

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

% Date of Decision: 04.07.2012

+ **OMP No.46/2001**

M/s. Jyoti Sarup Mittal ... Petitioner

versus

M/s. Abhiyan Cooperative Group ... Respondents
Housing Society Ltd. & Anr.

Advocates who appeared in this case:

For the Petitioner : Mr. Harish Malhotra Sr. Advocate with Mr. Rajender Aggarwal, Advocate

For Respondents : Mr. Bishwajit Bhattacharya, Sr. Advocate with Mr. Chandrachud Bhattacharya, Advocate

CORAM:
HON'BLE MR. JUSTICE ANIL KUMAR

ANIL KUMAR, J.

1. This order will dispose of the objections filed by the petitioner M/s. Jyoti Sarup Mittal under Section 34 read with Section 16 of the Arbitration & Conciliation Act, 1996 to the award dated 3rd January, 2001 made and published by Sh. S. C. Kapoor, the arbitrator, respondent No. 2.

2. Relevant facts for the adjudication of the objections are that the petitioner is a registered partnership, registered with the CPWD as Class-I Contractors and also registered with the Registrar of Firms vide Registration No. 579/93. Respondent No. 1 is a Society that had awarded the work of construction of Group Housing project on plot

No.15, Sector 12, Dwarka, Phase-I, Delhi on 19th March, 1996 for an amount of Rs.5,70,26,721/- pursuant to an agreement dated 28th June, 1996 entered between the petitioner and respondent No.1.

3. The agreement entered between the parties contemplated that the work of the construction of Group Housing will be completed by the contractor/ petitioner within 24 months commencing from 19th March, 1996. The letter dated 19th March, 1996 awarding the construction of Group Housing also contemplated that the estimated value of the contract will be subject to the measurement of actual work done and shall be subject to the conditions of the said contract. As per the terms of the agreement dated 19th March, 1996 it was also agreed that in addition to the tendered documents, the following letters/documents and clarification would also form a part of the agreement which are as under:-

(i) Your quoted rates for alternative items in respective scheduled for quantities and those submitted vide letter No.JSM/12/95/60P/5093 dated 18.12.1995.

(ii) Architects letter No.AAPL/95/ NIL dated 12.12.1995 alongwith tender documents and tender drawings.

(iii) Your letter No.JSM/12/95/60P/5093 dated 18.12.1995.

(iv) Your amended commercial and technical conditions contained in letter No.JSM/12/95/60P/5120 dated 28.12.1995.

(v) Your letter No.JSM/01/96/60T/46 dated 22.01.1996 offering 1% additional rebate after negotiations and last

letter No.JSM/01/96/60T/51 dated 23.01.1996 offering a special 0.25% rebate.

(vi) This office letter No.JSM/96/001 dated 19.3.1996.

(i) The Contractor shall furnish within a period of 15 days from the date of issue of this letter a bank guarantee bond on a Nationalised Bank for a sum of Rs.5.0 Lacs (Rupees Five Lacs) only as performance guarantee as per proforma Annexure.

(ii) The validity of the bank guarantee should cover the entire contract period plus twelve months for defects liability period.

(iii) The retention money shall be deducted @ 5% of gross value of work done from each bill subject to maximum of Rupees Ten Lacs only.

(iv) Escalation and Variation shall be paid as per tender.

(v) You shall arrange insurance cover at your expenses within a period of one month from the date of issue of this letter as per clause 3.7 of the tender documents.”

4. The petitioner was required to submit a detailed work programme within a fortnight showing weekly, fortnightly and monthly programme. The letter categorically stipulated that the time will be the essence of the contract. The parties also agreed that for compensation for delay (liquidated damages) referred under Clause 8.2 at page 51 of the contract at serial No.k of the appendix would form part of the contract. Clause 8.2 of the agreement is as under:-

8.2 Compensation for Delay/Liquidated Damages

8.2.1 The time allowed for carrying out the work is entered in the contract shall be strictly observed by the Contractor and shall be deemed to be the essence of the contract. The work shall throughout the stipulated period of the contract

be proceeded with all due diligence. The Architect shall monitor the progress of the work as per Bar Chart/CPM Chart. The contractor is bound to complete in terms of value of work actually executing not less than $1/8^{\text{th}}$ of the total value of work before $1/4^{\text{th}}$ of total time allowed for completion of the entire work, not less than $3/8^{\text{th}}$ of total value of work before $1/2$ of the total time allowed for completion of the entire work, not less than $3/4^{\text{th}}$ of total value of work before $3/4^{\text{th}}$ of the total time allowed for completion of the entire work.

8.2.2 For failure on the part of the Contractor to ensure adequate progress of the work during its execution as stipulated herein and above and/or to complete the entire work within the stipulated period notwithstanding any other remedies available to the employer under this contract, the contractor shall be liable to pay to the Employer as compensation for delay, an amount equal to $1/2$ % (half percent) of the contract value or (such amount as the Architect may decide) for every week or part thereof of the delay in completion of the proportionate work as stipulated hereinabove in the completion of the entire work, subject to a maximum of 5.0% (five percent) of the contract value. The non-levy of the compensation of any particular stage and/or on any particular occasion of failure of the contract to adhere to the time schedule stipulated hereinabove, shall not be a waiver. The compensation leviable under this clause shall be recoverable at any subsequent date and/or any subsequent failure of the contractor.

The total compensation for delay shall further be subject to an overall maximum of 10% of the contract amount as awarded. In case the liquidated damages in accordance with the above provision accurate to a maximum amount of 10% of the contract amount the owner shall be at liberty to rescind the contract and to get it completed by any agency it decides to appoint. All extra expenses incurred shall be recoverable from any money due to the Contractor or laying to his credit with the owner.”

5. The petitioner asserted that in order to complete the entire work within the time agreed with respondent No.1, he had allegedly made all the necessary and adequate arrangements of labor, materials, machinery and establishment including supervisory and technical staff.

6. The petitioner further asserted that though he performed his part of the agreement, however, right from the beginning, the progress of the work suffered due to many breaches on the part of the respondent no.1 which included the non issuance of the Architectural and structural drawings in time; delay in award of electrical work; non issuance of cement and steel; non-payment of monthly bills; indecisions regarding many items including Champ Wood etc. which led to a delay in the completion of work which according to petitioner was finally completed on 30th March, 2000.

7. According to the petitioner he suffered huge financial losses on account of the delay in work which were also intimated to respondent No.1 repeatedly. The petitioner also intimated the reasons for the delay and financial loss by letter dated 29th April, 1998.

8. The petitioner alleged that in order to negate their liability for delay, respondent No.1 started claiming damages and by letter dated 18th June, 1998 referred various issues to the architect. The issues which were referred to the architect for his decision were whether

respondent No.1 has delayed the payment; whether the petitioner had employed the engineers or not; whether refusal of extension by respondent No.1 was right or wrong; whether labor and machinery deployed by the petitioner were adequate; whether there was breakdown of machinery; who had to issue steel and cement and whether the decision regarding Champ wood was delayed by respondent No.1 or not.

9. Though under the agreement certain disputes had to be referred to the architect, however, according to the petitioner since the architect himself was responsible for delaying the decisions in respect of the execution of the work, the petitioner refused to participate in adjudication of the disputes by the architect. The petitioner alleged that he did not participate before the architect as it was known to the petitioner before hand as to what type and kind of decision the architect would have given on the issues referred to him.

10. The petitioner has also alleged that the issues referred to the architect were not under clause 9.01 of the agreement between the parties. Clause 9.01 of the agreement between the parties is as under:-

9.01 All dispute/s and differences of any kind whatsoever arising out of or in connection with the contract or in carrying out of the works (whether during the progress of the works or after their completion and whether before or after the determination, abandonment and whether before or after the determination abandonment or breach of the contract shall be referred to and settled by the Architect who shall state his decision in writing. The decision of the Architect with any of the excepted matters shall be final

and without any appeal as stated in the separate clause. But if either the employer or the contractor, is dissatisfied with the decision of the Architect on any matter, question on dispute any kind related to the contract (except any of the excepted matters) or as to the withholding by the Architect of any certificate to which the contract claim to be mentioned then such matters shall be dealt with as mentioned herein under:-

(i) It is a term of this contract that all questions and disputes shall be referred to the sole arbitration of the person appointed by the Employer. The arbitrator so appointed by the Employer shall be Fellow of Indian Institute of Architects or Fellow of Indian Institute of Engineer and non-member of the Abhiyan Cooperative Group Housing Society Ltd. The arbitrator had to deal with the matters to which the contract relates. The arbitrator to whom the matter/s is originally referred being transferred or vacating his office or being unable to act for any reason, the Employer at the time of such transfer, vacation of office or inability to act, shall appoint another person to act as arbitrator in accordance with the terms of the contract such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. The decision of the Arbitrator shall be final and binding on both the parties.

(ii) The either party (the employer or contractor) may within 30 days after receiving notice of such decision of the Architect, give written notice to other party requiring such matters in dispute be arbitrated upon. It is a term of this contract that party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such disputes along with the notice for appointment of arbitrator giving reference to the rejection by the Architect.

(iii) It is also term of Contract that if the Contractor does not make any demand for appointment of Arbitrator in respect of any claims in writing as aforesaid within 90 days of receiving the intimation from the Architect that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the liabilities under the contract in these claims.

(iv) The Arbitration shall be conducted in accordance with the provision of the Indian Arbitration Act, 1940 or any statutory modifications or re-enactment thereof and the

rules made shall apply to the arbitration proceedings under this clause. The arbitrator may from time to time with the consent of the parties enlarge the time for making and publishing the award.

(v) It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by appointing authority and give separate award against each disputes and claim referred to him and in all cases where the total amount of claims by any party exceeds Rs.1,00,000/- the arbitrator shall give reasons for the award.

