

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: 09.05.2011
Judgment Pronounced on: 13.05.2011

+ **CS(OS) No. 1362/1997**

M/S. HERBICIDES (INDIA) LTD. Plaintiff

- versus -

M/S. SHASHANK PESTICIDES P.LTD. AND ...Defendants

Advocates who appeared in this case:

For the Plaintiff:	Mr. Rajat Arora,
For the Defendant:	Mr. K.R. Gupta, Mr. S.K. Gupta, Mr. Nitin Gupta and Mr. Manish Gupta, Advs.

CORAM:-

HON'BLE MR JUSTICE V.K. JAIN

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| 1. Whether Reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. To be referred to the Reporter or not? | Yes. |
| 3. Whether the judgment should be reported in Digest? | Yes. |

V.K. JAIN, J

1. This is a suit for recovery of Rs 24,90,665/-. Defendant No. 1 is a company alleged to be owned and controlled by defendant No. 4 and his family members. Defendant No. 3 is the wife of defendant No. 4 and is running business in the name and style of defendant No. 2

from the same premises, where defendant No. 1 is functioning. Defendant No. 1-company entered into an agreement to purchase one lakh litres of weedicide, namely 2, 4-D Ethyl Ester 38% EC in 200 litres packaging, at the price of Rs 96.80 per litre plus local tax in staggered lots commencing from October, 1995 and ending in December, 1995. In the event of non-supply or non-lifting of goods, the party, in default, was to pay pre-determined compensation at the rate of Rs 20/- per litre. The plaintiff claims to have supplied 7000 litres of the aforesaid goods to defendant No. 1 in October, 1995. On the request of the defendant, invoice in respect of these 7000 litre of goods were raised on one M/s Paramount Pesticides Pvt. Ltd., nominee of the defendant.

Vide letters dated 14th November, 1995 and 17th November, 1995, defendant Nos.1 and 4 informed the plaintiff that due to failure of season, the market had crashed and they were not in a position to make any commitment for lifting or for making financial arrangement for further quantities. The plaintiff, thereupon, informed the defendant that it had made all the necessary arrangements for supply of contracted goods and its refusal to lift the

goods would cause immense loss to the plaintiff. The plaintiff asked defendant No. 1 to make arrangements to take delivery of the entire quantity during November and December. Since the defendants have failed to act upon the request and have also paid the price of 7000 litre of goods supplied to it, the plaintiff is now seeking a sum of Rs 18,60,000/- towards pre-determined compensation at the rate of Rs 20/- per litre of unlifted quantity of the goods, Rs 1,97,472/- + 2,93,680/- toward balance price of 7000 litre of goods after adjusting the payment of Rs 2 lakhs made by the defendant and Rs 1,39,513/- (56,093 + 83,420) towards interest at the rate of 18% per annum on the principal amount due from the defendant.

2. The defendants have contested the suit and have taken a preliminary objection that the suit is bad for misjoinder of parties since there is no privity of contract between the plaintiff and defendant Nos. 2 and 3 and there was no personal contract between the plaintiff and defendant No. 4. They have also taken a preliminary objection that suit against defendant No. 2, which is not a legal entity, is not maintainable. On merits, it has been alleged that the plaintiff was to deliver 10,000 litre of goods

by the eve of Diwali 1995 and the balance quantity was to be delivered in regular intervals commencing from 1st November, 1995 and was to be completed by 15th December, 1995, but, the plaintiff failed to effect the delivery of any part of the goods, despite receiving Rs 4 lakhs from them. It is further alleged that after expiry of season, the plaintiff tried to foist goods on defendant No. 1, but, at that time the goods were of no use to them. The defendants have denied having received 7000 litre of goods from the plaintiff and having asked the plaintiff to raise invoice in the name of Paramount Pesticides Pvt. Ltd. The defendant Nos. 1 and 4 have filed a counter-claim of Rs 5,45,000/- against the plaintiff on the ground that it had not refunded the amount of Rs 4 lakhs, received from them and, therefore was liable to refund that amount along with interest amounting to Rs 1,44,000/- and Rs 1,100/- towards Advocate fee for service of notice. In its replication, the plaintiff-company has admitted receipt of total payment of Rs 4 lakhs from defendant No. 1

3. The following issues were framed on the pleadings of the parties:

1. Whether the suit is bad for mis-joinder of defendant Nos. 2, 3 and 4 as parties, as alleged by defendants? OPP
2. Whether the suit has been filed by a duly authorized person on behalf of the plaintiff? OPP
3. Whether any quantity of 2, 4-D, Ethyl Ester 38% EC supplied by the plaintiff to defendant No. 1? OPP
4. Whether the defendant Nos. 1 and 4 are liable jointly and severally to pay pre-determined compensation of Rs 18,60,000/- to the plaintiff, as claimed? OPP
5. Whether the defendant Nos. 1 to 4 are liable jointly and severally to pay the sum of Rs 6,30,665/- for the goods supplied by the plaintiff to defendant? OPP
6. Whether the counter-claim has been instituted, signed and verified by a duly authorized person on behalf of defendant Nos. 1 and 4? OPD
7. Whether the defendant No. 1 is entitled to receive from the plaintiff the sum of Rs 5,45,000/- as claimed in its counter-claim? OPD

