

(2012) 08 BOM CK 0172

In the Bombay High Court

Case No : Appeal (Lodging) No. 349 of 2012 in Arbitration Petition No. 958 of 2010

Mahanagar Gas Limited

APPELLANT

Vs

M/s. Babulal Uttamchand and Co. 108, Shyamkamal A.
Agarwal Market Tejpal Road, Vile Parle, Mumbai-400057

RESPONDENT

Date of Decision : 28-08-2012

Acts Referred:

Arbitration Act, 1940 — Section 37

Arbitration and Conciliation Act, 1996 — Section 31(7)(b), 34

Citation : (2013) 2 MhLj 94

Hon'ble Judges : Mohit S. Shah, C.J;N.M. Jamdar, J

Bench : Division Bench

Advocate : Pradeep Sancheti, with Mr. S.A. Bhalwal instructed by M/s. Vyas and Bhalwal, for the Appellant; Chidanand Kapil instructed by y Ms. Shilpa Kapil, for the Respondent

Final Decision : Allowed

Judgement

Mohit S. Shah, C.J.—This appeal is directed against the judgment and order dated 9 March 2012 of the learned Single Judge dismissing the arbitration petition of the appellant herein u/s 34 of the Arbitration and Conciliation Act, 1996 with the only modification of reducing the future rate of interest from 18% to 12% from the date of the award (5 March 2010) till realisation on the claim as well as the counter-claim. The appellant awarded the respondent (the claimant) the work of project management and construction of pipeline network for domestic supply of natural gas in the area of Santacrtuz by work order dated 12 October 2002. The said work was to be completed within three years from the date of letter of acceptance. The work was valued at Rs. 3.87 crores. The respondent, accordingly, mobilised the requisite resources and made investment. The respondent was also required to enter into the agreement with the customers for providing gas connections.

2. The appellant failed to provide gas to the customers though the pipeline work

was completed by the respondent. The delay in supply of gas for about 18 months resulted in non-payment by the customers and consequent non-payment for the work done to the respondent. The respondent contended that on account of the breach of terms of contract by the appellant, the full work could not be completed in the stipulated period. The respondent raised claims before the Arbitrator. The appellant also filed counter-claims. After the pleadings were completed, one witness was examined by either party. The claims made by the respondent herein before the Arbitrator were as under:-

(i)

Work done not paid

Rs. 35,00,000

(ii)

Refund of security deposit

Rs. 20,00,000

(iii)

Material procured but not utilized

Rs. 4,00,000

(iv)

Supply of copper pipe

Rs. 3,74,680

(v)

Delay in payment

Rs. 98,748

(vi)

Loss of Profit

Rs. 26,70,726

(vii)

Less of Advance

Rs. 20,00,000

(viii)

Loss of infrastructure

Rs. 28,00,000

(ix)

Underutilization of Overheads

Rs. 69,44,072

(x)

Underutilization of Machinery

Rs. 8,01,239

(xi)

Underutilization of labour Force

Rs. 85,46,575

(xii)

Loss of business opportunities

Rs. 26,70,797

(xiii)

Cost

Rs. 5,00,000

(xiv)

Interest @ 24% p.a. on the amount claimed.

Rs. 3,33,06,837

3. On the other hand, the appellant also made counter-claims under the various heads. It is not necessary to refer to all the heads as the Arbitrator made the award with the counter-claim only for a figure of Rs. 7,17,445/- under the head of material reconciliation penalties and recoveries and no amount was awarded under the other heads.

4. It is the case of the claimant that after about 60 hearings took place, at the meeting of the Arbitral Tribunal on 7 August 2008, the parties agreed to sit together to arrive at the agreed figure of the balance amount payable to the claimants on account of the work done but not paid for (Claim No. 1) and the amount payable from the claimant to the respondent on account of material reconciliation recoveries (counter-claim No. 18). On 5 January 2009, the learned counsel for the parties filed jointly signed statement alongwith detailed working informing the Arbitral Tribunal that both of them had arrived at an agreed figure of Rs. 35,37,176/- as the amount payable to the claimant from the appellant on account of work done but not paid (Claim No. 1) and at a figure of Rs. 7,17,445/- as the amount due from the claimant on account of the recovery against Material Reconciliation Account (Counter-claim No. 18) and filed the jointly signed

statement which was taken on record. The Arbitral Tribunal accordingly, made the award for the aforesaid amounts in favour of the respective parties. The consent terms specifically provided that the same were without prejudice to the rights and contentions of the parties qua all other claims.

