

2. The petitioner herein was the original claimant whereas the respondent herein was the original respondent in the arbitral proceedings.

3. Some time in the month of February 2006, the respondent invited bids for transportation of material etc. by trailer, truck and LCV from Mumbai to outside project and vice-versa. The respondent had invited bids for 5 sectors i.e. i) Western Sector; ii) Southern Sector; iii) Northern Sector; iv) Eastern Sector; and v) other Sector in and around Mumbai. Pursuant to the said notice, the petitioner submitted its bid and was selected as successful bidder as far as northern sector (jobs covering outgoing from Mumbai by trailer) and southern sector (jobs covering outgoing from Mumbai by trailer and jobs covering incoming to Mumbai by trailer/truck). The respondent issued two letters of intent dated 12th September 2006 with regard to northern sector and 27th September 2006 with regard to southern sector.

4. Pursuant to the said two letters of intent issued by the respondent, the petitioner submitted two performance bank guarantees i.e. dated 9th October 2006 concerning northern sector to the tune of Rs.1,07,203/- and another performance bank guarantee dated 16th October 2006 in respect of southern sector to the tune of Rs.14,83,359/-. The said bank guarantees were valid till 11th November 2007 and 17th November 2007 respectively.

5. Pursuant to the said two letters of intent, the petitioner provided services to the respondent from time to time. The petitioner was performing its part of the obligations smoothly till December 2006.

6. It was the case of the respondent that with effect from 1st December 2006, the State of Maharashtra came out with an order issued under the provisions of the Bombay Sales Tax Act by virtue of

which sales tax on the price of the diesel to be sold in Maharashtra was reduced. As a result of the said reduction in sales tax levied on the diesel by State of Maharashtra, purchase price of the diesel was reduced by Rs.2.39 paise. The respondent came out with a resolution that in view of clause 7.4 of the Annexure-III to the tender document which provided for escalation and de-escalation in the freight/ transportation charges payable to the petitioner as per the rise and fall in the diesel price, the freight/transportation charges to be paid to the petitioner were liable to be reduced. The petitioner objected to the proposed reduction in the freight/ transportation charges payable by the respondent to the petitioner. The respondent started making deductions in the bills/ invoices submitted by the petitioner after undertaking the job.

7. The petitioner addressed a letter to the respondent on 15th January 2007 raising dispute about resolution unanimously passed by the respondent to reduce freight/ transportation charges payable to the petitioner.

8. The respondent addressed a letter to the petitioner on 23rd January 2007 informing the petitioner about variation in the rates of freight/ transportation charges payable by the respondent to the petitioner due to variation introduced during June 2006 to December 2006 in diesel price. The petitioner was informed that the diesel price for the period 1st December 2006 onwards were reduced from Rs.38.50 to Rs.36.11 and accordingly, the freight/ transportation charges also must be reduced. The petitioner vide its letter dated 5th March 2007 again lodged their objection to the reduced costs of freight/ transportation charges.

9. On 29th March 2007, the petitioner sent reminder to the respondent for looking into the matter and for sorting out the issue of reduction in the freight/ transportation charges due to the alleged reduction in diesel price. Vide letter dated 26th April 2007, the respondent informed the petitioner that the reduction in diesel price was not based upon the reduction in sales tax levied by State of Maharashtra but the same was on the strength of rate list/price list issued by the BPCL, Government of India Enterprise.

10. During the period between December 2006 and April 2007, the respondent kept on harping that diesel price was reduced in State of Maharashtra due to reduction in sales tax and hence the reduced cost of diesel must be taken as a base for de-escalation of the cost of freight/ transportation charges.

11. The petitioner vide their letter dated 7th May 2007 contended that BPCL was a body different from Government of India and the parties never contacted the Public Sector Undertakings like BPCL for deciding diesel price. The petitioner made it clear that it was not possible for the petitioner to work at the reduced cost of freight. The petitioner vide its letter dated 7th May 2007 placed on record that inspite of several letters addressed by the petitioner, the respondent had failed to take any concrete action to sort out the controversy on the point of de-escalation and sought confirmation from the respondent to pay cost of freight/ transportation charges at original rate which was required to execute a contract in hand.

12. It is the case of the petitioner that instead of sorting out the said issue and confirming that the petitioner would be paid cost of freight/ transportation charges at original rate, the respondent issued work order on 4th June 2007 to the petitioner and requested to effect transportation of certain material from ONCG Supply Base at Kakinada and to deliver the same to ONGC Nhava, Mumbai.

13. On 25th May 2007, the respondent issued another work order and requested the petitioner for lifting certain material from Kakinada in State of Andhra Pradesh and to supply it to the Nhava office of the respondent at Mumbai. It is the case of the petitioner that the respondent without clarifying or resolving issue of de-escalation in cost of freight could not have placed any fresh order for transportation of the material. The petitioner vide its letter dated 6th July 2007 again sent reminder to the respondent and requested to sort out the issue of de-escalation in cost of freight.

14. The respondent addressed a letter dated 4th July 2007 reiterating its stand that reduction/increase in diesel price and consequent de-escalation/escalation in the cost of freight in the past was on the basis on the rate list published by Oil Public Sector Undertakings. It was contended that de-escalation which was suggested from 1st December 2006 was also based on the rate list published by Oil Public Sector Undertakings. The respondent called upon the petitioner to execute two work orders dated 4th May 2007 and 25th May 2007 without any delay.

15. The petitioner vide its letter dated 19th July 2007 contended that the oil prices were always fixed by the Government

of India and not by Public Sector Undertakings and thus the stand taken by the respondent that the reduction in diesel price was on the strength of rate list/price list issued by Public Sector Undertakings was baseless. The petitioner called upon the respondent to immediately withdraw the proposed amendment to the cost of freight with clarification/confirmation that job already done and job in hand would be considered as per the old rate prior to 1st December 2007 so that the petitioner would execute the work order in hand.

16. On 6th November 2007, the respondent released an amount of Rs.9,74,241/- towards bills submitted by them. On 7th November 2007, the respondent addressed a letter to the bank invoking two performance bank guarantees for the sums of Rs.1,07,203/- and Rs.14,83,359/- respectively. It is the case of the petitioner that in the said letter, the respondent did not mention about the alleged default on the part of the petitioner for which the respondent had invoked the said two performance bank guarantees. The said letter dated 7th November 2007 was forwarded to the petitioner by the bank along with a covering letter informing about invocation of the bank guarantees of the respondent.

17. The petitioner was served with a copy of the letter dated 6th November 2007 on 7th November 2007 by fax by the respondent contending that the petitioner had failed to carry out two work orders and thus performance guarantee was invoked by them. The petitioner issued a notice dated 8th November 2007 to the bank through their advocate and called upon the bank not to act upon invocation letter dated 7th November 2007 sent by the respondent. The respondent,

however, encashed those two bank guarantees and recovered the said amount from the bank.

18. The respondent, thereafter, got the said work which was subject matter of the said two work orders executed through other contractor at the reduced rate. It is the case of the petitioner that the total value of the work under the said two work orders was about Rs.6 lacs whereas the respondent had invoked the two performance bank guarantees for the sum of Rs.15,90,562/-. The dispute arose between the parties and was referred to the arbitration. Pursuant to the liberty granted by the learned arbitrator, the petitioner filed a statement of claim in the month of March 2011 inter alia praying for a sum of Rs.36,47,466/- with interest thereon. The petitioner claimed refund of the amount encashed by the respondent by invoking two performance bank guarantees, balance freight charges at Rs.7,56,394/-, refund of deduction against diesel escalation at Rs.62,840/- and the deduction in the bill at Rs.2,24,550/-. The said statement of claim was resisted by the respondent by filing written statement. None of the parties led any oral evidence before the learned arbitrator. The learned arbitrator rendered an award on 12th October 2012 thereby rejecting the claims made by the petitioner which award is impugned by the petitioner in this petition on various grounds.

