

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

% Judgment delivered on: 09.05.2025

+ **FAO(OS)(COMM) 108/2023 and CM Nos.26534/2023 & 26535/2023**

**UNION OF INDIA** ..... Appellant

Versus

**AHLUWALIA CONTRACTS (INDIA) LTD.** ..... Respondent

**Advocates who appeared in this case:**

For the Appellant : Mr Sudhir Nandrajog, Senior Advocate with Mr Abhimanyu Garg and Mrs Preety Makkar and Ms Ankita Singh, Advocates.

For the Respondent : Mr S.K. Maniktala, Mr Udit Maniktala, Mr Jatin Kumar, Mr Sanchit Jain, Mr Mohit Sharma and Mr Kritik, Advocates.

**CORAM:****HON'BLE MR. JUSTICE VIBHU BAKHRU****HON'BLE MR. JUSTICE TEJAS KARIA****JUDGMENT****VIBHU BAKHRU, J.**

1. The appellant has filed the present intra-court appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 [**A&C Act**], *inter alia*, impugning an order dated 08.02.2023 [**impugned order**] passed by the learned Single Judge in OMP(COMM) 131/2016 captioned *Ahluwalia Contract (India) Ltd. v. Union of India*.



2. The respondent had filed the aforementioned application under Section 34 of the A&C Act for setting aside an arbitral award dated 20.11.2015 [**impugned award**] passed by the learned Arbitral Tribunal comprising of a Sole Arbitrator [**Arbitral Tribunal**]. Whilst the learned Arbitral Tribunal had allowed certain claims raised by the respondent (claimant before the Arbitral Tribunal), it had rejected the others being Claim Nos. 3, 4, 5, 7, 12, 14, and 17.

3. The impugned award was rendered in the context of disputes that had arisen between the parties in connection with the contract dated 29.08.2011 for Package-III Electrical Services at AIIMS, Patna under the Pradhan Mantri Swasthya Suraksha Yojana (PMSSY) [**the Contract**], entered into between the parties.

4. The learned Arbitral Tribunal found that time was the essence of the contract and that the delay involved in completion of the works due to non-availability of sites was not attributable to the respondent. Thus, the learned Arbitral Tribunal allowed certain claims raised by the respondent. However, the learned Arbitral Tribunal rejected certain claims made by the respondent, *inter alia*, on account of the expenditure incurred on establishment of the site office during the extended period of the Contract and loss of profits during the extended period of the Contract. The learned Arbitral Tribunal reasoned that the profits and overhead expenses were included in the rate of items and therefore, no additional amount for such expenditure and profits was admissible. The learned Arbitral Tribunal referred to Clauses 12.2 of the General



Conditions of the Contract [GCC], 2(x) of Schedule 'F' to the General Specifications of the Contract for arriving at its conclusion.

5. The learned Single Judge found the reliance of the learned Arbitral Tribunal on Clauses 12.2 and 2(x) of the GCC and 2(x) of Schedule 'F' to the General Specifications of the Contract was misplaced and held the impugned award was perverse insofar as it rejected Claim Nos. 3, 4, 5, 7, and 12. The learned Single Judge set aside the impugned award to the extent that the learned Arbitral Tribunal had rejected of the aforementioned claims. However, upheld the rejection of Claim No. 14 as being premature.

6. In view of the above, the principal question that arises for consideration is whether the impugned award to the extent that the respondent's claims are rejected, is vitiated by patent illegality on the face of the record.

#### **FACTUAL CONTEXT**

7. The respondent – Ahluwalia Contracts (India) Ltd. – is a private limited company incorporated under the Companies Act, 1956 and has its registered office at A-177, Okhla Industrial Area, Phase-I, New Delhi-110020. It is engaged in execution of Engineering, Designing, and Constructions Contracts.

8. The appellant – Union of India through Ministry of Health and Family Welfare, Government of India – invited Percentage Rate Tenders under three tier bid system, that is, Eligibility, Technical, and Financial. The date of opening of bids was stipulated as 05.01.2011.



The respondent participated in the bidding process and was awarded the Contract on 29.08.2011.

9. The work under the Contract was to be completed within a period of 16 (sixteen) months commencing from 19.08.2011; that is, on or before 18.12.2012 [the date of completion]. The scope of work under the Contract consisted of Supply, Erection/Installation, Commissioning and Testing of Electrical equipment [**the Work**] within a period of sixteen months and to provide comprehensive Operation and Maintenance for a period of 5 (five) years after the expiry of twelve months' Defect Liability Period [**DLP**].

10. It is the case of the respondent that as per the Contract, time was of essence and no time over-run was permissible. However, the appellant failed to provide sub-station buildings and other work fronts for installation of the equipment as only three sub-stations buildings were made available for installation of equipment till July 2012. Sub-station no. 2 (HVAC) Building was constructed in the month of May 2013, sub-stations no. 3 and 4 for Hospital were partially handed over to the respondent on 10.03.2015. The sub-station building 4A of OPD was not completed even on the date when reference was made to arbitration.

11. The respondent also claimed that due to prolongation of the work for the reasons attributable to the appellant, additional expenditure was incurred by the respondent in (i) mobilizing its men, material and resources beyond the date of completion; (ii) maintaining the Site



Office; (iii) staff in the Head Office; and (iv) on security establishment. And, the respondent was entitled to compensation for the same.

