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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.1333 OF 2012

Reliance Media Works Limited,)
(Formerly known as Adlabs Films Ltd.))
A company incorporated in India under)
the Indian Companies Act, 1956 and)
having its office at Film City Complex,)
Goregaon (East), Mumbai – 400 065.) ...Petitioner

....Versus....

B.R. Films,)
A partnership Firm constituted Under)
the provisions of the Indian Partnership)
Act, 1932, having its head office at Anand)
Villa, G-38, 15th Road, Santacruz (West))
Mumbai – 400 054.) ...Respondent

Mr.Shiraz Rustomjee, Senior Counsel with Ms.Shreya Parikh,
Mr.Surja Iyer, Mr.Hussain Dolkawala and Mr.Shriniket Deshpande i/b
Ganesh & Co. for the Petitioner.

Mr.Gaurav Joshi, Senior Counsel with Mr.Dharam Jumanani and
Ms.Mansi Vyas i/b DSK Legal for the Respondent.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 2ND MAY, 2018
PRONOUNCED ON : 11TH JULY, 2018

JUDGMENT :-

1. By this petition filed under section 34 of the Arbitration &
Conciliation Act, 1996, the petitioner has impugned the arbitral award

dated 10th December, 2012 passed by the learned arbitrator thereby allowing part of the claims made by the respondent. Some of the relevant facts for the purpose of deciding this petition are as under :

2. Some time in the month of October, 2007, the respondent was in the process of producing a Hindi movie titled "Banda Yeh Bindass Hai". The proposed title of the film was changed from "Pappu Pass Ho Gaya" to "Banda Yeh Bindass Hai". Prior thereto, on 11th August, 2007, the respondent had addressed a letter to Mark Meyerson of Twentieth Century Fox admitting that the proposed film "Pappu Pass Ho Gaya" was an Indian adaptation of film "My Cousin Vinny" and offered a token of US \$ 25,000 to the said Twentieth Century Fox for the same. On 20th September, 2007, IDBI had sanctioned financial assistance to the respondent of about Rs.750 lakhs for the said film titled "Pappu Pass Ho Gaya" on certain terms and conditions. The respondent had accepted the said offer and had accepted the terms and conditions of the financial assistance offered by the said IDBI by addressing a letter on 22th September, 2007. On 3rd October, 2007, the said IDBI and the respondent executed a loan agreement by which the respondent had borrowed a sum of Rs.750 lakhs from the said IDBI. A Deed of Hypothecation was also executed by the respondent in favour of IDBI admitting the first charge on the negatives of the film "Pappu Pass Ho Gaya". On 4th October, 2007, a tripartite Laboratory Agreement was executed between the petitioner, which was then titled as "Adlabs Films Limited", the respondent herein and the IDBI recording various terms and conditions agreed by and between those parties.

3. On 16th October, 2007, correspondence was exchanged between the respondent and the said Twentieth Century Fox with

respect to adaptation of the film "My Cousin Vinny" in the form of the proposed film "Pappu Pass Ho Gaya". On 27th December, 2007, the petitioner and the respondent executed "The Term Sheet" in respect of the said film "Banda Yeh Bindass Hai" which title was changed from "Pappu Pass Ho Gaya". On 14th March, 2008, the petitioner and the respondent entered into a Distribution Agreement under which the respondent granted exclusive distribution rights to the petitioner in respect of the film "Banda Yeh Bindass Hai" on various terms and conditions recorded therein.

4. It is the case of the petitioner that as on 31st March, 2008, the petitioner had paid a sum of Rs.7.00 crores under the said Distribution Agreement to the respondent. On 15th April, 2008, the respondent addressed a letter to the petitioner requesting for payment of Rs.1.00 crore as per schedule. On 7th June, 2008, the respondent addressed a letter to the petitioner alleging that the shooting of the said film was over and requested for release of under production amount of Rs.1.25 crores. It is the case of the petitioner that on 30th June, 2008, the respondent failed to deliver the said film which was the date of delivery mentioned under the said Distribution Agreement. On 1st July, 2008, the said Distribution Agreement was amended to record the change in the name of the petitioner from "Adlabs Films Limited" to "Big Pictures".

5. It is the case of the petitioner that on 8th August, 2008, the said film was allegedly shown to one Sunir Khetarpal, who was one of the then employee of the petitioner, according to the respondent. The petitioner has disputed this allegation of the respondent that the said film was shown to the said Sunir Khetarpal. On 20th August, 2008, the respondent addressed a letter to the petitioner informing

that the first copy of the film would be ready by September, 2008. It is the case of the petitioner that in the month of September, 2008, the respondent had started receiving legal notices from Twentieth Century Fox alleging that the said film “Banda Yeh Bindass Hai” was an unauthorized and plagiarized copy of the film “My Cousin Vinny”.

6. On 24th September, 2008, the respondent addressed a letter to the IDBI informing that making of the said film “Banda Yeh Bindass Hai” was delayed due to burning of a film set at Film City and matching of dates of the Artists, the post production work of the film was under progress and thus the date of release of the film had been moved to January, 2009. The Respondent requested the IDBI for extension of period of repayment of loan to 28th February, 2009. On 30th September, 2008, the grace period granted by the petitioner to the respondent for delivery of the said film came to an end.

