

IN THE HIGH COURT OF BOMBAY AT GOA
APPEAL UNDER ARBITRATION ACT NO. 8 OF 2016

Titagarh Wagons Limited, A Company
registered under the provisions of the
Companies Act, 1956, having its
registered office at:

1B Aster Court, 3, Loudon Street, Kolkata
700 017.

Through its authorized representative Mr.
Neeraj Rai

.... Appellant

Versus

Chowgule and Company Private Limited,
A Company registered under the
provisions of the Companies Act, 1956
having its registered office at:

'Chowgule House', Mormugao, Harbour,
Goa - 403 803.

.... Respondent

Shri Sudin Usgaonkar, Senior Advocate with Shri R. Choudhary
and Ms. Tanvi Kamat Ghanekar, Advocates for the Appellant.

Shri S.D. Lotlikar, Senior Advocate with Shri Prasheen Lotlikar
and Ms. Aditi Naik, Advocates for the Respondent.

CORAM:- C. V. BHADANG, J.

RESERVED ON: 28th NOVEMBER 2017

PRONOUNCED ON: 10th APRIL 2018

JUDGMENT:

This is an Appeal, under Section 37 of the Arbitration
and Conciliation Act, 1996 (Act, for short), challenging the
judgment and order dated 10.06.2015, passed by the learned

Principal District Judge, Panaji, in Arbitration and Conciliation Petition No. 43/2012. By the impugned judgment, the learned District Judge has confirmed the award passed by the learned Arbitrator on 30.05.2012.

2. The brief facts necessary for the disposal of the appeal may be stated thus:

On 20.02.2006, the respondent placed an order for supply of 122 wagons, comprising in two rakes of 58 wagons each plus 4% (60/61 wagons), with the appellant. The said purchase was under the Wagon Investment Scheme (WIS) of the Indian railways. According to the purchase order, the wagons being capital goods, were exempt from duties and taxes. The purchase order stipulated that the wagons were to be supplied by the appellant under the EPCG licence, to be secured by the respondent and an Advance Intermediate Licence, to be secured by the appellant. The purchase order was subject to execution of an agreement between the respondent and the CCM/FM South Western Railways, Hubli (Karnataka). The payment of advance was to be made within a week of the execution of the agreement with the South Western Railways. That agreement was executed on 08.08.2006.

3. It is a common ground that on account of non-availability of wheel sets indigenously, the respondent was required to obtain EPCG licence for import of 244 wheel sets each, for the two rakes, as per the advice of the Railway Board. This led the parties to amend certain terms of the contract, which were set out by the respondent in its letter dated 25.09.2006, which was accepted by the appellant, by its letter dated 27.09.2006. The material changes, which are relevant for the purpose are as under:

i. The delivery of the wagons after rake formation is within 30 days from the date of the receipt of the required number of wheel sets at the workshop of the respondent (initially the rakes had to be completed and delivered to the claimant by 5/6 months from dispatch memo by RDSO).

ii. Liquidated damages were provided under the amended contract for delayed delivery.

iii. In the event of delay in effecting delivery of rakes, a penalty at the rate of 0.50% per week to be charged upto a maximum of 5% on undelivered rakes as per the schedule mentioned. The penalty to be applicable even if there is a single wagon shortage in formation of a rake.

4. It can thus be seen that the delivery of the rakes was to be made within 30 days, from the date of the receipt of the required number of the wheel sets, in the workshop of the appellant. In the event of delay, the contract stipulated payment of liquidated damages at the rate of 0.50 % per week, subject to a maximum of 5% on the undelivered rakes, as per the schedule mentioned therein. The said damages/penalty were applicable even if, there was a shortage of a single wagon in the formation of a rake, which were to comprise 60/61 rakes as per the Railway guidelines.

5. It is undisputed that there was a delay of 2 weeks in supply of the first rake, while there was a delay of 26 weeks in the delivery of the second rake. It is also not in dispute and in fact, it is a matter of record that extension for supply of the rakes, was granted by the respondent, subject however, to its right to claim/levy liquidated damages as per Clauses 7 and 8 of the purchase order. In view of the delay of supply of rakes, the respondent sought to levy liquidated damages of Rs.68,52,909/-, against the appellant. The appellant by a letter dated 25.08.2008, sought waiver of the liquidated damages, which was not acceded to, by the respondent.