12. The respondent further states that provisional Extensions of Time [EOTs] were granted by the appellant to the respondent in order to keep the Contract alive on account of prolongation of the work, which was for reasons attributable to the appellant. Moreover, substantial payments, which were due to the respondent, were arbitrarily withheld by the appellant. The respondent also claimed that reimbursement of expenditure on extra items beyond the scope of the work was also pending.

13. According to the appellant, the delay at the initial stage itself was attributable to the respondent on several counts such as approval of milestones, submission of technical data sheet, and technical representatives not being positioned in full strength or in time.

14. It is the case of the appellant that building works of sub-station nos. 3, 4 and 4A had been awarded to another contractor and delay on part of other contractors is not an unexpected phenomenon. The appellant contended that the provision of EOT was envisaged in the Contract for the aforesaid reason. And, since the delay was on the part of another contractor, grant of EOT was the only admissible relief that could be granted. According to the appellant, the respondent is not entitled to any compensation.

## **ARBITRAL PROCEEDINGS**



15. The respondent made representations to Engineer in-charge and thereafter appealed before Chief Engineer, which was also rejected. Having exhausted all remedies for relief as mentioned in the Contract, the respondent invoked arbitration for resolution of the disputes. The Ministry of Health and Family Welfare (MoHFW) appointed the Arbitral Tribunal comprising of a sole arbitrator on 27.06.2014.

16. The respondent raised seventeen (17) claims before the learned Arbitral Tribunal out of which the learned Arbitral Tribunal granted nine (9) claims but rejected the remaining eight (8) claims. A tabular statement setting out the amounts awarded against the respective claims is set out below: -

<b>Claim No.</b>	<b>Particulars of Claim</b>	<b>Amount Claimed (₹.)</b>	<b>Amount Awarded</b>
<b><i>Claims Awarded by the Arbitral Tribunal</i></b>			
1.	On account of repeated shifting of sub-station equipments due to non-availability of sub-station building/s.	6,75,625/-	6,75,625/-
2.	On account of the expenses incurred on recharging of UPS and Batteries during the period from 1.12.2012 to 02.06.2014 i.e for the extended period of contract	18,880/-	18,880/-
6.	On account of the expense incurred on deployment of security staff for the	4,15,464/-	3,61,273/-



	extended period of contract.		
8.	On account of expenditure incurred on renewal of Performance Bank Guarantee And Security Bank Guarantee for the extended period of contract.	5,54,854/- + 1,26,968/-	6,81,822
9.	On account of renewal of Insurance Policies and EAR Policy for the extended period of contract.	9,89,690/-	9,89,690/-
10.	On account of providing vehicles with driver and fuel under clause 3(B) of Vol.II(B)/SCC for the extended period of contract.	5,74,540/-	4,99,600/-
11.	On account of claim under Clause 10C/GCC for increase in labor wages	32,81,601/-	32,81,601/-
13.	On account of processing of Extra/Deviation/Substituted Items.	18,58,014.2 5	18,58,014.2 5
16.	On account of interest	18% p.a.	10% p.a., w.e.f. 26.05.2014 till actual payment.
<b><u>Claims Rejected by the Arbitral Tribunal</u></b>			
3.	On account of expenditure incurred on	9,70,460/-	Nil



	establishment of site office.		
4.	On account of expense incurred on pay and allowance of the Site and Head Office Staff for extended period of contract.	97,96,460/-	Nil
5.	On account of expense incurred on conveyance and other services for extended period of contract.	11,76,252/-	Nil
7.	On account of the expense incurred on Labour Welfare for extended period of contract.	2,57,582/-	Nil
12.	On account of loss of Profits during the extended period of contract.	4,80,03,560 /-	Nil
14.	Claim under Clause 2A/GCC Bonus for early completion	2,13,00,360 /-	Nil
15.	On account of additional expense incurred on tour and travels of the respondents officials for testing of material at the factory premise	1,01,735/-	Nil
17.	For the cost of proceeding	To be assessed	Nil

17. The learned Arbitral Tribunal rejected Claim Nos. 3, 4, 5, and 7 on the ground that the Contract provided for a markup of 15% on the cost of materials and labour towards the contractor/respondent's



overheads and profits, in terms of Clause 2(x) of Schedule 'F' to the General Specifications of the Contract. Since the work continued beyond the stipulated period, the learned Arbitral Tribunal held that all justified expenses on materials and labour incurred during the prolongation of the Contract — including those forming the subject matter of Claim Nos. 3, 4, 5, and 7 — would include this 15% addition, thereby covering all overheads during the extended period. The relevant findings of the learned Arbitral Tribunal as reproduced in the impugned order are set out below: -

**“14. CLAIM No.3-Rs 9,70,460 & CLAIM No.4-Rs 97,96,460**

XXX

XXX

XXX

14.3 The scheme of the Contract envisages that such expenses are to be met out of the provision of Contractor's element of 15% on cost of materials and labour meant to cover all overheads and profits. As observed above in Para. 11(ii), all justified expenses on materials and labour during the period of prolongation of contract - for which claims have been filed by the Claimant - would be eligible for this 15% add-on – thus taking care of all overheads during the period of prolongation of contract. For this reason, consideration of this claim for expenses on staff is not called for. In fact, if we were to consider such claims, it would imply double consideration of compensation which in the scheme of contract is to be given by way of add-on of Contractor's element of 15% on cost of materials and labour to cover all overheads and profits.

