THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA
AND
THE HON'BLE JUSTICE B.R.MADHUSUDHAN RAO

COMCA No.29 of 2022

Mr. Avinash Desai, learned Senior Counsel representing Mr. Mohammed Omer Farooq, learned counsel appearing for the appellant.

Mr. Dama Seshadri Naidu, learned Senior Counsel representing Mr. K. V. Pavan Kumar, learned counsel for the respondent No.1.

JUDGMENT: (Per Hon'ble. Justice Moushumi Bhattacharya)

1. The Appeal, filed under section 37(1)(b) of The Arbitration and Conciliation Act, 1996, assails an order passed by the learned Commercial Court on 30.03.2022 in Commercial Original Petition No.79 of 2017. By the impugned order, the Commercial Court dismissed the appellant's petition filed under section 34 of the 1996 Act for setting aside an Award dated 17.12.2016.

2. The appellant was the respondent in the arbitration. The respondent No.1 was the claimant. The arbitration culminated in the Award dated 17.12.2016 passed by a Tribunal consisting of three learned Arbitrators. Apart from challenging the impugned order dated 30.03.2022 passed by the Commercial Court, the appellant also seeks to set aside the Award dated 17.12.2016. The appellant however restricts the scope of the

Appeal to the extent of the loss of profit awarded by the Arbitral Tribunal in favour of the respondent No.1/claimant.

3. But first, a brief narration of the relevant facts leading to the Award and the impugned order.

4. In June, 2012, M/s. Gayathri Projects Limited (GPL)/Principal Employer issued a Tender Notification inviting bids for designs, engineering, supplies, erection, testing and commissioning of 4,000 TPH External Coal Handling Plant for construction of 2X660 MW Thermal Power Plant developed by NCC Power Projects Limited at Krishnapatnam. The appellant (M/s.NCC Limited) and GPL were partners in a Joint Venture for development of the said power plant. The appellant and the respondent No.1/claimant (M/s. Elecon EPC Projects Limited) entered into a Consortium Agreement dated 27.08.2012 with the appellant as the lead partner. On 29.08.2012, the appellant submitted its bid to GPL on an individual basis with the understanding that upon securing the contract, the appellant would enter into a back-to-back contract with the respondent No.1 except for the construction of civil works. Before finalizing the contract with GPL, the appellant issued a Letter of Intent (LOI) dated 19.12.2012 to the respondent No.1 with a contract value of Rs.183 Crores and a contract period of 22 months from

the date of the LOI. On 09.02.2013 and 11.02.2023, GPL issued Letters of Award (LOAs) to the appellant and the appellant issued 2 LOAs to the respondent No.1 on 02.03.2013. The respondent No.1 submitted an Advance Bank Guarantee of Rs.15,48,56,900/- and a Performance Bank Guarantee of Rs.16,49,89,400/- in terms of the Agreement. The respondent No.1 also issued a LOA to the M/s. CKIT Conveyor Engineers of South Africa for availing of Professional Services for the 7.5 KM Pipe Conveyor Installation.

5. On 03.05.2013, the appellant released Rs.12 Crores as advance and thereafter the balance of Rs.3,48,56,900/-, against which the respondent No.1 submitted a Bank Guarantee for Rs.15.48 Crores. The respondent No.1 started the work on 17.05.2013, as per the LOI. On 27.08.2013, the appellant communicated the approval of the respondent No.1's designs and other permissions between August 2013 and October 2013. In October 2013, there was a change in the management of the appellant-Company. In December 2013, GPL instructed the respondent No.1 to proceed with the critical engineering works.

6. On 19.04.2014, GPL awarded the same scope of work to M/s.Macmet India Limited although the contract awarded to the respondent No.1 was not expressly terminated. On 05.06.2014,

the appellant invoked the Advance Bank Guarantee of Rs.15,48,56,900/- which led the respondent No.1 to file petitions under section 9 of the 1996 Act before the District Court at Ranga Reddy, Hyderabad. The respondent No.1 filed O.P.Nos.342 and 364 of 2014 for injunction on the invocation of the Bank Guarantee and Performance Bank Guarantee and also issued a notice for invocation of arbitration to the appellant on 05.07.2014. The respondent No.1 claimed Rs.101,68,18,000/- from the appellant.