(vi) It is also a term of this contract that if any fee is payable to the arbitrator this shall be paid equally by both the parties. The fee charged by the Arbitrator shall not be more than the fee prescribed in rules of Indian Council of Arbitration.

(vii) It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date of issues to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitrator shall be such places as may be fixed by the Arbitrator in his sole discretion.”

11. According to the petitioner the issues which were referred to the architect were not financial claims/disputes but were infect a ploy by the respondent No.1 to pre-empt the claims of the petitioner. The petitioner No.1 alleged that he, however, agreed for the adjudication of the issues raised before the architect by some independent arbitrator.

12. The issues referred to before the architect by respondent No.1 Society were decided on 17th October, 1998. The petitioner alleged that all the issues were decided in favour of respondent No.1 except for the

delay of two months on account of delayed decision regarding Ghana Teakwood which was attributed to respondent no.1. The petitioner contended that the delay in deciding about the Ghana Teakwood was actually not 2 months but was 4 months and 5 days which was established from architect's letter dated 30th April, 1998.

13. Thereafter, respondent no.1 appointed Sh.S.C.Kapoor as the sole arbitrator and referred claims to him without informing the petitioner about the claims. The petitioner therefore, contended that respondent No.1 was required to give a notice to the petitioner about the claims referred to the arbitrator, Sh.S.C.Kapoor.

14. Pursuant to the appointment of Sh.S.C.Kapoor as an arbitrator and the respondent No.1 referring his claims on 31st August, 1999, the arbitrator entered upon reference only on 18th September, 1999. The petitioner alleged that he too filed his counter claims on 23rd October, 1999. To the counter claims filed by the petitioner the respondent No.1 Society filed a reply on 21st November, 1999.

15. According to the petitioner before the arbitrator he raised the objection in terms of clause 9.01 of the agreement that the arbitrator could not enter upon the reference without adjudication of the dispute by an architect in terms of the said clause. The petitioner submitted that as the disputes were not referred in the first instance to the

architect, therefore, the arbitrator had no jurisdiction to enter upon the reference. According to the petitioner it was incumbent upon the arbitrator to decide the question of jurisdiction in terms of Section 16 of the Arbitration & Conciliation Act, 1996 before proceeding further with the disputes.

16. Regarding the delay in the completion of the contract awarded to the petitioner, it is asserted that the time was not the essence of the contract, since after the expiry of the original period, no formal extension was granted by respondent No.1. According to the petitioner this had resulted in setting the time at large and, therefore, since respondent no.1 had not decided the fresh date for completion, it is contended that the time was not the essence of the contract. It is also urged that on account of allowing the time to lapse because of faults on the part of respondent No.1 and attributable to him, respondent No.1 is not entitled to claim liquidated damages. The petitioner also alleged that the liquidated damages as claimed by respondent No.1 were otherwise in the nature of penal provision and thus, it could not be claimed by respondent No.1 nor could it be granted by the Arbitrator.

17. The petitioner has further alleged that the arbitrator has given contradictory findings as he has inferred that the time was not made the essence of the contract after stipulated date of completion, however, the arbitrator has still awarded liquidated damages in the nature of

penalty against the petitioner. The petitioner contended that the arbitrator held that the respondent No.1 was responsible for delay of 1 year 10 days and that the petitioner was responsible for the delay of the remaining period. The finding of the arbitrator regarding the delay is as under:-

“Considering all the above facts it is clear that the contractor M/s Jyoti Sarup Mittal have delayed the project at least for twelve months during the period of its contract time i.e. from 19th March, 1996 to 18th March, 1998 out of which two months maximum may be considered which took to finalize and confirm the alternative item of Ghana Teak wood in place of champ wood for door, window frames. Thus the net delay of ten months in completion of the construction of Group Housing Project for Abhiyan Co-operative Group Housing Society Limited, works out on the part of Contractors M/s Jyoti Sarup Mittal.”

18. The petitioner has challenged the remaining delay attributed to him by the Arbitrator, as according to him the remaining delay was also on account of non fulfillment of other requirements by respondent no.1, such as preparation of the bill in quadruplicate, as was required under the agreement; delay in release of payment of bills which was also attributable to respondent No.1. The petitioner claimed that the delay in the release of payments should also have been added for the purpose of considering the aspect of extension without levy of compensation. The petitioner asserted that the factum that the payments were delayed was even admitted by the arbitrator himself and, therefore, the time lost in releasing of the payments which was essential for the contract, should have been considered by the arbitrator in favour of petitioner and thus

the arbitrator has conveniently ignored a very relevant issue which is an error apparent on the face of the record.

19. The petitioner has also challenged the award on the ground that delay was caused due to non award of electrical work. According to the petitioner since the delay was admitted, the same ought to have been attributed to respondent No.1 and not to the petitioner. According to the petitioner the finding of the arbitrator in this aspect is also apparently perverse.

20. The petitioner has further challenged the award of sum of Rs.4,11,840/- in favour of respondent No.1 on account of the delay in procurement of Champ wood, on account of which petitioner had to incur extra expenditure in the use of Ghana Teakwood, against the claim of Rs. 13, 72,800/- made by respondent No.1.

21. The petitioner has also objected to the said award on the ground that the non availability of Champ wood was pursuant to the order of the Supreme Court, as a consequence of which Champ wood had disappeared from the market, since felling of timber in Assam was completely banned. Since procurement of Champ wood also, in the facts and circumstances was not possible. Respondent No.1 had approved the rate of Ghana Teakwood at the rate of Rs.43,700 cubic meter. After agreeing for the said rate respondent No.1 could not have disputed the

same. According to the petitioner this was contrary to Clause 5.13.1 and 5.13.2 of the contract which are as under:-

5.13.1 No alterations, omission or variation shall vitiate this contract but in case the Employer/Architect think proper at any time during the progress of the works to make any alterations in or omission from the works or any alteration in the kind of quality of the materials to be used therein and shall depending upon the feasibility, give notice thereof in writing well in advance under his hand to the Contractor, the contractor shall alter, add to or omit from, as the case may require, in accordance with such notice. The value of such extra alterations, additions or omissions shall in all cases be determined by the Architect and in accordance with the provisions of the clause-5.13.1 thereof and the same shall be added to or deducted from the contract amount accordingly, subject to the condition that the contract sum will not thereby vary on the whole by more than 25%. Additions or omissions of any work or item by the contractor without the approval of the Employer shall not carry any weightage and shall be treated as void.

5.13.2 The Contractor shall within seven days from date of receipt of order to carry out above work or within 7 days of having carried out the above work submit the rates he proposes to claim for such item supported by rate analysis and vouchers to the Architect. After scrutinizing, the Architect shall obtain approval from the owner which the Architect shall inform the Contractor the rates admissible/acceptable for such item. If the Contractor considers any assigned work outside the scope of contract he shall immediately bring it to the notice of Architect with financial implications thereof. He shall proceed with the work after obtaining change order approved,. Any claim for compensation for any cause whatsoever for which there is no provision in the contract shall be made in writing to Architect within two weeks of occurrence of the event due to which compensation is claimed. Any claim not made within the above period shall not be entertained.”

22. The petitioner has also contended that no wood could have been procured unless the sample flat was ready in terms of clause 5.3.1 at

page 77 of the contract and the sample flat was completed in all respect only in the first week of December, 1996 and the payment of the same was made on 7th January, 1997. However, since the approval was made much later, and unless and until it was approved by respondent No.1, the petitioner could not have procured the wood and, therefore, the delay could not be attributed to the petitioner.

23. The petitioner has also objected to the award on the ground that the architect had not determined the issues in the present matter, therefore, the award of the arbitrator is totally against the provisions of the contract. According to the petitioner the liquidated damages computed by the arbitrator in terms of clause 8.2.2 are penal in nature and such penal provisions could not be enforced and thus the arbitrator has misconducted himself as for awarding the liquidated damages the respondent No.1 was liable to prove the loss suffered by respondent No.1. Since there is no evidence about any loss suffered by respondent No.1, the amount as awarded by the arbitrator in terms of clause 8.2.2 is not sustainable and thus the award is liable to be set aside.

24. The learned counsel for the petitioner has also relied on State of Orissa & ors v. Calcutta Company Ltd, AIR 1981 Orissa 206; Nagpur Nagarik Shahakari Bank Ltd & Anr v. Union of India & Anr., AIR 1981 Andhra Pradesh 153; Fateh Chand v. Balkishan Dass, AIR 1963 SC 1405 and Maula Bux v. Union of India, AIR 1970 SC 1955. The

following claims were raised by respondent No.1 against which the amounts specified in the table below had been awarded by the arbitrator:-

Claim No.	Claim of Respondent No.1	Amount claimed (in Rs.)	Amount awarded (in Rs.)
1.	Respondent No.1 claims on account of which the respondents had to incur extra expenditure in use of Ghana Teak Wood.	13,72,000.00	4.11.840.00
2.	Respondent No.1 claims on account of losses suffered by the members of the society due to delay in completion of flats by petitioner(Contractor)	Nil	Clubbed with claim No.4
3.	Respondent No.1 claims on account of employment of two engineers and C.M.C. after 1.4.99 due to delay in completion of project on petitioner (Contractor):	4,32,430.00	Nil
4.	Respondent No.1 claims liquidated damage of date of delay.	57.0 Lakhs	i) 57,02,672.00 ii) No other damages.
5.	Respondent No.1 claims salary of two engineers not employed by the petitioner (contract) as per contract.	Nil	Nil
6.	Respondent No.1 claims on account of cost of facilities to be provided to them by the petitioner as per	60,000.00	Nil

	contractor but were not provided		
7.	Respondent No.1 claims on account of interest @ 18% from petitioner.	79,92,34.00	Respondent No.1 to be paid future interest on Rs.(61,14,512.00-19,39,940.00) = Rs.41,74,572.00 @ 18% per annum with effect from 3.1.2001
8.	Respondent No.1 claims the cost of arbitration from the petitioners	Nil	Nil
9.	Respondent No.1 claims costs in electrical works, work of installation of lifts by the other agencies due to delay by the petitioners.	Nil	Nil
10.	Respondent No.1 claims enforcement of performance guarantee.	Nil	Respondent No.1 is entitled to retain performance Guarantee without paying interest.