XXX

XXX

XXX



**15. CLAIM No.5 - Rs 11,76,252.**

XXX

XXX

XXX

15.3 As discussed above in Claims 3 & 4, such expenses are part of overheads. The scheme of contract envisages meeting overheads out of add-on of 15% on cost of materials and labour. As the Contactor's element of 15% on justified additional expenditure on materials and labour during the period of prolongation of contract will also be admissible [as observed above in Para.11(ii)], such claims cannot be considered separately; for otherwise, as observed above in respect of Claims No.3 & 4, it would amount to double counting of the claimed amount.

XXX

XXX

XXX

**17. CLAIM No.7- Rs 2,57,582.**

XXX

XXX

XXX

17.3 The expenditure incurred on labour welfare is of the nature which makes it part of 'overheads' for which contract envisages an add-on of Contractor's element of 15% on cost of materials and labour (to cover all overheads and profits) which is also admissible in the prolongation period. Showing this expense as a separate stand-alone item for reimbursement is, therefore, not justified.”

18. The learned Arbitral Tribunal rejected Claim No. 12 which dealt with loss of profit. The learned Arbitral Tribunal reasoned that the reimbursement of additional expenses along with add-on of the respondent's element of 15% on cost of materials and labour covered all overheads and profits incurred by the respondent on account of delay



for reasons not attributable to it. Thus, compensation for additional expenditure during EOT was inbuilt in the rates.

19. The learned Arbitral Tribunal found that the claim of ₹24 lacs per month as average profit was based on hypothetical calculations and was not backed by any contractual obligations as envisaged in the Contract.

20. The learned Arbitral Tribunal rejected Claim No. 14 as raised by the respondent for grant of the incentives and bonus for early completion in terms of Clause 2A of Schedule 'F' to the General Specifications of the Contract read with Clause 2A of the GCC and observed that there is no provision in the Contract which entitled the respondent to make any claim for loss of the opportunity to earn bonus. The said clause is extracted as under: -

**“CLAUSE 2A *Incentive for early completion***

In case, the Contractor completes the work ahead of scheduled completion time, a bonus @ 1% (one per cent) of the tendered value per month computed on per day basis, shall be payable to the Contractor, subject to a maximum limit of 5% (five per cent) of the tendered value. The amount of bonus, if payable, shall be paid along with final bill after completion of work. Provided always that provision of the Clause 2A shall be applicable only when so provided in 'Scheduled F'.

XXXXX

***Clause 2A of Schedule F***



Whether Clause 2A shall be applicable  
**Yes”**

21. The learned Arbitral Tribunal observed that said clause would be operative only if the Contract was to completed prior to the stipulated date of completion. And, it is hypothetical to assume that the respondent would have certainly succeeded in completing the Contract before time had there been no delay in availability of sub-station buildings.

22. The learned Arbitral Tribunal also rejected the respondent’s claim on account of additional expense incurred on tour and travels of its officials for testing of material at the factory premise being Claim No.15.

#### **IMPUGNED ORDER**

23. The respondent filed an application for setting aside the impugned award to the extent that some of its claims were rejected. The respondent did not challenge the finding of the learned Arbitral Tribunal with respect to Claim No. 15 before the learned Single Judge.

24. With regard to the rejection of Claim Nos. 3, 4, 5, and 7, the respondent contended that the reliance of the learned Arbitral Tribunal on Clause 2(x) of Schedule ‘F’ to the General Specifications of the Contract is incorrect inasmuch as the same is applicable only to the extra items of work. The respondent placed reliance on Clauses 12.2 and 2(x) of the GCC read with Clause 2(x) of Schedule ‘F’ to the General Specification of the Contract in support of its contention that the said claims were not in relation to extra items of work and even if



considered to be so, the rejection of the same would deprive the respondent to get paid on all these accounts.

25. The appellant contended that the learned Arbitral Tribunal rightly rejected the aforesaid claims and placed reliance on Clause 2(xi) of Schedule 'F' to the General Specification of the Contract inasmuch as the respondent was allowed 15% margin to cover the overheads and profits. In terms of Clause 2(xi) of Schedule 'F' to the General Specification of the Contract, the Standard Schedule of Rates was to apply, over and above which the respondent was entitled to 15% covering all overheads and profits. The said clause is reproduced as under: -

**“SCHEDULE 'F'**

**GENERAL RULES & DIRECTIONS:**

**2(xi)** Standard Schedule of Rates DSR 2007 with correction slip Issued upto date of receipt of bid.”

26. The learned Single Judge did not find any merit in the appellant's contention and observed that the bare reading of the aforesaid clauses indicated that the 15% margin is for the 'extra item of work' that may be awarded to the respondent during the course of the execution of the work. The learned Single Judge found the respondent's claims were in the nature of damages/prolongation cost and were based on the delay caused by the appellant in the execution of the work.



27. The learned Single Judge held the learned Arbitral Tribunal erred in rejecting Claim Nos. 3, 4, 5 and 7 based on the interpretation of the clauses of the GCC, which had no application to the facts of the present dispute between the parties. Although the learned Arbitral Tribunal found the respondent was entitled to all justified claims arising out of the additional costs incurred during the period as extended by the appellant, it rejected the aforementioned claims mechanically by applying the clauses of the Contract without rendering any finding on how they were attracted in the instant case.