8. Whether the defendant No. 1 is entitled to receive any interest, if so, at what rate and on what amount? OPD
9. Whether the plaintiff is entitled to receive any interest, if so at what rate? OPP
10. Whether there exist any privity of contract between the plaintiff and defendants 2&3? OPP
11. Whether the suit against defendant No. 2, non-juristic person is maintainable? OPD
12. Whether any contract was entered into between the plaintiff and defendant Nos.2 and 3 for the supply of goods set out in the plaint and whether any goods were supplied by the plaintiff to the defendants 2 and 3, if so of what value? OPP
13. Relief.

Issues No. 10, 11 & 12

4. This is not in dispute that only the plaintiff-company and defendant No.1-company were parties to the agreement for supply of goods. Defendant No. 1 is a legal entity and defendant No. 4 is one of its Directors. There is, however, no privity of contract between the plaintiff and

defendant Nos. 3 and 4. If there is a breach of contract on the part of defendant No. 1 or defendant No. 1-company has failed to pay the price of the goods received by it from the plaintiff-company, the remedy of the plaintiff-company lies only against defendant No. 1 and neither defendant No. 3 nor defendant No. 4 is personally liable to discharge the liability of defendant No. 1. Defendant No. 2 is not a legal entity and is only a trade name adopted by defendant No. 3. The issues are accordingly decided in favour of the defendants and against the plaintiff. The names of defendant No. 2 to 4 are struck off from the array of defendants.

Issue No. 2

Ex.PW-1/1 is the copy of the Resolution passed by the Board of Directors of the plaintiff-company, authorizing Mr Ahok Dugar, Mr V.P. Singal, Mr R.K. Gupta and Mr Paras Parakh and to commence & institute suits, etc. on behalf of the plaintiff-company and to sign and verify the pleadings etc. The suit having been instituted and the plaint having been signed and verified by Mr Ashok Dugar, the issue is decided in favour of the plaintiff and against the defendants.

Issues No.3 & 5

5. PW-1/A, Mr. Ashok Dugar, Director of the plaintiff-company, has stated that 7000 litre of goods in 35 drums were dispatched vide GR dated 21st October, 1995 (Ex.PW1/5) and the delivery of the consignment was taken by defendant Nos. 1 and 4, making endorsement in this record on the back side of GR. It has come in the deposition of PW-1 that the goods were moved by the plaintiff-company from Jaipur to Delhi on Stock Transfer basis and the truck, containing 7,000 litre of stock, was unloaded at the godown of defendant No. 1. It has also come in his deposition that defendant No. 4 Mr R.K. Gupta, who is the Director of defendant No. 1-company, was in touch with the officials of the plaintiff-company so that delivery could be taken at the godown of defendant No. 1.

In rebuttal, DW-1, Mr R.K. Gupta, has stated that no goods were supplied by the plaintiff to defendant No. 1. A perusal of the Goods Receipt Ex.PW-1/5 shows that it bears an endorsement of receipt of 35 drums on the back of the document. It is also noted in the endorsement that one drum had leakage from it. The GR pertains to 35 drums of

pesticides, the consignor as well as consignee is Harbicides India Ltd. and the goods were sent from Jaipur to Delhi on 21st October, 1995. According to Mr Ashok Dugar, these goods were received by Mr Vishesh Jain of the defendant, who made the endorsement on the back of this document. It has been admitted by Mr R.K. Gupta that Mr Vishesh Jain is also a Director of defendant No. 1. Since Mr Ashok Dugar had, in his deposition, claimed that these goods were received by Mr Vishesh Jain, it was incumbent on defendant No. 1 to produce Mr Vishesh Jain in the witness box to controvert the deposition of Mr Ashok Dugar in this regard and to prove that neither the goods were received by him nor does the GR Ex.PW-1/5 bear an endorsement by him.

6. In **Enuga Lakshamma Vs. Vennapuse Chinna Malla Reddy (Dead) by Lrs.**, 1985 (2) SCC 100, there was dispute with respect to the date of birth of the plaintiff/appellant. It was noticed that the father of the plaintiff/appellant was not produced as a witness. Supreme Court was of the view that non-examination of the father of the plaintiff/appellant on the most material issue, namely, the birth date of the plaintiff will have to be regarded as fatal to the plaintiff's case and the High Court was right in

drawing adverse inference against the plaintiff on this aspect.

In **Iswar Bhai C. Patel @ Bachu Bhai Patel Vs. Harihar Behera & Anr.** 1999 (3) SCC 457, the appellant did not enter the witness-box to deny on oath. The statement of defendant/respondent No.2 that it was at the instance of the appellant that he had advanced a amount of Rs 7,000/- to the appellant by issuing a cheque on the account of respondent No.1. The Court was of the view that the appellant having not entered the witness box and having not presented himself for cross-examination, an adverse presumption has to be drawn against him on the basis of the principles contained in Illustration (g) of Section 114 of Evidence Act.