25. The counter claims raised by the petitioner before the arbitrator and the amounts awarded by the arbitrator to the petitioner against the respondent no.1 are as under:-

Claim No.	Claim of the Contractor	Amount claimed (in Rs.)	Amount awarded (in Rs.)
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1.	The petitioner's claim on account of profit on the amount incurred for purchasing cement and steel.	23,95,464.00	3,59,320.00
2.	The petitioner's claim on account of interest at 24% on delayed due payments	3,46,600.00	90,412.00
3.	The petitioner's claim on account of escalation on the cost of work executed after the stipulated date of completion i.e. 18.3.1998.	34,84,647.00	6,09,508.00
4.	The petitioner's claim on account of loss of profit.	71,28,340.00	NIL
5.	The petitioner's claim on account of extra for the carrying out item of Grit wash in completed geometrical patterns.	7,54,000.00	3,77,000.00
6.	The petitioner's claim on account of spent to insurance cover/policy beyond stipulated date of completion.	2,17,257.00	1,08,700.00
7.	The petitioner's claim on account of damages.	27,60,000.00	3,95,000.00
8.	The petitioner's claim on account of 24% interest on all the due amounts from the due date of payment.	NIL	NIL
9.	The petitioner's claim on account of against the cost of arbitrator proceedings.	2,00,000.00	NIL

26. The pleas and contentions of the petitioner have been refuted by Respondent No.1 by contending inter alia that clause 8.2.1 of the contract stipulated that the architect shall monitor progress of the work as per the CPM Chart/bar chart. Clause 8.2.2 further enjoined that on

failure on the part of the contractor to adhere to the progress, the petitioner shall be liable to pay to the respondent No.1 compensation for delay and the amount equal to half percent of the contract value per week subject to a maximum of 5% of the overall contract value. According to respondent no.1 since the petitioner refused to get the disputes adjudicated before the Architect, the disputes were referred to the arbitrator and the petitioner cannot object to the same. According to respondent no.1 the arbitrator has awarded liquidated damages subject to 10% of the overall contract value of approximately Rs. 5.7 crores and this cannot be faulted by the petitioner as has been alleged by him. According to the respondent no.1 there is ample evidence in respect of the loss suffered by the respondent no.1 on account of delay in completion of project of construction of flats by the petitioner.

27. Regarding the objection of the petitioner, that the arbitrator had not awarded the liquidated damages but the penalty, respondent No.1 contended that the arbitrator in fact has dealt only with liquidated damages as per Clause 8.2.2 of the contract. The fact that the arbitrator has not awarded the penalty but the liquidated damages is also apparent from the methodology, the procedure and the formulae used by the arbitrator which is contemplated under Clause 8.2.2 of the agreement stipulating award of liquidated damages. The respondent no.1 asserted that though the petitioner had caused a delay of 61 weeks yet as per clause 8.2.2 the liquidated damages were limited for 20

weeks only by the arbitrator. The respondent No.1 emphasized that the use of the word 'penalty' at one place in the award will not change the nature of the liquidated damages awarded by the arbitrator to the petitioner, to that of penalty.

28. The respondent No.1 also contended that the petitioner himself has used the terms "penalty" and "liquidated damages" synonymously and, therefore since the liquidated damages were awarded in terms of Clause 8.2.2 which only contemplates award of liquidated damages and not penalty, the amount awarded by the arbitrator to the respondent no.1 will not become penalty. Reliance was also placed on behalf of respondent no.1 on ONGC v. Saw Pipes, JT 2003(4) SC 171 to contend that if the illegality is of a trivial nature, it cannot be held that the award is against public policy. In the circumstances it is contended that use of the word 'penalty' at one place will not convert the liquidated damages awarded to the respondent No.1 to that of penalty and thus, the award of such liquidated damages cannot be termed as unclear, unreasonable and such that will shock the conscience of the Court. Respondent No.1 also contended that a part of the delay on the part of the contractor, petitioner has been condoned by the arbitrator though respondent No.1 had refused to extend the performance of the contract which is also evidenced by letter dated 28th July, 1998 addressed to the petitioner. According to respondent No.1 even if the respondent no.1 had extended the time, still it is entitled to recover liquidated damages

for delay and the arbitrator has therefore rightly awarded the liquidated damages to the respondent No.1 in the facts and circumstances.

29. The learned counsel for the respondent No.1 has also relied on *Fateh Chand v. Balkishan Dass*, AIR 1963 SC 1405; *M/s.Bharat Heavy Electricals Ltd v. M/s.Globe Hi-Fabs Ltd*, 113(2004) DLT 205; *M/s.Weear Constructive Builders v. Delhi Jal Board*, 112(2004) DLT 613 and *M/s.M.K.Shah Engineers and Contractors v. State of Madhya Pradesh*, AIR 1999 SC 950.

30. This Court has heard the learned counsel for the parties and has also perused the arbitration proceedings and the award. The plea of the petitioner that the arbitrator has committed a jurisdictional error, as he has not decided about his jurisdiction in view of clause 9.01 of the contract is contrary to the record. The arbitrator has considered the objection raised by the petitioner at pages 8 & 9 of his award which is as under:-

"SUBMISSION BY THE CLAIMANTS:

The claimants made similar submission and stated that there should not only have been a dispute in the course of the execution of the contract but that dispute should have been referred to the dispute resolution machinery stipulated in the contract in the first instance, before the Arbitrator could be troubled with it, vide *Hotel Corporation of India v. Motwani* 1990.

(i) Bombay CR 357, copy of which has already been placed before the Arbitrator. The respondents failed to refer the point now raised either before the Society or before

the Architects to whom a reference is specifically required under clause 9.01. It is also important to note that “Interpretation of drawings” and “Interpretation of specifications” do not qualify for arbitration and it is held that the plea of “variation” or “extra work” calls for an interpretation of the relevant drawings or specifications, the so-called counter claim cannot be the subject matter of arbitration under sub-clauses (b) and (c) of clause 9.02 on page 58-59 of the contract.

DECISION BY THE ARBITRATION:

The respondents were first to raise preliminary objection as pointed out above. But if they were keen to follow the condition/clause 9.01 of the contract agreement they should have raised their objection with the Architects to whom the claimants had referred the issues raised by the respondents in the letter No.JSM/04/98/48/284 dated 29.4.1998. The respondents did not cooperate with the Architects and the Claimants society in constructive manner. Instead they doubted the impartiality of the Architects stating that the Architect is a party to the disputes and under the circumstances they would not accept the appointment of Architects as arbitrator. This was a clear violation of sub clause 9.01 of the agreement. The claimants had written to the respondents vide their letter dated 16.7.98 that as per clause 9.01 of the contract agreement, the Architect should in the first instance be asked to resolve all the disputes between the Society and the Contractors and issue suitable decisions. The respondents wanted the disputes to be referred to Arbitration.

After having raised a preliminary objection on the claims of the Claimants Society the respondents themselves raised counter claims most of which were not raised at any stage with the claimants society or the Architect. This gives an impression to me that the respondents are having double talk to create problems rather than solve them in the interest of completion of the project or in speedy resolution of disputes. The respondents had requested for extension of time till 31.10.1998 and had pressed for the appointment of a suitable arbitrator to settle their disputes Ex.C-22.

The claimants also had not formally raised the claims to the Architects, but informally the issues pertaining to

delay, non provision by the respondents the facilities, appointment of regular qualified Engineers, inadequacy of labour etc.

It was the claimants who had raised claims which were not referred to the Architect, and the respondents followed suit. Both the parties did not follow the procedure.

Since, the respondent expressed a view that they had no faith in the impartiality of the Architect, I am, therefore, of view that reference to Arbitration of all the claims pertaining to disputes was the right action legally particularly when both parties, claimants and respondents allowed the hearing and written submission to be presented before me in the face of legal objection. Moreover, all the disputes/claims raised by the claimants and the respondents were before the Architect who expressed his view during hearing clearly which may not have suited the respondents.

I, therefore, in the interest of equity and justice have entered into these claims and counter claims in order to resolve the disputes and give my award."