7. It is the case of the petitioner that the petitioner had intended to release the said film during the period September – October, 2008 for making maximum profit from the said film. On 2nd December, 2008, the respondent addressed a letter to the IDBI intimating that the said film was scheduled to be released before March, 2009. On 25th December, 2008, the respondent sent an e-mail to the petitioner alleging that the film was ready for delivery and release in the month of August, 2008.

8. On 30th December, 2008, the petitioner addressed a letter to the respondent alleging that no specific correspondence had been received from the respondent intimating that the said film was ready for delivery. Vide letter dated 9th January, 2009, the respondent replied to the said letter dated 30th December, 2008 and denied the

contents thereof. On 5th February, 2009, the petitioner addressed a letter to the respondent contending that the respondent had failed to deliver the said film by the petitioner by 30th June, 2008 and even within the grace period i.e. by 30th September, 2008. On 17th February, 2009, the respondent addressed a letter in response to the letter dated 5th February, 2009 and denied the contents thereof.

9. On 23rd March, 2009, the respondent terminated the Distribution Agreement dated 14th March, 2008 and informed the petitioner that the amount advanced by the petitioner under the said agreement was forfeited. On 26th March, 2009, the petitioner addressed a letter to the respondent and terminated the Distribution Agreement and called upon the respondent to refund the amounts paid by the petitioner under the said Distribution Agreement with interest.

10. On 13th April, 2009, the said Twentieth Century Fox filed a suit bearing No.1925 of 2009 against the respondent alleging infringement of their copyright by the respondent in the movie "My Cousin Vinny" and prayed for various reliefs.

11. On 5th May, 2009, the petitioner addressed a letter to the respondent expressing its shock about the suit filed by the Twentieth Century Fox against the respondent alleging infringement of their copyright of the film "My Cousin Vinny" and alleging that the respondent had misled the petitioner that its movie was the original work and had breached its obligation under the said Distribution Agreement. On 30th May, 2009, the respondent addressed a letter in response to the letter dated 5th February, 2009 addressed by the petitioner and alleged that the said suit bearing No. 1925 of 2009 filed

by the Twentieth Century Fox was frivolous and baseless.

12. On 27th May, 2009, the petitioner invoked the arbitration agreement under the said Distribution Agreement and called upon the respondent to appoint an arbitrator. In response to the said letter dated 2nd June, 2009, the respondent however suggested a different procedure for appointment of the arbitrator. On 4th August, 2009, the said Twentieth Century Fox and the respondent herein filed a consent terms in the said suit bearing No.1925 of 2009. Under the said consent terms the respondent agreed to pay certain amounts to the said Twentieth Century Fox and various rights in the said film on various terms and conditions.

13. On 30th November, 2009, the IDBI took action under the said Loan and Hypothecation Agreement entered into with the respondent herein and took possession of the film "Banda Yeh Bindass Hai". On 29th March, 2010, the parties jointly addressed a letter appointing a former Judge of the Supreme Court as the sole arbitrator. Pursuant to the directions issued by the learned arbitrator, on 29th June, 2010, the petitioner filed its statement of claim against the respondent *inter-alia* praying for refund of a sum of Rs.9.25 crores with interest at the rate of 18% p.a. and further interest thereon. The petitioner also prayed for a declaration that the respondent had illegally terminated the Distribution Agreement.

14. On 2nd July, 2010, All India Film Distributors addressed a letter to the IDBI with respect to the distribution or exploitation rights of the film "Banda Yeh Bindass Hai" and offered to make an investment of Rs.10.00 crores. The IDBI replied to the said letter of All India Film Distributors and agreed to appoint the said All India Film

Distributors as worldwide distributor for the rights of the said film "Banda Yeh Bindass Hai". As per the said letter, the said All India Film Distributors was to make an aggregate investment of Rs.12.35 crores in the said film.

15. On 23rd July, 2010, the IDBI addressed a letter to Venus Records and Tapes Private Limited thereby agreeing to assign electronic media rights, including satellite rights, video (India), cable (India), terrestrial TV rights and music audio rights to the All India Film Distributors for a period of 10 years subject to payment of Rs.3.00 crores upon assignment and other terms and conditions.

16. On 17th August, 2010, the respondent herein filed its written statement to the statement of claim filed by the petitioner and also the counter claim *inter-alia* praying for declaration that the termination of the Distribution Agreement was lawful and binding and prayed that the petitioner be ordered to pay a sum of Rs.9.15 crores and interest at the rate of 18% p.a. from 1st October, 2008 till the date of filing of the counter claim. The petitioner filed rejoinder to the written statement of the respondent and filed reply to the counter claim on 10th September, 2010.

17. The parties led oral well as documentary evidence before the learned arbitrator. On 10th December, 2010, the learned arbitrator made an award directing the petitioner to pay to the respondent a sum of Rs.9.15 crores with interest thereon at the rate of 18th p.a. from 1st October, 2008 till payment and also costs of the arbitration fixed at Rs.4.00 lakhs. Insofar as the claims made by the petitioner were concerned, the same came to be rejected. Insofar as part of the counter claims made by the respondent is concerned, the learned

arbitrator held that the respondent had failed to prove any further loss apart from not receiving 9.15 crores from the petitioner. Learned arbitrator awarded interest at the rate of 18% p.a. on Rs.9.15 crores payable from 1st October, 2008 till payment.

