$~J-

IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ O.M.P. (COMM) 162/2020 & I.A. 14331/2012, I.A. 10655/2022

Date of decision: 22nd May 2024

M/S DIVYAM REAL ESTATE PVT LTD ..... Petitioner

Through: Mr. Adhitya Srinivasan and Mr. Rishabh Kanojiya, Advocates.

versus

M/S M2K ENTERTAINMENT PVT LTD ..... Respondent

Through: Mr. Pravin Bhadur with Mr. Amit Agarwal, Ms. Kanika, Mr. Saurabh Kumar and Mr. S. Anjani Kumar, Advocates.

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI J.

By way of the present petition filed under section 34 of the Arbitration & Conciliation Act 1996 ('A&C Act'), the petitioner impugns Arbitral Award dated 07.03.2012 ('Arbitral Award') rendered by the learned Sole Arbitrator in relation to the disputes between the parties.

2. Briefly, disputes had arisen between the parties from Memorandum of Understanding dated 20.02.2006 ('MoU'), under which the petitioner was to construct a mall in the name and style of 'R-3 Mall' in Ahmedabad, Gujarat ('Mall') in which the respondent was to be

provided space for running a multiplex on lease basis. The bone of contention between the parties was, that respondent alleged that the petitioner had committed breach of the terms of the MoU by entering into a contract with a third-party on 09.03.2006, thereby terminating the respondent's contract. The respondent claimed that the termination was invalid and illegal, which impelled them to file a claim in arbitration.

3. By way of the Arbitral Award, the petitioner has been directed to pay to the respondent the sum of Rs. 24,54,458.33 alongwith interest at the rate of 12% per annum. The said sum comprises two primary components : (i) the sum of Rs. 4,54,458.33 towards expenses held to have been incurred by the respondent towards advertisement and exhibition charges etc. as detailed in the award; and (ii) the sum of Rs.20,00,000.00 towards 'loss of profit' suffered by the respondent, as also detailed in the award.

4. Notice on this petition was issued on 08.08.2012; following which reply dated 02.02.2013 and rejoinder dated 19.07.2013 have been filed by the respective parties.

5. The court has heard Mr. Adhitya Srinivasan, learned counsel appearing for the petitioner and Mr. Pravin Bhadur, learned counsel appearing for the respondent, in detail.

6. Both parties have also filed written synopses of their respective submissions in the matter.

PETITIONER'S SUBMISSIONS

7. Mr. Adithya Srinivasan, learned counsel appearing for the petitioner submits that in the petition they have raised two principal contentions

impugning the Arbitral Award. The *first* is that the MoU signed between the parties was merely an 'agreement to agree' and was therefore not a concluded or enforceable contract; and *second*, that the award of Rs. 20,00,000.00 in favour of the respondent by way of loss of profit, is untenable since it was based entirely on conjectures and surmises.

8. However, in the course of his submissions, Mr. Srinivasan has restricted the challenge to the award *only* to the untenability of the loss of profit awarded to the respondent.

9. In this behalf, Mr. Srinivasan has made the following submissions :

9.1. Counsel has first drawn attention to issue No.8 framed in the course of arbitral proceedings, which reads as under :

> *"8. Whether the respondent is liable to pay to the claimant Rs. 6,33,58,800/- towards loss of the profit?"*

9.2. Counsel submits that this issue has been decided by the learned Arbitrator in the following manner :

> *"**Issue No. 8***
>
> *In this regard the contention raised is that the claimant has lost profit which he has calculated from the period 20th June, 2006 to 20th December, 2008 by calculating an estimated loss of income from the sale of tickets, income from advertisement and income from concession. One must concede that while calculating the loss of profit there has to be certain amount of conjectures that has to be drawn because for future loss of profit there cannot be a straight jacket formula.*
>
> *Reliance is being placed on the decision of the Supreme Court in the case of **M/s A T Brij Paul Singh & Bros. vs. State of Gujarat** AIR 1984 SC 1703 would be inappropriate. The said decision pertained to the loss of*