19. During the course of the arguments, the learned counsel appearing for the petitioner did not seriously press the claim towards balance freight charges, deduction against diesel escalation and for wrongful deduction in the bill but seriously pressed the claim for refund of the amount recovered by the respondent for encashing two bank guarantees.

20. Some of the relevant clauses 3, 3.1 to 3.3, 4, 5 and 5.1 of the letter dated 27th September 2006 i.e. notification of the award of the contract which are relied upon by both the parties during the course of arguments are extracted as under :-

“3.0 TERMS OF PAYMENT:-

3.1 CORPORATION shall pay to CONTRACTOR rates as per schedule and terms and conditions enclosed at ANNEXURE-I.

3.2 The rates payable shall be firm during the entire CONTRACT period including extension period, if any as mentioned in the subject tender document.

3.3 The ESCALATION/DE-ESCALATION shall be allowed /effected for any rise/fall in the price of the diesel by an order of the Government of India, applicable at Mumbai with effect from any date after closing date of tender i.e. 17/03/2006 as per clause NO.7.4 of Annexure-III of the tender document.

4.0 MOBILISATION AND LIQUIDATED DAMAGES :- The Contractor shall be responsible to deploy vehicle(s) a and when required by the ONGC as per clause no.5.5.1 and liable for liquidated damages as per clause no.10 of Scope of work, Annexure-III of tender document.

5.0 PERFORMANCE BANK GUARANTEE/SECURITY DEPOSIT

5.1 You are requested to furnish a Performance Bank Guarantee / Security Deposit for Rs.14,83,359.00 (RUPEES FOURTEE LAKHS EIGHTY THREE THOUSAND THREE HUNDRED FIFTY NINE ONLY i.e. @7.5% of one year Contract value for above Schedules) valid upto 60 days beyond date of completion of Contract period of one year (i.e. 12 months + 60 days = Total validity required to be submitted upto 27/11/2007) from the date of commencement of Contract towards satisfactory performance of the entire contract (as per prescribed format given in the subject tender document) from a Nationalized/ Scheduled Indian Bank within 15 days from the date of issue of NOA.”

21. Clauses 9, 10, 20 and 21 of the contract agreement entered into between the parties are extracted as under :-

“9.0 PERFORMANCE :-

The CONTRACTOR shall undertake to perform all services under this CONTRACT with all-reasonable skill, diligence and care in accordance with sound industry practice to the satisfaction of the CORPORATION and accept full responsibility for the satisfactory quality of such services as performed by them. Any defect, deficiencies noticed in the CONTRACTOR's service will be promptly remedied by the CONTRACTOR within 10 days upon the receipt of written notice from the CORPORATION to improve their performance failing which the CORPORATION may terminate the CONTRACT by giving the CONTRCTOR 30 (thirty) days written notice.

10.0 PERFORMANCE BOND :-

The CONTRACTOR has furnished security deposit in the form of Two Bank Guarantees as per details given below towards performance under this CONTRACT.

a) Performance Bank Guarantee No.28/41 dt.09/10/2006 amounting of Rs.1,07,203/- Valid upto 11/11/2007 from Central Bank of India, Devnar Br. Mumbai.

b) Performance Bank Guarantee No.28/42 dt.16/10/06 amounting of Rs.14,83,359/- Valid upto 17/11/2007 from Central Bank of India, Devnar Br. Mumbai.

In the event CONTRACTOR fails to honour any of the commitments entered into under this agreement, and/or in respect of any amount due from the CONTRACTOR to the CORPORATION, the CORPORATION shall have unconditional option under the guarantee to invoke the above bank guarantee and claim the amount from the bank. The bank shall be obliged to pay the amount to the CORPORATION on demand.

20. CONSEQUENTIAL DAMAGES :

Notwithstanding either party's fault, neither party shall be liable to the other party in respect of any consequential damages whatsoever. The term "Consequential damages" as used herein shall include without limitations to the meaning, loss of profit, production, business opportunities or use of assets.

21. CHANGE IN LAW :

In the event of any change or amendment of any Act or law, Rules or Regulations of Govt. of India or Public Body or any change in the interpretation or enforcement of any said Act or law, rules or regulations by Indian Govt. or public body which becomes effective after the date as advised by the ONGC for submission of final price bid for this CONTRACT and which results in increased cost of the works under the CONTRACT through increased liability of taxes, (other than personnel and Corporate taxes), duties, the CONTRACTOR shall be indemnified for any such increased cost by the ONGC subject to the production of documentary proof to the satisfaction of the ONGC to the extent which is attributable to such change or amendment as mentioned above.

Similarly, if any change or amendment of any Act or Law including Indian Income Tax Act, Rules or regulations of any Govt. or public body or any change in the interpretation or enforcement of any said Act or Law, rules or regulations by Indian Govt. or public body becomes effective after the date as advised by the ONGC for submission of final price bid of this CONTRACT and which results in any decrease in the cost of the project through reduced liability of taxes, (other than personnel and Corporate taxes) duties, the CONTRACTOR shall pass on the benefits of such reduced cost, taxes or duties to the CORPORATION.

Notwithstanding the above mentioned provisions, CORPORATION shall not bear any liability in respect of (i) Personnel taxes on the employees of CONTRACTOR and the employees of all its SUB-Contractors etc. (ii) Corporate taxes in respect of the CONTRACTOR and its SUB-Contractors etc."

22. Clause 18.1 provides for termination of the contract on expiry of the contract. Clause 18.4 provides that if the performance of the contractor was not satisfactory and not upto the expected standard, the ONGC shall notify the contractor in writing and specify in detail the cause of such dissatisfaction. The ONGC shall have the option to terminate such agreement by giving 30 days' notice in writing to the contractor, if the contractor fails to comply with the requisitions contained in the said written notice issued by the ONGC. Clause 18.6 provides that in all cases of termination, the obligation of the ONGC to pay shall be limited to the period upto the date of termination. Notwithstanding the termination of the said agreement, the parties shall continue to be bound by the provisions of the said agreement that reasonably require some action or forbearance after such termination. Clause 27 provides for arbitration.

23. Clause 5 (v) of Annexure – I to the contract agreement provides that in case of failure on the part of the contractor to display the vehicles as required to lift the materials under the above clauses, non-supply charges shall be payable by the contractor to the ONGC as per clause 11.2 (Liquidated Damages). Clauses 6, 7 and 8 of the said Annexure – I are extracted as under :-

“6.0 ONGC shall have unqualified option to forfeit the Security Deposit if the contractor fails to carry out the jobs/provide the services as per terms and conditions of the contract without prejudice to other rights and remedies available to ONGC.

7.0 ONGC shall have right to recover from the Security Deposit/Bank Guarantee any sum of dues outstanding against the contractor including any amount on account of L.D.

8.0 ONGC shall have rights to forfeit Security deposit/Bank guarantee or appropriate towards the damages or losses that may be sustained by ONGC due to any act/omission or default by the Contractor.”

24. Clauses 7.3 and 7.4 of the Special Conditions are extracted as under :-

“7.3 Rate(s) shall be firm and valid for the whole period of this contract, except for escalation/de-escalation as per provisions of sub-clause No.7.4 hereinafter.

7.4 The ESCALATION/DE-ESCALATION shall be allowed/effectuated for any rise/fall in the price of the diesel by an order of the Government of India, applicable at Mumbai with effect from any date after closing date of tender i.e. 17/03/2006. Escalation/De-escalation shall be worked out for the actual effect on the expenses on account of diesel consumption with increase/decrease in the diesel prices. Distance for this purpose shall be as indicated in Annexure-III plus any extra distance on account of delivery/collection from places not covered under Annexure-III. The average kilometer's per liter shall be taken as four (4) kilometers in case of Trucks, two (2) kilometer in case of Trailer and 6 kilometers for Mini Trucks for prescribed capacity of Mini Trucks/trucks/trailers.”

