of finding that the Hudson Formula is adopted for quantifications of the claims overhead losses in India.

19. Learned Single Judge had set aside the arbitral award inter alia on the ground that the learned arbitrator had purported to rely on "privilege based practice" though as a matter of the fact that appellant was not able to demonstrate any material placed on the record to show that any such practice prevailed or was accepted in the trial.

20. Hon ble Justice, Dr. D. Y. Chandrachud (as his Lordship the then was), while authoring the judgement inter alia held that learned Single Judge was justified in coming to the conclusion that the arbitrator was manifestly in error in awarding the claim for overhead loses despite the fact that no oral evidence was produced on behalf of the appellant. The distinction was made with the earlier judgement of M/s A.T. Brij Paul Singh v. State of Gujrat 1984 4 SCC 59 and it was inter alia held that;

> "10. Brij Paul Singh's case therefore does not stipulate as a doctrine of law that the formula which has been prescribed in Hudson's treatise must invariably be accepted in all cases as a measure of damages sustained on account of loss of overheads. On the other hand in the subsequent decision of the Supreme Court in McDermott

> International (supra), the Supreme Court has relied upon the following observations contained in the earlier decision in M.N. Gangappa v. Atmakur Nagabhushanam Setty & Co.3.
>
> "In the assessment of damages, the court must consider only This is a digitally signed order.
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> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 14/06/2024 at 20:45:47 strict legal obligations, and not the expectations, however reasonable, of one contractor that the other will do something that he has assumed no legal obligation to do."

11. The judgment in McDermott International (supra) considers various formulae including Hudson's Formula, Emden Formula and Eichleay Formula. As regards Hudson's Formula the Supreme Court has noted, in the following extract, that although it has received judicial support in many cases, it has been the subject matter of criticism:

> "(a) Hudson Formula : In Hudson's Building and Engineering Contracts, Hudson formula is stated in the following terms:
>
> "Contract head office overhead & contract sum period of delay" profit percentage x ---------- x contract period In the Hudson formula, the head office overhead percentage is taken from the contract. Although the Hudson formula has received judicial support in many cases, it has been criticized principally because it adopts the head office overhead percentage from the contract as the factor for calculating the costs, and this may bear little or no relation to the actual head office costs of the contractor."

(emphasis supplied)

12. In McDermott International (supra) the Supreme Court has held that it is an accepted position that different formulae can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or other formula, having regard to the facts and circumstances of a particular case, would fall within the domain of the Arbitrator. In the present case no other formula other than Hudson's formula has been considered in the arbitral award. In the present case the Arbitrator proceeded on the basis that it was only Hudson's Formula which was to be applied and that even though no direct evidence had been adduced on behalf of This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 14/06/2024 at 20:45:47 the Appellant, nonetheless the Appellant would be entitled to damages measured with reference to the aforesaid formula. This approach of the Arbitrator is manifestly in the teeth of the law laid down

by the Supreme Court in McDermott International. Section 28(1)(a) requires that the Arbitral Tribunal shall decide a dispute submitted to arbitration in accordance with the substantive law for the time being in force in India. Section 28(3) requires the Arbitral Tribunal to decide in accordance with the terms of the contract and take into account the usages of the trade applicable to the transaction. The Arbitral Tribunal under Section 28(2) can act as amiable compositeur and can decide ex aequo et bono only if parties have expressly authorized it to do so. In the present case, the Learned Single Judge was correct in coming to the conclusion that the award of the Arbitrator proceeds on the manifestly misconceived notion that a contractor is entitled to claim overhead losses even in the absence of evidence on the basis of Hudson's Formula. Similarly, the Arbitral Tribunal proceeded on a misconceived premise that this formula is invariably adopted for quantification of claims for overhead losses in India. In the present case the Appellant produced no evidence in support of its claim; this has been so stated in the Award. The award of the claim is on the misconceived basis that the Hudson's Formula must be applied despite the absence of evidence. Since the fundamental basis that has permeated the award is contrary to law, the judgment of the Single Judge cannot be faulted in setting aside the arbitral award on that aspect.

13. The Arbitrator, as noted earlier, also awarded claims in respect of loss of profit, for underutilized plant and equipment and for reimbursement of infrastructure expenses. In respect of loss of profits, the Arbitrator merely held that a measure of 10% on the value of the remaining part of the works contract cannot be said to be unreasonable. The Arbitrator observed that a percentage representing 10% of the rate of profit is invariably accepted in the construction industry. Evidently save and except for an priori assumption, no evidence whatsoever was led This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 14/06/2024 at 20:45:47 before the Arbitrator in that regard. In P.R. Shah, Shares and Stock Brokers Private Limited v. B.H.H. Securities Private Limited4 the Supreme Court has held that while an Arbitral Tribunal cannot make use of its personal knowledge of the facts of the dispute, which is not a part of the record, the Tribunal can certainly use its expert or technical knowledge or the general knowledge about the particular trade in deciding a matter. That is why in many arbitrations, persons with technical knowledge are appointed since they may be well-versed with the practices and customs in the respective fields. The Arbitrator in the present case was not an arbitrator drawn from the trade. No basis whatsoever has been indicated in the award for accepting 10% as a measure representing loss of profits. No material was produced before the Arbitrator on the nature of the practice in the trade. During the course of the hearing no basis has been indicated to the Court from the record to suggest that any practice of that nature in the construction industry was brought to the notice of the Arbitral Tribunal. In the circumstances, the arbitral award to the extent that it allows the claim for loss of profits is based on pure conjecture and in the absence of any evidence whatsoever was correctly set aside. Similarly, in regard to the claim for underutilized plant and equipment and for reimbursement of expenses of infrastructure, it is evident that the Arbitrator has merely awarded a sum which he considered to be reasonable. No evidence whatsoever was led before the Arbitral Tribunal."

21. In the present case also, the learned Arbitrator passed the award on the basis of stating that, "Unfortunately, no evidence is led in this behalf by either party and therefore, there is no other alternative for the Arbitral Tribunal but to award some amount by making some guesswork." It is a matter of the fact as recorded in the impugned award also that the claimant had not produced any evidence in support to his claim. It is also pertinent to mention here that learned Arbitrator has not passed an This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 14/06/2024 at 20:45:47 award stating that the figure has been taken on the basis of the evidence of the respondent. The perusal of the impugned award indicates that the learned tribunal awarded the mesne profits @ Rs.30lakhs per month. However, not even a single reasoning has been given for reaching on this amount. This court is conscious of the fact that in exercise of jurisdiction under Section 34 of the Arbitration and Conciliation Act, this court cannot sit in appeal over the findings of the learned tribunal but at the same time, within the limited power conferred by the legislation, the court is required to see whether there is even an iota of reasoning for reaching the award. Hence, in the circumstances and in view of there being no evidence to the same, the impugned award to the extent of grant of Rs.15,90,00,000/- is set aside.

22. However, this would not prevent the respondent from agitating their dispute in accordance with the law towards this claim.

23. The petition along with the pending application is disposed of.

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24. In view of the finding of the court in O.M.P. (COMM) 223/2024, the present petition has become infructuous.

25. Hence, the present petition along with the pending application is dismissed being infructuous.

DINESH KUMAR SHARMA, J MAY 20, 2024 rb/aj** This is a digitally signed order.

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