

**Equivalent Citation:** 2018(4)ARBLR429(Delhi)

**IN THE HIGH COURT OF DELHI**

O.M.P. (COMM.) 10/2016, IA Nos. 6379/2016 and 4720/2017

Decided On: 03.07.2018

Appellants: **GTM Builders and Promoters Pvt. Ltd.**

**Vs.**

Respondent: **Sneh Developers Pvt. Ltd.**

**Hon'ble Judges/Coram:**

Vibhu Bakhru, J.

**Counsels:**

For Appellant/Petitioner/Plaintiff: Dayan Krishnan, Senior Advocate, Avneesh Saran, Jai Sahai Endlaw and Sanjeevi Seshadri

For Respondents/Defendant: Sudhir Nandrajog, Senior Advocate, H.S. Kohli, Avinash Sharma and Amit Sherawat

**Subject: Arbitration**

**Acts/Rules/Orders:**

Arbitration And Conciliation Act, 1996 - Section 33, Arbitration And Conciliation Act, 1996 - Section 34, Arbitration And Conciliation Act, 1996 - Section 34(3), Arbitration And Conciliation Act, 1996 - Section 73; Code of Civil Procedure, 1908 (CPC) - Section 152

**Cases Referred:**

A.T. Brij Paul Singh and Ors. vs. State of Gujarat [MANU/SC/0081/1984](#); Mohd. Salamatullah and Ors. vs. Government of Andhra Pradesh [MANU/SC/0020/1977](#); Dwaraka Das vs. State of Madhya Pradesh and Anr. [MANU/SC/0088/1999](#); Ahluwalia Contract (India) Limited vs. The Union of India [MANU/DE/3179/2017](#); Edifice Developers and Project Engineers Ltd. vs. M/s. Essar Projects (India) Ltd. [MANU/MH/0020/2013](#)

**Case Note:**

**Arbitration - Validity of award - Section 34 of Arbitration and Conciliation Act, 1996 - Petition filed under Section 34 of Act impugning arbitral award - Whether Arbitral Tribunal passed just and reasonable award - Held, service tax was computed on escalation amount as a separate head - Escalation would have to be included in bills and service tax on escalation was not payable separately - There was no evidence that any such amount was paid by Sneh - Letter of termination was not in terms of agreement - There was no finding that Sneh had fully complied with its obligation - Impugned award set aside to extent of amounts awarded in favour of Sneh and quantum of pre award interest would also reduced - Petition disposed of. [\[48\]](#), [\[49\]](#), [\[50\]](#)**

**Disposition:**

Disposed off

**Industry:** Real Estate

**JUDGMENT**

**Vibhu Bakhru, J.**

Introduction

1. The petitioner (hereafter 'GTM') has filed the present petition under Section [34](#) of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning the arbitral award dated 01.08.2015 (hereafter 'the impugned award') delivered by the Arbitral Tribunal constituted by a sole arbitrator, namely, Sh. D.P. Wadhwa (hereafter 'the Arbitral Tribunal'). By the impugned award, the Arbitral Tribunal has awarded a sum of ₹ 3,25,38,070/- alongwith pre-award interest at the rate of 18% per annum from 01.04.2010 till the date of the award and future interest at the rate of 18% per annum on ₹ 4,37,88,000/- till the date of payment in favour of the respondent (hereafter 'Sneh'). Insofar as the claims made by GTM against Sneh are concerned, the Arbitral Tribunal has rejected the same.

2. After the impugned award was delivered, on 07.08.2015, Sneh filed an application (styled as 'application under Section [152](#) CPC) seeking a rectification of the impugned award to the extent that the Arbitral Tribunal had awarded future interest on the sum of ₹ 4,37,88,000/- instead of ₹ 6,37,88,000/-, which is, in fact, the awarded amount. Sneh also filed another application dated 21.11.2015 under Section [33](#) of the Act, seeking a similar relief. In the meanwhile, on 19.10.2015, GTM filed the present petition. The petition as initially filed was defective and was returned as such. It was successively filed thereafter on several occasions and was returned on each occasion as it continued to be defective. It was finally re-filed on 14.01.2016 and was listed before this Court on 18.01.2016.

3. After the pleadings were completed, it was pointed out that the Arbitral Tribunal had not disposed of Sneh's application under Section [33](#) of the Act and on 11.05.2016, the matter was adjourned awaiting the decision of the arbitrator. On 08.07.2016, the Arbitral Tribunal disposed of the

application filed by Sneh, inter alia, holding that Sneh's application under Section 33 of the Act could not be considered till there was a valid award. And, since the impugned award was insufficiently stamped it could not be considered as an arbitral award, which could be rectified.