No explanation has been given by defendant No. 1 for not producing Mr Vishesh Jain in the witness box. It can, therefore, be presumed that had Mr Vishesh Jain been produced in the witness box he would not have supported the case of defendant No. 1 in this regard.

7. Ex.PW1/18 is the copy of the letters dated 20th November, 1995, sent by the plaintiff-company to defendant No. 1. It is subsequently stated in this letter that the

plaintiff had supplied only 7000 litre of goods to the defendant No. 1 against its assurance to lift 60,000 litre of goods during November, 1995, thereby leaving a shortfall of 56,000 litres. This letter was sent vide Courier Receipt Ex.PW-1/19. Ex.PW-1/20 is the letter dated 29th November, 1995 from the plaintiff-company to defendant No. 1 which purports to have been delivered by hand on 29th November, 1995 and bears the stamp of defendant No. 1. Vide this letter, the plaintiff sought billing instructions for the balance 5,000 liters supplied to defendant No. 1 and also sought dispatch instructions for the balance 53,000 litres to be supplied, during November and 40,000 litre to be supplied during December. This is not the case of the defendant that Ex.PW-1/20 does not bear stamp of defendant No. 1. In his affidavit, Mr R.K. Gupta did not claim that the signature and stamp on this letter have been forged by the plaintiff-company. Ex.P-1/21 is the letter dated 23rd December, 1995 sent by the plaintiff-company to defendant No. 1, referring to the telephonic discussion, wherein the plaintiff had requested defendant No. 1 to place further order for 93,000 litre, enclosing therewith invoice No. 655 for supply of 5,000 litre of goods and informing that

2000 litre of goods had already been billed on Paramount Pesticide Pvt. Ltd., Meerut as per the advice of the plaintiff. This letter was sent by registered post vide postal receipt Ex.PW-1/22 and the AD card bearing the stamp of defendant No. 1 is Ex. PW.1/23. Section 27 of General Clauses Act gives rise to presumption that service of notice has been effected when it is sent to the correct address by registered post. Similar presumption can be raised under Section 114 (e) of Evidence Act, once it is proved that a letter by registered post was sent at the correct address of the addressee and the registered envelope is not received back unserved, a statutory presumption of service on the addressee arises. Therefore, even if the AD card filed by the plaintiff is excluded from consideration, the service of this letter stands proved on account of the letter having been sent by registered post at the correct address of defendant No. 1-company.

8. Moreover, no evidence has been led by defendant No.1 to prove that the stamp on the AD Ex.PW-1/23 is not of defendant No. 1-company and/or the signature and stamp on this document have been forged by the plaintiff-company. No such claim was made by Mr R.K. Gupta in his

affidavit by way of evidence and no other witness has been produced by the defendant. Had the plaintiff not supplied 7000 litres of goods, defendant No. 1 would not have remained silent to the averments made in this regard in the letters Ex.PW-1/19 PW-1/20 and PW-1/21 and would have definitely controverted the same by writing to the plaintiff-company, immediately of receipt of these letters, that no material at all had been supplied to it. Failure of defendant No. 1 to controvert the averment made in the letters in this regard indicates that these goods were actually supplied to defendant No. 1 and the plea taken by the defendants in this regard are false. The plaintiff-company, therefore, is entitled to recover the balance price of that 7000 litre goods, but only from defendant No.1. The balance amount, payable towards price of 7000 litre of goods, after deducting Rs 4 lakhs paid to the plaintiff-company, comes to Rs 91152/-. The issue is decided against accordingly.

Issues No. 4, 6 & 7

9. A perusal of Ex.PW-1/3 which is the letter of the plaintiff-company dated 19th October, 1995, Ex.P-1/D1 & D-4, which is the letter of defendant No. 1 dated 20th October, 1995, Ex.PW-1/4, which is the letter of the

plaintiff-company dated 21st October, 1995, Ex.P-2/D1 & D4, which is the letter of defendant No. 1 dated 26th October, 1995, discloses the following terms agreed between the parties:

- (a) The total quantity agreed to be purchased by defendant No. 1 was 1 lakh litres;
- (b) The agreed price as per letter Ex.PW-1/3 was Rs 96.80 per litre + 2% local tax/CST Form in lieu of the sale. The rate given in the letter of defendant No. 1 is Rs 88 per litre + excise, which I am informed comes to Rs 96.80 per litre only;
- (c) 10,000 litres of the material was to be supplied by the eve of Diwali, 1995;
- (d) The supplies were to be completed by 15th December, 1995; 60,000 litres were to be supplied up to 30th November and the balance quantity in December, 1995, and were to be made at regular intervals, maintaining proper ratio.
- (e) In case of either non-supply on the part of the plaintiff or non-lifting of goods on the part of

defendant No. 1, a sum of Rs 20 per litre was agreed to be paid as compensation by the party in default.