> *profit claimed by the contractor of expected profit on balance of work contract. This is not so in the present case.* ***In fact one is constrained to observe that it is speculative if any profit would be made or not.*** *However, it cannot be ignored that it is the respondent who had committed the breach.*
>
> *In the peculiar facts the* ***reasonable loss of profit can be awarded which is drawn at Rs. 20 lakhs****. The issue is decided accordingly."*

(emphasis supplied)

9.3. Mr. Srinivasan submits, that as is seen from the discussion in the Arbitral Award on the issue relating to loss of profit, the learned Arbitrator first observes that it would be *"speculative if any profit would be made or not"* by the respondent; but then proceeds to award compensation for loss of profits *based purely on conjecture* and solely on the premise that the petitioner had committed breach of contract.

9.4. It is further submitted that noticeably, in one breath, the learned Arbitrator does not place reliance upon the principle of the law laid down by the Supreme Court in ***M/s A T Brij Paul Singh & Bros. vs. State of Gujarat***[1] saying that such reliance would be inappropriate in the facts of the case, however in the other breath, the learned Arbitrator proceeds to award loss of profit *without any legal or factual basis*.

9.5. The petitioner's main contention is that the learned Arbitrator has awarded loss of profit to the respondent based on *no*

[1] AIR 1984 SC 1703

evidence tendered on record; and the Arbitral Award is in fact self-contradictory in its reasoning.

10. In support of his contention, Mr. Srinivasan places reliance on the following judicial precedents :

10.1. ***Bharat Coking Coal Ltd. vs. L.K. Ahuja***[2] **:** to submit that the Supreme Court has held that where a contractor claims loss of profit, he must *establish* that if he had received the amount due under the contract, he would have utilised the same for some other business in which he could have earned profit, failing which, the claim for loss of profit cannot be granted. The petitioner cites the following portion of the judgement as being relevant :

> "*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 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.***"
>
> (emphasis supplied)

[2] (2004) 5 SCC 109

10.2. ***National Highways Authority of India vs. IJM-Gayatri Joint Venture*** [3] **:** to submit that a Co-ordinate Bench of this court has opined that a party claiming loss of profit must first prove the existing opportunity and then it's attempt to seize that opportunity and finally, that by not availing the said opportunity, it has incurred a loss. It has been held furthermore, that the loss so incurred must be quantified and proved. It is also pointed-out that the Co-ordinate Bench has held that the loss of profits is a claim in the form of damages under section 73 of the Indian Contract Act, 1872 ('Contract Act'); and a party must lead evidence and establish such claim; and that a "*mere calculation without any evidence"* would not suffice for an arbitrator to award such claims. Counsel cites the following extract of the judgement in support of the petitioner's case which reads as under :

> "*43. … … I also find merit in the contention of the Petitioner that it is a settled law that* ***a party claiming loss of profit will have to first prove the existing opportunity, and then its attempt to seize that opportunity and finally prove that by not availing the said opportunity, it has incurred a loss****. The loss would have to be quantified and proved. The Petitioner is right that none of these factors have been proved by the Respondent and there are no documents or any evidence on record in proof of loss of profit. … … Loss of profits is a claim in the form of damages under Section 73 of the Indian Contract Act. In order to seek a claim under*

[3] (2020) SCC OnLine Del 2498; NB : The view taken by the learned Single Judge on the issue of laws of profit was upheld by a Division Bench in ***IJM Gayatri JV vs. National Highways Authority of India***, *2022 SCC OnLine Del 3274*, though the appeal was otherwise partly allowed.

any of the three heads, ***the Contractor will have to lead evidence and establish the claim. A mere calculation without any evidence on record would not be enough for the Arbitrator to Award these Claims.*** *... ...*"

(emphasis supplied)