25. Clauses 10.1 and 10.2 of the said Special Conditions which are relevant for the purpose of deciding this petition are as under :-

“10 LIQUIDATED DAMAGES AND PENALTY

10.1 In case of any delay in carrying out any job assigned to the Contractor under the Contract, liquidated damages, not by way of penalty, at the rate of 1% (one percent) of the freight amount payable for the quantity actually delayed shall be imposed for each day's delay with a maximum ceiling of 5% of that particular consignment.

10.2 In case of failure on the part of the Contractor to deploy the vehicle in accordance with Clause No.6.5, non-supply charges shall be recoverable from the Contractor @ Rs.350/- (Rupees Three hundred fifty) only per truck and Rs.700/- (Rupees seven hundred only) per trailer Rs.100/- (one hundred only) for Mini Truck for the number of vehicles not supplied during the specified period in accordance with job order in terms of Clause 6.5. For example, if Contractor supplies 17 (Seventeen) Truck as against 20 (twenty) Truck in week on two days advance notice under Clause 6.5, an amount of Rs.1050/- (Rupees one thousand fifty) only shall be recovered from the Contractor for non-supply of three trucks. ONGC shall also have the option to let the work done at the risk and cost of the Contractor in such cases. ONGC shall have the right to repeat the work order for the same materials, which is not lifted or make arrangements at the risk and cost of the Contractor its sole discretion. In case the work Order is apply as in the case of original work orders.”

26. Mr.Purohit, learned counsel for the petitioner invited my attention to the correspondence entered into between the parties, various provisions of the contract and also the pleadings filed by the parties. He submits that the respondent has deducted the amounts from the freight / transportation charges based on the rate list issued by Bharat Sanchar Nigam Limited which could not have been considered as Government of India whose order would be binding on the parties for the purpose of escalation/deescalation. It was pleaded by the respondent that the Government of India included all the authorities including State Government. The respondent placed reliance on the alleged notification issued by the Government of Maharashtra for the purpose of de-escalation freight / transportation charges. He submits that in the written statement, the respondent did not rely upon clause 21 of the contract. The

learned arbitrator however, has applied clause 21 to the facts of this case while rejecting the claims made by the petitioner.

27. He submits that the change in the quantum of sales tax would not amount to change of law. Since there was a specific clause for escalation / de-escalation provided in the contract, general clause under clause 21 would not apply. He submits that the learned arbitrator has decided contrary to the stand taken by the respondent which was not part of the pleadings. He submits that the calculation of the freight / transportation charges was as per Annexure – III under clause 7.4 and not under clause 21.

28. Learned counsel for the petitioner submits that the entire action on the part of the respondent in reducing the freight / transportation charges was contrary to the terms of the agreement and was illegal. The learned arbitrator has decided contrary to the terms of the contract while rejecting the claims made by the petitioner. He submits that the learned arbitrator overlooked the admitted fact that the contract awarded to the petitioner was to transport the material even outside Maharashtra and from out of Maharashtra to Mumbai. The reduction of diesel price, if any, by the State Government thus was not binding on the petitioner or the respondent for the purpose of reducing the freight/ transportation charges.

29. Learned counsel for the petitioner then submits that the learned arbitrator failed to consider that the petitioner had agreed to execute the work orders issued by the respondent on the condition that

the respondent would pay the petitioner at the old rate provided in the contract which proposal was in accordance with the provisions of the contract. He submits that in any event the respondent got the said work orders executed through another contractor at the reduced rates. The respondent had thus not suffered any loss, even if the petitioner had refused to execute the said two work orders. He submits that the learned arbitrator however, did not decide whether any loss was suffered by the respondent or not for executing those two work orders through the other contractor at the risks and costs of the petitioner.

30. Learned counsel submits that it was not even the case of the respondent that the respondent had suffered any loss due to refusal on the part of the petitioner to execute those two work orders. He submits that even if the finding of the learned arbitrator that the petitioner had failed to execute the said two work orders is treated as correct, unless the respondent would have suffered any loss due to such refusal on the part of the petitioner in executing those two work orders, the respondent could not have appropriated the amount deposited by the petitioner towards retention money and by appropriating the money recovered by encashing the performance bank guarantees.

31. Learned counsel submits that even under clause 18 of the contract, in case of breaches, if any, by the petitioner, the respondent was bound to give 30 days notice before effecting the termination of the contract, whereas in this case the respondent had issued only 7 days notice. After expiry of 7 days, the respondent had got the work under those two work orders executed through another contractor. He submits

that even if the respondent could have encashed the bank guarantees, the respondent could not have appropriated the amount recovered from encashing the performance bank guarantees and also retention money amount unless any loss was suffered by the respondent.

32. Learned counsel submits that in any event even if the respondent could have recovered any amount under any provisions of the contract, the respondent could not have appropriated the entire amount of Rs.15,90,562/-. He submits that the total value under the said two work orders was aggregating to Rs.6.00 lacs approximately and thus the respondent could not have appropriated the amount of Rs.15,90,562/-.

33. Learned counsel for the petitioner then submits that the respondent did not give any reasons in the correspondence or in the pleadings as to why the respondent had recovered the said amount and appropriated due to the alleged loss, if any, suffered by the respondent.

34. Mr.Purohit, learned counsel for the petitioner placed reliance on the judgment of Queen's Bench Division (Commercial Court) in the case of ***Cargill International SA & Anr. vs. Bangladesh Sugar & Food Industries Corp. (1996) 4 All England Law Reports, 563***. He submits that even in case a performance bank guarantee, unless the respondent would have suffered any loss due to the alleged breaches on the part of the petitioner, if any, the respondent could not have forfeited and appropriated the amount under those bank guarantees. The relevant portions of the said judgment is extracted as under :-

“I turn therefore to the contract between the parties. Under Clause 13 the bond was 'liable to be forfeited ... if the seller

fails to fulfill any of the terms and conditions of this contract ... and also if any loss/damage occurs to the buyer due to any fault of the seller'. It seems to me that on a proper construction of this clause, there is no indication that it was the parties' intention that the bond would either satisfy the whole of the buyer's damages (see above), or prevent the seller from recovering any overpayment. The word 'forfeit' might be apt to suggest that once called, the bond moneys had 'gone' for good. But if it had been the intention of the parties to produce a result whereby the buyer could both call on the bond and sue for damages, whereas the seller forfeited his right to any overpayment, then much plainer words would have been required to take this case away from the general principles as I perceive them to be. That being so, it seems to me that treating the two parts of the clause disjunctively, and treating the right to forfeit as arising if either there was a breach or if any loss or damage occurred to the buyer due to any fault of the seller (which might not be a breach) would make commercial good sense. The buyer is stipulating clearly that, as between himself and the seller, all he needs to show to be entitled to call on the bond is a breach of contract; he need not show damage (although damage will almost always follow); if, on the other hand, say through a misrepresentation by the seller, damage was caused to the buyer then the right to call the bond was conferred by the second half of the clause. But in either event, there will be an 'accounting' at trial or arbitration to ensure that the buyer has not been underpaid or overpaid.

Further, it seems to me that the more natural reading of the clause is to treat the events giving rise to a right to 'forfeit' the bond as disjunctive. The words 'also if' would otherwise be unnecessary and the words 'due to any fault of the seller' would not lie easily with a construction which treated the only triggering event as a breach of contract ('fails to fulfill any of the terms and conditions of this contract').