4. Sneh's application under Section 33 of the Act was finally disposed of by an order dated 07.09.2016, whereby the Arbitral Tribunal rectified what was apparently a typographical error in the impugned award. This was brought to the notice of this Court on 09.11.2016 and on that date, this Court condoned the delay in re-filing of the present petition. Thereafter, on 15.04.2017, GTM filed an application (IA No. 4720/2017) for amendment of the present petition to challenge the impugned award, as rectified by the order dated 07.09.2016 passed by the Arbitral Tribunal under Section 33 of the Act. The same was allowed by this Court by an order dated 20.09.2017 and GTM was granted time to file an amended petition.

#### Factual background

5. GTM is a construction company and it had launched a project named "GTM Residency Tower No. 11, Valley View Estate, Gurgaon" for construction of a Group Housing Society on a part of plot of land that measured 22 acres 03 kanal and 14 marlas (approximately) and was located at village Gwal Pahari, Gurgaon, Haryana. Sneh is also a company engaged in the business of construction and taking up projects on a turnkey basis.

6. The parties entered into an agreement dated 10.03.2005 (hereafter 'the Agreement') with the object of constructing the said project. In terms of the Agreement, Sneh was to carry out the construction at a price of ₹ 750 per square feet of covered area; ₹ 400 per sq. feet for basement; and 400 per sq. ft. for the stilt area. The total covered area was agreed as 143664 sq. ft. and the area of basement and stilt was stipulated as 31000 sq. ft. and 9000 sq. ft. respectively. The total cost of construction was agreed at ₹ 14 crores. The rates as agreed were inclusive of all taxes including sales tax, service tax, work tax etc. The works were to commence immediately on execution of the Agreement - that is, on 10.03.2005 - and were to be completed by 31.10.2006.

7. The parties also entered into another agreement dated 01.03.2005 (hereafter 'the agreement for architectural services'), whereby GTM also appointed Sneh for providing detailed construction drawings and other services in the nature of architectural services for a consideration of ₹ 35,91,600/-.

8. GTM alleged that there were delays in execution of the works and issued a notice dated 31.07.2006 alleging that Sneh had breached the terms of the Agreement as it had failed to complete the works as per targets provided. Sneh was called upon to explain the breach, within a period of fifteen days as stipulated in the Agreement, failing which the Agreement would stand terminated on the expiry of fifteen days of the said notice. On the same date, GTM sent another notice calling upon Sneh to remedy the breaches in respect of the agreement for architectural services, within a period of seven days, failing which the said agreement would also stand terminated.

9. Thereafter, the parties held discussions and negotiations, which culminated into the parties executing an Addendum to the Agreement (hereafter 'the Addendum') on 28.09.2006. The recitals of the Addendum recorded that disputes had arisen between the parties due to breach of the contract by Sneh. In terms of the Addendum, Sneh undertook to complete the construction of the tower in all respect before 30.09.2007. Sneh also agreed to furnish a bank guarantee in the sum of ₹ 50,00,000/- or provide five cheques of ₹ 10,00,000/- each in lieu thereof, which could be encashed, if Sneh failed to perform the contract. Admittedly, Sneh did issue five such cheques. GTM states that the same were dishonored on presentation subsequently.

10. In the meanwhile, prior to the execution of the Addendum, Sneh furnished an undertaking dated 31.08.2007. In terms of the said undertaking, Sneh undertook that it would complete the project in all respect by 31.05.2008 and further that it would not claim any amount for the construction over and above ₹ 5.25 crores. This amount included an amount of ₹ 1.25 crores as escalation.

11. GTM alleges that Sneh did not complete the works as assigned and on 05.03.2008, GTM issued a notice cancelling the Agreement and the Addendum dated 28.09.2006. GTM also informed Sneh that it would be presenting the five cheques provided by Sneh as a security for its perform of the contract.

12. Thereafter, once again, the parties entered into negotiations to resolve the difference. The discussions culminated in the parties entering into a Memorandum of Understanding dated 25.03.2008 (MoU), whereby GTM revoked the letter of termination dated 05.03.2008 and restored the Agreement and the Addendum. Sneh agreed to invest a sum of ₹ 25,00,000/- in the month of March 2008 for purchase of material and for engaging labour so that pace of work could be increased. GTM also undertook to invest a sum of ₹ 25,00,000/- in the same manner. Sneh agreed to purchase material through bills and to pay 50% amount for the same. GTM agreed to pay the balance 50% and it was agreed that the material would be stored at the site office.