28. Insofar as Claim No. 12 is concerned, the learned Single Judge held that the learned Arbitral Tribunal had apart from stating that the respondent has been adequately compensated in form of reimbursement of additional expenses along with add-on element of 15% cost of material and labour, had not set out any reason for not allowing the claim.

29. The learned Single Judge thus held the impugned award was perverse to the extent it rejected the respondent's Claim Nos. 3, 4, 5, 7 and 12.

30. Lastly, the learned Single Judge dealt with Claim No. 14 as raised by the respondent for grant of the incentives and bonus for early completion. The learned Single Judge upheld the rejection of Claim No. 14 by the learned Arbitral Tribunal and held the respondent's claim in this regard as premature and that Clause 2A of the GCC provided for claim of incentives/bonus for early completion, which was payable



*'along with final bill after completion of the work'* which admittedly was not complete when the claims were raised by the respondent.

## **REASONING AND CONCLUSION**

31. As noted above, the controversy in the present case relates to the decision of the learned Single Judge in finding the impugned award as patently illegal on the face of the award insofar as it rejects Claim nos.3, 4, 5, 7 and 12 as raised by the respondent.

32. Whereas Claim nos.3, 4, 5 and 7 relate to the respondent's claim for expenditure incurred during the prolongation of the Contract; Claim no.12 relates to the loss of profits incurred on account of prolongation of the works under the Contract. The respondent's case for compensation rested on its assertion that the appellant had breached its Contract. This was premised on the allegation that the delay in execution of the Contract was for the reasons not attributable to the respondent but was on account of defaults on the part of the appellant. The respondent claimed that due to multifarious defaults, breaches, lapses and failures on the part of the appellant, it was prevented from completing the Contract within the stipulated time. The delay in execution of the Contract resulted in the respondent suffering additional costs including by way of idling and/or under-utilization of its committed sources. It claimed that it was compelled to suffer additional costs as a result of prolongation of work under several heads.

33. The respondent's Claim no.3 related to compensation for the expenditure incurred on establishment and in running costs of the site



office, which it claimed to have incurred during the period January 2013 to June 2014. The respondent had produced copies of the ledger accounts from its books of account for establishing the said claim. The respondent claimed that its expenditure on the said count amounted to ₹8,43,878/-. The respondent claimed that it was also entitled to 15% mark-up on the said amount and, accordingly, raised a claim of ₹9,70,460/-. Similarly, the respondent raised a claim of ₹97,96,460/- in respect of site and head office staff deployed during the period from January 2013 to June 2014; an amount of ₹11,76,252/- (Claim No. 5) on account of expenses incurred on conveyance and other services during the period January 2014 to June 2014; and an amount of ₹2,57,582/- incurred by the respondent as expenses on labour welfare during the period from June 2013 to June 2014 and thereafter, for the extended period of the Contract.

34. It is not necessary to examine whether the said claims are merited and whether the material placed by the respondent on record established that the respondent had incurred the said expenditure. This is because the learned Arbitral Tribunal's decision to reject the said claim is premised solely on the conclusion that the rates for the items to be executed covered an element of profits and overheads that precluded the respondent from raising the aforesaid claims. Thus, the only question that requires to be addressed is whether the aforesaid reasoning vitiates the impugned award on the ground of patent illegality.



35. The relevant extract of the impugned award, which sets out the learned Arbitral Tribunal's reasoning rejecting the said claims is set out below:

“(ii) The Contract provides for add-on of Contractor's element of 15% on cost of materials and labour to cover all overheads and profits [in terms of item 2(x) of Schedule 'F' of SCC p. 177, Vol –I of SoFC]. Claimant has added this element in many of the Claims filed by him. As the work continues to be executed in terms of this very Contract, applicability of the Contractor's element of 15% on cost of materials and labour will also continue in the period of EOT. However, while examining each Claim, it would need to be seen whether its applicability there is justified and to what extent.”

36. As is apparent from the above, the learned Arbitral Tribunal had concluded that the 15% mark-up on costs of material and labour covers all overheads and profits as in terms of Clause 2(x) of Schedule 'F' to the General Specifications of the Contract. It is, thus, relevant to refer to Clause 2(x) of Schedule 'F' to the General Specifications of the Contract, which reads as under:

**SCHEDULE 'F'**

**GENERAL RULES & DIRECTIONS:**

2(x) Percentage on Cost of Materials and labour  
to cover all overheads and profits.15%

37. The said Clause clarifies that the costs of material and labour as specified would include overheads and profits. There is no cavil that the contract price included a mark-up of overheads and profits. Thus, it was



not open for the respondent to raise any claim on account of profits and overheads in addition to the price as agreed. However, it is important to note that the reference to the mark-up 15% in Schedule 'F' to the General Specifications of the Contract would necessarily have to be read in the context of the GCC that refers to the said Schedule. It is thus relevant to refer to Sub-clause (x) of Clause 2 of the GCC, which is set out below:

**Section-1**

**CONDITIONS OF CONTRACT**

2. In the contract the following expressions shall, unless the context otherwise requires, have the meanings, thereby respectively assigned to them:-

xxx

xxx

xxx

(x) **Market rate** shall be the rate as decided by Engineer-in-charge on the basis of the cost of materials and labour at the site where the work is to be executed plus the percentage mentioned in Schedule 'F' to cover, all overheads and profits.”