In relation to Clause 16, I cannot accept Mr. Males' submission that the right to forfeit the bond is subject to the same conditions as to loss being suffered as provided for by Clause 13. The words 'mentioned at' are, I think, no more than

a reference back to Clause 13, which is headed 'performance bond'. I do not read these words as meaning 'the right to forfeit in the circumstances set out in Clause 13'. It seems to me that Clause 16 clearly provides that if the arrival period/time stipulated in the contract is not adhered to then the buyer will either be entitled to liquidated damages or to terminate the contract and call back the letter of credit and forfeit the bond. Again, the right, as between the parties, of the buyer to call on the bond is not conditional upon him showing any damage. On termination he is entitled to receive immediate payment of the bond moneys and sue for damages, and the seller, conversely, is entitled to recover any overpayment.

Although this point does not arise for decision, it seems to me unclear whether Clause 16 and 13 are cumulative. If the goods arrive late and the buyer affirms the contract is he entitled to both liquidated damages and to forfeit the bond. It could be said that Clause 16 was a self contained code for what happened on late arrival. I am asked to assume that the goods arrived late in breach of contract and that an over-age vessel was used to carry them, also in breach of contract. The latter breach would fall within the first part of Clause 13; the former within Clause 16. Even if Clause 16 was self contained, and no argument to this effect was addressed to me, then the right to forfeit the bond existed by reason of the latter breach. If the two clauses operate cumulatively, so that where there is late arrival and the buyer affirms the contract, it will be seen that the buyer not only receives liquidated damages (which would presumably be a genuine pre-estimate of the damages sustained) but also obtains a windfall payment of the moneys under the bond.

In my judgment, under no circumstances is the performance bond to provide to the buyer a windfall payment. That cannot have been the parties' intention: the bond could not be in stronger terms: the bank unconditionally and absolutely bound itself to make payment only to the buyer 'without any question whatsoever' and 'it is expressly understood that the sole judge for deciding whether the suppliers have performed the contract and fulfilled the terms and conditions of the

contract will be' the buyers. As Lord Denning MR said, this type of bond can be called upon whenever there is a breach or perceived breach, however trivial. It surely cannot have been the parties' intention that the buyer who could so easily call on the bond should be able to retain for his own benefit a windfall profit. If that had been the parties' intention, then either no party would trade on those terms or the buyer would always pay 10% more than the market price.

The basis upon which recovery may be made in respect of an overpayment is, I think, contractual rather than quasi contractual. It seems to me that it is necessary to imply into the contract that moneys paid under the bond which exceeded the buyer's actual loss would be recoverable by the seller. I am content to adopt Mr. Males' formulation of the term which is to be implied into the sale contract, as a matter of necessity or on the basis that the implication of such a term was so obvious that its incorporation in the contract went without saying: 'that the buyer will account to the seller for the proceeds of the bond, retaining only the amount of any loss suffered as a result of the seller's breach of contract.'

35. Learned counsel for the petitioner placed reliance on the judgment of the Supreme Court in the case of ***M/s.Kailash Nath Associates vs. Delhi Development Authority & Anr., decided on 9th January 2015 in Civil Appeal No.193 of 2015*** reported in 2015 SCC OnLine SC 19.

36. Learned counsel for the petitioner also placed reliance on the judgment of this Court in the case of ***Punj Lloyd Limited vs. Hindustan Petroleum Corporation Limited delivered on 24th March, 2015 in Arbitration Petition No.368 of 2012***. Paragraphs 63 and 85 to 87 of the said judgment of this Court read thus :-

“63. Learned senior counsel placed reliance on the

*judgment of the Supreme Court in the case of **M/s.Kailash Nath Associates Vs. Delhi Development Authority** decided on 9th January 2015 in Civil Appeal No.193 of 2015 reported in 2015 SCC OnLine SC 19 and in particular paragraphs 33 and 43 and would submit that even if the provision for price reduction was considered as liquidated damages, since the loss suffered by the respondent is capable of being calculated, the respondent not having suffered any loss could not have recovered any amount from the running account bills of the petitioner. Learned counsel submits that neither there was any pleadings nor any evidence led by the respondent as to how much loss the respondent had suffered because of the alleged delay on the part of the petitioner. Paragraphs 33 and 43 of the said judgment in the case M/s.Kailash Nath Associates(supra) read thus :*

“33. Section 74 occurs in Chapter 6 of the Indian Contract Act, 1872 which reads “Of the consequences of breach of contract.” It is in fact sandwiched between Sections 73 and 75 which deal with compensation for loss or damage caused by breach of contract and compensation for damage which a party may sustain through non-fulfillment of a contract after such party rightfully rescinds such contract. It is important to note that like Sections 73 and 75, compensation is payable for breach of contract under Section 74 only where damage or loss is caused by such breach.

43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows :-

Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of

damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.

The Section applies whether a person is a plaintiff or a defendant in a suit. The sum spoken of may already be paid or be payable in future.

The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.”

85. *It is not in dispute that the clause 10 of the general conditions which provided for payment of liquidated damages was replaced by clause 22 of the Special Conditions of the conduct which provided for price reduction for delay in completion of work due to reasons not attributable to the owner*

at the rate prescribed therein. The learned arbitrator has rendered a finding that the delay was caused by the petitioner which were not attributable to the respondent and had justified the amount of recovery by the respondent under the said clause 22.

86. A perusal of the award indicates that the learned arbitrator has rendered a finding on interpretation of the said clause 22. The said clause 22 was of penal nature. The Supreme Court in case of **Kailash Nath Associates (supra)** has held that where amount fixed were in nature of penalty only reasonable compensation can be awarded not exceeding the penalty so stated. A perusal of the pleadings as well as impugned award clearly indicates that it was neither the case of the respondent that the percentage at which the recovery was permissible under the said clause 22 of the Special Conditions of Contract subject to ceiling of 5% was reasonable compensation nor the learned arbitrator has rendered a finding that the said amount recovered by the respondent was reasonable compensation. It is also neither pleaded nor the learned arbitrator has rendered a finding that the amount mentioned in clause 22 was a genuine pre-estimate of damage or loss. In my view by allowing recovery of the respondent to the extent of the ceiling amount by the learned arbitrator, the learned arbitrator has acted contrary to the principles laid down by the Supreme Court in case of **M/s.Kailash Nath Associates (supra)** and several other judgments adverted in the said judgment.

87. This court in case of **Panna Sunit Khatau (supra)** has also taken a similar view and has held that even if the findings of willing default was correct, the learned arbitrator could have awarded only a reasonable compensation and not the entire amount calculated based on the clause which was in the nature of penalty. This court held that none of the party has led any evidence to show that the amount contemplated in the contract was reasonable compensation, hence no such recovery of the entire amount made by the party complaining breach could be sustained. I am respectfully bound by the judgment of the Supreme Court in case of **M/s.Kailash Nath Associates (supra)** and judgment of this court in case of **Panna Sunit Khatau**

(supra) which in my view squarely applies to the facts of this case. The award in so far as claim no.1 is concerned is accordingly set aside.”

37. Learned counsel for the petitioner submits that though the petitioner had specifically raised the issue before the learned arbitrator that since the respondent had not proved any loss due to alleged breaches on the part of the petitioner and was thus not entitled to appropriate any amount, the learned arbitrator has not decided the said issue in the impugned award.

38. Mr.Bharti, learned counsel for the respondent on the other hand supported the findings recorded by the learned arbitrator and would submit that such findings of fact rendered by the learned arbitrator cannot be interfered with by this Court under section 34 of the Arbitration & Conciliation Act, 1996. Learned counsel invited my attention to various provisions of the contract referred to aforesaid and would submit that the performance guarantees executed by the petitioner was an independent guarantee in order to secure the performance of the obligation of the petitioner under the provisions of the contract.