31. The petitioner has relied on Lalit Kala Akademi v. M/s.Svapan Construction AE+, 121(2005) DLT 495, in support of his contention that since the arbitrator did not decide about its jurisdiction in the first instance, before deciding the claims of the petitioner and the respondent No.1, therefore, the award is liable to be set aside. In the case cited by the petitioner the plea of the Lalit Kala Akademi was that there was no agreement whatsoever executed by the Akademi with M/s.Svapan Construction and thus, clause 45 of the tender document would not, in any way, bind Akademi and, therefore, the arbitration proceedings would not lie in view of the passing of the takeover Act by

the Central Government. Reliance was placed on provision 3(3) of the agreement entered by the earlier management of the Akademi which stood automatically terminated. M/s.Svapan Construction had not challenged the said Act or the termination. It was held that it would not be open to the contractor to enforce only one clause that is clause 45 of its agreement by referring to arbitration. This plea that the arbitrator had no jurisdiction was raised at the beginning of the arbitration proceedings, as Akademi had sent a communication to the arbitrator objecting to the jurisdiction to enter upon reference and to hold the arbitral proceedings. The arbitrator, however, overlooked the basic objection which could be said to be an objection within the meaning of Section 16 of the Arbitration & Conciliation Act, 1996. The arbitrator failed to discharge the obligation in this regard and chose to proceed with the matter without answering the objection raised about the jurisdiction. In these circumstances, it was held that the arbitral Tribunal ought to have considered and answered the same in the first instance before proceeding to decide the claims of the contractor. Consequently the award of the sole arbitrator was set aside. In contra distinction in the present case the arbitrator has decided the objection of the petitioner which has been reproduced hereinabove. The arbitrator categorically noted that the petitioner did not cooperate with the architects of respondent no1, the society in a constructive manner and rather they doubted the impartiality of the architect by contending that the architect is a party to the dispute and under the circumstances the

petitioner would not accept the appointment of the architect as arbitrator which was in clear violation of sub clause 9.01 of the agreement. There is no provision in the agreement for appointment of any other Architect other than the one which was appointed by the respondent no.1 society for resolution of disputes. Respondent no. 1 had also written a letter dated 16th July, 1998 invoking clause 9.01 of the contract and seeking resolution between the society and the contractor by the architect. However, the contractor/petitioner wanted the disputes to be referred to arbitration. Not only did the petitioner not agree to the methodology prescribed in terms of clause 9.01 for resolution of dispute, by an architect, but the contractor/petitioner himself raised counter claims, most of which were not raised by him at any stage with respondent No.1 or the architect. The petitioner/contractor had rather requested for extension of time till 31st October, 1998 and had pressed for appointment of a suitable arbitrator to settle their disputes which letter was specifically noted by the arbitrator as exhibit C-22. In the circumstances, the case relied on by the petitioner/contractor is apparently distinguishable.

32. In M.K.Shah Engineers and Contractors (supra) relied on by respondent No.1 it was held that the plea of bar, if any, created by the earlier part of the arbitration clause cannot be permitted to be set up by a party which itself has been responsible for frustrating the operation thereof. The Supreme Court had held that it will be a travesty of justice,

if the claimant is denied the right to have recourse to the remedy of arbitration on account of default of another party. In the precedent relied on by the respondent No.1 the reference to arbitration was required to be preceded by a decision of the Superintending Engineer and the procedure also contemplated a challenge to such decision within 28 days by a party not agreeing therewith. It was held that the steps preceding the coming into operation of the arbitration clause though essential are capable of being waived and if one party has by its own conduct or the conduct of its officials disabled such preceding steps being taken, it will be deemed that the procedural pre-requisites were waived. In the present case respondent No.1 had referred its disputes to the architect as per Clause 9.01 of the contract, even though the exact amounts were not quantified. However, the petitioner/contractor had refused to participate in the resolution of disputes raised before the architect on the ground that the architect himself is a party for delay and therefore, he would not adjudicate the issues raised before him fairly and impartially. The petitioner/contractor in the circumstances being at fault cannot be permitted to set up the bar of non performance of pre-requisite obligation so as to exclude the applicability and operation of the arbitration clause. The petitioner/contractor rather himself without referring the dispute to the architect referred the disputes/counter claims to the arbitrator and in the circumstances the petitioner cannot be allowed to contend that the disputes in the first instance ought to

have been referred to the architect. In M/s.Bharat Heavy Electricals Ltd (supra), another precedent relied on by the respondent No.1, the Bharat Heavy Electricals Ltd (BHEL) had primarily attacked the award on the ground that the arbitration proceedings initiated by Globe Hi-Fabs (GHF) were premature and against the terms of the contract as GHF had failed to refer their claims/dispute to the engineer and obtain his decision in terms of clause 43(i) of GCC. The Court noticed that BHEL rather had not designated, appointed or notified any of its engineers to be the 'Engineer' in terms of the relevant clause. If there was no designated, appointed or notified 'engineer', the BHEL could not insist upon the GHF to have made a reference to the 'engineer' for obtaining his final decision in the matter, before invoking arbitration. The Court rather observed that as per order dated 23rd August, 1996, the appointment of the arbitrator to decide and make the award regarding the claims/dispute raised by the GHF was made without any reservations and the GHF was not intimated at any stage that their request for invoking arbitration and appointment of an arbitrator was premature as the disputes/differences sought to be referred to arbitration, had not been referred to and decided by the 'Engineer' as envisaged by clause 43 of GCC. In the circumstances, the plea of BHEL that the arbitration proceedings initiated by GHF were premature and against the terms of the contract, because GHF had failed to refer the claim/disputes to the 'Engineer' and obtain its decision in terms of clause 43(i) of GCC was repelled.

33. In the present case as well, respondent No.1/claimant had raised the disputes before the architect in terms of Clause 9.01 of the agreement, however, the contractor/petitioner refused to accept the adjudication by the architect adjudication by the arbitration, on the premise that the architect himself is a party and therefore, will be biased. The petitioner has himself raised counter claims before the Arbitrator without referring those disputes to the Architect. If the claim of the respondent no.1 could not be decided by the Arbitrator without their adjudication by the Architect, the counter claims should not have been pressed by the Petitioner before the Arbitrator without getting them adjudicated from the Architect. These aspects have been categorically dealt with by the arbitrator and in the circumstances the plea of the petitioner/contractor that the arbitrator did not decide about its jurisdiction cannot be sustained. The learned counsel for the respondent No.1 also relied on M/s. Wee Aar Construction Builders (supra) by holding that where it was held that if the contractor also submits to the jurisdiction of the arbitrator by filing the counter claim then the principle of waiver and acquiescence shall be applicable. In the present case also the petitioner is deemed to have waived his objection by submitting to the jurisdiction of the Arbitrator by referring a number of counter claims to the Arbitrator and his objection that the disputes ought to have been decided at the first instance by the Architect cannot be sustained in the facts and circumstances.

34. The plea of the petitioner that the arbitrator mis-conducted in not deciding about his jurisdiction first, before dealing with the claims of both the parties is not sustainable in the facts and circumstances and is contrary to the record. The disputes were referred by the respondent No.1 to the architect, however, the petitioner on its own decided that the architect is biased and refused to participate in the adjudication and resolution of the disputes which were referred to the architect in the first instance, in compliance with Clause 9.01 of the agreement. In case the petitioner had any apprehension about the architect being biased, the remedy with the petitioner was to take appropriate legal recourse and the petitioner could not have refused to participate before the architect, for the adjudication of the disputes, which were referred to the architect in compliance with the term of the agreement between the parties. In any case since the petitioner himself refused to participate in the adjudication of the disputes by the architect, the petitioner cannot invoke the bar of clause 9 for adjudication of disputes by the arbitrator. The objection of the petitioner in this regard is, therefore, not sustainable and is repelled. It cannot be held in the circumstances that the arbitrator had committed misconduct, as has been alleged by the petitioner. In any case the petitioner himself referred the counter claim to the arbitrator without raising those claims before the architect. In the circumstances, if the

arbitrator has adjudicated the claims of the petitioner and respondent No.1, he cannot be faulted on this account.

35. The next plea of the petitioner/contractor is that the respondent No.1 is not entitled for liquidated damages as the damages awarded against him are in the nature of penalty. According to the petitioner/contractor the entire delay was attributable to the respondent No.1 and not just the delay of one year and ten days as has been held by the arbitrator. The petitioner has contended that against the claim of Rs. 57 lakhs the arbitrator has awarded a sum of Rs.57,02,672/- while taking recourse to clause 8.2.2 of the agreement. According to the petitioner the said clause clearly shows that compensation damages could be awarded by only the architect and not the arbitrator. According to the petitioner since the amount has not been awarded by the architect, therefore, award of the arbitrator is in complete dereliction of the provisions of the contract. It is also contended that the liquidated damages awarded by the arbitrator in terms of clause 8.2.2 is otherwise penal in nature and thus could not be enforced. It is further contended that if it is to be taken as a case of liquidated damages then the respondent No.1 was required to prove such loss, which was alleged to have been suffered by respondent No.1, which according to the petitioner has not been established. According to the petitioner, there is no evidence for sufferance of such loss and, therefore, no amount could be awarded to the respondent No.1 against

the petitioner. The pleas raised by the petitioner in its written synopsis dated 10th February, 2009 regarding the said claims are as under:-

“18. Claim No.2,3 and 4 – Respondent No.1 claimed compensation for the losses suffered on account of delay in completion of the project and under claim no.4 the respondent no.1 claimed liquidated damages of Rs.57 lacs due to delay. It is submitted that despite the fact that the arbitrator had agreed that 1 year 10 days delay was on the part of respondent no.1, the arbitrator has awarded a sum of Rs.57,02,672/- as against the claim amount of Rs.57 lacs to respondent No.1 while taking recourse to clause 8.2.2 of the contract agreement. The reference to clause 8.2.2 clearly shows that compensation so provided is to be determined by the architect and not by the arbitrator.

19. That it is submitted that it was an admitted case that the architect in the present case has not determined any compensation, therefore, the award of the arbitrator is totally against the provisions of the contract. Even otherwise, the amount mentioned in claim no.4 is on account of liquidated damages in terms of clause 8.2.2 which is otherwise penal in nature and the penal provisions are not liable to be enforced in law. Moreover, even if it is taken to be a case of liquidated damages then the respondent no.1 was bound to prove such loss having been suffered by respondent no.1 which admittedly respondent no.1 has deliberately failed to prove to have suffered. There was no evidence for sufferance of said loss, therefore there was no question of awarding any amount under this claim. The arbitrator has acted totally mechanically simply following the method adopted in clause 8.2.2 and without looking into the fact that respondent no.1 has miserably failed to prove any loss on the said amount. Moreover, since time was not set at large by respondent no.1 alone, therefore there was absolutely no reason to award any amount to the petitioner under this claim.”