38. Thus, the market rates as referred to in the Contract, are required to be determined by referring to Clause 2(x) of Schedule F to the General Specifications of the Contract. Clause 12 of the GCC refer to certain circumstances, which would require determination of market rates of items. The relevant extracts of Clause 12 of the GCC are set out below:

**“CLAUSE 12**

**Deviations/Variations Extent and Pricing**



The Engineer-in-Charge shall have power (i) to make alteration in, omissions from, additions to, or substitutions for the original specifications, drawings, designs and instructions that may appear to him to be necessary or advisable during the progress of the work, and (ii) to omit a part of the works in case of non-availability of a portion of the site or for any other reasons and the contractor shall be bound to carry out the works in accordance with any instructions given to him in writing signed by the Engineer-in-Charge and such alterations, omissions, additions or substitutions shall form part of the contract as if originally provided therein and any altered, additional or substituted work which the contractor may be directed to do in the manner specified above as part of the works, shall be carried out by the contractor on the same conditions in all respects including price on which he agreed to do the main work excepts as hereafter provided.

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## **12.2. Deviation, Extra Items and Pricing**

In the case of extra item (s), the contractor may within fifteen days of receipt of order or occurrence of the item(s) claim rates, supported by proper analysis, for the work and the Engineer-in-Charge shall within one month for the receipt of the claims supported by analysis, after giving consideration to the analysis of the rates submitted by the contractor, determine the rates on the basis of the market rates and the contractor shall be paid in accordance with the rates so determined.

In the case of substituted item(s), the rate for the agreement item (to be substituted) and substituted item shall also be determined in the manner as mentioned in the aforesaid para.

## **Deviation, Substituted items Pricing**



- (a) If the market rate for the substituted item so determined is more than the market rate of the agreement item (to be substituted), the rate payable to the contractor for the substituted item shall be the rate for the agreement item (to be substituted) so increased to the extent of the difference between the market rates of substituted item and the agreement item (to be substituted).
- (b) If the market rate for the substituted item so determined is less than the market rate of the agreement item (to be substituted), the rate payable to the contractor for the substituted item shall be rate for the agreement item (to be substituted) so decreased to the extent of the difference between the market rate of substituted the item and the agreement item (to be substituted)

### **Deviation, Deviated Quantities, Pricing**

In the case of contract items, substituted items, contract cum substituted items, which exceed the limits laid down in schedule F, the contractor may within fifteen days. of receipt of order or occurrence of the excess, claim revision of the rates, supported by the proper analysis for the work in excess of the above mentioned limits, provided that if the rates so claimed are in excess of the rates specified in the schedule of quantities, the Engineer -in -Charge shall within one month of receipt of the claim supported by the analysis, after giving consideration to the analysis of the rate submitted contractor, determine the rates on the basis of the market rates and the contractor shall be paid in accordance with the rates so determined.

39. It is apparent from the above that the mark-up of 15% is provided in cases of any deviation on account of extra items, quantities or



substituted items. In order to derive rate for such deviations, the contract provides that mark-up of 15% would be applied on account of overheads and costs. The respondent's claim was neither on account of deviation on account of quantities nor on account of additional items. The respondent's claim was for additional compensation for costs incurred on account of prolongation of the Contract for reasons attributable to the appellant.

40. Thus, the decision of the learned Arbitral Tribunal to reject the respondent's claim on the ground that it was covered by virtue of the mark-up as provided under Schedule 'F' is, clearly, unsustainable. The mark-up as provided under Clause 2(x) of Schedule 'F' to the General Specifications of the Contract has no relevance to the respondent's claim for compensation for additional costs and expenses incurred on account the prolongation of work. The impugned award to the aforesaid extent is vitiated by patent illegality on the face of the record.

41. In view of the above, we concur with the decision of the learned Single Judge that the impugned award to the extent that it rejects the respondent's claim for the reasons as articulated in the impugned award, is patently illegal. It satisfies the Wednesbury Principle of Unreasonableness that no reasonably instructed person could possibly arrive at the said conclusion.

42. As noted above, it is not necessary for this court to examine the respondent's claim on merits. The scope of examination under Section 34 of the Act is confined to determine whether the arbitral award is



liable to be set aside on account of patent illegality – which in this case it does. It does not extend to re-adjudication of the disputes between the parties.

43. We may refer to the decision of the Coordinate Bench of this Court in *Union of India v. Ahluwalia Contractors (India) Limited*<sup>1</sup>. The said decision was rendered in the appeal under Section 37(1)(c) of the A&C Act preferred by the appellant against the order<sup>2</sup> of the learned Single Judge<sup>3</sup> partly allowing the petition filed by the respondent under Section 34 of the A&C Act.

44. In the said case, the respondent had impugned the arbitral award, which was rendered in connection with disputes that had arisen between the parties with respect to the contract for Package III of Electrical Services at AIIMS, Raipur entered into between the parties on 11.08.2011. The terms of the said contract are materially similar to the Contract in the present case. And, somewhat similar claims were raised before the arbitral tribunal constituted *qua* the disputes relating to the said contract. The arbitral tribunal had rejected the claims, which are similar to the subject claims in the present appeal, essentially, on the similar reasoning as noted in the impugned award.