39. Learned counsel submits that since the petitioner admittedly did not execute two work orders, and had refused to execute the said work orders, the petitioner had failed to perform the terms of the contract and thus under clause 10 of the contract, the respondent became entitled to encash the performance bank guarantees and to appropriate such amounts. He submits that whether the respondent had suffered any loss or not is irrelevant for the purpose of encashing and appropriating the

amount under performance bank guarantees. He submits that the said amount appropriated by the respondent neither fall under section 73 nor 74 of the Indian Contract Act, 1872. He submits that once the respondent had placed work orders upon the petitioner during the existence of the contract, the petitioner could not have refused to perform their part of obligation on the ground that the respondent could not have reduced the freight / transportation charges or on any other ground.

40. It is submitted that the dispute, if any, between the parties could have been the subject matter of arbitration. He submits that the respondent rightly exercised their right under the provisions of the contract to get the said two work orders executed through another contractor at the risks and costs of the petitioner. He submits that the proof of loss is not required for the purpose of appropriating the said amount in view of the breaches admittedly committed by the petitioner under the performance of their part of obligation.

41. Learned counsel for the respondent placed reliance on clause 20 of the contract which provides for consequential damages. He submits that in view of the said clause, the petitioner could not have claimed any damages and also could not have asked for refund of the amount appropriated by the respondent.

42. In so far as the issue raised by the petitioner whether the decrease in the cost of the freight/ transportation charges was permissible under the provisions of the contract is concerned, he submits that the learned arbitrator has rightly relied upon clause 21 of the contract which

specifically provides that if due to any local law there was reduction or liability of taxes would have decreased the costs of project, the respondent was justified in reducing the freight / transportation charges payable to the petitioner. He submits that the quantum of the sales tax is not decided by the administrative order but under the substantive provision of law under clause 21 of the contract. He submits that the contract has to be read as a whole.

43. Learned counsel submits that increase or decrease in the price has to be considered under the provisions of the entire contract and not any particular provision. There was thus no breach on the part of the respondent in deducting any amount from the freight / transportation charges and their action was thus justified. He submits that the learned arbitrator has interpreted the provision of contract which interpretation is possible interpretation and thus cannot be substituted by any other interpretation by this Court under section 34 of the Arbitration & Conciliation Act, 1996.

44. Learned counsel submits that it was not the case of the respondent that the bank guarantee was encashed to appropriate any liquidated damages or penalty. The question of the respondent suffering any loss or not is thus irrelevant. The parties never intended to relate performance bank guarantee to any loss. Since the petitioner had committed the breaches on their part under the contract, the respondent was entitled to encash the performance bank guarantees and to appropriate the amounts therein.

45. Learned counsel for the respondent submits that the parties had contemplated under the terms of the contract as to how the breach if committed by a party has to be dealt with and the other party has to be compensated. He submits that under clause 10 of the contract, in case of a breach committed by the contractor, the respondent was entitled to invoke performance bank guarantee and to claim the said amount. Since the petitioner admittedly did not execute the two work orders, the respondent was entitled to encash the said two performance bank guarantees and to recover and appropriate the said amount.

46. Learned counsel for the respondent placed reliance on the judgment of the Madras High Court in the case of **Crompton Greaves Ltd. Vs. Dyna**, reported in (2007) 4 MLJ 1210 and in particular paragraphs 6, 8, 9, 15, 16, 23, 26 and 27 thereof and it is submitted that once the parties had agreed to levy compensation in accordance with the mode and manner prescribed under the provisions of the agreement applicability of Sections 73 and 74 of the Indian Contract Act is excluded. The provisions of the contract which permitted the respondent to encash the bank guarantee did not contemplate any proof of loss by the respondent.

47. Mr. Bharti, learned counsel for the respondent placed reliance on the judgment of the Supreme Court in the case of **Ramnath International Construction Pvt. Ltd. Vs. Union of India & Anr.**, reported in AIR 2007 SC 509 and submitted that if the compensation is prohibited or barred under the provisions of the contract, the learned arbitrator cannot allow any such compensation in excess of his jurisdiction.

48. Learned counsel for the respondent placed reliance on the judgment of the Division Bench of this Court in the case of ***Union of India Vs. Arctic India***, reported in ***2012 (5) Bom.C.R. 485*** and would submit that the learned arbitrator cannot allow any claim contrary to the terms of the contract. He submits that in this case, the learned arbitrator has not rejected the claim made by the petitioner contrary to the terms of the contract.

49. Learned counsel for the respondent then placed reliance on the judgment delivered by the learned Single Judge of this Court in the case of ***Jagson International Ltd. Vs. Oil and Natural Gas Corporation Ltd.***, reported in ***2012 (114) Bom.L.R. 2870*** and in particular paragraphs 20, 33, 34 and 35 in support of his submission and would submit that for appropriation of the amounts recovered by encashment of performance bank guarantees in terms of the contract, the respondent was not liable to prove any loss. Paragraphs 20, 33, 34 and 35 of the said judgment read thus :-

“20. On 15th April, 2008, by the impugned Award, the Arbitral Tribunal dismissed all claims made by the Petitioners and also vacated the interlocutory injunction by directing that it would be opened to the Respondents to encash the Bank Guarantee No.472 of 2003 issued by the State Bank of Hyderabad at the instance of the Petitioners. Hence the Arbitration Petition.

33. The basic principles of law revolving around the invocation of performance bank guarantee also have been considered by the learned Arbitral Tribunal.

34. Having once observed that the Petitioners failed to perform their contract and/or no case is made out and considering the terms and conditions of those performance bank guarantees with bank, any order of encashment of the

bank guarantee, in no way can be stated to be bad in law. The legal position/provisions so referred and relied in most of the cases were at interim stage. This is the case, after considering the merits of the matter, at final stage, the Arbitral Tribunal has permitted the Respondents to invoke the bank guarantee. Admittedly, there was no performance as contemplated and as agreed and provided, the consequences of invocation, I see there is no reason to interfere with the same.

35. The learned Senior counsel appearing for the Petitioners has wrongly submitted and relied upon the various judgments of Supreme Court and also of this Court and thereby contended that the Respondents ought to have proved the actual loss. Admittedly, there is no such situation in the present case with regard to the proof of the actual damages. All those cases so referred and relied upon, in no way concern and/or deal with the situation like this. The composite agreements, apart from the clauses, the execution of performance bank guarantee read with the undertaking so signed, need to be read together. It cannot be dissected for any reason. It is not the case that the Respondents claiming so called damages by leading evidence to support their case of actual loss. It is not the case even of the Petitioners that such agreement restricting to 7.5% of total value, as mentioned and/or recorded in the bank guarantee read with the undertaking, is contrary to law and/or impermissible. Both the parties have acted upon the same for long. The learned Arbitrator, after considering and giving clear findings directed to encash the bank guarantee. Admittedly, there was interim relief since long. ”

50. Mr. Bharti, learned counsel for the respondent makes an attempt to distinguish the judgments cited by the learned counsel for the petitioner in case of *Cargill International SA & Anr. (supra)* on the ground that the clause considered by the Queen's Bench Division in the said judgment was different than the clause of the contract applicable to the parties in this case.

51. In so far as the judgment of the Supreme Court in the case of *M/s.Kailash Nath Associates (supra)* relied upon by the petitioner is concerned, the learned counsel appearing for the respondent submits that the said judgment would also not apply to the facts of this case as in this case, there was no provisions under the contract for proving any loss for encashing and appropriating any amount under the performance bank guarantee.