7. The Award was passed on 17.12.2016 in favour of the respondent No.1 for an amount of Rs.5,09,49,625/- along with interest @ 12% per annum and Rs.5 Crores towards damages together with interest @ 12% per annum from the date of the Award till realization. The appellant's petition for setting aside of the Award was dismissed by the Commercial Court on 30.03.2022 (impugned order) leading to the present Appeal.

8. On 10.10.2022, a Co-ordinate Bench of this Court granted the appellant 8 weeks to deposit the awarded amount and the respondent No.1 was permitted to withdraw the said amount. On 19.01.2023, the appellant deposited Rs.8 Crores and sought for time to deposit the balance of Rs.9.66 Crores which was granted by the Co-ordinate Bench. The appellant

has deposited Rs.17.66 Crores as on date and the respondent No.1 has furnished a Bank Guarantee for an amount of Rs.19.50 Crores which is lying with the Commercial Court in COP No.79 of 2017.

Arguments advanced on behalf of the Parties:

9. Learned Senior Counsel appearing for the appellant submits that the award of damages in favour of the respondent No.1 for loss of profits is patently illegal and contrary to public policy since there was no breach of contract and the respondent No.1 failed to bring any material on record in support of its claim for loss of profits. Counsel submits that the claim was awarded solely on the decision of the Supreme Court in *A.T. Brij Paul Singh Vs. State of Gujarat*[1]. Counsel submits that the Commercial Court travelled beyond the scope of the section 34 application in giving further reasons in support of the award of loss of profits by relying on Hudson's formula. According to counsel, damages cannot be awarded under section 73 of The Indian Contract Act, 1872, in the absence of evidence of loss of profits.

[1] (1984) 4 SCC 59

10. Learned Senior Counsel appearing for the respondent No.1/claimant submits that the claims were supported by evidence and were meticulously addressed by the Tribunal. Counsel asserts that interference based on fundamental policy is only warranted in exceptional circumstances which are absent in the present Appeal. Counsel submits that the appellant's admitted failure to notify the respondent No.1 of the termination of the principal contract formed the primary basis for the Award. Counsel urges that the Tribunal correctly found that the appellant's failure to notify the respondent No.1 of the contract termination amounted to a material breach. Counsel submits that the respondent No.1 continued to perform the work to the benefit of the appellant and that the Tribunal was justified in upholding the principal claims and awarding consequential damages for loss of profits.

The Point which falls for Adjudication:

11. The controversy before the Court is whether the Arbitral Tribunal was justified in awarding Rs.5 Crores to the respondent No.1/claimant as damages for loss of profits.

12. As stated above, the appellant has challenged only this component of the Award and has not pressed any of the other claims which were allowed in favour of the respondent No.1.

13. Our decision on this point is given under specific headings for a better delineation of the issues involved.

Decision:

14. The basis for awarding damages for loss of profits was on account of the respondent No.1/claimant bearing the consequences of short-closure without notice thereof. The claim for damages for loss of profits was the eighth and the last claim of the respondent No.1 in the arbitration. The total claim amount was for Rs.101,68,18,000/-. The claimed damages under the head of loss of profits was Rs.18.30 Crores i.e., 10 % of the contract value. The Tribunal awarded Rs.5 Crores for loss of profits.

The Undisputed Facts before the Arbitral Tribunal

15. The appellant and GPL were shareholders in NCCPL. GPL short-closed the contract with the appellant on account of changes in the management structure of the appellant. The

respondent No.1/claimant was admittedly kept in the dark about the short-closure. The respondent No.1 expected that the contract would be awarded to it on revised terms despite the changes in the management structure of the appellant.