13. The parties agreed that the work of construction would start "in full speed from 01.04.2008" according to the fortnightly construction program submitted by Sneh. Sneh agreed to submit the running bills and GTM had agreed to pay the said bills after 7 days of its presentation. It was further agreed that failure on the part of Sneh to adhere to the fortnightly program would invite the penalty of 10% deduction from the running bill. Sneh also agreed to prepare a construction schedule within a period of seven days of the parties entering into the MoU.

14. The parties further agreed that the total construction cost had been increased and for the same, ₹ 1.25 crores would be payable (as already provided under the Addendum) but no further escalation would be payable to Sneh. Mr. H.S. Lamba, Managing Director of Sneh also executed an undertaking-cum-indemnity confirming that the project would be handed over complete in all respects in accordance with the specifications, within a period of ten months from the date of the undertaking and Sneh would not claim any extra amount from GTM. He also agreed to indemnify GTM against any loss, harm or injury caused to GTM on account of delay in construction and completion of the project.

15. Thereafter, Sneh raised three running bills - running bills dated 15.04.2008, 22.05.2008 and 16.07.2008 - for work done up to 03.08.2008.

There are disputes between the parties in relation to the amounts owed in respect of those bills. According to GTM, the bills were duly verified and it was found that the bills were highly inflated and were not commensurate with the actual work done at the construction site. Further, the said bills were raised without deducting cost of material purchased by GTM as was agreed under the MoU. GTM claimed that it had deducted the cost of material and paid the balance amount to Sneh and, therefore, no further amounts were payable against those running bills. This is disputed by Sneh. Sneh claims that it had received a sum of ₹ 5,00,000/- against partial discharge of the amount payable against the invoice dated 16.07.2008, which was for a sum of ₹ 42.62 lacs. There is also a dispute as to the amounts received by Sneh against other invoices.

16. GTM claims that Sneh abandoned the work at the site on 28.08.2008 and GTM took possession of the site on that date. GTM further claims that it issued a notice dated 29.08.2008 terminating the Agreement, the Addendum and the MoU, which was sent by registered post. The same is disputed by Sneh. Sneh claims that GTM attempted to forcibly takeover the site. It further claims that it had received an envelope by speed post containing blank sheets. This was refuted by GTM by its letter dated 08.09.2008; it claimed that the envelope sent by speed post contained the termination letter dated 29.08.2008.

17. On 10.09.2008, Sneh sent a letter claiming that GTM had no right to terminate the Agreement or interfere with the working at the site without its consent and till all the outstanding bills had been paid in full.

18. GTM called upon Sneh to be present at the site on 19.09.2008 for measurement of the work done. However, it is claimed that Sneh did not cooperate with the same. GTM claims that in the circumstances, the work of joint measurement was handed over to an independent consultant, who submitted its report on 03.10.2008. Thereafter, GTM entered into an agreement with another entity for completing the balance works.

19. In view of the disputes that had arisen between the parties, the arbitration clause was invoked and both the parties filed applications before this Court. The said applications were disposed of by a common order dated 06.01.2010 appointing the sole arbitrator, a former judge of the Supreme Court, to adjudicate the disputes between the parties.

#### Impugned Award

20. Before the Arbitral Tribunal, GTM filed its Statement of Claims, inter alia, claiming that Sneh had failed to perform the contract entered into between the parties. GTM further claimed that the works executed by Sneh were defective and it had flouted the norms as set down by Haryana Urban Development Authority (HUDA); consequently, GTM would require to spend an estimated amount of ₹ 2,69,25,000/- for rectification of the works done. GTM also claimed that Sneh had played a fraud on GTM by misrepresenting itself to be a firm of architects and holding out that its Managing Director was a qualified architect. GTM claimed (i) compensation for delay in construction of the building at the rate of 2.5% of the contract value of ₹ 14 crores computed at ₹ 35 lacs; (ii) ₹ 2,69,25,000/- towards rectification of defects in the work executed; (iii) ₹ 10 crores for completion of the unfinished works; (iv) ₹ 2 crores as damages on account of the loss of reputation; (v) interest at the rate of 24% per annum on the aforesaid claims; (vi) costs of proceedings; and (vii) award equivalent penalty that would be imposed by HUDA.