6. As disputes and difference arose between the parties, on the point of damages, the dispute was referred to a sole Arbitrator, appointed by this Court, at the instance of the respondent. The respondent filed a statement of claim before the learned Arbitrator, claiming liquidated damages, as aforesaid, with interest.

7. It was contended that the extension of time was granted to the appellant, for supplying of the rakes, subject to Clauses 7 and 8 of the purchase order, which entitled the respondent to claim liquidated damages for delay in supply, beyond the stipulated date, which was 30 days after the receipt of the wheel sets, by the appellant at their workshop.

8. The appellant resisted the claim and also raised a counterclaim, before the learned Arbitrator. It was contended that the Arbitrator had no jurisdiction, in as much as, there was no subsisting dispute, existing between the parties, as the respondent had finally settled the entire bill without any demur. It was contended that once, the rakes are delivered and the entire payment is made, all other claims stand waived. It was next contended that the respondent has committed breach of the agreement/purchase order, as it had failed to pay the excise

duty and therefore, the respondent is not entitled to seek liquidated damages. The appellant also invoked force-majeure clause, as according to the appellant, the delay in delivery of the rakes was on account of the circumstances beyond its control. It was contended that the payment of excise duty of Rs.3.5 crores, which was otherwise payable by the respondent, was made by the appellant, due to which, the appellant came in trouble with lack of finance. It was also contended that the appellant was serving an order from the Indian Railway Board, which was required to be complied with priority, before the end of the financial year 2007-08. It was also contended that the time was never the essence of the contract and therefore, no damages for delay in delivery are payable.

9. On the basis of the rival pleadings, the learned Arbitrator framed the following issues:

- 1. Whether the claimant proves that they are entitled to recover liquidated damages of Rs.11,39,899/- and Rs.57,13,010/- for delay in delivery of the 1st rake and 2nd rake together with interest @ 18% per annum with effect from 16.09.2007 and 21.04.2008 respectively with further interest of 18% from the aforementioned dates till the date of payment ?*
- 2. Whether the respondent proves that the claim was fully and finally settled by document dated 28.04.2008 and therefore there is no dispute in existence between the parties in this arbitration ?*

3. *Whether the respondent proves that the claimant have breached the conditions of not honouring the actual duties/levies of Excise thereby forcing the respondents to pay an amount of Rs.3,41,27,728/- ?*
4. *Whether the respondent proves that the delivery period stood extended till 21.04.2008 on account of force majeure ?*
5. *Whether the respondent proves that they are liable to recover interest as claimed in an amount of Rs.58,20,452.86 on payment of excise duty until its refund and counterclaim no. 3 ?*

10. The parties produced documents which are essentially in nature of the correspondence exchanged and the purchase order with the amendment. None of the parties led oral evidence before the learned Arbitrator and the matter was argued on the basis of the documents produced.

11. The learned Arbitrator refused to accept that there was no subsisting dispute between the parties, as the entire payment was made by the respondent to the appellant, as to the price of the wagons. The learned Arbitrator also refused to accept that since, the entire payment was made, the respondent could not have claimed liquidated damages. Insofar as merits of the claim are concerned, the learned Arbitrator noticed that admittedly, there was a delay in delivery of the two rakes and

therefore, the burden had shifted on the appellant to justify the delay. The learned Arbitrator also on facts, held that the reasons shown were not sufficient to justify the delay. In such circumstances, the learned Arbitrator by an award dated 30.05.2012, directed the appellant to pay to the respondent an amount of Rs.68,52,909/-, by way of liquidated damages, together with interest at the rate of 12% per annum from 01.06.2008, till payment, along with costs. In the event, the sum awarded was not paid within a period of 90 days, the amount was to carry interest at the rate of 15% per annum from the date of the award, until payment. The three claims made by way of counterclaim were rejected.

12. Feeling aggrieved, by the grant of liquidated damages, the appellant approached the learned Principal District Judge in a petition under Section 34 of the Act, being Arbitration and Conciliation Petition No. 43/2012. The learned Principal District Judge by the impugned judgment and order dated 10.06.2015, has dismissed the petition and has confirmed the award passed by the learned Arbitrator, which brings the appellant to this Court.