36. The arbitrator in his award has categorically noted that clause 5.1 laid down that within the period of 24 months the project was

required to be completed i.e. from 19th March, 1996 to 18th March, 1998. Sub clause 5.14 categorically stipulates that time is the essence of the contract within the period of completion, whereas, sub clause 5.14.2 requires the contractor to apply within 7 days for extension of time to the respondent No.1 through the architect. It further stipulates that if the Contractor fails to get the time extension in writing within the time contemplated from respondent no1/architect, then clause 5.14 for compensation for delay would automatically become operative.

37. This has not been disputed by the petitioner that he did not apply for extension of time, even though the conclusion of the project was delayed beyond 24 months up to 52 months, though the respondent No.1 and the architect have contended that even after 52 months, the work was incomplete. On behalf of respondent No.1 it had been contended that as the contractor/petitioner had failed to get the time extended, he became liable to pay the compensation/liquidated damages and the relevant clause of 5.14 of the contract became operative automatically. The respondent No.1 had also contended that the agreement specifically provided for the continuance of the agreement, till its completion, subject to the payment of the appropriate compensation after the expiry of 24 months from its commencement.

38. The arbitrator had also categorically noted that the petitioner/contractor never made any application seeking extension of any specific period with reference to any particular circumstance/development calling for such an extension. The arbitrator categorically referred to the program for completion given by the petitioner/contractor by letter dated 18th December, 1997 (Exhibit C-112) which was revised in March, 1997 promising completion by 5th February, 1998 (Exhibit C-107) and thereafter, despite repeated warnings about very unsatisfactory pace at which the work was executed, the respondent No.1 had written a letter dated 14th October, 1997 (Exhibit C-70). Though a fresh bar chart was given on 20th October, 1997 reaffirming the completion of the project by 30th March, 1998 (Exhibit C 69) but the bar chart was very inadequate. It was also noted that while the bar chart was given it had been pointed out that the respondent No.1 could invoke clause 8.2.1 and 8.2.2 of the agreement for compensation/liquidated damages. The respondent No.1 had informed the petitioner/contractor through the architect on 7th April, 1998 (Exhibit C-52) about his dissatisfaction and which was stated as under:-

“We must in the first place, record our dissatisfaction at this inordinate delay which has subjected us to considerable inconvenience, avoidable costs and mental tension. We reserve our right to compensation and liquidated damage for the delay and the consequent inconvenience and losses suffered by us, in terms of clause 8.2 of a contract (page 51) we need hardly emphasize that all additions to or escalation of costs during the period of

delay in the completion of the project shall have to be borne by the contractors in terms of the contract.”

39. The petitioner contractor had, however, attributed the delay of the construction project to respondent No.1 on account of delay in issue of architectural and structural drawings; non issue of stipulated materials like cement and steel; delay in payment of running bills; delay in approving Champ Wood substitute; delay in award of electrical works; delay in issue of grit wash drawing and approval of samples; delay on account of making changes in drawings and specifications in items at a very belated stage; enlargement of scope by introducing belatedly and un-authorizedly provision of basement in Block B; delay in arranging additional quantity of earth to be filled under floors; change in design of electric sub-station.

40. The arbitrator has dealt with the pleas and contentions of the petitioner/contractor as well as the respondent No.1 and even the representations made by the architects in this regard. Regarding delay in issue of architectural and structural drawings the arbitrator concluded by noting the fact that not even a single letter or any oral representation was made by the petitioner/contractor in the regular meetings of the building committee at site, to the effect that any drawings had not been issued or that the work at the site had been held

up for non issue of any drawing till 20th October, 1997. The arbitrator has noted at page 86 of the award in para 9 as under:-

“9. The following facts are noteworthy in this connection:

(i) There are not one letter from them, nor was there any oral representation made by them in the regular meetings of the Building Committee at site, to the effect that any drawings had not been issued, much less to the effect that work at the site was held up for non-issue of any drawings, till the 20th October, 1997. On that day, a letter (Exhibit C-69) was addressed by the respondents to the President of the Society, enclosing a revised programme of work, promising completion to the contract by the 31st March, 1998, subject to the conditions that the Running Account payments were made promptly and that “pending decisions” (which were not set out) were conveyed immediately. The letter has the following as its last paragraph, indicating that they had decided to add the Architects also as yet’s another scapegoat for their delays: “It may not be out the way to point out designs and details of compound wall are still awaited and the work on development activities will be started after the receipt of drawings.” The drawings were issued in November, 1997 but the boundary wall was not completed till the end of November, 1999.”

41. Considering the various evidence and the facts in the present matter the arbitrator, therefore, held that there was no delay in issue of drawings and details which rendered the preparation of program and advance planning of the work by the petitioner ineffective. It was further held that if the petitioner/contractor suffered financial losses due to loss of productivity and the work force employed by it is because of lack of planning by him, then it is the petitioner/contractor who has to bear the consequences, thereof, and the respondent No.1 and his architect

are not responsible for delay in issuing the drawings if any and, therefore, the petitioner/contractor could not claim any extra time for completing the work.

42. Regarding the plea of the petitioner/contractor about delay due to non issue of cement and steel, the arbitrator/respondent No.2 inferred that the cement and steel were never in short supply which is inferable from the stock of cement and steel. Relying on the provision of the agreement also it was held that respondent No.1 could not be held responsible for any delays even if, those materials were not available with the factory/stockiest/supplier or on account of required transport, etc. Thus the arbitrator concluded that in view of Clause 12.1.2.5 respondent No.1 is not responsible for the delay of project due to non supply of steel and cement and, therefore, no extra time could be allowed to the petitioner/contractor.

43. The next plea for delay in conclusion of the project on behalf of the petitioner/contractor was about delay in payment of bills by the respondent No.1 society. The arbitrator considered all the pleas and contentions of both the parties and the documents produced and proved on the record and the terms of the agreement. The arbitrator ultimately held that in terms of Clause 5.9.1 respondent No.1 could withhold payment on the ground of inordinate delay in the execution of

the project, however, the society refrained from doing so. The arbitrator has further inferred that the petitioner/contractor has not been able to explain as to how a delay of few days in payment of any bill had resulted in dislocation of the execution of the project. The arbitrator noted in detail and analyzed the 20 bills presented by the petitioner/contractor during the contractual period of 24 months up to 18th March, 1998 showing that there was no complaint in respect of 11 cheques issued by the society for an amount of Rs.1,00,89,854/-. The complaint of the petitioner/contractor was only in respect of few out of 10 bills which fact was intimated in the letter D-46. The arbitrator also noted that the petitioner/contractor's grievances are imaginary and they were rather red herrings. The observation and findings of the arbitrator in this regard are as under:-

“The separate bill-wise clarifications provided in the appended notes would make it clear that the Respondents' grievances are imaginary-that they are really red herrings meant to distract attention from their failure to complete the project in 21 months as they have promised or even in 24 months as the contract required. They could do only work which amounted in financial terms to 40 per cent of the contractual value during the two years ended 18.3.1998.”

44. The arbitrator has noted that though the contract does not provide for payment of any interest in case of delay in payments of bill and the question of interest liability was dropped by the petitioner contractor in his letter to the society dated 23rd January, 1996, as the

payments were not held up for any period nor it was because the respondent No.1 had any difficulty in payment of amounts of the bills to the petitioner. The arbitrator also inferred that substantial payment had already been made well before the time stipulated by the petitioner/contractor. It was further noted that if the loss of the interest, if any, the petitioner/contractor suffered as a result of the payment of his bills before the expiry of 20 days by respondent No.1, the amount would far exceed the interest which the petitioner might have earned on account of early payment of many bills by the respondent no.1 to the petitioner. Taking all the facts into consideration, the arbitrator had held that delay in making payment of running account bills, therefore, could not be ascribed to the respondent No.1. In any case the question of payment of interest of the delayed payment has been considered by the arbitrator under counter claim 2 of the petitioner. The petitioner contractor had claimed an amount of Rs.3,46,600/- as interest at the rate of 24% per annum on delayed payment and the arbitrator has awarded an amount of Rs.90,412/- as interest which has not been challenged by the respondent No.1. The finding of the arbitrator regarding the plea of the petitioner contractor for delayed payment is as under:-

“I have also examined other bills where the delay has been claimed by the respondents. I am of the view that the respondents should have examined their own failings or should have controverted the reasons for delay as put forward by the claimant society. They have not done so bill by bill. Considering all the facts aspects put forth by the

claimant society and the Respondents, in the interest of equity and justice I am of the view that the delay has been on account of non compliance by the Respondents of the requirements as laid down in the contract agreement, and the should, therefore, not be considered as the reason for delay in the completion of the project. The Respondents should have exercised care and precaution in preparing the bills and taken timely action to get the payment in time. They are, therefore, to bear the consequences flowing out of this. In my view, the Claimants are not responsible for the delay in payment of R.A.Bills.”

45. The petitioner contractor also claimed delay in approving Champ Wood substitute. The arbitrator has noted that the first bar chart submitted by the petitioner contractor indicated start of wood work in the month of July, 1996 and completion of wood work in October, 1997 i.e. within 16 months, whereas, the ban of cutting of trees in Assam was imposed by the Supreme Court in April, 1997 as per letter dated 29th April, 1997 of the petitioner/contractor. The petitioner had informed the society/respondent no.1 about the non availability of the Champ Wood and after considering all the aspects the petitioner/contractor was intimated to substitute Champ Wood, with Ghana Teakwood. Considering the various factors and the facts established on record, the arbitrator held that though the petitioner contractor has not been able to establish that he took timely action to procure Champ Wood and construct a sample house as required by the provisions of the contract, however, the arbitrator still took a liberal view and concluded that the delay of four months was acceptable on behalf of the

petitioner, in view of the facts and circumstances of the present matter.