21. Apart from contesting GTM's claims, Sneh also filed a Statement of Claims raising claims (five in number) aggregating ₹ 25,24,47,896/- alongwith interest at the rate of 24% per annum. The first claim - referred to as Claim No. 1 - comprised of fourteen separate claims aggregating a sum of ₹ 21,26,65,896/-: (i) ₹ 37,62,000/-, on account of the unpaid balance of the running bill dated 16.07.2008; (ii) ₹ 70,81,000/- being the balance of unpaid bill as on 31.03.2008 towards running bill dated 24.09.2007 and 03.12.2008; (iii) ₹ 1,25,00,000/- on account of escalation; (iv) ₹ 2,53,40,760/- on account of cost of difference in the area shown in running bills and actual construction at site; (v) ₹ 63,35,190/- as escalation on additional construction at the rate of 25% of the initial cost of material of labour; (vi) ₹ 60,43,000/- on account of material illegally retained at site; (vii) ₹ 1,00,00,000/- on account of plant and machinery illegally retained at site including shuttering; (viii) ₹ 29,50,000/- on account of cost of scaffolding material taken on hire; (ix) ₹ 18,23,840/- on account of hire charges for shuttering material from August 2008 to 25th February, 2010; (x) ₹ 51,37,093/- on account of service tax payable; (xi) ₹ 48,00,000/- as loss of profit on the leftover work; (xii) ₹ 9,54,20,100/- on account of penalties on delayed payment of running bills; (xiii) ₹ 2,66,59,296/- as interest on various amounts claimed other than unclaimed bills; And, (xiv) ₹ 48,13,617/- as interest on the unpaid running bills. In addition, Sneh also claimed a sum of ₹ 47,82,000/- on account of wages paid to idle labour, supervisory staff on account of the delayed and fragmented payment of the bills alongwith interest at the rate of 24% per annum (Claim No. 2); ₹ 1,50,00,000/- on account of loss of opportunities (Claim No. 3); ₹ 2 crores as loss of goodwill (Claim No. 4) and loss of expenditure on account of being dragged into litigation by other parties to be quantified at a later stage (Claim No. 5). Sneh also claimed interest on the aforementioned amounts.

22. The Arbitral Tribunal framed the following issues:-

"(i) Which of the two parties - M/s. GTM Builders and M/s. Sneh Developers committed breach of the agreement dated 10.03.2005 and addendum dated 20.09.2006, and so to what extent and to what effect?

(ii) Whether M/s. GTM Builders have not made payments to M/s. Sneh Developers in terms of the agreement?

(iii) Whether certain plant/machinery was on rent with M/s. Sneh Developers from M/s. Mainee Steels Pvt. Ltd. and did M/s. Sneh Developers create a lien thereof in favour of M/s. GTM Builders without informing M/s. GTM Builders that the said plant/machinery was on rent with M/s. Sneh Developers, and if so to what effect?

(iv) Whether M/s. GTM Builders validly terminated agreement dated 10.03.2005 and if so to what effect?

(v) Whether the addendum dated 20.09.2006 was got entered into with M/s. Sneh Developers by M/s. GTM Builders to cheat M/s. Sneh Developer and if so to what effect?

(vi) Whether M/s. GTM Builders took illegal possession of the building from M/s. Sneh Developers and if so to what effect?

(vii) To what amount, if any, is any of the parties entitled from each other on alleged breaches committed of the agreement and the addendum?

(viii) Whether any of the parties succeeding in its claim, is entitled to any interest and if so on what amount and at what rate and for what period?

(ix) Relief."

23. Both the parties filed their relevant documents relied upon by them before the Arbitral Tribunal. Further, the Managing Directors of both the parties also tendered affidavits and were cross-examined. Although, the Arbitral Tribunal framed several issues including the issue as to which party was in breach of the Agreement and the Addendum, the Arbitral Tribunal did not render any specific finding with regard to issues and considered the case as whole. The Arbitral Tribunal held that the termination letter issued by GTM (letter dated 29.08.2008) was not in terms of Clause 15 of the Agreement and, therefore, the Agreement was not validly terminated. The Arbitral Tribunal further held that as a consequence of the aforesaid finding, Sneh would be entitled to damages at the rate of 10% to 15% of the balance unexecuted work.

24. The Arbitral Tribunal rejected the claims made by GTM on the ground that GTM had failed to prove the same. The Arbitral Tribunal held that GTM had not led evidence to establish its claim for compensation for delay in construction or for rectification of defects or for the cost incurred for completion of the works; and, therefore, it had failed to establish the same.