10.3. ***Finolex Cables Limited vs. Mahanagar Telephone Nigam Ltd. (MTNL)***[4] **:** to submit that a Co-ordinate Bench of this court has observed that it is incumbent on a party to prove that it has suffered some loss, although it does not have to prove actual loss. It is argued, that on the principles of section 74 of the Contract Act, it has also been held that even if a party proves that it has suffered some loss, the adjudicatory body is required to award a 'reasonable sum' depending on the facts and circumstances of the case. The petitioner cites para 43 of the judgment, which reads as under :

"*43. It is, therefore, plain that it was incumbent on MTNL to prove* ***that it had suffered some loss*** *although as Mr. Sethi rightly pointed out* ***it did not have to prove the actual loss****. What, however, the learned Arbitrator has found and which finding has not been challenged by MTNL is that MTNL suffered no loss whatsoever. There was absolutely no material placed on record by MTNL that it suffered an iota of loss on account of non-supply of cables. Therefore, even assuming that Clause 7.4 signifies a genuine pre-estimate of damages, MTNL was not relieved of showing that it had suffered some loss.* ***This again even if it proved that it suffered some loss, the adjudicatory body, which in this case was the learned Arbitrator was required to award 'a***

[4] 2017 SCC OnLine Del 7816; NB : The view taken by the learned Single Judge has been affirmed by a Division Bench in ***Mahanagar Telephone Nigam Limited (MTNL) vs. Finolex Cables Limited****, 2017 SCC OnLine Del 10497.*

reasonable sum'. What is reasonable would depend on the facts and circumstances of every case. *If the maximum amount of LD was to be awarded then it was incumbent on the Arbitrator to explain how the maximum LD anticipated by the clause as (*sic, *was a) reasonable sum. In this regard, the Court finds no explanation whatsoever for the learned Arbitrator awarding the maximum 10% of the total value of the contract particular when no loss whatsoever has been suffered by MTNL."*

(emphasis supplied)

10.4. ***State (NCT of Delhi) vs. Hurryson Enterprises***[5] : to submit that, relying upon a view taken by a Division Bench of this court in ***Ahluwalia Contract (India) Limited vs. Union of India***[6], a Co-ordinate Bench has held that for damages to be granted towards loss of profit, some material evidence is necessary and damages cannot be granted as a matter of course, without proof of the party having suffered any injury. The Co-ordinate Bench has also held that compensation for loss of profit cannot be based on conjectures and has to be based on real evidence. The petitioner cites the following portions of the judgement :

> "*31. Recently, in Ahluwalia Contract (India) Limited v. UOI FAO (OS) (COMM) 143/2017, Decided on 17th October, 2017 a Ld. Division Bench of this Court has held that in order for an award of loss of profits to be passed, injury has to be established. The observation of the Division Bench is as under:*

[5] 2018 SCC OnLine Del 13105
[6] 2017 SCC OnLine Del 11042

"9. Bharat Coking (supra) and Brijpaul (supra), no doubt, are authorities for the proposition that the Court ***even in arbitration cases should be conscious of and ordinarily should not refuse claims towards loss of profits.*** *At the same time, the reference to Section 73 - which finds express mention in Brijpaul (supra) clarifies that damages claimed cannot be granted as a matter of course;* ***some material evidence is necessary****. In this case, the extensions led to claims for payments on various accounts and heads during the extended period. The cumulative effect of the award and the impugned judgment is such that the majority of such heads of claim for extra expenditure, increased salary and other overheads for the additional period have been granted. They are based upon certain formulae under the contract. However, in the case of the claim of general loss of profits, having nexus with the value of the contract, the Court finds that there is no worthwhile evidence - apart from the line of questioning adopted by the claimants.*