5. Learned Arbitrator Dr. Justice B.P. Saraf (Retd.) acting as the sole arbitrator ultimately made the following award after giving reasons:-

30. In the premises, I make the following award:

Claims of the Claimant:

(i) The Respondent do pay to the Claimant a sum of Rs. 35,37,176/- (Rupees Thirty Five Lakh Thirty Seven Thousand One Hundred Seventy Six only) as agreed between the Claimant and the Respondent, on account of work done but not paid with interest calculated thereon at the rate of 12 per cent per annum from 1st January 2006 to the date of the award.

(ii) The Respondent do pay to the Claimant a sum of Rs. 25,23,873/- (Rupees Twenty Five Lakhs Twenty Three Thousand Eight Hundred Seventy Three only) on account of loss of profit with interest calculated thereon at the rate of 12 per cent per annum from 1st January 2006 to the date of the award.

(iii) The Respondent do pay to the claimant a sum of Rs. 26,04,129/- (Rupees Twenty Six Lakh Four Thousand One Hundred Twenty Nine only) on account of costs of the arbitration.

(iv) The Respondent do pay to the Claimant further interest on the sum directed to be paid to the claimant by this award at the statutory rate of 18 per cent per annum as set out in section 31(7)(b) of the Act from the date of the award to the date of payment.

Counter-claims of the Respondent

(v) The Claimant do pay to the Respondent a sum of Rs. 7,17,445/- (Rupees Seven Lakhs Seventeen Thousand Four Hundred Forty Five only), as agreed between the Claimant and the Respondent, on account of Recovery against Material Reconciliation Account with interest calculated thereon at the rate of 12 per cent per annum from 1st January 2006 to the date of the award.

(vi) The Claimant do pay to the Respondent further interest on the sum directed to be paid by this award to the Respondent at the statutory rate of 18 per cent per annum as set out in section 31(7)(b) of the Act from the date of the award to the date of payment.

6. The learned Single Judge has held that the award does not call for any interference except the modification made as regards the rate of interest. The learned Arbitrator had awarded further interest at the rate of 18% per annum from the date of the award till the date of payment. The learned Single Judge has reduced the said rate to 12% per annum as indicated hereinabove.

7. The learned counsel for the appellant has challenged the award as confirmed by the learned Single Judge and has made the following submissions:-

(i) The claimant had not led any evidence in support of the claim for loss of profit. Relying on the decision of the learned Single Judge of this Court in *Mazgaon Dock Ltd. v. Offshore Hook-up and Construction Services (India) Pvt. Ltd.* (Arbitration Petition No. 295 of 2007) decided on 20 August 2011), it is contended that the Arbitrator should have drawn an adverse inference against the respondent for withholding the best evidence which was within his special knowledge. It is obvious that before submitting his offer pursuant to the tender notice, the respondent must have worked out the figure and it was for the respondent to lead evidence as to what was the margin of profit expected by him while submitting his offer. But that evidence was not led.

(ii) The Arbitrator had awarded costs at 90% of the fees of the Arbitrator and the fees of the Techno-legal Consultant and advocate and other expenses aggregating to Rs. 28,93,476/-. It is submitted that since the respondents had made a total claim of Rs. 3.33 crores but the learned Arbitrator awarded only Rs. 35.37 lakhs under the first head of work done but not paid and Rs. 26.70 lakhs under the head "Loss of Profit", the learned Arbitrator ought not to have awarded 90% of the cost. It is submitted that the learned Arbitrator having made the award to the extent of only about 20% of the total claim of the respondent, the costs should not have been awarded at 90%.

(iii) As regards interest, the Arbitrator erred in awarding interest on the amount of Rs. 35,37,176 which was an agreed amount between the parties and, therefore, on such agreed amount, no interest can be awarded from the date of the claim till the date of the award.

(iv) It was also contended that no interest could have been awarded on the amount of loss of profit because that amount was ascertained for the first time while making the award.

8. On the other hand, the learned counsel for the respondent has opposed the appeal and submitted that as per the settled legal principles, this Court would not interfere with the arbitration award by sitting in appeal over such award and by reappreciating the evidence on record. It is submitted that while filing the consent terms of 2 January 2009, it was made clear by the parties that the settlement for the respondent's claim under item No. 1 work done and not paid at Rs. 35,37,176/- was without prejudice to the rights and contentions of the parties qua the other claims and, therefore, the respondent was not debarred from making any other claim including the claim for cost and interest on other amount.