The findings of the arbitrator in this regard are as under:-

“The Respondents have not been able to establish/substantiate that they took timely action to procure champ wood and construct a sample house as per provision/requirements in the contract agreement or even as per the bar chart submitted by them to the claimants after the agreement was signed. It is only after the Hon’ble Supreme Court of India issued a judgment regarding ban on felling of champ wood in Assam that they raised the issue of shortage/non-availability of champ wood in the market. I agree with the views of the claimants in this regard. The plea of the Respondents, to my mind, that they could not procure the champ wood much in advance of making the sample flat and the approval thereof by the Claimants Society and Architect, is not tenable. It indicates their reluctance to procure champ wood. They did not even respond positively when the Claimants Society organized a meeting with a supplier of champ wood. They only pointed out that substitute Ghana teak wood or other steel/Aluminum be used in frames. This naturally had extra cost implication which the Claimants Society had to examine. The respondents there raised the delay in the completion of the project due to delay/late decision of wood substitute. The total delay in the project cannot be justified on account of this reason. Even if a more liberal view is taken of the initial delay caused by the Respondents of 12 months as stated by the Architect, a delay of about four months could be accepted in the completion of the project beyond the date of completion i.e 2.4.1998, due to delay in decision of substituting champ wood by Ghana teak wood after the Hon’ble Supreme Court banned felling of champ wood in Assam.

Considering the submission made by the Respondents and Claimants, in my view and be the interest of equity and justice, a delay of four months only could be assigned to this reason.”

46. Regarding delay caused as has been alleged by the petitioner due to non award of electrical works, it was held that the

petitioner/contractor has not produced any evidence and document in support of his contention and, therefore, the petitioner was not entitled for any delay on this ground. However, on account of coordination problem between the petitioner/contractor and the electrical contractor and since four months time had already been awarded to the petitioner/contractor for wood substitution which was a parallel activity, it was concluded that no further time could be awarded to the petitioner in this regard, justifying delay on his part.

47. The petitioner had next claimed delay on account of the issue of grit wash drawing and approval of samples. The arbitrator noted in detail the facts and circumstances and submissions and counter submissions and held that the delay of work on account of grit wash was the responsibility of the petitioner/contractor and that the same could not be attributed to the respondent No.1 or the architect. It was also categorically observed that the petitioner was responsible for the delay in the work due to slow progress of grit wash work. Thus, no extra time was allowed to the petitioner contractor for delay on the said ground.

48. The next claim for the delay by the petitioner contractor was on account of making changes in the drawings and specifications of the items at a very belated stage. Regarding this the arbitrator after detailed

consideration of the facts and circumstances, permitted three months and 17 days delay as justifiable on the part of the petitioner/contractor.

49. The petitioner contractor has also attempted to justify delay on account of arranging additional II quantity of earth contract provision. After detailed analysis of the facts, it was held that there was no delay due to the delayed decision by respondent No.1. Therefore, no delay on this ground was held to be justifiable on the part of the petitioner.

50. The petitioner/contractor also sought justification of delay on account of change in the design of electric sub-station. After considering the facts in detail, the arbitrator ultimately held that the extension of time upto 12th April, 1999 would be justifiable on behalf of the petitioner/contractor and therefore he would not be liable for liquidated damages as had been agreed upon between the parties for the said period.

51. Regarding the architect's letter for delay, after analyzing all the facts and circumstances in detail the arbitrator held that the petitioner/contractor had delayed the project for 10 months after deducting 2 months from the delay of 12 months during the period of 19th March, 1996 to 18th March, 1998. The arbitrator in this regard held as under:-

“ Considering all the above facts it is clear that the contractor M/s Jyoti Sarup Mittal have delayed the project at least for twelve months during the period of its contract time i.e. from 19th March, 1996 to 18th March, 1998 out of which two months maximum may be considered which took to finalize and confirm the alternative item of Ghana Teak wood in place of champ wood for door, window frames. Thus the net delay of ten months in completion of the construction of Group Housing Project for Abhiyan Co-operative Group Housing Society Limited, works out on part of Contractors M/s Jyoti Sarup Mittal.”

52. Taking into consideration all these factors and analyzing the various reasons for delays the arbitrator held as under:-

” Summary of Views of Arbitrator:-Analysis of the reasons of delays as submitted by the Respondents; indicates that the total delay in completion of main tower blocks should not be more than four months i.e 02.08.1998. This is due to provision of basement of in tower ‘B’. My views are different from that of the Architect. But considering that the construction of sub-station building is a part of this contract agreement and was got executed by the Claimants Society and Architect after 12.02.1999 with estimated time of completion not exceeding two months, the date of completion of the total project including construction of sub-station could not go beyond 12.04.1999. Having examined in detail all the reasons for delay as enumerated by the respondents and after careful consideration of the submissions by both the parties and the Architect in the interest of equity and justice to both, Claimants and Respondents, I decide that twelve months and ten days extra time be allowed beyond the date of completion specified in the agreement to the Respondents. Beyond that period the Respondents are responsible and the legal aspect of liquidated damages and compensation would come into play for reason indicated by me in my decision on Legal aspects.”

53. The arbitrator, therefore, considered the counter claims of the petitioner and allowed an amount of Rs.3,59,320/- on account of purchase of cement and steel; Rs.90,412/- on account of interest on delayed payment; Rs.6,09,508/- on account of escalation on the cost of work executed after the stipulated date of completion that is 18th March, 1998; an amount of Rs.3,77,000/- on account of carrying out item of grit wash in completed geometrical patterns and Rs.1,08,700/- as the amount spent for insurance cover/policy beyond stipulated date of completion and finally Rs.3,95,000/- as damages, i.e a total amount of Rs. 19,39,940. The respondent No.1 has not filed objections to the counter claims of the petitioner allowed by the arbitrator. Regarding the claims of respondent No.1/society the arbitrator has awarded an amount of Rs.4,11,840/- towards the extra expenditure in use of Ghana Teakwood in place of Champ wood. Regarding the losses suffered by the members of the society/respondent no.1, the arbitrator awarded Rs. 57,02,672/- as liquidated damage in terms of clause 8.2.2.

54. Regarding the compensation claimed by respondent No.1, the arbitrator noted that the members of respondent No.1 society have been subjected to considerable inconvenience, tension and expenditure as a result of avoidable delay in the completion of the contract works beyond the end of March, 1998. The arbitrator also took note of the funds locked up of the members in the incomplete housing project without

yielding any income or other benefits and also the fact that some of them had been compelled to pay rent for their present residential accommodation at rates which are spiraling from year to year without being able to occupy the apartments under construction in the society or to get any rent income from them by letting them out to tenants. While considering the basis for liquidated damages, the arbitrator also took into consideration the part of the principal amount borrowed by them for investment in the project as well as interest at high rates paid by them to their own employers or banks or LIC or Housing finance institutions like the Delhi Cooperative Housing Finance Corporation Ltd. and Housing Development Finance Corporation. In computing the damages the arbitrator has taken into consideration not only the financial loss to the members of the respondent No.1 society but also the inconvenience and tension suffered by them.

55. The arbitrator awarded the liquidated damages in terms of clause 8.2.2 on the basis of the justification which is reproduced as follows:-

“i) The Respondents had been paid Rs.2,49,45,266.00 up to 31.3.1998 against their first twenty bills (C-175). Interest at 18 per cent on the funds so locked up without benefit to the members of the Society, because of the respondents revision and breach of contract, would work out to Rs.45,90,146.00 per year or Rs.91,80,292 for a delay of two years. If interest is similarly calculated on the further aggregate sum of Rs.2,20,32,141.00 paid against bills from month to month between 1.4.1998 to 22.1.2000, the loss of the Society upto date would be much larger.

It cannot be dispute that if the Society had kept the amounts paid to the contractor in long-term or fixed deposits with any Cooperative Bank it would have earned interest substantially exceeding the ceiling fixed for the liquidated damages in the contract during the 27 months of delay in the completion of project. The rate of interest on long-term deposits on banks is more than 10 per cent annum.

ii) The members of the Society have had to pay Rs.10,20,000.00 each, since that is the cost of a flat. Some of them, who joined the society in the later stages of the project have had to pay equalization charges with reference to the subscriptions actually made by the older members from time to time. The total cost of the project was thus over Rs.9 crores. Even if the society, or individually the members, had invested the funds sunk in the project in a saving (as distinct from a long-term deposit) account in a bank, they would have been entitled to receive altogether Rs.36 lakhs per year or over Rs.72 lakhs during the period of delay of two years, at the rate of 4 per cent per annum currently paid by banks on savings accounts. (The rate used to be 5 percent in the past.)

iii) Many of the members have had to avail of loans from the Delhi Cooperative Housing Finance Corporation Limited, (a State Government controlled bank) or the HDFC Ltd or LIC or their respective employers. The DCHFC, HDFC and LIC charge over 14 per cent interest, in effect, though the rate of interest charged by some of the employers may be lower. A copy of the statement of interest payable by members to DCHFC received from that Corporation is annexed. Since the members have been unable to occupy the flats which are yet to be allotted and handed over to them, their investment has turned out to be sterile till now. If the apartments had been made over to them before 31.3.1998, contracted, they would have used them for the own residential purposes or let them out of rent. It is believed that the rental value of each flat could not conceivably even less than Rs.4000 per month or Rs.48000 per year. The total rental value would accordingly have worked out to Rs.43,20,000 per year. The members aggregate loss would, on this basis, be Rs.86,40,000.00 during the period of two years delay. The loss would be greater by way of interest payment on loans/loss of rent, if the actual period of delay is taken into account for purposes of calculation of the damages. It the rent

currently being paid by the members for the houses which they are occupying is also considered, the loss to the members would be enormous. Some of the members pay rent ranging from Rs.5000 to Rs.7000 per month for their rental private accommodation.

It may be pointed out, in this context, that the respondents have been claiming interest at 24 per cent per annum for alleged delays of a few days in the payment of their "bills on account" by the Society for the work done by them. The Society cannot bring itself to make such claims, which are "beyond the dreams of avarice".