16. The respondent No.1 engaged a consultant for procurement of projects and the service agreement with the consultant was part of the records. Moreover, orders were also placed with M/s.CKIT Limited of South Africa for the Design and Engineering of the Pipe Conveyor System. The appellant did not object to the quality of work at any point of time. Although there is a controversy regarding the quantum of work completed by the respondent No.1, GPL assessed the work done as 19.21% up to October 2013.

17. The contractual relationship between the appellant and the respondent No.1 continued till 26.10.2013. The respondent No.1 continued to perform the work and the appellant continued to enjoy the services and benefits of that work. The respondent No.1 came to know on 19.04.2014 that GPL had awarded the same work to M/s.Macmet. The appellant meanwhile stayed away from meetings and any form of exchange with the respondent No.1 from October, 2013 to April 2014.

18. The Arbitral Tribunal allowed most of the claims of the respondent No.1 including part-claim for damages for loss of profits to the extent of 5 Crores against the claim of 18.30 Crores.

The Indian Contract Act, 1872 and Compensation for Breach

19. The Indian Contract Act, 1872 does not define the word 'breach' as a standalone act or omission. Sections 73 and 74 of the Act ensure compensation as a consequence of breach. Section 37 of the Act clarifies a pre-breach situation by declaring that the parties to a contract must either perform or offer to perform their respective promises unless such performance is dispensed with or excused under the provisions of the Act or under any other law. Section 39 gives the promisee the option to terminate the contract when the other party has refused to perform or has disabled himself/herself from performing the promise in its entirety. This option is subject to the promisee's acquiescence either by words, actions, or conduct.

20. The appellant indisputably benefited from the work done by the respondent No.1/claimant but suppressed the fact of

short-closure keeping the respondent No.1 in the dark. The appellant, on the other hand, did not suffer any loss which would be evident from the appellant not filing any counterclaim in the arbitration for damages.

21. The question is whether the Arbitral Tribunal overstepped its limits in relying on *A.T. Brij Paul Singh* (supra) for awarding 5 Crores to the respondent No.1 as damages for loss of profits. The award should be viewed in the factual context of *A.T. Brij Paul Singh* (supra) and Hudson's formula which provided the calculation template for the Supreme Court in that case.

22. In *A.T. Brij Paul Singh*, the Supreme Court dealt with breach of a works contract and of the contractor's entitlement to damages for loss of profit consequent to the breach. The Supreme Court held that the plaintiff/contractor was entitled to damages under the head "loss of profits" with reference to Hudson's Building and Engineering Contracts (commonly referred to as Hudson's formula) and directed the respondent State to pay Rs.2,00,000/- as damages for breach. The Supreme Court noted that the plaintiff/appellant had relied upon the decision of the same High Court in a connected proceeding where the Court had accepted the claim for loss of profit computed at 15% of the value of the unexecuted work. Despite

the decision in the connected matter, the High Court had refused to accept the appellant's case on the ground that the appellant had not produced relevant documents to establish its claim. The Supreme Court accordingly held that the High Court should have accepted 15% of the value of the balance of the works contract as a reasonable measure of damages for loss of profit since the appeal concerned the same scope of work.

23. Neither Section 73 nor Section 55 of The Indian Contract Act, 1872 provides for a mechanism for assessment of damages for breach or failure to perform a fixed-time contract, respectively, notwithstanding the legislative intent to compensate a party who suffers on account of the breach or non-performance.

24. In fact, Section 56 of the 1872 Act also contemplates compensation for loss through non-performance of an act which the promisor knew to be impossible or unlawful, as opposed to the promisee who was kept unaware of such impossibility or illegality. The underlying thrust of these provisions is simply to compensate the innocent party who has suffered due to the act of another, whether on account of breach, failure, or impossibility of performance.