18. Being aggrieved by the impugned award, the petitioner filed this petition under section 34 of the Arbitration & Conciliation Act. The respondent did not file any arbitration petition impugning part of the award rejecting part of the claims made by the respondent.

19. Mr.Rustomjee, learned senior counsel for the petitioner invited my attention to various documents, submissions made in the pleadings filed by both the parties and various paragraphs of the impugned award rendered by the learned arbitrator. He also invited my attention to various provisions of the Distribution Agreement dated 14th March, 2008. The delivery of the film period agreed under the said Distribution Agreement was on or before 30th June, 2008 with grace period of three months. The minimum guarantee amount payable by the petitioner to the respondent in consideration for the Distribution / Exploitation Rights was agreed at Rs.1840 lakhs inclusive of all applicable taxes and stamp duties which were to be borne by the respondent. Out of the said payment of Rs.1840 lakhs, Rs.600 lakhs were payable on or before signing of the said Distribution Agreement, Rs.100 lakhs within 15 days before the start of shoot or 29th February, 2008 whichever is later, Rs.225 lakhs at the end of principal photography of the film or 31st March, 2008 whichever was later and the balance payment of Rs.915 lakhs was payable on the delivery of the film.

20. The respondent had agreed to provide the adequate

publicity material required to carry out the pre-publicity of the film i.e. Teaser Trailer within 90 days before worldwide theatrical release date, Master (Digi Betas and DVDs) with song Promos, Medley and Dialogue Promos 45 days before worldwide theatrical release, Theatrical Trailer, 45 days before worldwide theatrical release date, Censor Certificates, 10 days before worldwide theatrical release date. In the said agreement it was also provided that the respondent had represented that the said film "Banda Yeh Bindass Hai" and all individual works comprised in the said film were original works under the Copyright Act and did not infringe Intellectual Property Rights of any third party. The respondent further represented that neither the said film nor any part thereof was obscene, blasphemous, plagiarized or in violation of any moral right of another. All Intellectual Property Rights in respect of the said film at all times vest solely and exclusively with the respondent.

21. It was provided in the said agreement that in the event of any default or breach of the said agreement by the respondent and failure to cure, such default or breach within 7 calendar days after written notice from the other party, licensee on its option, shall have the right to (i) suspend its obligations hereunder and/or (ii) terminate the said agreement. It was further provided that in the event of any default or breach of this agreement by the petitioner and failure to cure, such default or breach within 30 days calendar days after written notice from the other party, the respondent at its option, shall have the right to (i) suspend its obligations hereunder and/or (ii) terminate the said agreement.

22. In the said agreement, the parties also provided for consequence of termination or expiration of the said agreement. It

was agreed by and between the parties that in the event of the said agreement if terminated due to the default of the respondent then the respondent shall forthwith refund all the moneys received by the respondent from the petitioner till such date of termination with costs of any money payable at the rate of 18% p.a. It was further clarified that in the event there was any default on the part of the respondent in respect of release of the said film, then in that case, no costs of money would be payable by the respondent for 90 days grace period, that has been granted regarding the release date of the said film.

23. It was further provided that in the event the said Distribution Agreement was terminated due to default of the petitioner, then the respondent shall be entitled to retain / forfeit all the moneys received by the respondent from the petitioner till the date of such termination and all the rights of the said film, granted by the respondent to the petitioner as set out in clause 1 of the said Distribution Agreement, shall revert to the respondent. The parties also agreed to refer the disputes and differences that would arise between them pursuant to the said Distribution Agreement to the arbitration of a sole arbitrator to be mutually appointed by the parties.

24. It is submitted by the learned senior counsel that the respondent in this case has forfeited the amount paid by the petitioner to the respondent and has also claimed damages and has retained the said film also with it. He placed reliance on various paragraphs from the written submissions filed before the learned arbitrator. He submits that in para 7.3 of the written submissions filed by the petitioner, it was specifically contended by the petitioner that all clauses relating to the forfeiture in the said Distribution Agreement were in the nature of penalty and was void. It was contended by the

petitioner in the said written submissions that if the petitioner would have committed breach in taking delivery of the film and release it, it was opened to the respondent to release it through another distributor and in that event it was possible that the respondent would have earned some amount of money by doing so and in such a situation, the respondent would not have suffered any loss.

25. Learned senior counsel also placed reliance on para 7.4 of the written submissions in which the petitioner had contended that “without prejudice to the submission in respect of forfeiture clause which was in the nature of penalty”, Rs.9.25 crores by no stretch of imagination was a reasonable estimate of loss likely to be suffered by the respondent. The respondent had to prove the actual loss, the respondent had actually suffered. There was absolutely no indication of such loss on record, the respondent had actually suffered and thus the respondent was not entitled to forfeit the amount of Rs.9.25 crores.

26. Learned senior counsel placed reliance on paragraphs 11.2 and 12.2.3 of the written submissions and would submit that it was specifically contended by the petitioner before the learned arbitrator that at the most the damages could only be measured by comparing the expected revenue if the film was released in September – October, 2008 through the petitioner, as against the revenue that the respondent would have earned by release of the film in September – October, 2008 through another distributor. The respondent in that event could claim only the difference between the two amounts towards the loss of the respondent which the respondent has failed to prove.