It has also been pointed out that all the office-bearers of the society are professionals either in practice or in service and they have spent their valuable time in fruitless efforts to make the contractors complete the works properly. It has been a heart – breaking job for them. If the value of the time wasted by them in this frustrating exercise is also taken into account in terms of fees that any outside professional engaged in similar service would have been entitled to, the compensation demanded by the society would appear disproportionately low. The compensation has to be based not merely on the losses incurred in any manner directly or indirectly by the members of the Society either individually or collectively but also on the calls on their time and energies made by the impugned delay on the part of the respondents. A cooperative society is just a bundle or association of members and when liquidated damages are worked out the individual losses/"losses of income or profits of the members will necessarily be as much a component in the calculation of the damages as the direct losses of the society as a legal entity. Otherwise contractors will get away with flagrant breaches of contract, particularly in projects for construction of residential houses at the cost and to the detriment of the public."

56. This being the basis for the arbitrator's award of liquidated damages, even though inadvertently he termed the same as penalty at one place, on the basis of 0.5% of the contract amount per week, the delay from 12th April, 1999 to 14th June, 2000 i.e. for 61 weeks was

taken into consideration. For 61 weeks the liquidated damages at the rate of 0.5% of the contract amount was further restricted in view of the stipulation of maximum of 10% of the liquidated damages and, therefore, the amount of Rs.57,02,672/- was awarded to respondent No.1.

57. In the State of Orissa & Ors v. Calcutta company Ltd. (supra), relied on by the petitioner, it was held that the use of the term penalty or liquidated damages by itself is not decisive, as even what is described as liquidated damages could turn out to be penalty on the facts of a given case. It was held by the Division Bench of the Orissa High Court that essence of a penalty was payment of money stipulated as in terrorem while the essence of liquidated damages is genuine covenanted pre-estimate of damages. Liquidated damages must be the result of a genuine pre-estimate of damages and they do not include a sum fixed in terrorem. In the said case, there was no evidence at all that any damages had been caused, as the Calcutta Company had made certain supplies and it had demanded for specifying the space for stacking. The correspondence had shown that the departmental officer had taken steps to demarcate the site. According to the Calcutta Company, the material could not be supplied because of lack of stacking, however, the State of Orissa forfeited the security furnished by the Calcutta Company and penalty was also levied against the Company on account of plea of breach of contract. A suit was filed by the Calcutta Company

for quashing the order of penalty and forfeiture of security amount by the State of Orissa. The case was defended by the State of Orissa and other defendants contending that penalty and forfeiture were in accordance with the terms of the contract and they also established their obligation to provide the road. The trial court decreed the suit which was challenged in appeal. The appeal was dismissed by a Single Judge against which a Letters Patent Appeal was filed. It was contended that the contract contemplated liquidated damages to the tune of Rs.96,405/- and that the amount forfeited was not really a penalty. The question for determination before the Court was whether demand for Rs.96,405/- was for liquidated damages under Clause 2 of the Contract or penalty under the provisions thereof. The Division Bench had held that the Calcutta Company had made certain supplies and had demanded space for stacking which the defendants had failed to provide to demarcate and in the circumstances it could not be held that the Calcutta Company had committed any breach of the Contract, and therefore, the appeal was dismissed and the decree passed by the Single Judge was upheld.

58. In Nagpur Nagrik Sahakari Bank Ltd (supra), relied on by the petitioner the Court had held that it is not in a position to assess the compensation in the event of a breach of contract, 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 penalty. It was held that the parties suffering loss from breach must prove it. In the instant case, the bank had appointed a sole advertising agent to procure the advertisement in the telephone directory and an agreement was entered into between the company and the sole advertising agent. The sole advertising agent in terms of clause 4 of the agreement, gave a bank guarantee for due performance of the terms of the agreement. The Bank which gave guarantee was liable for a sum not exceeding Rs.47,325-75/- on failure of sole advertising agent to perform his part of the contract. The sole advertising agent did not compile the accounts as was required under the agreement and even the other bank which had given the bank guarantee on behalf of the sole advertising agent disowned its liability entailing filing of a suit by Nagpur Nagrik Sahkari Bank Ltd. In the suit, the question that had arisen for determination was whether it was mandatory on the part of the plaintiff bank to prove the loss sustained so as to be made good by the first defendant relying on Clause-I of the bank guarantee. It was contended that it was incumbent upon the plaintiff bank to prove the loss. The Division Bench of Andhra Pradesh High Court had held that where the Court is unable to assess 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 penalty. It was further held that where the loss in terms of

money can be determined, the party claiming compensation must prove the loss suffered by him.

59. In *Fateh Chand* (supra), relied on by the petitioner, it was held by the Supreme Court that the Court is not bound to award compensation when no legal injury has resulted. Referring to Section 74 of the Contract Act, 1872 it was held that the measure of damages in the case of breach of a stipulation by way of penalty is reasonable compensation not exceeding the penalty stipulated for. It was further held that in assessing the 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 the 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 the duty to award compensation according to settled principles. In the instant case, in a contract for sale of certain land and buildings, there was a covenant that if the vendee failed to get a sale deed registered by the date stipulated, the amount of Rs.25,000/- (Rs.1,000/- paid as earnest money and Rs.24,000/- paid out of the price on delivery of possession) shall stand forfeited and the agreement shall be deemed cancelled. The covenant for forfeiture of Rs.24,000/- was a stipulation by way of penalty. On failure of the vendee to get the sale deed

registered, it was held that in the absence of any proof of damage arising from the breach of the contract, the amount of Rs.1,000/- (earnest money) could be forfeit, however, there was no principle on which compensation equal to 10% of the agreed price could be awarded to the plaintiff, since he had failed to prove any loss suffered by him on account of the breach of contract.

60. In *Maula Bux* (supra), the Supreme Court repelled the contention that quantified amounts spelt out in a contract for supply of potatoes to the Central Government, were, in the circumstances of the case, genuine pre-determination of what the damages were likely to be suffered as a result of breach of contract and held that such conditions were unenforceable penalties. The Court also noticed that the Central Government did not make any effort to establish the quantum of damage suffered by it. It approved the previous ruling in *Fateh Chand* and applied the ratio, holding that:

“ Counsel for the Union, however, urged that in the present case Rs. 10,000 in respect of the potato contract and Rs. 8500 in respect of the poultry contract were genuine pre-estimates of damages which the Union was likely to suffer as a result of breach of contract, and the plaintiff was not entitled to any relief against forfeiture. Reliance in support of this contention was placed upon the expression (used in Section 74 of the Contract Act), "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". 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...."

Similarly, the ratio of *M.L. Devendra Singh v. Syed Khaja*, 1973 (2) SCC 515 was affirmed in *P. D'Souza v. Shondrilo Naidu*, (2004) 6 SCC 649. The Court accepted the same approach and further emphasized that mere stipulation of some amount would only be a piece of evidence, but inconclusive by its very nature.

61. The fact that the parties themselves have provided a sum to be paid by the party breaking the contract does not, by itself, remove the strong presumption contemplated by the use of the words 'unless and until the contrary is proved'. The sufficiency or insufficiency of any evidence to remove such a presumption is a matter of evidence. The fact that the parties themselves specified a sum of money to be paid in the event of its breach is, no doubt, a piece of evidence to be considered in

deciding whether the presumption has been repelled or not. But, in my opinion, it is nothing more than a piece of evidence. It is not conclusive or decisive.

62. It would be necessary to extract Section 73 and 74 of the Indian Contract Act, 1872. They are as follow:

73. Compensation for loss or damage caused by breach of contract-

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.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract - When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation - In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

74. Compensation for breach of contract where penalty stipulated for-

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.

Explanation.- A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception.- When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the 1*[Central Government] or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation. - A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

63. The above provisions enact principles upon which damages are to be awarded by the Courts in India for breach of contracts. There are obvious differences between the two provisions. Section 73 outlines the general principles for the award of damages, which is the difference between the price or cost of the goods or services contracted for as on the date of breach, which the injured party would be entitled to. In such an instance, the injured party would have to prove the breach (of contract); the value, cost or price of the goods or services contracted for on the date of breach and the measures taken by it towards mitigation of the damages. Section 74, on the other hand, dispenses with the requirement of proving actual damage once breach of contract is established, the Court is entitled to award the "reasonable

compensation" not exceeding the amount specified in the contract or the amounts which can be arrived at on application of the formulae or method prescribed in the contract.

64. The Supreme Court, in *Fateh Chand* (supra) called Section 74 as the provision cutting through the maze of rules evolved by English Courts over a period of time to distinguish between what is considered a genuine pre-determination of damages and what is penalty and, therefore, not enforceable. The Court held as follows:

“10. Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by Section 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 damage"; 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.

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15. Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The Section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the court is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. Use of the expression "to receive from the party who has broken the contract" does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach.

65. In *Oil and Natural Gas Corporation Ltd. v. SAW Pipes Ltd* AIR 2003 SC 2629, the Court summarized the legal position as follows:

68. From the aforesaid discussions, it can be held that:

(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, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.

66. There is pre-estimate of damages on account of considerable inconvenience, tension and expenditure as a result of avoidable delay in completion of the contract work beyond the end of March, 1988, the time agreed by the petitioner for completion of Construction of Group housing flats. The pre-estimate of damage is based on the funds locked up of the members in the incomplete housing project without yielding any income or other benefits; compulsion of some of them to pay rent for their residential accommodation at rates which are spiraling from year to year without occupying the apartment under construction; to get any rent income from their apartments under construction by letting them out to tenants; principal borrowed for investment in the project as well as interest at high rates paid to the respective employers by the members of banks or LIC or Housing Finance institution like Delhi Co-operative Housing Finance Corporation Ltd or Housing Development Finance Corporation. In assessing damages the Court has,

subject to the limit 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. 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. Pre-estimate of damages merely dispenses with proof of "actual loss or damage"; 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. In the facts and circumstances of the respondent no.1 society it cannot be held that no legal injury at all has resulted or the loss caused to the respondent no.1 society is not to be compensated. On reading of Section 74 along with section 73 of the Contract Act the Court is competent to award reasonable compensation in case of breach even if no actual damages is proved to have been suffered in consequence of breach of Contract.