25. GTM had submitted a report of an independent Civil Engineer and Architect, Sh. Ashok Kumar Kalyan, who had examined the construction carried out. However, this report was rejected as Sneh had not accepted it and GTM had not produced the concerned witness to prove the same.

26. Insofar as Sneh's claims are concerned, the Arbitral Tribunal allowed Claim No. 1(i) and Claim No. 1(ii) and awarded a sum of ₹ 1,08,43,000/- on account of unpaid balance amount of running bills. The Arbitral Tribunal also awarded a sum of ₹ 60,43,000/- on account of material taken over by GTM [Claim No. 1(vi)]; ₹ 99.92 lacs on account of machinery including shuttering taken over by GTM [Claim No. 1(vii)]; and ₹ 29,50,000/- being cost of scaffolding [Claim No. 1(viii)]; and a sum of ₹ 5,15,000/- as service tax on escalation of ₹ 1.25 crores [Claim No. 1(x)].

27. The Arbitral Tribunal also held that Sneh was entitled to loss of profits for the unexecuted works. The unexecuted works were computed at ₹ 2,19,50,695/- being the total cost of the project of ₹ 15.25 crores and ₹ 13,05,49,305/- being the amount paid to Sneh. The Arbitral Tribunal computed the loss of profits on the said unexecuted works at the rate of 10% of the value amounting to ₹ 21,95,070/- [Claim No. 1(xi)]. The Arbitral Tribunal also awarded interest at the rate of 18% per annum on the awarded amount from 01.04.2010 till the date of the award and future interest at the rate of 18% per annum on the awarded sums (₹ 6,37,88,000/-) from the date of the award till actual date of the payment if the awarded amount was not made within a period of ninety days from the date of the impugned award.

#### Submissions

28. Mr. Dayan Krishnan, the learned Senior Counsel appearing for the petitioner assailed the impugned award on several fronts. First, he submitted that the decision of the Arbitral Tribunal holding GTM's termination of the contract was illegal, unreasoned and palpably erroneous. He submitted that the said finding was arrived at only on account of the termination notice not being in terms of the Agreement. However, the Arbitral Tribunal had not examined the question whether GTM had breached the Agreement by not performing the contract within the stipulated period. Second, he submitted that the Arbitral Tribunal had grossly erred in awarding a sum of ₹ 1,08,43,000/- (₹ 37,62,000/- + ₹ 70,81,000/-) on account of the unpaid bills. He stated that the said amounts were not proved. He pointed out that Mr. H.S. Lamba had testified that Sneh had given a bill dated 31.08.2008 for the total outstanding amount of ₹ 2,88,15,122/-. He was cross examined with regard to the statement of accounts and it was suggested to him in his cross-examination that the statement of accounts furnished was incorrect. He had responded by stating that "only my accountant will tell". The Arbitral Tribunal had observed that since accountant had not been produced, the statement of accounts could not be taken as correct and had accordingly rejected the claim for the outstanding amount. He submitted that having rejected the same, the Arbitral Tribunal allowed the claim for unpaid bills by referring to paragraph 64 of the affidavit of Sh. H.S. Lamba and further by observing that GTM had not cross-examined Mr. H.S. Lamba on the aforesaid inconsistency. He submitted that once Mr. Lamba had testified that only his accountant could tell whether his statement of accounts was correct, the question of putting any further questions regarding the statement of accounts was not necessary. Thus, the Arbitral Tribunal's decision of allowing claims only on the ground that the petitioner had not confronted the witness with the inconsistency in the claims is ex facie unsustainable.

29. Next, Mr. Krishnan submitted that the award of ₹ 29,50,000/- as hire charges for scaffolding material is also not supported by any evidence.

30. He also assailed the award of ₹ 5,15,000/- on account of tax on ₹ 1.25 crores. He contended that the same was ex facie erroneous, as the service tax was included in all the bills submitted and there was no separate liability for escalation. Further, no proof of any such payment had also been provided by Sneh. Lastly, he submitted that the award of loss of profits is wholly perverse. He also submitted that no evidence or any material was produced by Sneh in support of its claim for loss of profits and the award of the said claim is without any material.

31. Mr. Nandrajog, the learned Senior Counsel appearing for the respondent countered the aforesaid submissions. He submitted that the award regarding unpaid bills was based on the testimony of Mr. Lamba and was not only supported by the statement of accounts (which had been doubted by the Arbitral Tribunal) but also by separate bills and vouchers. However, Mr. Nandrajog could not point out any separate bill that would establish the amount awarded. He submitted that as far as award of ₹ 37,62,000/- [Claim No. 1(i)] is concerned, the same was evidenced by a bill for a sum of ₹ 42,62,000/- produced by Sneh. Further, Sneh had also acknowledged that a sum of ₹ 5,00,000/- had been received against the aforesaid bill and, therefore, a sum of ₹ 37,62,000/- was payable.