27. Learned senior counsel placed reliance on the issues framed by the learned arbitrator. The respondent had informed the petitioner by a letter dated 7th June, 2008 that their entire shooting of the film was over and had called upon the petitioner to release their balance under the production amount of Rs.125 lakhs. He submits that by the said letter dated 7th June, 2008, the respondent however had not informed the petitioner that the respondent was ready to deliver the film to the petitioner at that point of time. He placed reliance on the letter dated 28th August, 2008 from the respondent to Mr.Sunir Khetarpal informing that the first copy of the film would be ready by September, 2008. It was recorded in the said letter that the said Sunir Khetarpal had suggested that there was a high clutter of films during the third quarter of the year 2008, the parties will discuss and decide appropriate date for release of the film. It was further recorded that as per the observation of the respondent, there were new films that had been postponed from their earlier scheduled dates in October – November, 2008. The respondent suggested that the parties shall meet and finalize the date of release of the said film on 1st September, 2008 at 3:00 p.m. It is submitted that the said letter of the respondent would indicate that even on that date, the film was admittedly not ready.

28. Learned senior counsel placed reliance on the letter dated 24th September, 2008 addressed by the respondent to the IDBI Bank Limited informing IDBI Bank Limited that the entire shooting of the film was complete and post production work was under progress. The film would be released in the mid October, 2008 but due to many big films being scheduled for release in October to December, 2008 period, the respondent had moved to January, 2009. The respondent requested IDBI Bank Limited to extend the repayment of loan till February, 2009

on the ground that the film was expected to be released in January, 2009 and was delayed due to burnt of a film set at film city and then due to matching of dates of the artists.

29. Learned senior counsel also invited my attention to to the letter dated 2nd December, 2008 from the respondent to the IDBI Bank Limited informing that the respondent had entered into a contract with the petitioner for release of the film "Pappu Pass Ho Gaya" and were expecting to release the film in August, 2008. However, due to crash in the market and inflow of the big films, the respondent was unable to release the said film. The said film was now scheduled to be released on or before March, 2009. It was further stated in the said letter that Global melt down had affected the business of the respondent like T.V. and Equipment / Theatre hire was also really low. The IDBI Bank Limited was however, informed that the respondent had also invested in Deepa Mehta's two films "Heaven on Earth" and "Stella" but unfortunately it also could not be released due to current scenario. The respondent requested the IDBI Bank Limited to bear with them at that moment and assured to repay the entire interest with principal before release of the film.

30. Learned senior counsel for the petitioner placed reliance on email from the respondent to Sunir Khetarpal, C.E.O. of the petitioner alleging that the respondent had informed the said Sunir Khetarpal as early as in August, 2008 that the shooting of the film was over and the respondent was ready to deliver the film for release. It was alleged in the said email that the parties had meetings and on the basis of the recommendation of the petitioner, the respondent had agreed for release of film on 9th January, 2009. It was further alleged that the said Sunir Khetarpal wanted to postpone the film release to

January / July, 2009. The respondent had allegedly expressed their displeasure and disappointment on the postponement, which would mean a delay of almost one year post completion of principal photography. The respondent alleged that the respondent had been requesting the petitioner for past three months to fix the date of release latest by February, 2009, however, the petitioner had not taken the said issue seriously.

31. It is submitted that in none of these letters, the respondent had alleged that the said film was shown to Sunir Khetarpal though most of these correspondence were addressed to him by the respondent. Learned senior counsel for the petitioner placed reliance on the letter dated 30th December, 2008 to the respondent in response to the email dated 23rd December, 2008 sent by the respondent to Sunir Khetarpal contending that the petitioner had not received any specific correspondence from the respondent intimating the petitioner that the said film was ready to be delivered. No specific date was agreed as mentioned in the letter of the respondent for release of the said film although the parties were discussing the possibility of such release some time next year. It was recorded that the officials of the petitioner had met Sanjay Bhutiani of the respondent and apprised him about the fact of the present market environment that was required to be considered in order to enable the petitioner to exploit the film optimally to recover all the investments.

32. The petitioner recorded that considering the present recessive trend in the market being faced by the petitioner, the petitioner was in process of factoring the same in their decision to access the suitability of releasing the film at the a time which according to the petitioner would be commercially most viable time to

do so. He submits that the oral communication recorded in the said letter was never disputed by the respondent.

33. Learned senior counsel for the petitioner placed reliance on the letter dated 9th January, 2009 from the respondent to Sunir Khetarpal in response to the letter dated 30th December, 2008 alleging that by a letter dated 7th June, 2008, the respondent had informed the petitioner that the entire shooting of the film was over and had requested the petitioner to release the payment in terms of the Distribution Agreement. The respondent had also informed the petitioner that by a letter dated 28th August, 2008 the first copy of the film would be ready by September, 2008 being the delivery date as per the agreement. On the basis of the meetings and the telephonic conversation, the respondent had agreed to postpone the delivery to January, 2009. The respondent opposed the request of the petitioner to postpone the release date to July – August, 2009 on the ground that the said delay shall be detrimental in exploitation of the said film and the same may be termed as “stale”. The respondent informed the petitioner that if the respondent would delay release of the film beyond February, 2009, it would result in loss of reputation and financial loss. The respondent alleged the delay on the part of the petitioner and requested to finalize the date of release in consultation with the respondent, to send to the respondent a release plan along with list of theaters in each territory, to start pre-release publicity, to remit the payment due to the respondent under the said agreement and to take delivery of the positive prints from lab on release of film under their letter of instruction. The respondent vide letter dated 22nd January, 2009 sent a reminder to the petitioner to comply with the request made by the respondent in letter dated 9th January, 2009.