9. As regards the claim under the loss of profit, the learned counsel for the respondent claimant has relied on the decision of the Apex Court in *Dwaraka Das Vs. State of Madhya Pradesh and Another*, and *MSK Projects (I) (JV) Ltd. Vs. State of Rajasthan and Another*, . It is submitted that the claim made by the

contractor for recovery of amount of damages as expected profit out of contract cannot be disallowed on the ground that there was no proof that he suffered actual loss to the extent of amount claimed on account of breach of contract.

10. As regards the challenge to the amount under the head "costs", the learned counsel for the respondent-claimant submitted that the matter was heard by the Arbitrator at as many as 71 sittings and the appellant agreed to pay the amount under Claim No. 1 quantified at Rs. 35.37 lakhs only after about 60 sittings. It is, therefore, submitted that the appellant having allowed the arbitration sittings to be held as for many as 60 sittings before agreeing to pay for the work done but not paid, the learned Arbitrator was justified in awarding costs at the rate of 90% of the total costs towards the fees of the Arbitrator and the fees of the Techno-legal Consultant and advocate fees.

11. Before we proceed to examine rival contentions we must keep in mind the scope an of appeal under the Arbitration Act. In the appeal, the order passed by learned Single Judge u/s 34 of the Act refusing to interfere with the award of the learned Arbitrator, is challenged. Scope of section 34 of the Act is well settled. It is on very limited grounds that the award of Arbitrator can be set aside by the Court u/s 34. The scope of an appeal from order passed u/s 34 of the Act will be governed by the same limitations imposed on the exercise of the power u/s 34, if not, more stringent.

12. The first controversy is as regards the 10% damages awarded to the Respondent. According to learned counsel for the Appellant the Respondent did not produce on record any material to show how he is entitled to the damages on account of loss of profit. According to the learned counsel loss of profit and it's quantum cannot be presumed and the party must prove it by producing adequate evidence on record. Reliance is placed on the judgment of the learned Single Judge in Mazgaon Dock Limited (supra) to contend that since no evidence was produced by the claimant, adverse inference ought to have been drawn and the learned Single Judge ought to have remanded the matter to the Arbitrator on this issue. Learned counsel urges that we should remand the matter to the learned Arbitrator, to decide this issue. This submission is countered by the learned counsel for Respondent by relying on the judgments of the Apex Court which lay down guidelines for computing the loss of business when breach of contract is alleged.

13. The judgment rendered by the learned Single Judge in Mazgaon Docks (supra) was rendered in the facts of that case. In that case the claim was made by sub-contractor. As per the clause provided in the agreement therein, the sub contractor was not entitled to damages for breach of the contract. In the present case there is no such negative clause and a fundamental breach of the contract is alleged. These distinguishing facts have been noticed by the learned Single Judge who has rightly come to the conclusion that the ratio rendered in Mazgaon Docks case (supra) was not applicable to the facts of the present case.

14. In the present case the contract which was awarded in favour of the Respondent was in respect of laying down pipelines for providing gas to the consumers. The Respondent accordingly mobilized the resources and made substantial investment. The respondent entered into agreement with the customers for providing gas connections. For about 18 months the appellant did not provide gas to the customers through the pipelines constructed by the respondent-claimant. Providing gas through the pipelines was the fundamental feature of the agreement between the parties. This basic clause of the contract was breached by the appellant. Once such fundamental feature is breached, there would be justification for providing to the aggrieved party arise and for that purpose provisions of the Contract Act come into operation. The contractor is entitled to claim damages for loss of profit which he is expected to earn by undertaking the works contract, and such claim of expected profits is admissible once improper breach of contract is demonstrated. The Apex Court in the case of A.T. Brij Paul Singh and Others Vs. State of Gujarat, observed: (SCC pp.64-65, paras 10-11)

What would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid. In this case we have the additional reason for rejecting the contention that for the same type of work, the work site being in the vicinity of each other and for identical type of work between the same parties, a Division Bench of the same High Court has accepted 15 per cent of the value of the balance of the works contract would not be an unreasonable measure of damages for loss of profit.

Now if it is well-established that the respondent was guilty of breach of contract inasmuch as the rescission of contract by the respondent is held to be unjustified, and the plaintiff-contractor had executed a part of the works contract, the contractor would be entitled to damages by way of loss of profit. Adopting the measure accepted by the High Court in the facts and circumstances of the case between the same parties and for the same type of work at 15 per cent of the value of the remaining parts of the work contract, the damages for loss of profit can be measured.