13. I have heard Shri Usgaonkar, the learned Senior Counsel for the appellant and Shri Lotlikar, the learned Senior Counsel for the respondent. With the assistance of the learned Counsel for the parties, I have gone through the record and the impugned award passed by the learned Arbitrator and the judgment of the learned District Judge.

14. It is submitted by Shri Usgaonkar, the learned Senior Counsel for the appellant that the Arbitrator has passed the award, ignoring the settled principles of law as to the entitlement of the liquidated damages. It is submitted that the liquidated damages cannot be granted unless, the parties plead and demonstrate sufferance of actual loss. It is submitted that admittedly, time was not of the essence of the contract and the respondent had failed to plead or demonstrate the sufferance of actual loss. In this regard, the learned Senior Counsel has referred to the contract entered between the appellant and the South Western Railways under the WIS on 08.08.2006. It is submitted that the validity of the said agreement was for a period of ten years from the "commencement date". It is submitted that Clause 2.4 of the agreement defines the "commencement date", as the date when the wagon/rake is received by the Railways from the wagon manufacturer, duly

cleared and certified by the Commissioner of the Railway safety and they become available for service or commercial use. It is submitted that under Clause 2.5 of the agreement, the respondent was entitled to get rebate of 10% in freight on normal tariff rate, as may be notified by the Government from time to time. As per Clause 2.5, the freight rebate was admissible for a period of ten years from the “commencement date”. In short, according to the appellant, the commencement date being commensurate with the date of the receipt of the wagons/rakes by the Railway Administration, the respondent did not suffer any damages on account of the loss of the freight rebate, which was otherwise available for a period of ten years from the commencement date. It is submitted that Section 74 of the Contract Act only dispenses with the proof where such loss/damages, cannot be proved. The learned Senior Counsel was at pains to point out that compensation is payable for breach of contract under Section 74 of the Contract Act, only where the damage or loss is caused by such breach or where it is possible to prove the actual loss or damages, the proof is not dispensed with. Where the damage or loss is not suffered, the law does not provide for a windfall. Reliance in this regard is placed on several decisions of the Supreme Court including in the case of **Fateh Chand Vs. Balkishan Dass, AIR 1963 SC**

1405, Maula Bux Vs. Union of India, AIR 1970 SC 1955, Kailash Nath Associates Vs. Delhi Development Authority & Another, (2015) 4 SCC 136 and the decision of this Court in the case of **Raheja Universal Private Limited Vs. B.E. Billimoria and Company Ltd., 2016 (5) Mh.L.J. 229.**

15. It is next submitted that the burden to prove actual loss is on the party claiming compensation and the doctrine of “mitigation of loss” and “burden of proof” cannot be overlooked by the Court or by the Arbitrator, while determining reasonable compensation. Reliance in this regard is placed on the decision of this Court in the case Court **Mahanagar Telephone Nigam Limited Vs. SRV Telecom Private Limited, 2016 (5) Mh.L.J., 29** and **Continental Transport Organization Pvt. Ltd. Vs. Oil and Natural Gas Corporation Limited, 2015 (7) Bom.C.R. 922** and **Hindustan Petroleum Corporation Limited Vs. Offshore Infrastructure Limited, 2015 (6) Mh.L.J. 287.** Reliance is also placed on the decision of the Kerala High Court in the case of **State of Kerala Vs. United Shippers and Dredgers Ltd., 1982 AIR (Ker) 281** and that of the Delhi High Court in the case of **Vishal Engineers and Builders Vs. Indian Oil Corporation Limited, 2012 AIR (Del) 165.**

16. It is submitted that any remote or indirect loss sustained by reason of breach of contract, would not entitle any party to any compensation as has been held by the Supreme Court in the case of **Karsandas H. Thacker Vs. Saran Engineering Co. Ltd., AIR 1965 SC 1981**. Lastly, it is submitted that an award against statutory provisions of substantive law, would be considered against public policy, as held by the Supreme Court in the case of **Oil and Natural Gas Corporation (ONGC) Ltd. Vs. Saw Pipes Ltd., AIR 2003 SC 2629**. In short, it is submitted that the clause as to liquidated damages, can be invoked only in the case of actual loss/damages and if determinable, they are required to be proved. It is submitted that the learned District Judge was in error in holding that the award of the Arbitrator was not against the public policy. It is submitted that both, the learned Arbitrator, as well as the learned District Judge, failed to see that the liquidated damages, cannot be claimed or granted in the absence of actual loss/damage suffered.