34. The petitioner vide their letter dated 5th February, 2009 to the respondent in response to the letter dated 9th January, 2009 and 22nd January, 2009 contended that the respondent was unable to deliver the film by due date and had failed to communicate the petitioner that the first copy of the film was ready for delivery on a particular date nor any request was made by the respondent to the petitioner to take delivery of the film till the petitioner received a letter dated 9th January, 2009. The petitioner had demanded the delivery of the film by June, 2008 and in that event within the grace period i.e. by September, 2008.

35. In the said letter, the petitioner informed the respondent that there was serious economic recession. The entire industry was affected by the recent Global melt down and the film industry had been hit by the recession like others if not more. In last four months, satellite prices of films have plummeted to 40% of an average of their original price. There was liquidity crises in the market resulting in sale of even Music and Home Video rights at throw away prices. The petitioner contended in the said letter that if the respondent would not have defaulted in delivery of the film by 30th June, 2008, or even by 30th September, 2008, the petitioner would have been much more comfortable scenario by completing the exploitation of the rights before this recessionary trend would have set in.

36. The petitioner informed the respondent that in such a market scenario, the petitioner will require re-looking at the Minimum Guarantee Amount and assessing the financial viability and worth of the film *vis-a-vis* the final product ready with the respondent and pursuant to which, the petitioner may mutually take a decision with respect to the balance amount to be payable by the petitioner to the

respondent and also the possible release date of the film which will be conducive for gaining optimum profit for both the parties. The petitioner proposed a joint meeting between the respective officials of the parties.

37. The respondent vide their letter dated 17th February, 2009 denied that the respondent was unable to deliver the film by agreed date. The respondent contended that the petitioner had at no time prior to the agreed date of delivery, had showed their readiness and willingness to pay the balance amount and to take delivery. It was contended that the petitioner was repudiating to take delivery at the agreed price and for that the petitioner had come out with the said afterthought stand which was false and without any merit. The respondent also denied that there was any market recession. The petitioner had released and/or was releasing two films which started after the film of the respondent.

38. The respondent also alleged that in the month of October, 2008, the respondent had informed the petitioner that Star T.V. had offered to acquire the satellite rights of the film for five years for the price of Rs.6 crores and had requested the petitioner to sell the same, the respondent however never responded to the same. The respondent informed the petitioner that the respondent was loosing every day by way of interest payable to the IDBI Bank Limited and IFC due to the alleged defaults and breaches of the petitioner. The respondent called upon to finalize the date of release in consultation with the respondent, post the respondent with pre-release publicity plan and to start release publicity in consultation with the respondent. The respondent called upon the petitioner to send the release plan along with list of theaters in each territory within the period of 7 days

from the date of receipt of the said letter.

39. Learned senior counsel invited my attention to a letter dated 23rd March, 2009 from the respondent to Sunir Khetarpal thereby terminating the Distribution Agreement with immediate effect and forfeiting the amount paid by the petitioner to the respondent under the said agreement and/or against the lost and/or damages as were being suffered or incurred or sustained or would be suffered by the respondent on account of the alleged defaults and/or breaches of the terms and conditions of the said agreement. The respondent informed the petitioner that the respondent would be fully entitled to deal with and dispose of the said film and all rights of the said film to any third party or the persons as the respondent would deem fit and proper. It is submitted by the learned senior counsel that even in the said letter, it was neither any suggestion nor any demand made by the respondent that the respondent was entitled to anything more than forfeiting the amount paid by the petitioner.

40. It is submitted by the learned senior counsel that the petitioner rightly terminated the agreement on 26th March, 2009 on recording true and correct facts on record and denying the claim of the respondent that the respondent was entitled to forfeit the amount of Rs.9.25 crores or that the respondent was entitled to terminate the Distribution Agreement. In the said letter the petitioner had contended that the forfeiture of the said amount was in the nature of penalty and was not towards compensation for any loss alleged to have been caused to the respondent. The petitioner also categorically denied that the respondent had suffered any loss or damages as claimed by the respondent vide letter dated 23rd March, 2009. The petitioner called upon the respondent to withdraw the notice of forfeiture of the

said amount and to refund the said amount to the petitioner with interest.

41. In paragraph 17 of the said letter, the petitioner contended that failure on the part of the respondent to deliver the film to the petitioner before 30th September, 2008 constitutes a repudiatory breach of the fundamental and material term of the Distribution Agreement. The petitioner contended that the said Distribution Agreement was an essence of contract and that the petitioner was not obliged to pay to the respondent the balance consideration or to perform the Distribution Agreement as per the terms originally agreed upon. The petitioner contended that failure on the part of the respondent to deliver the film by stipulated date constitute repudiatory breach of the Distribution Agreement.