That in arbitration proceedings, just as in civil cases, ***an injured party can claim damages, does not necessarily translate into an award for damages towards loss of profits unless some diligence is exercised by the party (in the present case, Ahluwalia claiming it). In other words, a claim for damages (general or special) in the proceedings, cannot as a matter of course, result in an award, without proof of having suffered injury****. The tribunal - as well as the learned Single Judge in this case appreciated the conspectus of circumstances. The former had the benefit of consideration of record as the primary adjudicatory body. The Tribunal was unable to discern any substantial material to justify the claim for damages towards loss of profits. Having regard to these facts,*

this Court is of the opinion that the rejection of claim Nos. 12-13 was dealt with correctly and reasonably by the learned Single Judge in the impugned judgment, which does not warrant interference."

* * * * *

"33. Loss of profits can be awarded only when it is clear that the rescission is invalid and illegal. Moreover, no evidence was led in respect of loss of profits and only an estimate has been awarded. ***Compensation for loss of profits cannot be based on conjecture, and has to be based on real evidence****."*

(emphasis supplied)

10.5. Lastly, counsel places reliance on the decision of a Co-ordinate Bench in ***National Projects Construction Corpn. Ltd. vs. Ambika Engineers & Consultants***[7] : to submit that it has been reiterated that loss of profit cannot be awarded merely on surmises or conjectures; but has to be proved and cannot be merely '*paper profits'*. In the said case, the court has further held that only once it is established that loss has been suffered, would the manner of estimating the sum be gone into by applying a recognized method. The petitioner draws attention to the following portions of the said decision :

"*30. ... ... Moreover, it is the settled position* ***that loss of profits cannot be awarded merely upon a surmise or a conjecture****. The loss has to be proved. It cannot be mere 'paper profits'.* ***Only once it is established that the loss has been suffered, only then the manner of estimating the same can be gone into by applying any of the recognised methods.*** *... ..."*

(emphasis supplied)

[7] 2018 SCC OnLine Del 11608

RESPONDENT'S SUBMISSIONS

11. On the other hand, Mr. Pravin Bhadur, learned counsel appearing for the respondent has sought to support the arbitral award. However, in view of the limited challenge pressed on behalf of the petitioner, counsel has restricted his submissions only to the question of whether the loss of profit awarded in favour of the respondent was tenable.

12. Learned counsel for the respondent has argued that the learned Arbitrator has returned a finding that the petitioner was guilty of breach of the MoU, thereby also dismissing the petitioner's counter-claims. It is argued that by way of the present petition, the petitioner is therefore asking the court to re-appreciate evidence adduced before the learned Arbitrator, which is impermissible under section 34 of the A&C Act. It is submitted that the award is neither contrary to law nor against the public policy of India.

13. In this behalf, learned counsel for the respondent has drawn attention of this court to affidavit dated 01.02.2010 tendered by Mr. Sunil Gupta, Deputy Manager of the respondent by way of evidence in the arbitral proceedings, in which, it is argued, the witness has furnished details of the expenses incurred by the respondent towards performing its obligations under the MoU. It is pointed-out, that the said witness has deposed that the respondent spent a sum of Rs. 20,08,343.00 towards payment made to various parties for performing its part under the MoU.

14. It is also submitted that in addition to such expenses, the respondent has also suffered loss of goodwill and loss of profit, resulting from termination of the MoU by the petitioner.

15. To this end, attention is drawn to para 4 of affidavit dated 01.02.2010, which reads as under :

> "*I state that the Claimant has also suffered loss of profit as a result of illegal termination of the MoU by the Respondent and the Claimant is claiming loss of profit of Rs. 6,33,58,800 for the period 20.0.2006 (i.e date of handing over of the Multiplex till 20.12.2008.*"

16. It is submitted that in his cross-examination Mr. Sunil Gupta has given the following answers to the questions put to him :