17. On the contrary, it is submitted by Shri Lotlikar, the learned Senior Counsel for the respondent that all the grounds, on which the claim for liquidated damages was resisted before the Arbitrator, have now been given up by the appellant. It is

submitted that all such grounds have been rejected by the learned Arbitrator, as well as by the learned District Judge for cogent reasons. It is submitted that for the first time, it was urged before this Court that the learned Arbitrator had wrongly cast the burden with regard to the claim for liquidated damages on the appellant and that there was no evidence brought on record by the respondent to claim the actual loss or damage. It is submitted that no such contention was ever raised on behalf of the appellant, before the learned Arbitrator. It is submitted that admittedly, there was a delay in supply of the two rakes and the contract between the parties contains a clause for liquidated damages. It is submitted that even otherwise, the respondent had pleaded in paras 26 to 30 of the statement of claim that they were greatly prejudiced on account of the delay in the delivery of the rakes and had also set out the manner in which the amount of Rs.68,52,909/- is arrived at. It is submitted that there is no specific denial of the averments made in paras 26 to 30 of the statement of claim. It is submitted that once, the averments made in statement of claim are not denied, specifically, the same amounts to an admission.

18. Reliance is placed on the decision of the Supreme Court in the case of **Muddasani Venkara Narsaiah (D)**,

through LR's Vs. Muddasani Sarojana, (2016) 12 SCC 281, in order to submit that in the absence of there being any specific denial, the averments made in the statement of claim, would stand admitted and the respondent therefore, was not required to prove the same.

Reliance is next placed on the decision of the Supreme Court in the case of **MSK Projects (I) (JV) Ltd. Vs. State of Rajasthan, (2011) 10 SCC 573**, in order to submit that a new plea, which was not raised before the Arbitrator, cannot be allowed to be raised, before the Court and therefore, the ground based on Section 74 of the Contract Act, which was sought to be raised for the first time before the District Judge, was unsustainable.

19. The learned Counsel has referred to para 64 of the judgment in the case of **ONGC Limited** (supra) in order to submit that in the case of breach of contract, the party complaining of breach is entitled to receive reasonable compensation, whether or not, actual loss is proved to have been caused. It is submitted that Section 74 of the Contract Act has to be read along with Section 73 and in every case of breach of contract, a person aggrieved by such a breach is not required to prove actual loss/damage suffered by him, before he

can claim damages and the Court is competent to award reasonable compensation in case of breach, even if, no actual loss is proved to have been suffered in consequence of the breach of a contract. It is submitted that in some contracts, it would be impossible to assess the loss arising from breach and if, the compensation contemplated, is not by way of penalty or is not unreasonable, the Court can award the same, if it is a genuine pre-estimate by the parties as a measure of reasonable compensation.

20. Lastly, it is submitted that the appellant has failed to demonstrate, before the learned District Judge as to the specific ground, under which the award was challenged under Section 34 of the Act and at the best one could assume that the challenge was based on the ground that the award was contrary to the public policy of India. It is submitted that by no stretch of imagination, it can be said that the award was against public policy of India.

Reliance is placed on the decision of the Supreme Court in the case of **Associate Builders Vs. Delhi Development Authority, (2015) 3 SCC 49**, in support of the contention that the plea raised by the appellant, which in fact, is a question of fact, cannot come within the ambit of the award

being against the public policy. He therefore submits that the appeal be dismissed.