42. The petitioner contended that the respondent was not entitled to forfeit the loss consideration of Rs.9.25 crores paid by the petitioner to the respondent and that forfeiture of the said amount by the respondent was in the nature of penalty. The petitioner also contended that the respondent had not suffered any damages or loss and was thus not entitled to forfeit the said amount towards compensation or any alleged loss suffered by the respondent. The petitioner called upon the respondent to forthwith refund the said amount. The petitioner invoked arbitration clause by the said letter.

43. It is submitted by the learned senior counsel that the contention of the petitioner that the forfeiture clause was in the nature of penalty was raised not only before the learned arbitrator by the petitioner but was raised in the correspondence addressed by the petitioner to the respondent before invoking the arbitration agreement.

Learned senior counsel placed reliance on a letter dated 30th November, 2009 from IDBI Bank Limited to the respondent alleging that though at the request of the respondent, the period of loan was extended by the IDBI Bank Limited from 1st September, 2008 to 28th February, 2009, the respondent had failed and neglected to make repayment of the loan with interest and other amounts payable to the IDBI Bank Limited and had committed various defaults.

44. It is submitted that the IDBI Bank Limited had contended that the said bank was a single first charge holder of the film along with all the copyrights over the film. The IDBI Bank Limited was now enforcing and implementing its rights and security in respect of the said film including of disposing of the rights and releasing the said film at costs and consequences of the respondent. The IDBI Bank Limited informed that the said Bank was also enforcing and implementing the rights by way of taking possession of the film along with all the properties / rights charged / conferred in favour of the IDBI Bank Limited including negative of the film with all its versions, development, distribution, screening, exhibition, hire, lease or otherwise exploitation of the film for any or all the territories all over the world in exercise of their powers under the loan agreement.

45. The IDBI cautioned the respondent not to deal with the film / sell the film or its rights therein and any dealings with the film by the respondent would be subject to the sole first charge of the IDBI loan for an amount of Rs.843.88 crores and outstanding interest thereon. It is submitted by the learned senior counsel that the said letter of the IDBI Bank Limited to the respondent would clearly indicate that the respondent was not to pay the IDBI Bank Limited from the amount payable by the petitioner to the respondent.

46. The next submission of the learned senior counsel for the petitioner is that no steps were taken by the respondent to mitigate the alleged loss suffered, if any, by the respondent. It was not even suggested by the respondent that any publicity material was ready and offered by the respondent to the petitioner. Learned arbitrator has not considered the evidence produced by the petitioner at all in the impugned award. He submits that the learned arbitrator has rendered a perverse finding that publicity of the film was not done by the petitioner and amounted to breach on the part of the petitioner.

47. Learned senior counsel invited my attention to the issues framed by the learned arbitrator insofar as the issue of publicity material and pre-release promotion is concerned. He submits that the learned arbitrator has also considered the alleged trade practice about delivery of film and has rendered a perverse finding that the film was ready on hard disk at the beginning of August, 2008 without any such evidence on record. There was no discussion in the impugned award on the issue as to whether the film produced by the respondent was the original work of the respondent or not. There is no discussion in the impugned award on the issue as to whether the respondent had actually suffered any loss or not. The petitioner had not received the film from the respondent.

48. The respondent had never asked the petitioner for payment of balance amount of Rs.9.15 crores. The mitigation of loss could not be by the IDBI Bank Limited but ought to have been by the respondent themselves. Reliance is placed on section 73 of the Indian Contract Act. No material was produced by the respondent to show that any efforts were made by the respondent to mitigate the

loss alleged to have been suffered by the respondent. Learned arbitrator has not dealt with the plea of the petitioner that forfeiture clause was penal in nature and was void though was substantially raised not only in the pleadings filed before the learned arbitrator but also repeatedly in the correspondence also.

49. It is submitted by the learned senior counsel that the time was an essence of contract and the respondent was under an obligation to deliver the film on or before 30th June, 2008 with three months grace period. Learned arbitrator has rendered a perverse finding that whether time was an essence of contract or not was not relevant. He submits that the impugned award on this issue is contrary to and in violation of the principles of law laid down by the Supreme Court in case of **M/s.China Cotton Exporters vs. Beharilal Ramcharan Cotton Mills Limited, AIR 1961 SC 1295** and in particular paragraphs 6 and 10 holding that any commercial contracts, time is ordinarily of the essence of contract. He also placed reliance on the judgment of the Supreme Court in case of **Mahabir Prasad Rungta vs. Durga Datta, AIR 1961 SC 990** and in particular paragraph 8 holding that in commercial transaction, time is ordinarily is an of essence. The parties had entered into a term sheet provided for four months grace period which was subsequently reduced to three months in the Distribution Agreement.

50. Learned senior counsel placed reliance on the oral evidence of the witness examined by the petitioner who deposed that a film had self-life. He also placed reliance on the deposition made in paragraph 10 and few other paragraphs. The respondent also had admitted that the film had self-life.

51. Insofar as obligation of the respondent to release the pre-publicity material to the petitioner is concerned, learned senior counsel submits that it was obligatory on the part of the respondent to provide the material in this regard much before release of the film as provided in the said Distribution Agreement to the tune of Rs.3.00 crores. He relied upon part of the cross-examination of the witness examined by the respondent and in particular reply to the question nos.96 to 98, 108, 110, 111, 114 and 115 in support of his submission that such publicity material was not even ready. He submits that until January, 2009, when the respondent called upon the petitioner to release the film, even at that point of time pre-publicity material was not even ready.