25. Section 70 of The Indian Contract Act, 1872 invigorates the framework by stipulating that a person who enjoys a lawful, non-gratuitous act of another or receives a benefit from such act must compensate the latter for the benefit received. Section 70 would apply with full force to the facts of this case, since it is undisputed that the respondent No.1 continued to perform its contractual obligations while the appellant continued to reap the benefits thereof, on a deliberate act of suppression of the short-closure from the performing party/respondent No.1.

26. The Courts have therefore filled the lacuna by adopting a fair means of assessing damages in suitable cases on the overarching need to compensate the party who has suffered the breach.

The Award for Loss of Profits should be placed in context

27. The respondent No.1 presented comprehensive evidence in support of its claims forming the foundation for the loss of profits. The Tribunal's decision to allow less than 1/3rd of the respondent No.1's claim for loss of profits, that is, 5 Crores as opposed to 18.30 Crores, certainly cannot be described either as fanciful or arbitrary. It is relevant for contextual purposes that even a conservative investment such as a fixed deposit would

yield an annual return of 8%; whereas the respondent No.1 has been awarded 2.75% of its claimed loss of profits. Hence, the Award of 5 Crores, as against 18.30 Crores, represents opportunity costs and essentially serves as compensation for the untimely closure of the contract at the behest of the appellant and GTL.

28. Opportunity costs, as a consequential damage, is a remedy to which every business person is entitled to in commercial contracts. The expectation aligns with the doctrine of business prudence and the primary objective of a person to enter into commercial transactions with another.

29. The award of 5 Crores must also be assessed against the respondent No.1's claim of 18.30 Crores which approximately represented 10% of the total project cost of 183 Crores. The Tribunal employed Hudson's formula (without specifically naming it) which is recognised as a fail-safe methodology for assessing damages for loss of profit in major contracts arising from competitive tenders which has been judicially endorsed in *McDermott International Inc Vs. Burn Standard Limited* [2] . Hudson's formula calculates costs by using the percentage of head office overheads and profits specified in the contract,

[2] (2006)11 SCC 181

multiplied by the contract sum, divided by the contract period and further multiplied by the period of delay in days.

30. Hudson's formula has also found mention in several other cases as an indicator for measuring damages for loss of profits in the face of rescission/breach of contract.

31. Hence, the Arbitral Tribunal cannot be faulted for employing a formula for calculating just compensation to the respondent No.1 after recording its satisfaction that there had indeed been a material breach of the contract terms.

The Facts of the Case within the Statutory Framework:

32. It is undeniable that the Arbitral Tribunal found that the appellant's failure to notify the respondent No.1 of the termination/short-closure of the contract amounted to a material breach. The finding of material breach would automatically trigger section 73 of The Indian Contract Act, 1872, which provides for compensation for loss or damage consequent to breach of contract. Section 73 of the Act declares that the party who suffers from the consequences of a broken contract is entitled to receive compensation for any loss or damage caused by the party who has caused the breach. The loss would encompass the effect and consequences of the

breach which was within the contemplation of the parties at the time of entering into the contractual relationship.

33. Admittedly, the appellant abstained from meetings and correspondence with the respondent No.1 from October 2013 to April 2014 due to the change in the appellant's management commenced from October 2013. The respondent No.1 nonetheless continued to perform its contractual obligations during this period and only came to know on 19.04.2014 that GPL had awarded the same work to M/s.Macmet. The appellant invoked the Advance Bank Guarantee of Rs.15.48 Crores much later, on 05.06.2014. The respondent No.1 invoked the arbitration clause on 05.07.2014. Hence, the respondent No.1 continued to work during the 6 months interregnum under the belief that the contract subsisted between the appellant and the respondent No.1 as executed in December 2012/March 2013.

34. The above facts would show that the Arbitral Tribunal merely evened the scales of justice by awarding 5 Crores as loss of profits to the respondent No.1 for the balance work which the respondent No.1 could have performed had the contract not been short-closed.