This judgment is followed in the case of Dwaraka Das Vs. State of Madhya Pradesh and Another, . The Apex Court in MSK Projects (I) (JV) Ltd. Vs. State of Rajasthan and Another, , observed as under:

38. In common parlance, "reimbursement" means and implies restoration of an equivalent for something paid or expended. Similarly, "Compensation" means anything given to make the equivalent. (See: State of Gujarat Vs. Shantilal Mangaldas and Others, ; Tata Iron and Steel Co. Ltd. v. Union of India and Ors.; Ghaziabad Development Authority (Supra); and H.U.D.A. v. Raj Singh Rana, (Supra). However, in Dwaraka Das Vs. State of Madhya Pradesh and Another, , it was held that a claim by a contractor for recovery of amount as damages as

expected profit out of contract cannot be disallowed on ground that there was no proof that he suffered actual loss to the extent of amount claimed on account of breach of contract.

39. In *A.T. Brij Paul Singh and Others Vs. State of Gujarat*, , while interpreting the provisions of Section 73 of the Indian Contract Act, 1972, this Court held that damages can be claimed by a contractor where the government is proved to have committed breach by improperly rescinding the contract and for estimating the amount of damages, court should make a broad evaluation instead of going into minute details. It was specifically held that where in the works contract, the party entrusting the work committed breach of contract, the contractor is entitled to claim the damages for loss of profit which he expected to earn by undertaking the works contract. Claim of expected profits is legally admissible on proof of the breach of contract by the erring party. It was further observed that what would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid.

40. In *B.S.N.L. Vs. Reliance Communication Ltd.*, , this Court held as under:

53. Lastly, it may be noted that liquidated damages serve the useful purpose of avoiding litigation and promoting commercial certainty and, therefore, the court should not be astute to categorise as penalties the clauses described as liquidated damages.

41. This Court further stated in *Oil and Natural Gas Corporation Ltd. v. SAW Pipes Ltd.* (Supra):

64....This section is to be read with Section 74, which deals with penalty stipulated 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 emphasizes 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.

15. Thus, it is clear from the dicta of the Apex Court reproduced above that the claim for damages by a party is admissible once it demonstrates that the other party has committed breach of the fundamental terms of the contract. In the Government contracts which are undertaken by the contractor for earning profits, it is implicit that once there is breach, the object of earning profit is nullified. Once such fundamental breach occurs, the party is presumed to have suffered loss of profit. In the case of *MSK Project India* (supra) the Apex Court has categorically laid down that the claim by contractor for damages as expected

profit out of contract, cannot be disallowed on the ground that there was no proof that he has suffered actual loss. The Apex Court in the case of A.T. Brij Paul Singh V/s. State of Gujrat, held that in case of Government contract where the Government commits breach by improperly rescinding the contract the Court should carry out a broad evaluation regarding the damages instead of going into minute details. In the present case the Respondent had made a claim for loss of profit. The Arbitrator was not expected to go through the minute details to ascertain the exact figure of damages. The Arbitrator applied rough and ready formula to arrive at the damages payable. Once the Arbitrator arrives at a figure, even by guesswork, the Court may not interfere with it, if it is not unreasonable.

16. The Apex Court in the case of Mohd. Salamatullah and Others Vs. Government of Andhra Pradesh, , while dealing with the grant of damages in the case of breach of contract, held that the appellate Court was not justified in interfering with the quantification of damages, even if they were based on guesswork. In the present case the Arbitrator has granted 10% damages towards the loss of profit. We do not intend to interfere with the award of grant of damages. Not only it appears reasonable to us in facts of the present case, we must also bear in mind the scope of appeal u/s 37 of the Arbitration Act.

17. The second objection of the learned counsel for appellant was regarding payment of costs. The learned Arbitrator awarded Rs. 26,04,129/- on account of costs of arbitration to be paid by the Appellant. Learned counsel for the appellant makes a grievance that many reliefs claimed for by the Respondent were not granted by the Arbitrator and in fact the substantial claim of Rs. 35,37,176/- was arrived at by an agreement between the parties. Thus, learned counsel contended that the costs were excessive. Learned counsel for the Respondent submitted that though the substantial claim was arrived at by way of consensus between the parties, the concession was given by the appellant only after about 60 sittings. He submits that it is not as if in the preliminary stages itself, that the appellant had conceded to the claim.