32. Insofar as the award of ₹ 70,81,000/- [Claim No. 1(ii)] is concerned, he referred to two invoices and submitted that if the notings made on the

invoices were considered, the amount payable would be in the vicinity of ₹ 70,81,000/-. Mr. Nandrajog rightly conceded that the award of ₹ 5,15,000/- on account of service tax was not payable. He supported the award for loss of profits [Claim No. 1(xi)] by referring to the decision of the Supreme Court in A.T. Brij Paul Singh & Ors. v. State of Gujarat: [MANU/SC/0081/1984](#) : (1984) 4 SCC 59 and stated that no particular evidence was required for awarding loss of profits and the same could be awarded by estimating the same at 10%.

33. Mr. Nandrajog also submitted that the present petition was not maintainable, as it was filed beyond the time as stipulated in Section [34\(3\)](#) of the Act. He submitted that although the petition was filed on 19.10.2015, it was not supported by any affidavit and, therefore, could not be considered as a petition at all. He further submitted that Sneh's application under Section [33](#) of the Act was allowed by the Arbitral Tribunal on 07.09.2016. However, the amended petition was filed by GTM in April 2017 and, therefore, that was beyond the period stipulated under Section [34\(3\)](#) of the Act.

#### Discussion and Conclusion

34. The contention, that the petition is barred by limitation as it is beyond the period specified under Section [34\(3\)](#) of the Act, is not sustainable. The petition was filed on 19.10.2015 and was within a period of three months from the date of the award.

35. There was a delay in re-filing the petition. However, that was condoned by this Court by an order dated 09.11.2016. Sneh's contention that the amended petition was beyond the period of three months from the date of the order dated 07.09.2016 and, therefore, barred by limitation, is also unmerited. The said issue had been raised on behalf of Sneh and was rejected by this Court by an order dated 20.09.2017. Further, it is also important to note that the rectification carried out by the Arbitral Tribunal was only a typographical mistake inasmuch as the sum of ₹ 6,37,88,000/- was incorrectly mentioned as ₹ 4,37,88,000/-. Even if this correction is ignored, it would have no material effect on the impugned award inasmuch as the Arbitral Tribunal had awarded an aggregate amount of ₹ 3,25,38,070/- alongwith interest at the rate of 18% per annum from 01.04.2010 till the date of the award. The computation of this amount had been incorrectly stated as ₹ 4,37,88,000/-. The correct amount could always be computed by the court while enforcing the impugned award.

36. The first and foremost issue to be considered is with regard to the Arbitral Tribunal's finding that the termination letter dated 29.08.2008 was illegal. The Arbitral Tribunal had held that the termination letter was not in terms of Clause 15 of the Agreement. This finding cannot be faulted, as Clause 15 of the Agreement expressly provided that upon failure of Sneh to carry on the construction work with due diligence, that is, late commencement of work, slow progress, sub-standard work, non adherence to agreed time frame schedule, would entitle GTM to "terminate the said agreement by giving 15 days notice to Sneh." Admittedly, the termination notice did not provide for 15 days period. Thus, plainly, the termination notice was not in terms of the Agreement. However, this Court has its reservations whether the consequences of the same would be as held by the Arbitral Tribunal. The principal dispute before the Arbitral Tribunal was that which party was in breach of the Agreement. GTM had contended that Sneh had delayed the construction, while Sneh had contended that GTM was responsible for not providing timely payments for execution of the works. This was at the core of the disputes that were required to be addressed as there was no dispute that the project had been inordinately delayed. There appears to be no dispute that initially Sneh was responsible for the delays as is evident from the plain tenor of the Addendum entered into between the parties. The Arbitral Tribunal did not address this issue at all but proceeded only on the basis that since the termination letter was illegal, Sneh would be entitled to loss of profits for the unexecuted portion of the works.

37. This approach appears to be manifestly erroneous.

38. Having stated the above, there could be no dispute that Sneh would be entitled for the value of the work done. This is considering that GTM was unable to prove its counter claims. Thus, the next controversy to be examined relates to the award of Claim No. 1(i) and Claim No. 1(ii) for the unpaid balance of the invoices raised by Sneh.