52. Mr.Purohit, learned counsel for the petitioner in the rejoinder invited my attention to the escalation and de-escalation clause in the contract and would submit that the said clause refers to the Government of India and not the State of Maharashtra as canvassed by the learned counsel for the respondent. He submits that clause 21 was not relied upon by the respondent in the written statement and was not applicable to the facts of this case.

53. Learned counsel invited my attention to the letter dated 28th December 2009 addressed by the respondent to the petitioner in which, there was a specific reference to the recovery of the liquidated damages by the respondent in terms of clauses 10.1 and 10.2 of Annexure-II. He submits that even if the petitioner did not execute the said two work orders, the respondent could have appropriated the amount encashed from the retention money and performance bank guarantees unless the respondent would have suffered any loss and would have proved the same. There cannot be any windfall in favour of the respondent merely because the petitioner had not executed the said two work orders out of several work orders.

REASONS AND CONCLUSIONS:-

54. The question that arises for consideration of this Court is whether the respondent was justified in encashing and appropriating the retention money deposit and the performance bank guarantees in view of the petitioner not having executed the two work orders on the ground that the reduction in freight/transportation charges by the respondent was unlawful and as to whether the respondent was liable to prove any loss if suffered in view of the petitioner refusing to execute two work orders.

55. Clause 3 of the letter dated 27th September 2006 i.e. notification of the award of the contract provides for the payment required to be made to the petitioner by the respondent. Under clause 3.3 of the said letter, it was clearly provided that the escalation/de-escalation shall be allowed /effected for any rise/fall in the price of the diesel by an order of the Government of India, applicable at Mumbai with effect from any date after closing date of the tender. A perusal of the correspondence exchanged between the parties indicates that it was the case of the respondent that with effect from 1st December 2006, the State of Maharashtra came out with an order issued under the provisions of the Bombay Sales Tax Act by virtue of which, sales tax on the price of the diesel to be sold in Maharashtra was reduced. As a result of the said reduction in sales tax levied on the diesel by State of Maharashtra, purchase price of the diesel was reduced by Rs.2.39 paise. According to the respondent, they accordingly provided for de-escalation in the freight/transportation charges payable to the petitioner as per the rise and fall in the diesel price.

56. The correspondence further indicates that the petitioner had opposed such proposal on the part of the respondent on the ground that under clause 3.3 of the letter dated 27th September 2006, the escalation and de-escalation was allowed in the price of the diesel only by an order of the Government of India applicable at Mumbai and not by any order of State of Maharashtra. The correspondence further indicates that the respondent, thereafter, changed its stand and informed the petitioner vide its letter dated 26th April 2007 that the reduction in diesel price was not based upon the reduction in sales tax levied by State of Maharashtra but the same was on the strength of rate list/price list issued by the BPCL, Government of India Enterprise. When the petitioner protested against the said stand of the respondent vide letter dated 7th May 2007 and informed that BPCL was a body different from Government of India and the parties never contacted the Public Sector Undertakings like BPCL for deciding diesel price, the respondent could not have reduced the cost of freight, the respondent reiterated its stand that reduction/increase in diesel price and consequent de-escalation/escalation in the cost of freight in the past was on the basis of the rate list published by Oil Public Sector Undertakings.

57. The petitioner, therefore, contended that since de-escalation of the freight/transportation charges by the respondent was illegal and contrary to the terms of the contract, the petitioner insisted that unless the respondent would have agreed to pay the rate of freight/transportation charges as per the old rate paid in past under the said contract, the petitioner would not be able to execute those two work orders. The respondent, however, insisted for executing the said two work orders at the de-escalated freight/transportation charges. It is not in dispute that the

respondent got the said two work orders executed through another contractor at the rate less than the rate payable to the petitioner under the said contract.

58. A perusal of the written statement filed by the respondent in the arbitral proceedings indicates that it was averred by the respondent that BPCL was a Government of India undertaking and the prices fixed by the said Government of India were based on the instructions and directions received by the Public Sector Undertakings including BPCL. It is also averred that the Government of Maharashtra reduced the sales tax on diesel prices some time in the months of November-December 2006 and in view thereof, the diesel prices decreased and the said BPCL had forwarded the rates of diesel dated 1st December 2006 applicable at Mumbai.

59. In paragraph 8 of the written statement, it was averred by the respondent that under clause 7.4 of the contract, escalation/de-escalation was allowed on account of rise and fall of diesel price by an order of Government of India. It was, however, contended by the respondent that Government of India mentioned in the said clause included and pre-supposed all authorities including the State Government. In order to keep the clause short and simple, all these aspects had not been elaborated in the said clause. It is averred that the respondent had correctly deducted from the bills submitted by the petitioner on account of decrease in sales tax under the notification issued by the Government of Maharashtra resulting in the decrease of the price of diesel. It is also averred that the respondent was justified in deducting the said amount applying the de-escalated rates due to

notification of Government of Maharashtra pertaining to sales tax resulting in decrease of diesel prices. It is clear that the respondent did not rely upon clause 21 of the contract either in the correspondence or in the written statement before the learned arbitrator. The respondent, however, filed written submission before the learned arbitrator on 14th April 2012.

60. A perusal of the said written submission which was filed after conclusion of the arguments indicates that in the said written submission, the respondent placed reliance on clause 21 of the contract which provides for consequence in view of change in law. Based on clause 21 of the contract, it was contended in the written submission that since the decrease of the diesel price was on account of decrease in the sales tax by the State Government deduction by the respondent was totally justified or was in accordance with the contract. The petitioner had no opportunity to deal with the said written submission raising a new contention by the respondent based on clause 21 of the contract.

61. A perusal of the award indicates that the learned arbitrator has placed reliance on clause 21 of the contract and held that the said clause made a specific provision that any change or amendment of any Act or Law, rules or regulations of Government of India or Public Body or any change by Indian Government or Public Body becomes effective after the date as advised by the respondent for submission of final price bid of the said contract which resulted in any decrease in the cost of the project through reduced liability of taxes, the contractor shall pass on the benefits of such reduced cost, taxes or duties to the ONGC.

The learned arbitrator accordingly rejected the contention of the petitioner that the de-escalation of the freight/transportation charges was contrary to clause 3.3 of the contract.

62. Consequently, the learned arbitrator has also held that the act of the petitioner in refusing to perform the obligation under the work orders was unwarranted and tantamounted to repudiation of the contract which entitled the respondent to exercise its rights under the contract and invoke the performance bank guarantees. The learned arbitrator has held that the refusal on the part of the petitioner to execute the two work orders was unjustified because of the reduction in the contract price on account of reduction in diesel price. It is held that the respondent was thus justified in invoking the performance bank guarantees and accordingly, answered the said issue in negative.

63. In so far as the submission of Mr.Bharti, learned counsel for the respondent that even if, according to the petitioner, the respondent was not entitled to de-escalate the freight/transportation charges based on any notification issued by the State of Maharashtra and not under any order of the Government of India, the petitioner could not have refused to execute the said two work orders is concerned, in my view, since the respondent had taken a wrong and inconsistent stand in the correspondence itself before placing fresh work orders upon the petitioner, the petitioner was entitled to raise such protest and to make a representation to the respondent to sort out the said issue before executing the fresh two work orders. The respondent, instead of sorting out the said issue, raised inconsistent stand and issued 7 days' notice

instead of 30 days' notice before taking further steps in getting the said two work orders executed through another contractor.

64. In my view, the refusal on the part of the petitioner to execute two work orders out of several work orders which were satisfactorily performed in these circumstances was justified. In my view, the finding of the learned arbitrator that the petitioner thus could not have refused to perform its part of the obligation and ought to have accepted the reduced rate is perverse. It was not the case of the respondent that the several other work orders placed by the respondent upon the petitioner were not performed satisfactorily by the petitioner.