> *"Q. Kindly state on what basis the Chart of Expenditure/Loss have been calculated as stated in Paras 2, 3 and 4 of your Affidavit ?*
>
> *A. So far as Para 2 is concerned, it is actual expenses incurred by the Claimant.*
>
> *So far as Loss of Goodwill is concerned, it is based on the actual accounting principle.*
>
> ***So far as Loss of Profit stated in Para concerned, we have calculated the figure we received from the Marketing Department.***
>
> *Q. Kindly state if you have any personal knowledge what you have stated in pertaining to Loss. ?* (sic)
>
> *A. The Statement in Para 4 is not based on personal knowledge.* ***It is based on Industrial Norms.***
>
> *Q. Are you aware of the prevailing Industrial Norms ?*
>
> *A.* ***The same I mean the assessment that have been made on the basis of prevailing price occupancy ratio and other expenses.***
>
> *Q. Have you checked what is sent by the Marketing Department ?*
>
> *A. I did not check it"*

(emphasis supplied)

17. It is argued on behalf of the respondent, that a perusal of the examination-in-chief and the cross-examination of the aforesaid witness indicates, that there was sufficient material on record before

the learned Arbitrator to ascertain the loss of profit claimed to have been incurred by the respondent; and that only a broad evaluation of the issue was required. Counsel places reliance on the decision of the Supreme Court in *M/s A T Brij Paul Singh & Bros.* (supra), to argue that once it is held that a party is guilty of breach of contract, part of which has been performed by the other side, the party would certainly be entitled to damages; and that one of the heads of damages is 'loss of profit' which was expected to be earned by the respondent by undertaking the work. It is argued that the Supreme Court has also held that what is to be the measure of profit, and what evidence should be tendered to sustain a claim for loss of profit, are different matters. Counsel draws attention to the following portion of the said judgement :

> "*12. ... ... In our opinion,* ***while estimating the loss of profit that can be claimed for the breach of contract by the other side, it would be unnecessary to go into the minutest details of the work executed in relation to the value of the works contract****.* ***A broad evaluation would be sufficient****. We in this connection, invited both Mr Aneja, learned counsel for the appellant and Mr T.U. Mehta, learned counsel for the respondent to give broad features of the work as well as the portion of the work executed by the appellant. Having heard them, we are satisfied that the appellant should be awarded Rs 2 lakhs under the head 'loss of estimated (sic expected) profit' for breach of contract by the respondent."*
>
> (emphasis supplied)

18. Furthermore, counsel submits that loss of profit is always a '*guesstimate' i.e.* a guessed-estimate and cannot be an exactitude.

19. Learned counsel for the respondent has also placed reliance upon the verdict of the Supreme Court in ***Mohd. Salamatullah vs. Govt. of***

Andhra Pradesh[8], to submit that in the said case, the court has faulted the High Court for having reduced the damages awarded for breach of contract based on estimated profits from 15% to 10 % of the contract price, without the High Court having given any convincing reasoning. Counsel draws attention to the following portion of the Supreme Court judgement :

> *"4. However, the High Court, after setting out the facts bearing on the quantification of the damages, stated, without any convincing reasoning:*
>
> > *We think that it will be just and reasonable to put this profit at 10 per cent of the contract price which works out to Rs 1,25,000.*
>
> *We are not able to discern any tangible material on the strength of which the High Court reduced the damages from 15 per cent of the contract price to 10 per cent of the contract price.* ***If the first was a guess, it was at least a better guess than the second one. We see no justification for the appellate court to interfere with a finding of fact given by the trial court unless some reason, based on some fact, is traceable on the record****. There being none we are constrained to set aside the judgment of the High Court in regard to the assessment of damages for breach of contract. ... ...*"

(emphasis supplied)

20. Counsel submits therefore, that this court ought not to interfere with the Arbitral Award which has been made after a due assessment of loss of profit, based on evidence duly tendered by the respondent.