45. The Single Judge had allowed the respondent's challenge to the arbitral award to the extent of rejection of certain claims relating to the

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<sup>1</sup> FAO (OS) (COMM) No.178/2017 decided on 22.09.2017

<sup>2</sup> Ahluwalia Contracts (India) Limited v. The Union of India, Ministry of Health & Family Welfare: Neutral Citation No.: 2017:DHC:2441

<sup>3</sup> One of us [Vibhu Bakhru, J.]



expenses incurred by the respondent during the extended period of the contract. Accordingly, the impugned award in the said petition was set aside to the aforesaid extent.

46. The Division Bench of this court had considered the challenge and rejected the said appeal by an order dated 22.09.2017. The relevant extracts of the said decision in *Union of India v. Ahluwalia Contractors (India) Limited*<sup>1</sup> are set out below:-

“13. If one considers the extended period in question, which is 60 months, the unreasonableness of the textual approach is writ large on the face of the record. What can be considered reasonable had to be seen within the context of the time-frame agreed to by the parties. Thus, for example, if the delay had been about 3-4 months, it would have roughly translated to 20-25% of the overall time-frame agreed to by the parties; the denial of any amount similar to the ones claimed by Ahluwalia Contracts would have been justified. However, the delay in this case went far beyond that and in fact amounted to more than three times the time agreed by the parties. It was keeping in mind these circumstances which were apparent from the record that the learned Single Judge held the arbitrator’s approach to be unreasonable and set-aside the findings, disallowing claim nos.3, 4, 5 and 7.

14. One of the vitiating factors that strikes at the root of the award in accordance with the established authority, including *Associate Builders (supra)* is if the award discloses an approach or renders findings which no reasonable man or individual would have arrived at in the given circumstances of the case. The present is one such. The denial of claim no.14, if seen in the context of these circumstances, as



juxtaposed with denial of claim nos. 3, 4, 5 and 7, is radically different. The denial of claim no.14 in such circumstances cannot be called unreasonable whereas denial of claim nos. 3, 4, 5 and 7 can be called unreasonable.

15. For the above reasons, that the impugned judgment does not disclose any error or unreasonable approach,

16. It was stated during the hearing that in compliance and in furtherance of the impugned judgment, the claimant has approached the appellant for a fresh reference in respect of claims that were rejected but restored by the learned Single Judge. If so, the Central Government is directed to take a decision and make appropriate reference for adjudication of the claims afresh in accordance with law. The appeal is accordingly dismissed but with the above observations.”

47. The Special Leave Petition (Civil) Diary No.1490/2018 against the said decision was dismissed by the Supreme Court by an order dated 12.02.2018.

48. Insofar as the respondent's claim for loss of profits (Claim No.12) is concerned, we are unable to accept that the impugned award suffers from any patent illegality.

49. The respondent had claimed a sum of ₹4,80,03,560/- (Rupees Four crores eighty lakhs three thousand five hundred and sixty only) on account of loss of profits during the prolonged/extended period of the Contract from 19.12.2012 to 18.08.2014. It had claimed that it had fully mobilized itself in all respects and in every possible manner to execute the works. However, the Contract was prolonged for a period of twenty



months on account of reasons as attributable to the appellant. The respondent had computed the monthly profits that it would have earned by assuming that the value of the contract included profits to the extent of 10% of the said value, which the respondent claimed, it would have earned in a period spanning sixteen months. The respondent had then extrapolated the monthly profits to the period of twenty months being the delay in completion of the Contract. Paragraph 12.9 of the Statement of Claims, which sets out the manner in which the respondent had computed the loss of profits, is set out below:

“12.9 It is submitted that as on 18.08.2014, the Contract, in question, has already prolonged by a period as long as 20 months and the loss of profit suffered by the claimant, computes to Rs.4,80,03,560/- (Rupees four crore eighty lacs three thousand and five hundred and sixty only) as per details below:

S.No.	Particulars	Amount (Rs.)
1.	Contract Value (Supply, Erection, Installation, Testing and Commissioning portion)	38,40,28,519/-
2.	Stipulated Contractual Period	16 months
3.	Anticipated profit under the Contract [10% of 1 above]	3,84,02,852/-
4.	Anticipated average monthly profit under the Contract [3/2]	24,00,178/-
5.	Prolonged period as on date (19.02.2012 to 18.08.2014)	20 months
6.	Loss of profits during the prolonged/extended	<b><u>4,80,03,560/-</u></b> ”



	period, as on 18.08.2014 [4x5]	
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50. The Arbitral Tribunal had rejected the aforesaid claim for the following reasons:

“22.4 Claimant has put his claim on the premise that he was entitled to per-month-average profit of the order of Rs.24 lacs. No such commitment for this order of profit entitlement to Claimant is seen in the Contract. The hypothesis based on entitlement of per month profit of about Rs.24 lacs that should be accruing to Claimant, is flawed and not backed by any provision of the contractual obligation existing between Claimant and the Respondent. **As such the claim for loss of profit based on this calculation is hypothetical and unreal.** Claimant is only entitled to compensation of additional expenses incurred on account of prolongation of contract along with add-on of Contractor’s element of 15%, wherever applicable, which covers both overheads and profits.”