10. Ex.P-4/D1&D4 is the letter dated 14th November, 1995, written by defendant No. 1 to the plaintiff-company, enclosing therewith a circular issued by M/s Parijat Agencies Pvt. Ltd and seeking review of the matter on account of market conditions being bad and season having been miserably failed. Ex.P-5/D1&D4 is the letter dated 17th November, 1995 written by defendant No. 1 to the plaintiff-company, referring to the earlier letter dated 14th November, 1995 (Ex.P-4/D1&D4) and regretting that the season had miserably failed and therefore, the market had crashed. It was stated in this letter that since there was no lifting and no finances in the market, defendant No. 1 was not in a position to make any commitment for lifting or to make financial arrangements. Defendant No. 1-company expressed its inability to pursue the matter in the circumstances and requested the plaintiff-company to make

some alternative arrangement. In view of these letters, it cannot be disputed that defendant No.1-company had refused to accept any further delivery from the plaintiff-company and, thereby committed breach of contract to purchase one lakh litre of goods from the plaintiff-company.

In its letter dated 20th November, 1995 (Ex.PW-1/18), the plaintiff-company informed defendant No. 1 that on account of firm written confirmation from it they had already procured 40 M.T. of 2, 4-D Ethyl Ester technical Remix/Acromax and also liquid Emulsifiers costing approximately Rs 83 lakhs and defendant No. 1's failure to lift the material would put them to a great loss. Vide letter dated 21st November, 1995 (Ex.PW-1/20), the plaintiff again sought instructions for dispatch of remaining 93 litre of goods. These letters indicate that the plaintiff-company had obtained the necessary raw material and was in a position to supply the remaining 93,000 litre of goods to defendant No. 1.

11. In his affidavit by way of evidence, Mr Ashok Dugar, Director of the plaintiff-company, has specifically stated that the plaintiff duly made all arrangements and procured all the raw-material, consisting mainly of 2,4-D

Ethyl Ester Technical and required stabilizers, solvents and drums etc. at a considerable cost. According to him, the plaintiff purchased a total quantity of 60 MT of 2,4-D Ethyl Ester Technical at the relevant time which also included 39 MT of 2,4-D Ethyl Ester Technical required for formulation of one lakh litres of the said goods. The said 39 Mt was procured at a landed cost of Rs 73,61,250/-. He has further stated that the plaintiff had also procured other emulsifiers, drums, solvents, etc. at an approximate value of Rs 15,00,000/- in order to fulfil its obligations in supplying one lakh litres of the said goods to the defendants 1 and 4. He has also referred in his evidence to Ex.PW-1/6 to 15, which are the invoices by the Atul Products Ltd. on the plaintiff, during August, 1995 to November, 1995 towards supply of 2,4-D, Ethyl Ester Technical.

12. The learned counsel for the defendant has objected to the invoices being read in evidence on the ground that they have not been proved in accordance with law as the person, who procured the invoices, has not been produced in the witness-box. In support of his contention that mere putting exhibit marks on the document does not by *ipso facto* amount to proof of the document. The learned counsel

for the defendant has referred to decisions of **Sait Tarajee Khimchand And Ors. vs Yelamarti Satyam Alias Satteyya And Ors.**, *AIR 1971 SC 1865* and **Narbada Devi Gupta vs Birendra Kumar Jaiswal And Anr.** *AIR 2004 SC 175*.

13. Even if these invoices are excluded from consideration, the deposition of PW-1, read along with letters sent by the plaintiff-company to defendant No. 1-company, clearly shows that the plaintiff-company had procured the requisite raw-material for supply of one lakh litre of the material to defendant No. 1-company. Vide letter dated 20th November, 1995 (Ex.PW-1/18) in response to defendant No.1's letter dated 17th November, 1995, the plaintiff-company informed it that on their firm written confirmation, it had already procured 40 M.T. of 2, 4-D Ethyl Ester technical Remix/Acromax and also liquid Emulsifiers costing approximately Rs 83 lakhs and their declining to lift the material when the goods were ready for dispatch was not only against business ethics, but will also put the plaintiff to a great loss. Defendant No. 1-company was requested to make balance payment so as to enable the

plaintiff-company to deliver the balance quantity of 53,000 litres which was to be delivered in November, 1995 and to make necessary arrangement for further 40,000 litres which was to be supplied during December 1995. There was no response from defendant No. 1 to this letter. Vide letter dated 29th November, 1995 (Ex.PW-1/20), the plaintiff again requested defendant No. 1 to send dispatch instructions for the balance 53000 litres to be supplied during November and 40,000 litres to be supplied during December so as to enable it to arrange immediate supply from Jaipur plant. Again, there was no response from defendant No.1. These letters, coupled with the deposition of PW-1 Ashok Dugar, are sufficient to prove that the plaintiff-company had either produced the remaining 93000 litres of the finished product or at least 53000 litre which was the balance quantity to be supplied in November, 1995 or it had at least procured the necessary raw material and was ready to supply those goods to defendant No. 1-company immediately on receiving dispatch instructions and requisite payment from it. Even otherwise, it is difficult to say that the plaintiff-company would not have procured raw material even up to 17th November, 1995, when it had to supply 600 litres of

material during November, 1995 and 40,000 of material during December, 1995. The plaintiff-company had agreed to pay liquidated damages at the rate of Rs 20 per litre in case of its failure to supply the goods, within the agreed time. Therefore, it would not have taken the risk of paying those damages to defendant No.1-company and, therefore, must have procured the necessary raw material for this purpose.