21. I have carefully considered the rival circumstances and the submissions made and I do not find that any case for interference is made out. The material facts are not in dispute, apart from being matters of record. As per the modification effected in September 2006, the delivery of the wagons was to be made within 30 days of the receipt of the required number of wheel sets, reaching the workshop of the appellant. In the event of delay in effecting delivery of the rakes, a penalty at the rate of 0.5% per week was to be levied, subject to a maximum of 5% on the undelivered rakes, as per the schedule mentioned. The penalty was applicable even if, there was a single wagon shortage in formation of a rake. It is undisputed that there was a delay of 2 weeks in supply of the first rake and a delay of 26 weeks in supply of the second rake by the appellant. The question is whether, the respondent was entitled to levy and to recover the liquidated damages. The use of the word "penalty" may not make any difference, in as much as Section 74 of the Contract Act also, refers to a penalty, apart from "liquidated damages". The entire challenge in this appeal as would be apparent from the submissions advanced at the bar, is based on

Section 74 of the Contract Act. The contention in short is that under the said section, claim of liquidated damages, cannot be granted for the asking. The party concerned is required to prove actual loss occasioned, due to the breach of the contract by the adversary. In order to appreciate the submission made in this behalf, it would be necessary to briefly note the legal position as settled by the various decisions cited at the bar. A Constitution Bench of the Supreme Court, had the occasion to consider the question of grant of liquidated damages in the context of Section 74 of the Contract Act in the case of **Fateh Chand** (supra). This is what is held in para 10 of the judgment:

“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 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 damages; does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach."

(Emphasis supplied)

22. It can thus be seen that, the section merely dispenses with proof of actual damages and it does not justify the award of compensation, when in consequence of the breach, no legal injury at all has resulted. In other words where the legal injury or the loss, arising out of the breach, is ascertainable and can be proved, it does not absolve the claimant from proving such loss in order to get the compensation by way of the liquidated damages. It can further

be seen that the section applies to liquidated damages and penalty alike, subject however, to the fact that it is reasonable. The award of such compensation cannot be in excess of what is stipulated under the contract. In the case of **Fateh Chand** (supra) on facts, it was found that there was no evidence to show that the plaintiff had suffered any loss in consequence of the default by the defendant.

23. The subsequent decisions are mainly based on the decision in the case of **Fateh Chand** (supra). In the case of **Maula Bux** (supra), a three Judge Bench of the Supreme Court was concerned with a case of forfeiture of deposit made as security for due performance of the contract. It was held that if, the forfeiture is of the nature of a penalty, Section 74 of the Contract Act applies. The Supreme Court taking note of its decision in the case of **Fateh Chand** (supra) held thus, in para 8 of the judgment:

“The claim made by the plaintiff to forfeit the amount of Rs. 24,000/- may be adjudged in the light of Section 74 of the Indian Contract Act, which in its material part provides :-

“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 maybe, the penalty stipulated for.”

The section is clearly an attempt to eliminate the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine preestimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty.”

24. It can thus be seen that, in every case of breach of a contract, the person aggrieved by the breach, is not required to prove the 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”, as appearing in the said section is intended to cover different types of contracts, which come before the Courts. In case of some contracts, it may be impossible for the Courts to assess compensation, arising from such breach. In such cases, the section dispenses with the proof of such loss or damage and the Court can grant the compensation in terms of the liquidated damages, if the sum named by the parties is regarded as a genuine pre-estimate of such loss. In the case of **Maula Bux** (supra) on facts, it was found that it was possible for the Government of India to lead evidence to prove the loss suffered, arising out of the breach of the contract.

25. In a recent decision in the case of **Kailash Nath Associates** (supra), the Supreme Court after taking a survey of several decisions, holding the field has deduced the following principles in para 43 of the judgment:

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:-

43.1. 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.

43.2. 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.

43.3. 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.

43.4. The section applies whether a person is a plaintiff or a defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. 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.

43.7. 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.

(Emphasis supplied)

26. In the said case the issue was regarding the refund of earnest money deposited in respect of a public auction of plots by Delhi Development Authority. In that case, on facts, it was found that the amount was sought to be forfeited without any loss being shown. On the contrary it was found that the DDA had received much higher amount on re-auction of the same plot. It was in this context held that if, damage or loss is not suffered, the law does not provide for a windfall.

27. In the case of **ONGC Limited** (supra) the Supreme Court has held that in certain cases, it is impossible to assess the damages or prove the same and such a situation is taken care of by Sections 73 and 74 of the Contract Act.