[ emphasis added]

51. It is apparent from the above that the Arbitral Tribunal’s decision to reject the claim rested on the findings: (a) that it was not supported by any provision under the Contract; (b) that the loss of profit is based on a calculation, that is, “hypothetical and unreal”; and (c) that the respondent’s entitlement to compensation is confined to the additional expenses incurred on account of prolongation of Contract along with the mark-up 15%, wherever is applicable.

52. We are unable to fault the learned Arbitral Tribunal’s finding that the claim raised by the respondent was hypothetical and unreal. We



are, thus, unable to concur with the learned Single Judge's conclusion that the impugned award suffers from patent illegality in this regard.

53. As noted above, the respondent has not led any evidence to establish that it had suffered any loss of profits on account of prolongation of works. As noted above, it merely imputed the monthly profits that it would have earned from the Contract in question and assumed that it would have earned similar monthly profits during the period for which the Contract was performed.

54. We consider it relevant to refer to the decision of the Supreme Court in *Bharat Coking Coal Ltd. v. L.K. Ahuja*<sup>4</sup>. The Supreme Court had in the context of a claim for loss of profits during prolongation of the works, held as under:

“24. Here when claim for escalation of wage bills and price for materials compensation has been paid and compensation for delay in the payment of the amount payable under the contract or for other extra works is to be paid with interest thereon, it is rather difficult for us to accept the proposition that in addition 15% of the total profit should be computed under the heading “Loss or Profit”. It is not unusual for the contractors to claim loss of profit arising out of diminution in turnover on account of delay in the matter of completion of the work. What he should establish in such a situation is that had he received the amount due under the contract, he could have utilised the same for some other business in which he

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<sup>4</sup> (2004) 5 SCC 109



could have earned profit. Unless such a plea is raised and established, claim for loss of profits could not have been granted. In this case, no such material is available on record. In the absence of any evidence, the arbitrator could not have awarded the same. This aspect was very well settled in *Sunley (B) & Co. Ltd. v. Cunard White Star Ltd.* [(1940) 1 KB 740 : (1940) 2 All ER 97 (CA)] by the Court of Appeal in England. Therefore, we have no hesitation in deleting a sum of Rs 6,00,000 awarded to the claimant.”

55. In *Batliboi Environmental Engineers Limited v. Hindustan Petroleum Corporation Limited and Anr.*<sup>5</sup>, the Supreme Court had explained as under:

“16. This is without doubt, a sound legal and correct proposition. However, the computation of damages should not be whimsical and absurd resulting in a windfall and bounty for one party at the expense of the other. The computation of damages should not be disingenuous. The damages should commensurate with the loss sustained. In a claim for loss on account of delay in work attributable to the employer, the contractor is entitled to the loss sustained by the breach of contract to the extent and so far as money can compensate. The party should to be placed in the same situation, with the damages, as if the contract had been performed. The principle is that the sum of money awarded to the party who has suffered the injury, should be the same quantum as s/he would have earned or made, if s/he had not sustained the wrong for which s/he is getting compensated. [See - *Robinson v. Harman* (1848) 1 Ex

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<sup>5</sup> 2023 INSC 850



850 at 855 and Livingstone v. Rawyards Coal Co (1879-80) L.R. 5880 cases 25]

17. We shall subsequently catechise the Hudson's formula, suffice at this stage is to notice that the learned arbitrator does not specifically refer to any formula or the method, and the figures to compute damages under the head of loss on account of overheads and profits/profitability. The award, as quoted above, does refer to Sections 55 and 73 of the Contract Act.

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20. We have briefly referred to the principle applicable for computing the claim for compensation/damages in case of partial prevention, i.e., where the breach by the employer is not fundamental and does not entitle the builder/contractor to cease the work, or, being fundamental, is not treated as repudiation by the builder/contractor. Measure of compensation/damages in such cases is the loss of profit arising from reduced profitability or added expense of the work carried out.<sup>14</sup> In a given case, where there is a fundamental breach by the employer, albeit, the builder/contractor does not immediately elect to treat the contract as repudiated, he may still be entitled to raise a claim for loss of profit on the uncompleted work. Offsite expenses or overheads are all administrative or executive costs incidental to the management supervision or capital outlay as distinguished from operating charges. These charges cannot be fairly charged to one stream of work or job, and rather be distributed as they relate to the general business or the work of the contractor/builder being undertaken or to be undertaken, as the overheads are relatable to the builder/contractor's business in entirety.

21. The usage of formulae such as Hudson's, Emden's, or Eichleay's formulae to ascertain the loss of overheads and profits has been judicially approved in the English cases of Peak Construction (Liverpool) Ltd v.



McKinney Foundations Limited<sup>15</sup>, Whittal Builders v. Chesterle-Street District Council<sup>16</sup>, and JF Finnegan Ltd v. Sheffield City Council<sup>17</sup> and in the Canadian case of EllisDon v. Parking Authority of Toronto<sup>18</sup>. The three formulae deal with theoretical mathematical equations, but are based on factual assumptions, and therefore can produce three different and unrelated compensation/damages. Therefore, while applying a particular equation or method, the assumptions should be examined, and the satisfaction of the assumption(s) ascertained in the facts and circumstances.