65. In so far as the reliance placed on clause 21 of the contract for the first time in the written submission is concerned, it is clear that the respondent had never relied upon the said clause either in the correspondence or in the written statement or at the time of submission made before the learned arbitrator. The petitioner had thus no opportunity to deal with the said new plea raised by the respondent for the first time in the written submission after closure of the arguments. The learned arbitrator thus before considering the new plea raised for the first time in the written statement either ought to have discarded such plea which was not raised in the correspondence or in the written statement or ought to have given an opportunity to the petitioner to deal with such a new plea before rendering the impugned award. In my view, Mr. Purohit, learned counsel for the petitioner is justified in contending that the reliance placed on clause 21 of the contract by the respondent for the first time in the written submission and the learned arbitrator relying

upon such clause without giving an opportunity to the petitioner to deal with the same is in violation of the principles of natural justice.

66. I do not therefore propose to go into larger issues as to whether the action on the part of the respondent for de-escalation of the freight/transportation charges could be justified under clause 21 of the contract or not contrary to the stand taken by the respondent in the correspondence as well as in the written statement that the de-escalation was on the basis of the rate list issued by BPCL based on the notification issued by the State of Maharashtra.

67. The next question that arises for consideration of this Court is whether the respondent could appropriate the amount recovered by encashing two performance bank guarantees and also retention money deposit in view of the alleged non-performance of the contract by the petitioner in respect of the two work orders even if, the respondent had not suffered any loss or had failed to prove any alleged loss.

68. Under clause 5.1 of the letter dated 27th September 2006, it was provided that the contractor was to furnish a performance bank guarantee/security deposit towards satisfactory performance of the entire contract. Under clauses 9 and 10 of the contract agreement entered into between the parties, it was provided that the contractor shall undertake to perform all services under the contract with all reasonable skill, diligence and care in accordance with sound industry practice to the satisfaction of the respondent. It was provided that in the event, the contractor failed to honour any of the commitments entered into under

the said agreement and/or in respect of any amount due from the contractor to the Corporation, the Corporation shall have unconditional option under the guarantee to invoke the bank guarantee and claim the amount from the bank.

69. Clause 20 provided for consequential damages which include loss of profit, production, business opportunities or use of assets. It was provided that neither party shall be liable to the other party in respect of any consequential damages whatsoever notwithstanding either party's fault. Clause 6 of the Annexure – I of the contract agreement provided that the respondent shall have unqualified option to forfeit the security deposit if the contractor fails to carry out the jobs or provide the services as per terms and conditions of the contract without prejudice to the other rights and remedies available to the respondent. The respondent shall have right to recover from the security deposit/ bank guarantee any sum or dues outstanding against the contractor including any amount on account of liquidated damages. The respondent shall also have rights to forfeit security deposit / bank guarantee or appropriate towards the damages or losses that may be sustained by the respondent due to any act/omission or default by the contractor.

70. Clause 10 provided for liquidated damages and penalty. Clause 10.1 provided for the amount which could be recovered by way of damages and penalty by the respondent. If the contractor failed to deploy the vehicle in accordance with clause 6.5, the respondent is entitled to recover non-supply charges from the contractor @ Rs.350/-

only per truck and Rs.700/- per trailer and Rs.100/- for Mini Truck for the number of vehicles not supplied during the specified period.

71. A perusal of the letter dated 28th December 2009 addressed by the respondent to the petitioner's advocate clearly indicates that it was the case of the respondent that since May 2007 the petitioner had not executed jobs assigned despite making continuous efforts by the respondent with the petitioner. The respondent alleged that the petitioner had not completed four work orders inclusive of work orders dated 4th May 2007 and 25th May 2007. In the said letter, the case of the respondent is clearly indicated that in terms of clauses 10.1 and 10.2 of Annexure-II of the contract dated 28th March 2007, the liquidated damages were recovered from pending bills of the contractor for delayed services. It was further contended that the action of the respondent for invocation of the bank guarantee was due to non-performance of the contract by the petitioner.

72. In my view, the argument of the learned counsel for the respondent that the respondent had not recovered any liquidated damages from the petitioner or that the encashment of the performance bank guarantee and the retention money deposit was neither under Section 73 nor Section 74 of the Indian Contract Act is totally untenable and contrary to Sections 73 and 74 of the Indian Contract Act, 1872. The submission of the learned counsel is also contrary to the stand taken by the respondent itself in the letter dated 28th December 2009. Learned counsel for the respondent could not explain the inconsistencies in its stand when his attention was invited to the contents of the letter dated 28th December 2009 addressed by the respondent to the advocate of the

petitioner. The respondent has neither pleaded nor proved that the amount mentioned in the contract under liquidated damages clause was a reasonable compensation or was a genuine pre-estimate loss. Though the value of work under the said two work orders was about Rs.6 lacs the respondent appropriated the larger amount and that also without proving the breaches on the part of the petitioner and the loss suffered if any by the respondent due to such alleged breaches which is not permissible in law.

73. A perusal of the provisions of agreement and in particular clauses 7 and 8 of Annexure -I which permits the respondent to recover from the security deposit/bank guarantee any sums of dues outstanding against the contractor including any amount on account of liquidated damages, clearly indicates that the respondent could recover the amount outstanding if any or towards liquidated damages. Clauses 10.1 and 10.2 of the contract also make it clear that the respondent could recover the liquidated damages at particular rate prescribed therein in case of any delay in carrying out any job assigned to the contractor. In this case, the respondent had not alleged any delay on the part of the petitioner.

74. A perusal of the written submission filed by the respondent before the learned arbitrator clearly indicates that the contention of the respondent was that the respondent had not pleaded any loss due to non execution of the work orders and, therefore, had not submitted any claim towards loss. The respondent also admitted that the respondent got executed the two work orders through Delhi Assam Roadways at the same rate which according to the petitioner was not commercially viable

and on that ground, the petitioner failed to perform its obligation of executing the contract.

75. A perusal of the written statement filed by the respondent and more particularly paragraph 18 clearly indicates that it was the case of the respondent that those two work orders bearing Work Order Nos. 643 and 663 were got executed by M/s.Delhi Assam Roadways at decreased rates. It is thus clear beyond reasonable doubt that the respondent had not incurred any loss of any nature whatsoever in view of the petitioner refusing to perform the said two work orders in view of the respondent making illegal deductions of the amounts from the freight/transportation charges or was insisting to get further work done from the petitioner on the reduced rate of freight/transportation charges. On the contrary, the record indicates that the respondent was benefited financially by getting the said two work orders executed by another contractor. In my view, there is no merit in the submission of Mr.Bharti, learned counsel for the respondent that once it was held by the learned arbitrator that the petitioner had refused to perform its part of the obligation under the contract, the respondent was entitled to encash the bank guarantee and also to appropriate the said amount.

76. A perusal of the terms and conditions of the contract referred to aforesaid clearly indicates that the performance bank guarantee was furnished by the petitioner to secure the performance of the contract. The purpose of giving such performance bank guarantees and earnest money deposit was to enable the respondent to recover the outstanding amount recoverable, if any, from the contractor under the

contract or towards liquidated damages in case the respondent had suffered any loss. In my view, there cannot be any windfall in favour of the respondent to encash and appropriate the amounts by encashing the performance bank guarantee and/or retention money merely on the basis of the alleged breaches committed by the petitioner without there being any amount recoverable by the respondent from the petitioner as outstanding under the provisions of the contract or against the loss, if any, suffered by the respondent due to the breaches committed by the petitioner. I am not inclined to accept the submission of Mr.Bharti, learned counsel for the respondent that it was an absolute right of the respondent to appropriate the said amount without the respondent having proved any loss due to the breaches, if any, committed by the petitioner.