28. Now coming to the present case, the specific objection based on Section 74 of the Contract Act was not raised before the learned Arbitrator. The contentions based on the agreement between the respondent and the South Western Railways and the specific submissions on the basis of the “commencement date”, were not raised before the learned Arbitrator. The contention essentially, is that there is no effective loss of rebate, in as much as, the contract with Railways was for a period of ten years from the commencement date, which was from the date of delivery of the rakes. The Supreme Court in the case of **MSK Projects (I) (JV) Ltd.** (supra) has held that a new case or a defence not raised before the Arbitrator, cannot be considered by the Court under Section 34 or Section 37 of the Act. In that case, a claim was made by a concessionaire, under the toll agreement. It was contended that the concessionaire had suffered loss on account of delay in issuance and implementation of notification by the State, barring the use of the old route. The award of the Arbitrator was set aside by the Courts, on the ground that there was no clause in the agreement for State to issue such a notification. The Supreme Court held that the award could not have been set aside, as such a plea about absence of a clause in the agreement, was not raised before the Arbitrator.

29. Applying the principle as laid down in the said decision, in my considered view, the appellant cannot be allowed to raise a plea, based on the contents of the agreement dated 08.08.2006, between the respondent and the South Western Railways. Nonetheless, I find that the same cannot be accepted, even on facts, in the present case. In this regard the claim made in paras 25 to 28 of the statement of claim may be reproduced as under:

“25. The claimant submits that the respondent is due and liable to pay to the claimant, liquidated damages, under Clause 8 of the Purchase Order which are liable to be calculated as stated hereunder.

The delivery of the 1st rake whose cost was Rs.11,38,57,523/- was delayed by 2 weeks and therefore, the liquidated damages calculated at 0.5% per week, works out to Rs.11,39,899/-.

The delivery of the 2nd rake whose cost was Rs.11,42,60,200/- was delayed by 26 weeks and therefore, the liquidated damages calculated maximum at 5% works out to Rs.57,13,010/-.

The total amount of the liquidated damages, thus works out to (Rs.11,39,899/- + Rs.57,13,010/-) = Rs.68,52,909/-. The claimant is entitled to recover the same from the respondent.

26. The claimant states that they were greatly prejudiced on account of delay in delivery of rakes, on the part of the respondent.

The Railway Wagons Investment Scheme, under which the purchase was affected, provides for guaranteed 8 rakes per month for movement of material with 10% discount, in freight, for 6 rakes per month.

Each rake enables movement of 3600 metric tons of iron ore.

The rakes procured were for intended movement of ore fines from 'Hospet' to 'Goa'.

The freight applicable is Rs.415.61 per metric ton. Thus, discount available is Rs.4156 per metric ton.

The delay in delivery of the rakes was solely attributable due to the default on the part of the respondent, for which the claimant was in no way responsible.

27. The loss which the claimant suffered by way of loss of discount, was to the tune of Rs.59,57,632/- as detailed below:-

	Delay by about	Loss of quantity (MT)	Discount applicable to quantity (MT)	Discount Rs./T	Discount Lost Rs.
1 st Rake	½ month	14,400	10,800	4156	4,18,848
2 nd Rake	6.17 months	1,77,696	1,33,272	4156	55,38,784
		1,92,096	1,44,072		59,57,632

This is in addition to the loss of business to the extent of 1,92,096 MT over the period of delay in delivery of rakes.

28. The claimant is, therefore, entitled to an amount of Rs.68,52,909/- claimed by the claimant, as liquidated damages. The quantum of liquidated damages was fixed in view of prejudice and loss that was caused to the claimant, after the delivery of the rakes was delayed. It was a fair and estimation of the loss likely to be suffered by the claimant, and the claimant indeed suffered loss much in excess of the amount of the liquidated damages, payable under the said Clause No. 8.