39. The Arbitral Tribunal has awarded a sum of ₹ 1,08,43,000/- against Claim No. 1(i) and Claim No. 1(ii). The said award is based on paragraph 64 of the affidavit of Mr. H.S. Lamba. The relevant extract of the impugned award indicating the reasons for awarding the said amount is reproduced below:-

□

The witness has not been confronted with the inconsistency between para 50 of his affidavit in evidence and the relevant portion of para 64.1 of the said affidavit in this context. No questions have been asked to the witness Mr. H.S. Lamba during the course of the cross-examination to challenge the veracity of the said statement in the affidavit of evidence. Accordingly I hold that Sneh will be entitled to the payment of the aforesaid unpaid balance amount of running bills i.e. Rs. (37,62,000.00 + 70,81,000.00) = Rs. 1,08,43,000.00."

40. There is an apparent error on the face of the record as paragraph 64 of the affidavit of Mr. H.S. Lamba does not read in the manner as recorded by the Arbitral Tribunal. The relevant extract of paragraph 64 of the said affidavit reads as under:-

"64. I say that the Claimant is raising the following claims against the Respondent arising out of and in relation to the subject agreement:

#### CLAIM NO. 1

That Respondent inspite of the repeated request, reminders has not paid a sum of Rs. 18,30,85,703.00 (Rupees Eighteen Crore Thirty Lac Eighty Five Thousand Seven Hundred and Three only) detailed as follows towards the building construction, escalation of cost, tax liability, cost of material, plants and machinery illegally taken into possession by Respondent.

□

Refer to Ex. 35, 37. No payment was made by respondent.

iii. Escalation settled vide M.O.U. dated 25.3.08 1,25,00,000.00

Refer to Ex.-44. No payment was made by respondent."

41. The figure of ₹ 70,81,000/- is not mentioned in the affidavit.

42. Mr. Nandrajog contended that the unpaid amount of ₹ 70,81,000/- was proved by the documents on record. He submitted that the original bill (Ex. 35) was for a sum of ₹ 43,81,309.19/-. The said bill was finalized for a total value of ₹ 36,65,210/- and after deliberations, the net sum payable was reduced to ₹ 10,65,210/- with the sum of ₹ 6,00,000/- being withheld. He submitted that Ex. 37 is a bill for an amount of ₹ 59,49,914/-, which was raised after accounting for a sum of ₹ 6,00,000/-, which was held from the previous bill (Ex. 35). He submitted that if the said adjustments were carried out, the sum total of both the bills would amount to ₹ 70,58,149/-.

43. Obviously, the said contention cannot be accepted. First of all, paragraph 64 of the affidavit does not refer to the figure of ₹ 70,81,000/-; secondly, the Arbitral Tribunal has not considered any adjustments as are now sought to be explained by the learned counsel; and thirdly, even after considering the adjustments as explained by Mr. Nandrajog, the amounts works out to be ₹ 70,58,149/- and not 70,81,000/- as awarded by the Arbitral Tribunal. Thus, this Court is at a loss to find any reason which could have persuaded the Arbitral Tribunal to have awarded the aforesaid sum.

44. The award of the sum of ₹ 37,62,000/- stated to be the balance remaining unpaid against bill dated 16.07.2008 is also unsustainable. The Arbitral Tribunal has referred to the statement of accounts (filed as Annexure-44). The said statement of accounts has not been accepted by the Arbitral Tribunal as Mr. Lamba could not affirm as to the accuracy of that statement. The Arbitral Tribunal has also observed that there was inconsistency in the amount as claimed in paragraph 50 of the affidavit and as indicated in paragraph 64 of the same affidavit. However, the Arbitral Tribunal reasoned that the affidavit must still be accepted, notwithstanding the inherent inconsistency, as Mr. Lamba had not been confronted with the same. Plainly, this reasoning is erroneous, as a suggestion was put to Mr. Lamba that the said statement was not correct and he had unequivocally responded: "only my accountant can tell". The Arbitral Tribunal had thus not accepted the correctness of the statement of accounts yet had relied upon the same while awarding a sum of ₹ 37,62,000/- against Claim No. 1(i).