52. It is submitted that admittedly in the month of September, 2008, which was the agreed date of release with grace period, the respondent had never offered pre-publicity material to the petitioner and the same was not even ready. The trailer of the movie was also not ready. Learned arbitrator has rendered totally one sided award and has not considered the oral as well as documentary evidence produced by the petitioner. There is no discussion in the impugned award about the case of the petitioner that the publicity material was neither ready nor offered or delivered by the respondent to the petitioner.

53. It is submitted by the learned senior counsel that the balance amount of Rs.9.25 crores was payable by the respondent upon delivery of the film. The release date was to be mutually decided which was 30th June, 2008 with three months grace period. The shooting of film even according to the respondent was over only on 7th June, 2008. The finding of the learned arbitrator that the film was

ready in August, 2008 itself is thus perverse.

54. Learned senior counsel submits that even the correspondence between the respondent and the IDBI Bank Limited in which the respondent had given various reasons for delay in releasing the film makes it clear that no delay on the part of the petitioner was alleged in those correspondence for release of the film and in any event the causes of delay mentioned in those letters were not attributable to the petitioner. Even according to the respondent, the post production work of the film was under process in the month of September, 2008. In the letter addressed to the IDBI Bank Limited on 2nd December, 2008, the respondent no.1 themselves informed the IDBI Bank Limited that the film was to be released before March, 2009. Even according to the respondent, the two other films also could not be released due to Global melt down. The respondent did not blame the petitioner for the alleged delay in the said letter addressed to the IDBI Bank Limited.

55. It is submitted by the learned senior counsel that by the end of September, 2008, the respondent had already received notice from Twentieth Century Fox alleging infringing of the copyright by the respondent in the movie "My Cousin Vinny". The said Twentieth Century Fox had filed suit bearing Suit No.1925 of 2009 on 13th April, 2009 against the respondent alleging infringement of the copyright in the said film "My Cousin Vinny". On 4th August, 2009, the respondent and the said Twentieth Century Fox had filed the consent terms in the said suit. He submits that the respondent had taken a stand contrary before the IDBI Bank Limited in the earlier proceedings about the date of release of film in question over the film and reasons for delay.

56. Insofar as the question as to whether Sunir Khetarpal, C.E.O. of the petitioner was shown the film on 8th August, 2008 by the respondent or not is concerned, it is submitted by the learned senior counsel that there was no such allegation made by the respondent in any of the correspondence though the petitioner all through out had been contending that the said film was not ready by the respondent. The respondent had not demanded a sum of Rs.9.25 crores in August, 2008 though the film was allegedly ready at that time. The respondent had to pay huge amount to the IDBI Bank Limited. Till the month of January, 2009, there was no demand raised by the respondent for the balance payment. The said Sunir Khetarpal had already left the job of the petitioner by that time. The alleged voucher for payment of token amount for lunch on the date showing the film allegedly to Sunir Khetarpal would not prove that the said film was shown to Sunir Khetarpal, the Ex.C.E.O. of the petitioner.

57. It is submitted that the view taken by the learned arbitrator is not a possible view. It is submitted that the film was not the original film but was adaption of the film "My Cousin Vinny". Though the respondent had represented to the petitioner that the said work was the original work under the Copyright Act in the said movie, factually the position was totally different. It is submitted that the respondent had offered US \$ 25,000 to Twentieth Century Fox for giving adaptation rights to Twentieth Century Fox by an email dated 11th August, 2007. He invited my attention to a letter dated 16th October, 2007 through Twentieth Century Fox to the respondent directing the respondent not to commit any breach of the copyright.

58. It is submitted that the correspondence between the respondent and Twentieth Century Fox would clearly indicate that the

film “Banda Yeh Bindass Hai” was not the original film but was adaption of the film “My Cousin Vinny”. The respondent had already replied the legal notice from Twentieth Century Fox in the month of September, 2008. The petitioner came to know about the said suit filed by Twentieth Century Fox against the respondent only in the month of May, 2009. The respondent had made a statement in the said suit filed by Twentieth Century Fox not to release the film for some time which statement was continued from time to time till the consent terms were filed by the respondent in the said suit.

59. It is submitted that the respondent became entitled to release the film only after the consent terms between the respondent and said Twentieth Century Fox was filed. Learned senior counsel also placed reliance on the internal email from Sanjay Bhutiani and the respondent dated 29th June, 2009 admitting that there was adaptation of the film “My Cousin Vinny” by the respondent while making the said film “Banda Yeh Bindass Hai”.