30. It can thus be seen that the claim was under two heads namely (i) loss of discount and (ii) loss of business to the extent of 1,92,096 MT, over the period of delay in delivery of rakes. The claim under the second head has nothing to do with the commencement date. In any event, even if, the freight rebate would be available for a period of ten years from the commencement date, the availability of such rebate was postponed or delayed on account of failure to supply the rakes, within the time stipulated. In my considered view, in order to decide whether, the amount named by the parties is a genuine pre-estimate of a loss suffered, on account of the breach of the contract, the nature of the agreement as a whole has to be

seen. Under Clause 5.2 of the contract dated 08.08.2006, apart from the freight rebate, guaranteed supply of wagons was assured at the rate of 6 rakes per month, in addition to supply of two bonus rakes, without freight concession. In my considered view, it cannot be accepted that merely because the contract with the Railways was for a period of ten years (from the “commencement date” i.e. the date when the wagons of a rake are received by Railways from the manufacturer), there was no loss on account of the loss of rebate, cannot be accepted.

31. The matter can be looked at from another angle. The contract was for investment in two rakes of 58 wagons each plus 4% (60/61 wagons). It is not clear from the contract whether, the “commencement date”, would be qua each rake or whether, the period of ten years would commence on supply of the first rake, in which case, the delay in supply of the second rake of about 26 weeks, is bound to cause loss on account of the non-availability of rebate, over the delayed period. In my considered view, had the contention based on the commencement date been raised before the learned Arbitrator, the parties would have got an opportunity to meet each others case in a better manner. In any case, I find that in this case, it

was difficult to assess or to prove the loss, with any amount of precision, thus, attracting Section 74 of the Contract Act, as held by the Supreme Court in the case of **ONGC Limited** (supra), dispensing with its proof.

32. The next thing to be seen is whether, the sum named by the parties is a reasonable pre-estimate of the loss. In this regard, it would be significant to note that Clause 8 of the purchase order stipulates the penalty at the rate of 0.5%, subject to a maximum of 5%. The respondent has claimed and the learned Arbitrator has granted the compensation at the minimum rate of 0.5%. Thus, the same cannot be said to be unreasonable or a windfall gain to the respondent.

33. Although in the appeal memo, the appellant has also challenged the rejection of the counterclaim, the submissions made on behalf of the appellant at bar, as also the written submissions filed on record would indicate that the challenge is only to the award, granting compensation to the respondent. However, it may be mentioned that the learned Arbitrator upon consideration of the documentary evidence on record, has come to the conclusion and to my mind rightly so, that there was a delay on the part of the appellant in supply of the wagons and

the case put forth on the basis of a claim that the appellant was required to pay the excise duty, of which he subsequently obtained refund and the delay on account of an order for supply of wagons from the Railway Board being required to be attended to with priority has been negatived. That being a finding of fact, properly recorded on appreciation of material on record and which has been confirmed by the learned District Judge, calls for no interference.

34. At this stage, a brief reference may be made to other decisions, on which reliance is placed on behalf of the appellants.

In the case of **Raheja Universal Private Limited** (supra), there was termination of the contract between the parties, prior to the stipulated date of completion. In that case, the respondent's application for extension of time was not granted by the petitioner, nor the petitioner had led any evidence to prove the actual loss suffered due to alleged delay on the part of the respondent. The Division Bench of this Court found that liquidated damages could be claimed only if, the extension was granted and there was a consequent delay in completion of the contract. As noticed earlier, the petitioner itself, had refused to extend the time sought for by the

respondent. It can thus be seen that the case of **Raheja Universal Private Limited** (supra) turned on it's own facts.

35. In the case of **Mahanagar Telephone Nigam Limited** (supra) the proceeds of the performance security were payable to the purchaser under the contract as compensation for any loss, resulting from the supplier's failure to complete it's obligations, under the contract. In that case, the respondent had refused to supply the goods during the extended period of contract and the petitioner was required to initiate fresh contract. However, on facts, it was found that the petitioner failed to prove the actual loss, if any, before the Arbitrator, suffered by the petitioner due to non-supply of the material by the respondent.

36. In my considered view, the question whether, the damages or loss is "difficult or impossible to prove" would be a question, which would depend upon the facts and circumstances of each case. Thus, although the principles would apply universally, the conclusions and the findings as to the grant or otherwise, would solely depend upon the individual factual situation obtaining in each case.