14. It was contended by the learned counsel for the defendants that even if there was breach of contract on behalf of defendant No.1 and despite the contract between the parties providing for payment of liquidated damages in case of breach of contract on the part of either party, the plaintiff-company is not entitled to damages since there was no proof of any damages having been actually suffered by it. In support of his contention, he has relied upon the decision of Supreme Court in **Fateh Chand vs. Balkishan Dass**, AIR 1963 SC 1405, **Maula Bux vs. UOI** AIR 1970 SC 1955 and **Gopal Krishnaji vs. Mohamed. Haji**, AIR 1968 SC 1413. The learned Counsel for the plaintiff on the other hand contended that since the contract between the parties stipulated payment of liquidated damages which was a bona

fide and genuine pre-estimate of the loss which the plaintiff company was likely to suffer because of breach of contract on the part of the defendant, it was not necessary for the plaintiff company to prove the actual damages and it is entitled to recover the liquidated damages at the rate stipulated in the contract. In support of his contention that the plaintiff-company is entitled to damages at the agreed rate of Rs 20 per litre, the learned Counsel for the plaintiff has relied upon **BSNL vs. Reliance Communication Ltd.** (2011) 1 SCC 394 and **ONGC vs. Saw Pipes Ltd** AIR 2003 SC 2629.

15. In the case of **Fateh Chand** (supra), the agreement for sale of the suit property provided that if the vendee fails to get the sale deed registered by 1st June, 1949, a sum of Rs 25,000/- which he had paid to the vendor, shall be deemed to be forfeited and the agreement cancelled. Alleging that the agreement was rescinded, on account of default on the part of the defendant and the amount of Rs 25,000/- paid by him had been forfeited, the plaintiff filed a suit for recovery of possession of the suit property which he had delivered to the vendee. Referring to Section 74 of Indian Contract Act, Supreme Court, *inter alia*, observed as

under:

“The measure of damages in the case of breach of a stipulation by way of penalty is by s. 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damages"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.” (emphasis supplied)

16. In the case of **Maula Bux** (supra), the contract between the plaintiff and defendant-Union of India provided for forfeiture of the security deposit in case of rescission of

the contract. Government of India rescinded the contracts and forfeited the amount which the plaintiff had deposited with it. A suit for recovery of Rs 20,000/- was the filed by the plaintiff against Union of India. The suit was dismissed by the Trial Court, holding that though the Government of India was justified in rescinding the contract, they could not have forfeited the amount of deposit as they had not suffered any loss in consequence of the default committed by the plaintiff. The High Court, however, awarded a sum of Rs 416.25 to the plaintiff along with interest. The High Court, in awarding the aforesaid sum to the plaintiff, took into consideration the decision of Supreme Court in the case of **Fateh Chand** (supra), but felt that the aforesaid judgment did not purport to overrule the previous trend of authorities to the effect that earnest money deposited by way of security for due performance of a contract does not constitute penalty contemplated under Section 74 of Indian Contract Act and even if it was held otherwise, the Government was entitled to receive from the plaintiff reasonable compensation not exceeding that amount, whether or not actual damage was proved to have been caused.

17. Setting aside the order of High Court and restoring that of the Trial Court, the Supreme Court, inter alia, observed as under:

“Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty.....

.....It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree, and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression "whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him.....

.....In the present case, it was possible for the Government of India to lead evidence to prove the rates at which potatoes, poultry, eggs and fish were purchased by them when the plaintiff failed to deliver "regularly and fully" the quantities stipulated under the terms of the contracts and after the contracts were terminated. They could have proved the rates at which they had to be purchased and also the other incidental charges incurred by them in procuring the goods contracted for. But no such attempt was made."