45. Mr. Nandrajog had stated that the said amount was proved as the bill dated 16.07.2008 had been filed and produced on record. He stated that the said bill was for a sum of ₹ 42,62,000/- and Sneh had acknowledged receipt of ₹ 5,00,000/- against the aforesaid amount leaving a balance of ₹ 37,62,000/- to be paid by GTM. He also referred to the said bill (Ex. 75 placed at Page 616-617 of the documents filed by the petitioner). The examination of the said documents indicates that the grand total is ₹ 42.62 lacs, but it is also stated that steel of 7.5 tons and 850 bags of cement had to be reduced. It was GTM's case that it had supplied the material and the amount for the same was to be reduced from the said bills. GTM had also produced the said bill indicating certain deductions. This Court is not called upon to examine whether the amounts as claimed by GTM were required to be adjusted against the said bill. However, it is ex facie apparent that the bill (Ex-75) was not for a sum of ₹ 42.62 lacs but for ₹ 42.62 lacs "less; steel 7.5 tons, cement 850 bags" and, thus in any event, the entire amount of ₹ 42.62 lacs could not have been awarded to Sneh on a plain reading of that invoice. In view of the above, the award of ₹ 1,08,43,000/- against Claim No. 1(i) and Claim No. 1(ii) is not sustainable and the impugned award in that regard is liable to be set aside.

46. The next issue to be examined is with regard to the award against Claim No. 1(vi) and Claim No. 1(vii) relating to plant and machinery retained by GTM. The Arbitral Tribunal awarded a sum of ₹ 60,43,000/- and ₹ 99,92,000/- against the aforesaid claims respectively. The said award is based on the affidavit filed on behalf of Sneh as well as the documents produced by it; thus, no interference with the award of the aforesaid amounts, is warranted.

47. The next issue relates to the award of ₹ 29,50,000/- as the cost of scaffolding material taken over by GTM - Claim No. 1(viii). It was contended on behalf of GTM that there was no bill evidencing the cost of scaffolding. Although this may be correct; however, no interference with the impugned award would be warranted, as the Arbitral Tribunal has relied upon the testimony of Mr. H.S. Lamba as well as Ex. 185 indicating the amount incurred on that count. This Court is not required to reappraise the evidence under Section 34 of the Act and the decision of the Arbitral Tribunal in this regard cannot be interfered with.

48. Insofar as the award of ₹ 5,15,000/- against service tax is concerned, Mr. Nandrajog had readily agreed that the said claim was not sustainable. The service tax was computed on the escalation amount as a separate head. Concededly, escalation would have to be included in the bills and service tax on escalation is not payable separately. Further, there is no evidence that any such amount was paid by Sneh.

49. The last issue to be examined is relating to the award of loss of profits. As noticed above, the same is premised on the basis that the letter of termination issued by GTM was not in terms of the Agreement. As noticed above, the central issue to be decided by the Arbitral Tribunal was that which party was in breach of the Agreement. There is no finding that Sneh had fully complied with its obligation. Thus, although the Arbitral Tribunal has found fault with the termination notice issued by GTM, there is no adjudication as to the central issue as to which party was responsible for the breach of the Agreement. Be that as it may, the award of loss of profits is also not sustainable as it is based on no evidence at all. The Arbitral Tribunal had simply relied upon the decisions of the Supreme Court in A.T Brij Paul Singh (supra), Mohd. Salamatullah & Ors. v. Govt. of AP [MANU/SC/0020/1977](#) : (1977) 3 SCC 590, and Dwaraka Das v. State of MP & Anr.: [MANU/SC/0088/1999](#) : (1999) 3 SCC 500 for awarding the claim for loss of profits as ₹ 21,95,070/- (being 10% of the estimated value of unexecuted works). None of the said decisions are authorities for the proposition that claim for loss of profits can be awarded without any rudimentary evidence or material indicating the same. Indisputably, it is open for the courts to estimate the quantum of loss of profits; however, it would be necessary for a party to establish that in the normal course, the contract would have yielded profits to the extent as claimed. In the present case, there is no material to establish that Sneh would have earned any profit from the contract in question. The Division Bench of this Court in Ahluwalia Contract (India) Limited v. The

Union of India: [MANU/DE/3179/2017](#) : 244 (2017) DLT 360 had clarified the above in the following words:-

"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."

(Also see: Edifice Developers and Project Engineers Ltd. v. M/s. Essar Projects (India) Ltd: [MANU/MH/0020/2013](#)).

50. In view of the above, the impugned award is set aside to the extent of the amounts awarded in favour of Sneha against Claim No. 1(i) - ₹ 37,62,000/-, Claim No. 1(ii) - ₹ 70,81,000/-, Claim No. 1(x) - ₹ 5,15,000/- and Claim No. 1(xi) - ₹ 21,95,070/-. Consequently, the quantum of pre-award interest would also stand reduced in proportion to the aforesaid extent.

51. The petition is disposed of in the above terms. The pending applications are also disposed of. The parties are left to bear their own costs.

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