77. The Queen's Bench Division (Commercial Court) in the case of *Cargill International SA & Anr. (supra)* has dealt with a similar issue at length and has held that under no circumstances is the performance bond to provide to the buyer a windfall payment. It is held that it is necessary to imply into the contract that moneys paid under the bond which exceeded the buyer's actual loss would be recoverable by the seller. The buyer will account to the seller for the proceeds of the bond, retaining only the amount of any loss suffered as a result of the breach of contract by the seller.

78. I am not inclined to accept the submission of Mr.Bharti, learned counsel for the respondent that the law laid down by the Supreme Court in the judgment relied upon by Mr.Purohit, learned counsel for the petitioner would not apply to the case of appropriation of

the amount under the performance bank guarantees. In my view, the purpose of furnishing such performance bank guarantees was to secure the performance of the contract and to make the said sums available with the respondent to appropriate the same only against the recovery, if any, of the respondent against the petitioner under the contract or for liquidated damages if such loss was capable of being calculated and was proved. I am in complete agreement with the views expressed by the Queen's Bench Division (Commercial Court) in the case of *Cargill International SA & Anr.(supra)* which principles would apply to the facts of this case.

79. In the case of *M/s.Kailash Nath Associates (supra)*, the Supreme Court has classified the measure of damages under Section 74 of the Indian Contract Act in detail. The Supreme Court has averted to its earlier judgment in the case of ***Maula Bux Vs. Union of India***, reported in **(1970) 1 SCR 928** and several other judgments. The Supreme Court in the said judgment of *Maula Bux (supra)* has held that it was possible for the Government of India to lead evidence to prove the rates at which the items which were purchased by them when the plaintiff failed to deliver those goods and the purchaser having failed to prove the rate at which they had to be purchased, no such claim could be made.

80. Supreme Court in the case of *M/s.Kailash Nath Associates (supra)* has held that if damage or loss is not suffered, the law does not provide for a windfall. It is held that the expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is held that it is only in cases where damage or loss is

difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded. In my view, if loss is capable of being calculated and is being proved, it would not fall under Section 74 of the Indian Contract Act.

81. In this case, the respondent had awarded the contract under the said two work orders to another contractor which the petitioner had refused to perform, at the rate less than the rate payable to the petitioner under the contract and thus there was no loss. It was an admitted position that the respondent had not suffered any loss but was benefited of the said two transactions. Since the loss, if any, suffered was capable of being calculated and proved and since the respondent had failed to prove the same, even otherwise, in my view, the respondent could not have appropriated any amount from the retention money deposit or the amount recovered by encashing the performance bank guarantee. In my view, such illegal recovery would result in an unjust enrichment in favour of the respondent.

82. A perusal of the award clearly indicates that the learned arbitrator though the specific issue was raised by the petitioner that the respondent had not suffered any loss and though the respondent had admitted in its written submission that the respondent had not pleaded any loss due to non execution of the two work orders and, therefore, had not submitted any claim towards loss, has not dealt with the said issue raised by the petitioner in the impugned award and has simplicitor rejected the claim for refund of the amount illegally appropriated by the respondent in the impugned award. The learned arbitrator has not decided in accordance with what the parties had submitted before the

learned arbitrator. This Court in the case of *Punj Lloyd Ltd.(supra)* after considering the judgment of the Supreme Court in the case of *M/s.Kailash Nath Associates (supra)* has held that unless and until the loss is pleaded and proved, the same cannot be recovered by the owner from the contractor. I am respectfully bound by the said judgments.

83. In so far as the Division Bench of this Court in the case of *Union of India Vs. Arctic India (supra)* relied upon by Mr. Bharti, learned counsel for the respondent is concerned, in my view, the said judgment does not apply to the facts of this case. Learned arbitrator has not allowed any claim in favour of the petitioner contrary to the terms of the contract. Learned arbitrator, in my view, has allowed the respondent to appropriate the amounts from the retention money deposit and the performance bank guarantees contrary to the terms of the contract and also the law laid down by the Supreme Court and this Court. The award shows patent illegality and deserves to be set aside.

84. In so far as the judgment of the Supreme Court in the case of *Ramnath International Construction Pvt. Ltd.(supra)* relied upon by Mr. Bharti, learned counsel for the respondent is concerned, even in the said judgment the Supreme Court has held that the arbitrator cannot decide contrary to the terms of the contract. In my view, the said judgment does not assist the case of the respondent but assist the case of the petitioner.

85. In so far as the judgment of the Madras High Court in the case of *Crompton Greaves Ltd. (supra)* relied upon by the learned counsel

for the respondent is concerned, it is held by the Madras High Court that the arbitrator cannot travel beyond the contract to award compensation. The Madras High Court has considered the clause of the contract which expressly stipulated that no compensation was payable if the contract was terminated on account of termination of the project by the principal. Learned arbitrator in that matter had allowed the claim for compensation in the teeth of express prohibition of the contract. In my view, the claim of the petitioner for refund of the security deposit and the amount recovered illegally by encashing the performance bank guarantees was not contrary to the terms of the contract. The appropriation of such amount by the respondent without there being any loss suffered is contrary to the terms of the contract and the provisions of the Indian Contract Act. The said judgment of the Madras High Court thus does not assist the case of the respondent but assist the case of the petitioner.

86. In so far as the judgment of this Court in the case of *Jagson International Ltd. (supra)* relied upon by the learned counsel for the respondent is concerned, this Court took a view that it was not the suggestion of the contractor that the amount specified in the bank guarantee was not reasonable compensation, leave alone proving so. The contractor in that case had given an undertaking. Learned Single Judge of this Court considered the provisions of the agreement along with the undertaking and the performance bank guarantees and in facts of that case held that the party having agreed to pay fixed amount in case of failure to perform their part and had executed the bank guarantee/undertaking could not be permitted to say that the respondent ought to have led evidence to prove the actual loss. In my view, the

facts of that case are totally different. The provisions in this contract does not permit any appropriation of the amount recovered by the respondent by encashing the performance bank guarantees. The submission of the respondent in this case is that the said amount was not even recovered as and by way of liquidated damages or as a fixed amount. Be that as it may, I am bound to rely upon the statement of law declared by the Supreme Court prior to delivery of the said judgment by the learned Single Judge of this Court and even later taking a different view in the matter.

87. In so far as clause 20 of the contract which provides for consequential damages relied upon by the learned counsel for the respondent is concerned, the said clause does not assist the case of the respondent. On plain reading of the said clause, it is clear that the said clause prohibits both the parties to claim any damages including loss of profit from either party notwithstanding either party's fault. The said clause, in my view, assist the case of the petitioner and not the case of the respondent who has appropriated the amount liable to be refunded to the petitioner. In my view, the said recovery effected by the respondent is totally illegal. Learned arbitrator thus ought to have allowed the said claim made by the petitioner.

88. In so far as the other claims made by the petitioner and rejected by the learned arbitrator are concerned, since the learned counsel for the petitioner has not pressed those claims, I am not inclined to set aside that part of the award. In my view, the award rejecting the claims for refund of the amount encashed under performance bank guarantees

shows patent illegality on the face of the award and is in conflict with the public policy and thus deserves to be set aside. In my view, since the findings of the learned arbitrator are perverse, this Court has ample power to set aside such findings of facts which are perverse. The interpretation of the learned arbitrator of the terms of the contract is impossible interpretation and thus deserves to be set aside.

89. I, therefore, pass the following order:-

- a) The impugned award in so far as the rejection of the claim for refund of the amount under two performance bank guarantees for Rs.1,07,203/- and Rs.14,83,359/- respectively with interest thereon is set aside. Rest of the award is upheld.
- b) Arbitration Petition is disposed of in aforesaid terms.
- c) There shall be no order as to costs.

R.D. DHANUKA, J.