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

**23. Ordinarily, when the completion of a contract is delayed and the contractor claims that s/he has suffered a loss arising from depletion of her/his income from the job and hence turnover of her/his business, and also for the overheads in the form of workforce expenses which could have been deployed**



**in other contracts, the claims to bear any persuasion before the arbitrator or a court of law, the builder/contractor has to prove that there was other work available that he would have secured if not for the delay, by producing invitations to tender which was declined due to insufficient capacity to undertake other work. The same may also be proven from the books of accounts to demonstrate a drop in turnover and establish that this result is from the particular delay rather than from extraneous causes. If loss of turnover resulting from delay is not established, it is merely a delay in receipt of money, and as such, the builder/contractor is only entitled to interest on the capital employed and not the profit, which should be paid.** The High Court of Justice Queen’s Bench Division in the case of Property and Land Contractors Ltd v. Alfred McAlpine Homes North Ltd.<sup>19</sup> succinctly points the inexactitude of Hudson’s formulae, by observing:

“Furthermore, the Emden formula, in common with the Hudson formula (see Hudson on Building Contracts, (11th edn, 1995) paras 8–182 et seq) and with its American counterpart the Eichleay formula, is dependent on various assumptions which are not always present and which, if not present, will not justify the use of a formula. For example, the Hudson formula makes it clear that an element of constraint is required (see Hudson para 8.185) ie in relation to profit, that there was profit capable of being earned elsewhere and there was no change in the market thereafter affecting profitability of the work. ***It must also be established that the contractor was unable to deploy resources elsewhere and had no possibility of recovering cost of the overheads from other sources, eg from an increased volume of the work.*** Thus, such formulae are likely only to be of value if the event causing delay is (or has the characteristics of) a breach of contract.”



24. As mentioned in McDermott International Inc., Hudson's 11th Edition has referred to Eichleay formula, which gives the resultant figures with greater precision and accuracy. This formula, which emerged in 1960s<sup>20</sup>, is far more nuanced and rigorous, as it requires the builder/contractor to itemise and quantify the total fixed overheads during the contract period. It takes into consideration all the contracts of the contractor/builder during the contract period with those of the individually delayed contract to determine the proportionate fraction of the total fixed overheads. However, in both Hudson's and Eichleay's formulae, the amount to be recovered is determined weekly or monthly, which the delay in the contract completion is expected to earn.

27. Arbitral tribunal in the present case has given complete go by to these principles well in place, overlooked care and caution required and taken a one-sided view grossly and abnormally inflated the damages. The figures quoted in paragraph 11 *supra* show the overstatement and aggrandizement in awarding Rs. 1,57,37,666/-, towards loss of overheads and loss of profits/profitability, in a contract of Rs. 5,74,35,213/-. Rs.1,21,95,859.68/- was paid for the work done within the term. Rs. 2,92,07,619.13 was paid for the work done post the term. Thus, Rs. 4,14,03,478.81/- was paid for 80% of the work. The balance was Rs.1,14,87,042.00/. The amount awarded towards loss of overheads and profits/profitability is Rs.1,57,37,666/-. No justification for computation of the loss is elucidated or can be expounded. Even if one were to rely upon the chart given by the BEEL, and ignore the contradictions in findings, the amount awarded is highly disproportionate and exorbitant. It is clearly a case of overlapping or at least a part doubling of the loss/damages.

28. The arbitral tribunal has accepted that principle of mitigation is applicable but observes that the only way BEEL could have abated the loss, was to work on



Sundays or holidays. This reasoning is again ex facie fallacious and wrong. The principle of mitigation with regard to overhead expenses does not mandate working on Sundays or holidays.”

56. The requirements of establishing a claim for loss of profits on account of prolongation of a contract as explained by the Supreme Court in *Bharat Coking Coal Ltd. v. L.K. Ahuja*<sup>4</sup> was also reiterated by the Supreme Court in a later decision in *M/s Unibros v. All India Radio*<sup>6</sup> in the following words:

“16. To support a claim for loss of profit arising from a delayed contract or missed opportunities from other available contracts that the appellant could have earned elsewhere by taking up any, it becomes imperative for the claimant to substantiate the presence of a viable opportunity through compelling evidence. This evidence should convincingly demonstrate that had the contract been executed promptly, the contractor could have secured supplementary profits utilizing its existing resources elsewhere.”

57. As noted above, in the present case, the respondent has not led any evidence to sustain its claim for loss of profits during the prolongation of the period. Thus, the conclusion of the learned Arbitral Tribunal that the said claim is unreal and hypothetical, cannot be interfered with.

58. It is also material to note that the scope of interference with an arbitral award is limited to the grounds as set out in Section 34 of the A&C Act. The Arbitral Tribunal is a final adjudicator of the disputes

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<sup>6</sup> 2023 INSC 931



between the parties and its decision cannot be faulted so long its view is a plausible one. Accordingly, no interference with the same would be warranted under Section 34 of the A&C Act.

59. In view of the above, we are unable to concur with the decision of the learned Single Judge to set aside the impugned award insofar as Claim No.12 (Loss of Profits) is concerned.

60. In view of the above, the impugned order to the extent it sets aside the impugned award in respect of Claim No.12 (Loss of Profits) is concerned, the same is set aside. However, the impugned order to the extent that it sets aside the impugned award in respect of rejection of Claim Nos.3, 4, 5 and 7 is concerned, the same is sustained.

61. The present appeal is partially allowed to the aforesaid extent. The pending applications are also disposed of.

62. The parties are left to bear their own costs.

**VIBHU BAKHRU, J**

**TEJAS KARIA, J**

**MAY 09, 2025**  
**RK**