In **Saw Pipes Ltd** (supra), the respondent offered to supply casing pipes to the appellant, who accepted the offer and issued a detailed order containing terms and conditions of which the goods were to be supplied on or before 14th November, 1996. The contract provided for payment of liquidity damages to the appellant. After referring to Sections 73 and 74 of the Contract Act, Supreme Court, inter alia, observed as under:

"Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This Section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia [relevant for the present case] provides that when a contract has been broken, if a sum is named in the contract as the

amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach. Take for illustration: if the parties have agreed to purchase cotton bales and the same were only to be kept as a stock-in-trade. Such bales are not delivered on the due date and thereafter the bales are delivered beyond the stipulated time, hence there is breach of the contract. Question which would arise for consideration is--whether by such breach party has suffered any loss. If the price of cotton bales fluctuated during that time, loss or gain could easily be proved. But if cotton bales are to be

purchased for manufacturing yarn,
consideration would be different
(emphasis supplied)

....Take for illustration construction of a road or a bridge. If there is delay in completing the construction of road or bridge within stipulated time, then it would be difficult to prove how much loss is suffered by the Society/State. Similarly in the present case, delay took place in deployment of rigs and on that basis actual production of gas from platform B-121 had to be changed. It is undoubtedly true that the witness has stated that redeployment plan was made keeping in mind several constraints including shortage of casing pipes. Arbitral Tribunal, therefore, took into consideration the aforesaid statement volunteered by the witness that shortage of casing pipes was only one of the several reasons and not the only reason which led to change in deployment of plan or redeployment of rigs Trident-II platform B-121. In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provisions of Section 73 and 74 of the Indian Contract Act. There was nothing on record that compensation contemplated by the parties was in any way unreasonable.”

In para 69 of the judgment, the Court, *inter alia*, concluded as under:

“(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same;

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the Court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, Court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.”

In **BSNL** (supra), the contract between the parties provided for payment of liquidity damages to the appellant. On the question as to whether a sum named in the contract is a pre-estimate of reasonable compensation for the loss or by way of penalty, Supreme Court referred to the following extract from Law of Contract (10th Edn.):

“a payment stipulated as in terrorem of the offending party to force him to perform the contract. If, on the other hand, the clause is an attempt to estimate in advance the loss which will result from the breach, it is a liquidated damages clause. The question whether a clause is penal or pre-estimate of damages depends on its construction and on the surrounding circumstances at the time of entering into the contract”.

As regards the liquidity damages, the Court observed as under:

“Lastly, it may be noted that liquidated damages serve the useful purpose of avoiding litigation and promoting commercial certainty and, therefore, the court should not be astute to categorize as penalties the clauses described as liquidated damages. This principle is relevant to regulatory regimes. It is important to bear in mind that while categorizing damages as "penal" or "liquidated damages", one must keep in mind the concept of pricing of these

contracts and the level playing field provided to the operators because it is on costing and pricing that the loss to BSNL is measured and, therefore, all calls during the relevant period have to be seen.”

18. It would be appropriate to notice here that in the case of **Maula Bux vs. UOI** (supra) the contract between the parties was for supply of goods to the government and therefore loss of the government on account of non-supply of the goods could have been easily proved by the government as was also noted by Supreme Court. In **ONGC vs. Saw Pipes Ltd** (supra) the contract pertained to supply of pipes required for deployment of rigs which were to be used for production of gas and the plan for redeployment and a revised plan had to be made for deployment of rigs on account of various constraints including shortage of casing pipes which were to be supplied by Saw Pipes Ltd. and shortage of casing pipes being only one of the several reasons leading to delay in deployment of rigs, the actual damages on account of delay in supply of casing pipes could not have been ascertained by the Court. In **BSNL vs. Reliance Communication Ltd.** (supra), there was an interconnection agreement between the parties which

provided for payment of liquidated damages and considering that the telecom services in India are operating under regulatory regime where all service providers are to be afforded level playing field. The Court was of the view that the compensation claimed by BSNL was pre-estimate of damages and was not penal in nature.

19. In **Shiva Jute Baling Ltd vs. Hindley and Company Ltd**, AIR 1959 SC 1357, the appellant company entered into a contract with the respondent company for supply of 500 bales of jute. The contract provided that in the event of default of tender or delivery, the seller shall pay to the buyer as and for liquidated damages, Rs 10 per ton plus the excess (if any) of the market value over the contract price, the market value being that of jute contracted for on the day following the date of default. On the appellant taking the stand that the contract had stood cancelled, the respondent claimed default on the part of the appellant and the matter was referred for arbitration. Upholding the compensation awarded by the Arbitrator in terms of the contract between the parties, Supreme Court, inter alia, observed as under:-

“The argument under this head is that the liquidated damages provided under clause (12) of the contract include not only the difference between the contract price and the market price on the date of default but also a further sum of 10s. per ton. Reference in this connection is made to Sections 73 and 74 of the Indian Contract Act, and it is said that the extra amount of 10s. per ton included in the sum of liquidated damages is against the provision of these section and therefore the award being against the law of India is bad on the face of it and should not be enforced in India. Section 73 provides for compensation for loss or damage caused by breach of contract. It lays down that when a contract has been broken, the party who suffers by such breach is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Section 74 provides for breach of contract where penalty is stipulated for or a sum is named and lays down that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for. What clause (12) of the contract provides in this case is the