18. We have been informed that around 71 sittings of arbitral tribunal took place. In that context, if the amount of Rs. 26,04,129/- is spread over 71 sittings, the resultant cost awarded per sitting is not exorbitant or unreasonable. The learned Arbitrator also took note of the fact that the appellant itself had claimed an amount of Rs. 19 lakhs towards the fees of the advocates alone. However, we do find some substance in the argument of the learned counsel for the appellants that once most of the claims of the respondent were rejected and the appellant had agreed to settle the substantial claim, the learned Arbitrator was not justified in directing the appellant to pay 90% of the costs. Even if the share of the appellant towards payment of cost is pegged down to 70% and the figure is rounded off, it would come to about Rs. 20 lakhs. We propose to reduce the costs payable by the appellant to the respondent to Rs. 20 lakhs.

19. The last contention advanced on behalf of the appellant was in respect of payment of interest. It was contended that the learned Arbitrator ought not to

have awarded interest on the amounts awarded from the date of the claim till the award.

20. It was contended on behalf of the appellant that since the parties arrived at the settlement on 5 January 2009 agreeing that the amount of Rs. 35,37,176/- was to be paid by the appellant to the respondent for item (i) - "work done not paid", there was no justification to grant interest from 1 January 2006.

It is not possible to accept the above submission. In the first place, when the parties arrived at the above agreement on 5 January 2009, the respondent-claimant had made it more than amply clear that the settlement for the respondent's claim under item (i) - "work done not paid" at Rs. 35,37,176/- was without prejudice to the rights and contentions of the parties qua the other claims. The other claims included claim No. (xiv) for interest at the rate of 24% per annum on the amounts claimed. Hence, the learned Arbitrator was justified in granting interest on the amount of Rs. 35,37,176/- under item (i) - "work done not paid" for the period from the date of the claim till the date of the award, i.e. from 1 January 2006 till 5 March 2010.

21. Learned counsel for the appellant, however, submitted that when the claimant has been awarded compensation for loss of profit on the basis of guess work and not on the basis of any evidence led by the claimant before the learned Arbitrator, no interest should have been awarded from the date of the claim till the date of the award.

22. Learned counsel for the respondent-claimant, however, opposed the above submission and contended that loss of profit occurred when the contract was breached and while passing the award the learned Arbitrator only recognized this fact. It was not as if the loss of profit occurred when it came to be computed by the learned Arbitrator.

23. We are of the view that while the submission made by each party has some merit, the matter needs to be examined with some circumspection. Though ordinarily an arbitration award would not deserve to be interfered with merely because another view is possible, in the facts and circumstance of the case it may not be unreasonable not to award interest from the date of the claim till the date of the award giving compensation for loss of profit when the claimant had not led any evidence such as calculations made at the time of submitting the tender. On the other hand, where the claimant has led evidence before the learned Arbitrator to quantify the compensation for loss of profit upon wrongful termination of the contract, the learned Arbitrator should award interest from the date of the claim till the date of the award. Since, in the facts of the present case, the claimant had not led specific evidence and the learned Arbitrator has awarded compensation for loss of profit on the basis of mere estimates, we are of the view that interest should not be awarded to the claimant on the amount of compensation for loss of profit from the date of claim till the date of award. In any case, we make it clear that the claimant is entitled to interest on the amount

of compensation for loss of profit from the date of award till the date of payment.

24. As regards the future rate of interest, i.e. interest for the period from the date of the award till the date of payment, it has already been reduced by the learned Single Judge from 18% to 12% per annum. In the absence of any cross objection, there is no occasion for considering this aspect. In view of the above discussion, we are of the view that the award made by the learned Arbitrator does not call for any interference except the following modifications:-

i) The amount on account of costs to be paid to the respondent-claimant shall be Rs. 20 lakhs.

ii) As far as the interest is concerned, the same shall be calculated at the rate of 12% per annum from the date of the claim till the date of the award on the principal amount awarded by the Arbitral Tribunal i.e. Rs. 35.37 lakhs for the work done and not paid under claim No. (i) and also at the rate of 12% per annum from the date of the award till the date of payment on the principal amount of Rs. 35.37 lakhs.

iii) Interest shall be paid at the rate of 12% per annum from the date of the award till the date of payment on the amount of Rs. 25.23 lakhs under the head "loss of profit", and not for any period prior to the date of the award.

iv) As regards the future rate of interest, the learned Single Judge has already reduced the rate of interest from 18% to 12% and that part of the judgment stands confirmed.

The appeal is accordingly partly allowed only to the aforesaid extent.