67. Now turning to the pleas and contentions raised by the petitioner/contractor, the following observations of the Apex Court in Union of India v. A.L. Rallia Ram, AIR 1963 SC 1685 will also be relevant which have not been varied and still hold the field, despite the passage of many years, and numerous subsequent judgments on the subject.

“14. An award being a decision of an arbitrator whether a lawyer or a layman chosen by the parties, and entrusted with power to decide a dispute submitted to him is ordinarily not liable to be challenged on the ground that it is erroneous. In order to make arbitration effective and the awards enforceable, machinery is devised for lending the assistance of the ordinary Courts. The Court is also entrusted with power to modify or correct the award on the ground of imperfect form or clerical errors, or decision on questions not referred, which are severable from those referred. The Court has also power to remit the award when it has left some matters referred undetermined, or when the award is indefinite, or where the objection to the legality of the award is apparent on the face of the award. The Court may also set aside an award on the ground of corruption or misconduct of the arbitrator, or that a party has been guilty of fraudulent concealment or willful deception. But the Court cannot interfere with the award if otherwise proper on the ground that the decision appears to it to be erroneous. The award of the arbitrator is ordinarily final and conclusive, unless a contrary intention is disclosed by the agreement. The award is the decision of a domestic tribunal chosen by the parties, and the Civil Courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision. Wrong or right the decision is binding if it be reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement. But it is now firmly established that an award is bad on the ground of error of law on the face of it, when in the award itself or in a document actually incorporated in it, there is found some legal proposition which is the basis of the award and which is erroneous.”

68. Acknowledging that the Arbitrator is the final judge of facts, the Apex Court in *State of Orissa and Anr. v. Kalinga Construction Co. (P) Ltd.* (1970) 2 SCC 861 held that the High Court erred in considering the matter as a court of appeal and in re-evaluating the evidence and that it further erred in recording a finding in reversal of the conclusions of the arbitrator. In *Hindustan Iron Co. v. K. Shashikant & Co. & Anr.* AIR 1987 SC 81 the Court held that the award of the Arbitrator ought not to be set aside for the reason that, in the opinion of the Court, the Arbitrator had reached wrong conclusions or failed to appreciate the facts.

69. In *Municipal Corporation of Delhi v. Jagan Nath Ashok Kumar and Anr.* AIR 1987 SC 2316 the Court held that if the reasons appear per se to be not unreasonable and irrational the Court ought not to reappreciate the evidence. It approved the observations made in *Mediterranean & Eastern Export Co. Ltd. v. Fortress Fabrics Limited* (1948) 2 ALL ER 186, which are as follows: –

"A man in the trade who is selected for his experience would be likely to know and indeed to be expected to know the fluctuations of the market and would have plenty of means of informing himself or refreshing his memory on any point on which he might find it necessary so to do. In this case according to the affidavit of sellers they did take the point before the Arbitrator that the Southern African market has slumped. Whether the buyers contested that statement does not appear but an experienced Arbitrator would know or have the means of knowing whether that

was so or not and to what extent and I see no reason why in principle he should be required to have evidence on this point any more than on any other question relating to a particular trade. It must be taken I think that in fixing the amount that he has, he has acted on his own knowledge and experience. The day has long gone by when the Courts looked with jealousy on the jurisdiction of the Arbitrators. The modern tendency is in my opinion more especially in commercial arbitrations, to endeavor to uphold awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them. If an arbitrator has acted within the terms of his submission and has not violated any rules of what is so often called natural justice the Courts should be slow indeed to set aside his award."

That this well settled proposition of law was reiterated in the decision of the Apex Court in Coimbatore District Podu Thozillar Sangam v. Balasubramania Foundary and Ors. AIR 1987 SC 2045. It was opined that it is only an error of law and not a mistake of fact, committed by the arbitrator, which is justifiable in the Application/Objection before the Court. If no erroneous legal proposition emerges from a perusal of either the Award or any document annexed with the Award, and the alleged mistakes or alleged errors, are only mistakes of fact, and if the Award is made after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement, the Award is not amenable to the correction of the Court. Similar views were again expressed in Indian Oil Corporation Ltd. v. Indian Carbon Ltd.(1988) 3 SCC 36; Jawahar Lal Wadhwa and Anr. v. Haripada Chakroberty (1989)

1 SCC 76; Puri Construction Pvt. Ltd. v. Union of India (1989) 1 SCC 411; Sudarsan Trading Co. v. Government of Kerala and Anr. (1989) 2 SCC 30; Food Corporation of India v. Joginderpal Mohinderpal and Anr. AIR 1989 SC 1263 where even a plausible view taken by the Arbitrator was held not to be open to Court interference, if the latter preferred a contrary or alternate view.

70. In U.P. Hotels & Ors. v. U.P. State Electricity Board, AIR 1989 SC 268 the decision of the Umpire had been challenged in respect of his interpretation of Section 49 of the Electricity (Supply) Act. Even on this aspect, which quite palpably takes on the characteristics of a point of law in contradiction to point a fact, the Apex Court did not favor jural intervention. It was observed as follows:

"28. We, are, therefore, of the opinion that the view taken by the Umpire on Section 49 was a possible view in the light of the decision of this Court in Indian Aluminium's case. In the premises, a question of law arose certainly during the course of the proceedings. Such a question has been decided by the Umpire on a view which is a possible one to take. Even if there was no specific reference of a question of law referred to the Umpire, there was a question of law involved. Even on the assumption that such a view is not right, the award is not amenable to interference or correction by the courts of law as there is no proposition of law which could be said to be the basis of the award of the Umpire, and which is erroneous."

71. In Hind Builders v. Union of India, AIR 1990 SC 1340 the Court cautioned that where two opinions were possible it could not be

predicated that there was an error apparent on the face of the Award. In *Bijendra Nath Srivastava v. Mayank Srivastava and Ors.*, AIR 1994 SC 2562 the view was expressed that the reasonableness of reasons given by the arbitrator were not open to challenge and that the proper approach would be for the Court to support the Award. Similarly, in *Hindustan Construction Co. Ltd. v. Governor of Orissa and Ors.*, AIR 1995 SC 2189 it was repeated that the Court cannot reappreciate the material on the record. In *Trustees of the Port of Madras v. Engineering Constructions Corporation Ltd.*, (1995) 5 SC 531 the decision of a Division Bench of the High Court of Madras, which reversed the Award on a question of fact and not a question of law, was set aside by the Supreme Court. After considering its previous decisions, the Apex Court in *B.V. Radha Krishna v. Sponge Iron India Ltd.*, (1997) 4 SCC 693 again held that the Court could not substitute its own view in place of that of the Arbitrator. In *Army Welfare Housing Organisation v. Gautam Construction & Fisheries Ltd.*, (1998) 7 SCC 290 the Court declined to vary an award for the reason that without reappreciating evidence it would not be possible to fault the quantum awarded towards anticipated expenses.

72. On perusal of the judgments of the Apex Court spanning several decades, what emerges is that jural interventions with Awards is proscribed, rather than prescribed. The role of the Appellate Court is

logically minuscule, and would be restricted to errors of law or jurisdiction of immense import. The Arbitrator has considered the factual matrix of these claims, has perused the grounds set-out in the Objections, and after giving due consideration to the law laid down in various cases which have been dealt with in the Award itself found that the claim of the Society/Respondent no.1 for liquidated damages has merit and it also has sufficient evidence for the same. The arbitrator has considered the facts and evidence in respect of considerable inconvenience, tension and expenditure as a result of avoidable delay in completion of the contract work beyond the end of March, 1988, the time agreed by the petitioner for completion of Construction of Group housing flats. The facts and evidence regarding the funds locked up of the members in the incomplete housing project without yielding any income or other benefits; compulsion of some of them to pay rent for their residential accommodation at rates which had spiraled as they were not able to occupy the apartment under construction; they did not get any rent income from their apartments under construction by letting them out to tenants; principal borrowed for investment in the project as well as interest at high rates paid to the respective employers by the members of banks or LIC or Housing Finance institution like Delhi Co-operative Housing Finance Corporation Ltd or Housing Development Finance Corporation. The respondent no.1 society had demanded damages in terms of term 8.2.2. and in the circumstances, arbitrator awarding 57,02,672.00 in place of Rs.57 lakhs claimed by the

respondent no.1 is not such an error which will vitiate the award entirely as has been claimed by the petitioner. In the circumstances, there is no error of law or any other error apparent on the face of the record as has been alleged by the petitioner.

73. No other objections had been raised by the counsel for the petitioner except those which have been considered and dealt by this Court hereinabove though the Arbitrator has allowed other claims of respondent no.1. The respondent no.1 has not raised any objections to the counter claims of the petitioner/contractor allowed by the respondent no.2/Arbitrator either.

74. In the facts and circumstances and for the foregoing reasons the objections raised by the petitioner against the award dated 3rd January, 2001 made and published by Sh.S.C.Kapoor, arbitrator, respondent No.2 are without any legal basis and have no merit and are therefore dismissed. The parties shall be entitled for the amounts as has been awarded by the Arbitrator. The petitioner shall also be liable to pay a cost of Rs.30,000/- to the respondent no.1 society in the facts and circumstances.

JULY 04, 2012
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ANIL KUMAR, J