measure of liquidated damages and that consists of two things, namely, (i) the difference between the contract price and the market price on the date default and (ii) an addition of 10s. per ton above that. There is nothing in s. 73 or s. 74 of the contract Act, which makes the award of such liquidated damages illegal. Assuming that the case is covered by s. 74, it is provided therein that reasonable compensation may be awarded for breach of contract subject to the maximum amount named in the contract. What the arbitrators have done is to award the maximum amount named in the contract. If the appellant wanted to challenge the reasonableness of that provision in clause (12) it should have appeared before the arbitrators and represented its case. It cannot now be heard to say that simply because clause (12) provided for a further sum of 10s. per ton over and above the difference between the contract price and the market price on the date of the default, this was per se unreasonable and was therefore bad accordingly to the law of India as laid down in Sections 73 and 74 of the Contract Act. Both these sections provide for reasonable compensation and s. 74 contemplates that the maximum reasonable compensation may be the amount which may be named in the contract. In this case the arbitrators have awarded the maximum amount so named and nothing more. Their award in the circumstances cannot be said to be bad on the face of it, nor can it be said to be against the law of India as contained in these sections of the Contract Act.”

20. The propositions of law which emerge from the statutory provisions contained in Section 73 & 74 of the Indian Contract Act when examined in the light of a cumulative reading of aforesaid decisions of Supreme Court can be summarized as under:

- a) If a party to the contract commits breach of the contract, the party who suffers loss/damage on account of such breach is entitled to receive such compensation from the party in breach of the contract which naturally arose in usual course of business, on account of such breach or which the parties to the contract knew, at the time of making the contract, to be likely to result on account of its breach. However, the party suffering on account of the breach is entitled to recover only such loss or damage which arose directly and is not entitled to damages which can be said to be remote.
- b) In case the agreement between the parties provides for payment of liquidated damages, the party suffering on account of breach of the contract even if it does not prove the actual loss/damage suffered by it, is entitled to reasonable damages unless it is proved that no loss

or damage was caused on account of breach of the contract. In such a case, the amount of reasonable damages cannot exceed the amount of liquidated damages stipulated in the contract.

Any other interpretation would render the words “whether or not actual damage or loss is proved to have been caused thereby” appearing in Section 74 of the Indian Contract Act absolutely redundant and therefore the Court needs to eschew such an interpretation.

- c) If the amount stipulated in the contract, for payment by party in breach of the contract, to the party suffering on account of breach of the contract is shown to be by way of penalty, the party suffering on account of the breach is entitled only to a reasonable compensation and not the amount stipulated in the contract. If it is shown by the party in breach of the contract that no loss or damage was suffered by the other party on account of breach of the contract, the party in breach of the contract is not liable to pay any amount as compensation to the other party.

d) If the nature of the contract between the parties is such that it is not reasonably possibly to assess the damages suffered on account of breach of the contract, the amount stipulated in the contract, for payment by the party in breach should normally be accepted as a fair and reasonable pre-estimate of damages likely to be suffered on account of breach of the contract and should be awarded.

21. In the case before this Court, though the plaintiff company has not proved the actual damages suffered by it on account of breach of contract by defendant No.1 company it cannot be disputed that some loss or damage was definitely suffered by the plaintiff company on account of the breach. No evidence has been led by defendant No.1 to prove that either on account of increase in price of raw material/finished goods or for some other reason the plaintiff company did not suffer any loss on account of the failure of defendant No.1 to lift the balance quantity of 93,000 litres. As noted earlier, the facts and the circumstances of the case including the letters written by the plaintiff company to defendant No.1 from time to time, coupled with the deposition of PW-1 Shri Ashok Dugar,

clearly show that the plaintiff company had either procured the requisite raw material or had produced the finished product, may be to the extent of 53,000 litres if not 93,000 litres. Vide its letter dated 21st October, 1995 (Exh. PW-1/4) plaintiff company had written to defendant No.1 that since the product agreed to be supplied to it was required for application in wheat crop in north India and if it is not disposed then, it will have to be stocked for next year and therefore, there should not be any doubt left about their lifting the entire quantity. The plaintiff company went to the extent of requesting defendant No.1 company to re-assess and let it know if defendant wished them to reduce any quantity. In its reply dated 26.10.1995 Exh. (P-2 D1 and D4) defendant No.1 did not dispute that if the contract goods were not lifted by it, the plaintiff company would have to carry the same for one year. In its letter dated 17.11.1995 (Exh. P-5 D1 & D4) which is an admitted document, defendant No.1 company itself informed the plaintiff company that the season had miserably failed, the market had crashed and therefore they were not in a position to make any commitment for lifting or making financial arrangement. Therefore it cannot be disputed

that the goods agreed to be sold by the plaintiff to defendant No.1 were seasonal in nature and if they were not sold by December, 1995 the plaintiff company had necessarily to carry the inventory upto next season. If the plaintiff company did not manufacture any goods other than 7000 litres supplied by it to defendant No.1, it would have stored the raw material procured by it till next season when it would have utilized it for manufacturing the finished product. The plaintiff company in such a case, suffered damages on account of interest which it paid or it could have earned on the amount paid for procurement of raw material and would also have incurred cost in storing that raw material for about one year. If the plaintiff company had manufactured the remaining 93,000 litres of finished product, it was deprived of use of the money which defendant No.1 company would have paid to it in case it had not committed breach of the contract and thereby it incurred loss of interest on the amount which it would have received from defendant No.1 company besides incurring expenditure on storage of finished products. If the plaintiff company partly manufactured the finished product and had to store them upto the next year along with the raw material