37. In the case of **Mahanagar Telephone Nigam Limited** (supra), the purchaser was required to invite a fresh tender for supply of goods in question from another contractor and it was held that the loss cannot be said to be one, which is difficult or impossible to prove and evidently, in such a case, the parties will be required to plead and prove, the actual loss suffered. At the cost of repetition, it is necessary to emphasize that the seminal question, which the learned Arbitrator or the Court is required to address itself is whether, in fact, the loss suffered can be stated to be one which is “difficult or impossible to prove”. It is only where the loss is such, which is “difficult or impossible to prove”, that the Section 74 of the Contract Act, would apply, dispensing the necessity to prove such loss.

38. In the case of **Continental Transport Organization Pvt. Ltd.** (supra), it was found on facts that the respondent had not incurred any loss of any nature whatsoever, in view of the refusal by the petitioner to execute the two work orders in question. In that case, it was found that the respondent was in fact benefited financially by getting the two work orders executed by another contractor.

39. In the decision of this Court, in the case of **Hindustan Petroleum Corporation Limited** (supra), the Arbitrator had not considered the case made out by the petitioner and had totally overlooked the evidence produced by the petitioner. Thus, on facts, it was found that the findings rendered by the Arbitrator were perverse and illegal.

40. The decision of the Kerala High Court in the case of **United Shippers and Dredgers Ltd.** (supra) and that of the Delhi High Court in the case of **Vishal Engineers and Builders** (supra), only reiterate the principles as set out above on the interpretation of Sections 73, 74 and 75 of the Contract Act. There cannot be any manner of dispute with the proposition that every breach of every contract, need not necessarily result into loss or damage and one cannot compensate a person, who has not suffered any loss or damage. The question essentially is whether, one of the parties has been put to any loss or damage, on account of the breach of the contract and if yes, whether, the loss is such which is difficult or impossible to prove. It is only in such a case that the liquidated damages named in the contract, can be granted, if they are found to be genuine pre-estimate of the loss suffered.

Lastly, in the case of **Karsandas H. Thacker** (supra), the Hon'ble Supreme Court has held that a party would not be entitled to any compensation on account of any remote or indirect loss or damage suffered by reason of the breach of the contract.

41. Coming back to the present case, the respondent had opted for the WIS and had entered into contract with the South Western Railways for investment in two rakes. The contract stipulated grant of rebate at the rate of 10% on normal tariff rates and a guaranteed supply of wagon at the rate of 6 rakes per month in addition to guaranteed supply of two bonus rakes, without concession. The rakes were intended to transport the iron ore from Hospat (Karnataka) to Goa. The respondent had invested huge amount of more than Rs.22 crores as price of the two rakes. In matters of business and commercial transaction, any delay of the present nature, is bound to result into loss to the party concern. The appellant contested the claim mainly on three grounds, (i) accord and satisfaction, where it was claimed that the rakes have since been delivered and the respondent had paid the price and therefore, there is no dispute which is subsisting between the parties, (ii) about the delay being attributable to certain lapses on behalf of the respondent and

(iii) invocation of force-majeure clause, which have been negated by the learned Arbitrator and confirmed by the learned District Judge.

42. The Hon'ble Supreme Court in the case of **J.G. Engineers Private Limited Vs. Union of India and Another, (2011) 5 SCC 758** has held that the District Judge, exercising powers under Section 34 of the Act, exercises supervisory and not appellate jurisdiction, over the award of the Arbitral Tribunal. In the case of **ONGC Limited** (supra), it has been held that an award can be set aside, as being opposed to public policy of India under Section 34(2)(b)(ii) of the Act, only where the award is contrary to the fundamental policy of the Indian Law or the interests of India or justice or morality or if, it is patently illegal or is so unfair and unreasonable that it shocks the conscience of the Court.

43. A perusal of the award passed by the learned Arbitrator does not show that it can be said to be patently illegal or so unfair and unreasonable that it shocks the conscience of the Court. The exercise by the Court under Section 34 of the Act, being supervisory in nature, the scope of the challenge under Section 37 of the Act, would be still

narrower. On a careful consideration of the award passed by the learned Arbitrator, I do not find that any case for interference is made out.

The impugned judgment of the learned District Judge, confirming the award of the learned Arbitrator, does not suffer from any infirmity, so as to require interference. The appeal is without any merit and is accordingly dismissed, with no order as to costs.

C. V. BHADANG, J.

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