DISCUSSION & CONCLUSIONS

21. Upon a conspectus of the averments contained in the petition, the reply and the rejoinder; having heard learned counsel for the parties

[8] (1977) 3 SCC 590

in-detail; and having perused the impugned Arbitral Award, this court is of the following opinion :

21.1. On the limited challenge pressed on behalf of the petitioner, *viz.* a challenge only to the award of Rs. 20 lacs to the respondent towards loss of profit, the discussion and reasoning contained in the Arbitral Award is sparse and cryptic.

21.2. The learned Arbitrator first makes a passing observation that the respondent had incurred loss of profit, which he says has been calculated for the period from 20.06.2006 to 20.12.2008 based on the estimated loss of income (from sale of tickets, advertising and concession); and then proceeds to observe that calculating loss of profit must involve a *certain* amount of conjecture and that there cannot be straight-jacket formula for that purpose. However, the learned Arbitrator thereafter proceeds to observe as follows :

> "*... ... In fact one is constrained to observe that* ***it is speculative if any profit would be made or not.*** *However, it cannot be ignored that it is the respondent who had committed the breach.*"
>
> (emphasis supplied)

Evidently therefore, upon an overview of the material before him, including the affidavit-in-evidence filed by Mr. Sunil Gupta on behalf of the respondent, the learned Arbitrator himself *concludes* that even the issue whether the respondent would have made *any profit at all* was a matter of speculation.

21.3. Clearly therefore, the learned Arbitrator was of the view that even the *foundational fact* as to whether the respondent would

have made a profit *at all* was in doubt. Having said that however, the learned Arbitrator then proceeds to say that since it cannot be ignored that the petitioner had committed breach of contract, the respondent was liable to be compensated. However the learned Arbitrator proceeds to award to the respondent – *not compensation or damages* for breach of contract – *but* the learned Arbitrator awards what he calls "*reasonable loss of profit*" which is "*drawn at Rs. 20 lakhs*", thereby deciding issue No. 8 relating to loss of profit in favour of the respondent.

21.4. In the opinion of this court, there is a clear discordance, whereby on the one hand, the learned Arbitrator holds that whether or not the respondent would have made any profit is itself a matter of speculation; but on the other hand, he proceeds to award loss of profit of Rs. 20 lacs, drawing that figure *literally from thin air*.

21.5. Clearly therefore, the learned Arbitrator did not proceed even on the basis of the evidence on record, that was available *inter-alia* by way of the evidence tendered before him by Mr. Sunil Gupta, to arrive at that conclusion and that figure.

21.6. It is settled law that where an arbitrator has rendered no clear findings on a contentious issue and the conclusions drawn by an arbitrator are in disregard of the evidence on record, the award is liable to be set-aside, as being perverse and patently

illegal. In this regard, in ***I-Pay Clearing Services (P) Ltd. vs. ICICI Bank Ltd***.[9] the Supreme Court has held :

> "*41. Under the guise of additional reasons and filling up the gaps in the reasoning, no award can be remitted to the arbitrator, where there are no findings on the contentious issues in the award.* ***If there are no findings on the contentious issues in the award or if any findings are recorded ignoring the material evidence on record, the same are acceptable grounds for setting aside the award itself.*** *Under the guise of either additional reasons or filling up the gaps in the reasoning, the power conferred on the Court cannot be relegated to the arbitrator. In absence of any finding on contentious issue, no amount of reasons can cure the defect in the award.*"

(emphasis supplied)

22. In the circumstances, this court is persuaded to allow the present petition, holding that the award of Rs. 20 lacs to the respondent towards loss of profit was based on no evidence on record; and in fact, the learned Arbitrator has failed to even decide whether the respondent had incurred, or would have incurred, any loss of profit at all.

23. Arbitral Award dated 07.03.2012 is accordingly set aside; leaving the parties to bear their own costs.

24. The petition is disposed-of.

25. Pending applications, if any, also stand disposed-of.

ANUP JAIRAM BHAMBHANI, J

MAY 22, 2024/*V.Rawat*

[9] (2022) 3 SCC 121