required for production of the remaining quantity of the finished product, the plaintiff company suffered a loss on account of expenditure incurred in storage of the finished product and raw material besides loss of interest on the amount paid by it for the raw material. Even if I take a conservative interest @ 12% p.a. the plaintiff company would have suffered loss of about Rs.10 per litre besides the expenditure incurred on storage of raw material/finished product for about one year. In these circumstances, it can hardly be disputed that the plaintiff company is entitled to recover at least Rs.10 per litre from defendant No.1 company by way of damages for the loss suffered by it due to breach of contract on the part of defendant No.1 company.

22. It was contended by the learned Counsel for the defendants that it was incumbent upon the plaintiff company to make efforts to mitigate the losses and no evidence has been produced to prove any such effort. In support of his contention he has relied upon **Pannalal Jugatmal vs. State of Madhya Pradesh AIR 1963 MP 242** and **Firm Bhagwandas Shobhala Jain, a Registered Fir, and Anr. vs. State fo Madhya Pradesh AIR 1966 MP 95.**

In the case of **Pannalal** (supra) the Court was concerned with a case attracting Section 73 of the Indian Contract Act and not a case to which the provisions of Section 74 of the Indian Contract Act applied. During the course of the judgment the Court referring to Section 73 of the Indian Contract Act observed as under:

14. Now, the rule is that damages are compensatory and no penal and that one who has suffered loss from breach of contract must take every reasonable step that is available to him to mitigate the extent of damages caused by the breach. He cannot claim to be compensated by the party in default for loss which is really due not to the breach but to his own failure to behave reasonably after the breach. This rule is incorporated in the explanation to Section 73 of the Contract Act.

In case of **Bhagwandas** (Supra) which again was a case attracting applicability of Section 73 of the Indian Contract Act, the Court inter alia observed as under:

33. It has also to be remembered that the law imposes a duty upon the plaintiffs to take all reasonable steps to mitigate the loss caused by a breach of contract and debars him from claiming compensation for any part of the

*damages which is due to his neglect to do
so;.....*

However, in the case before this Court since admittedly the goods were seasonal in nature and therefore could not have been disposed of till next year, it cannot be said that the plaintiff company could have disposed them of soon after there was breach of contract on the part of defendant No.1. Moreover, since the market had crashed and there were no buyers in the market for the product as is evident from the letter written by defendant No.1 to the plaintiff on 17.11.1995, the plaintiff company would not have been in a position to sell the goods manufactured by it on the instructions of defendant No.1 company at a remunerative price. Even if the plaintiff company had not manufactured the finished goods, it would not have been possible for it to sell the raw material procured by it, at the same price at which it was procured. The raw material meant for manufacture of seasonal goods could not have fetched a ready buyer at the cost price of the plaintiff company, in case it could not have been consumed for about a year.

Since there was no breach of contract on the part of the plaintiff, defendant no.1 is not entitled to recover any amount from it and the counter claim is therefore liable to be dismissed. The plaintiff company on the other hand is entitled to recover a sum of Rs.9,30,000/- though only from defendant No.1 company as damages @ Rs.10 per litre. The issues are decided accordingly.

Issue No. 8

23. In view of my findings above, I hold that defendant No.1 is not entitled to any interest from the plaintiff.

Issue No. 9

24. The plaintiff has claimed interest @ 18% p.a. on the price of 7000 litres of the finished product which it had supplied to defendant No.1 company. No agreement between the parties for payment of interest has either been pleaded or proved by the plaintiff. However, since this is a suit for price of goods sold and delivered, interest can be awarded to the plaintiff under Section 61(2) of the Sales of Goods Act. Considering the nature of transaction between the parties, I am of the view that interest should be awarded to the plaintiff company @ 12% p.a. Calculated on the aforesaid rate, the amount of interest comes to Rs.93,008/-.

The plaintiff is entitled to recover the aforesaid amount from defendant No.1 as interest. The issue is decided accordingly.

Relief

25. In view of my findings on other issues defendant No.1 is not entitled to recover any amount from the plaintiff. The plaintiff however, is entitled to recover a total sum of Rs.11,14,160/-from defendant No.1 company alone.

ORDER

For the reasons given in the preceding paragraphs a decree of Rs.11,14,160/- with proportionate costs and pendent lite and future interest @ 12% p.a. is hereby passed in favour of plaintiff and against defendant No.1. The suit against the other defendants is dismissed without any order as to costs.

Decree sheet be prepared accordingly.

(V.K. JAIN)
JUDGE

MAY 13, 2011
bg/vn