The Compensation awarded does not amount to an Unexpected Windfall

35. Reasonable compensation for an injury suffered by a contracting party may be assessed by an estimation based on a practical, rough and ready approach for compensating the innocent party without delay for the loss already suffered by that party. The law permits a reasonable degree of estimation for quantification of damages once the Arbitrators are satisfied of the fact of breach by one of the parties to the contract and damage suffered by the other. Formulae such as Hudson's formula come to the aid in situations where the Tribunal may not have exact figures at its disposal or where the evidence produced lacks a precise estimation of foreseeable losses.

36. The question is: Would a party in such cases be left in the lurch of this uncertainty? The answer must be in the negative since failure to prove losses with granular certainty cannot prevent the Court from relying on a reasonable estimation for award of compensation. The bottomline is that the estimation of loss must be reasonable and not exaggerated. A party must suitably be compensated and the Court must draw upon attending facts with regard to the extent of loss. In the present

case, the respondent has presented its quantum of damages in a tabular format which the Award records as Document C-88.

37. In any event, the award of 5 Crores which is less than 3% of the contract value cannot, under any circumstances, be termed as irrational or legally unsound.

The Award for Loss of Profits is not bereft of Reasons

38. Breach of contractual obligations can assume various forms. Disabling another party from performing his/her contractual obligations or disabling oneself from performing, would also amount to breach. In other words, self-induced frustration of a contract would also amount to breach.

39. The appellant's failure to inform the respondent of short-closure of the contract at the relevant time, despite being privy to the same, amounts to disablement of performance as contemplated under section 39 of the 1872 Act. In other words, once the contract between the GPL and the appellant was closed on 26.10.2013, the appellant as the promisor, had an obligation to communicate this fact to the respondent, namely, that the appellant was disabled from performing its promise in its entirety.

40. GPL short-closed the contract with the appellant; the appellant was aware of the said untimely-closure. The appellant however failed to communicate this fact to the respondent which resulted in the respondent continuing to perform its obligations under the contract and the appellant reaping the benefit of the same. The Arbitral Tribunal found that the respondent was entitled to damages for expected profits due to the appellant's suppression of the fact of short-closure which kept the respondent engaged in the work while the appellant continued to collect payment from GPL for the work done by the respondent.

41. The reasons given by the Arbitral Tribunal for compensating the respondent for the projected loss are perfectly justifiable in the above factual matrix. In fact, we find that the relevant part of the Award outlines the basis for grant of compensation to the respondent on account of loss of profits contrary to the allegations made on behalf of the appellant. Damages were not awarded in a vacuum or without any application of mind. The Arbitral Tribunal clearly articulated its reasons for doing so, namely, that

(i) The respondent made necessary preparations for the work expecting substantial profit.

(ii) The respondent had executed the work for the benefit of the appellant but had not been paid for it.

(iii) The respondent continued to work despite short-closure of the contract which was not communicated to the respondent.

(iv) The appellant benefited from the work done by the respondent and was rewarded for the same.

(v) The appellant did not suffer any loss due to the closure of the contract.

(vi) The project was conceived on a large scale requiring specialized technical expertise. Hence, the respondent was entitled to damages on expected profits.

42. These reasons are not only rational but reasonable with reference to the quantum. The fact that the respondent incurred substantial expenditure on account of the project is evident from the other heads of claims which were allowed by the Arbitral Tribunal. In our view, the award for loss of profits should be seen as concomitant to the other claims allowed by the Arbitral Tribunal in favour of the respondent.

43. It is imperative that the Arbitral Tribunal be allowed a free play in the joints in its assessment of the facts and conclusions therefrom. A paralysis in its ability to arrive at well-considered decisions would be contrary to the object of the 1996 Act. A common business sense for arriving at broad estimates without granular accuracy is within the settled contours of the arbitral domain.

44. In essence, the award does not give any reason to hold that the Arbitral Tribunal transgressed beyond its domain.

The Perimeter of Interference narrows down as the proceedings move up the hierarchy of Courts.

45. It is well settled that a Court hearing an Appeal under section 37 of the 1996 Act should be more circumspect in matters of interference as the scope for such is narrower than in an application for setting aside of an Award under section 34 of the 1996 Act. An appeal from a decision upholding an award calls for greater caution as the grounds for interference are restricted to absence of reasons, patent illegality or perversity. Section 37 of the 1996 Act does not contemplate the Court embarking on a fact-finding exercise for re-appraising the

evidence, unless the Arbitral Tribunal has ignored the evidence before it or has arrived at findings contrary to the evidence.

46. Simply put, the appellate Court would strive to preserve the Award and the order of the section 34 Court unless they are found to be perverse, patently illegal or in conflict with the public policy of India in all respects.

47. The Referral Court should therefore restrain itself from interfering with the discretion exercised by the Arbitral Tribunal unless the discretion is found to be unreasonable and in defiance of logic.

48. The law with regard to the Appeal Court steering clear of interference was articulated by the Supreme Court in *NTPC Ltd. Vs. M/s.Deconar Services Pvt. Ltd.*[3] and *Dyna Technologies Private Limited Vs. Crompton Greaves Limited*[4]. The principal consideration before the Supreme Court was whether the Arbitrator's opinion reflected a possible view on the evidence as opposed to the Court higher up in the hierarchy finding a different conclusion to be equally possible. The Supreme Court negatived the inclination to interfere in such cases and reinforced the authority of the Arbitral Tribunal as master of the

[3] (2006) 11 SCC 181
[4] (2019) 20 SCC 1

evidence. *Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd*[5] held that interference on the grounds of fundamental policy of Indian law is only warranted in exceptional cases where the finding given by the Arbitral Tribunal is *ex facie* contrary to public policy or against the basic notions of justice and morality.

49. The reliance placed by the appellant on *Unibros Vs. All India Radio*[6] must be seen within the context of the particular facts before the Supreme Court where the computation of loss of profit was assessed in a case of delay in performance of the contract attributable to the employer. Moreover, in *Unibros,* the Supreme Court was confronted with two Awards arising from the same claim i.e., for loss of profit and found the second Award to be a virtual reproduction of the first. The Supreme Court however accepted Hudson's Formula as a credible method for computing loss of off-site overheads and profits.

50. In the present case, the appellant seeks to segregate the Award of loss of profits from the other parts of the Award. This Court is unable to accept the stand as that would cause a chasm between the reasons and the underlying factual context. Moreover, slicing the Award into unnatural wedges would result

[5] (2003) 5 SCC 705
[6] 2023 SCC OnLine SC 1366

in an incomplete reading of the reasons for allowing the claims. In fact, restricting our gaze only to the award for loss of profits would reflect only a part of the justification for allowing the claim. The award for loss of profits cannot be divorced from the overall factual context underscoring the findings given by the Tribunal for allowing the other claims of the respondent No.1.

Conclusion

51. We do not find the impugned order passed by the Commercial Court on 30.03.2022 falling foul of any of the grounds on which the award would fail under section 34 of the Act. The Commercial Court upheld the Award after recording its satisfaction with the reasons given by the Arbitral Tribunal. The Commercial Court also found that the findings of the Arbitral Tribunal were supported by evidence. The Commercial Court relied on section 70 of the 1872 Act to conclude that the respondent is entitled to compensation for the work done and the expenses incurred for performing the contract. We do not find the reasons given by the Commercial Court to be perverse or against the law as discussed in the preceding paragraphs of this judgment.

52. The impugned order dated 30.03.2022 passed by the Commercial Court does not warrant any interference. The Award dated 17.12.2016 likewise shuns any form of interference. The above discussion gives the reasons for this view. In any event, upending the entire Award only on one head i.e., award of damages for loss of profits is an unnatural procedure for assessment and contrary to the statutory mandate.

53. COMCA No.29 of 2022 is accordingly dismissed. All connected applications are disposed of. Interim orders, if any, shall stand vacated.

MOUSHUMI BHATTACHARYA, J

B.R.MADHUSUDHAN RAO,J

Date: 23.04.2025
va/bms