60. Learned senior counsel tendered a 'note on damages' and submits as under :-

a). The forfeiture clause was by way of penalty and thus in a case of termination for the alleged breach by the petitioner, the respondent at the highest would have been entitled to reasonable compensation for the loss suffered on account of the breach. The respondent failed to prove that it had suffered loss / damages. If the amount can be regarded as genuine pre-estimate of the loss that may be suffered on account of breach, it would be a valid clause and would be upheld. If the amounts stipulated can be regarded as penalty or being penalty in

nature, it would be held incapable of enforcement.

b). Learned senior counsel placed reliance on the judgment of the Supreme Court in case of **Fateh Chand vs. Balkishan Dass, AIR 1963 SC 1405** and would submit that measure of damage in case of breach of stipulation by way of penalty is reasonable compensation and not existing penalty stipulated. In assessing damages, the court has subject to the limit of penalty stipulated jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. He also placed reliance on the judgment of the Supreme Court in case of **Maula Bux vs. Union of India, 1969 (2) SCC 554** and in particular paragraphs 6 and 7 in support of this plea.

c). Learned senior counsel placed reliance on the judgment of the Supreme Court in case of **Oil & Natural Gas Corporation Limited vs. Saw Pipes Limited, (2003) 5 SCC 705** and would submit that since the forfeiture clause was in the nature of penalty, the party claiming compensation would not be entitled to the said compensation as provided but would only be entitled to reasonable compensation for the loss suffered, if any, on account of breach on the part of the other party. He also placed reliance on the judgment delivered by the Division Bench of this Court in case of **Board of Trustees of Trust vs. Pioneer Engineer and Anr. (2006) 5 BCR 628** and in particular paragraphs 21 to 33 and also the judgment of the learned single Judge of this Court in case of **Smt.Panna Sunit Khatau & Ors. vs. Dilip Dharamsey Khatau & Ors.** in Arbitration Petition No.4 of 1986 decided on 12th April, 2013.

d). It is submitted that the clause in the Distribution Agreement providing for forfeiture of the amount does not state that the amounts receivable by the respondent was a reasonable and genuine, pre-estimate of loss suffered by the respondent in case of breach, if any, of the petitioner. The petitioner had pointed out that in the event of breach by the petitioner, if any, it was upon the respondent to release the said film through another distributor and it was possible for the respondent to earn some amount by distributing the film through another distributor and in that event the respondent would not have suffered any loss.

e). It is submitted that though the petitioner had specifically contended that a sum of Rs.9.25 crores could not be considered as reasonable pre-estimate of the loss likely to be suffered and that the respondent had to prove the loss suffered, if any, which the respondent had failed to do so, learned arbitrator has not considered these crucial issues and the submissions made by the petitioner in the impugned award at all.

f). The learned arbitrator has while dealing with the matter of forfeiture of the amount of Rs.9.25 crores has not dealt with the issue of penalty at all. The respondent could not have forfeited the amount of Rs.9.25 crores paid by the petitioner. In his alternate submission, he submits that the learned arbitrator ought to have held the clause in the nature of penalty and at most would have considered the said amount of Rs.9.25 crores as outer limit. This submission of the learned senior counsel is made without prejudice to the rights and contentions of the

petitioner that the said amount of Rs.9.25 crores being in the nature of penalty could not be forfeited at all in absence of the respondent proving any loss. The respondent was thus not entitled to be awarded with any compensation.

g). Reliance is also placed on the Illustration (c), (d) and (g) to section 73 of the Contract Act. The respondent was knowing that the onus was on the respondent to lead the evidence and to establish the price which it could have obtained for licensing distribution rights of the film to another buyer in the market in the year September – October, 1986 i.e. the date of the alleged failure to take delivery or in the month of January, 2009 i.e. the alleged date of breach or at least in or around March, 2009 i.e. the date of termination. Except making a bald statement that the respondent tried to find out another distributor – buyer, the respondent did not lead any evidence in this regard and did not make any attempt to prove the market value of the distribution rights as on September – October, 2008 or January, 2009 or March, 2009.

h). It is submitted by the learned senior counsel that the allegation of the respondent that it was unable to mitigate its loss by disposing of the distribution right in the market because the IDBI Bank Limited took possession of the film and was a relatable breach by the petitioner was totally false. the Distribution Agreement between the petitioner and the respondent was entered into much later than the loan agreement between the respondent and the IDBI Bank Limited which was dated 3rd October, 2007. The respondent did not lead any evidence to prove that the respondent made an attempt to

dispose of the distribution rights in the market in the intervening period of 14 months / 11 months. The IDBI Bank Limited had already taken possession of the film due to the breach committed by the respondent of the loan agreement and thus the respondent could not seek recovery of any damages from the petitioner.

i). Learned senior counsel strongly placed reliance on the principles laid down in case of **Hadley & Anr. vs. Baxendale & Ors., (1854) 9 Ex. 341**. It is submitted that there was no provision in the Distribution Agreement or in any other document to indicate that the obligation of the respondent to pay to the IDBI Bank Limited under the loan agreement was in any manner linked with the obligation of the petitioner to pay to the respondent under the Distribution Agreement. It was not the case of the respondent in the correspondence with the IDBI Bank Limited that the respondent could not comply with its obligation to repay the loan of the IDBI Bank Limited in view of the alleged default on the part of the petitioner to pay under the Distribution Agreement.

j). Insofar as the alleged efforts shown by the respondent to mitigate the loss by relying upon the correspondence between the IDBI Bank Limited and All India Film Distributor of Venus Records and Tapes Private Limited are concerned, it is submitted by the learned senior counsel that these letters appeared to have been written in or around July, 2010 i.e. much after the date of the alleged breach and/or the date of termination of the respondent i.e. September, 2008 / January, 2009 / March, 2009 and would not substantiate the case of the

respondent on the plea of mitigation. He submits that those letters would indicate that the same were exchanged as and by way of the consequence of the steps taken by the IDBI Bank Limited and not by the respondent for exploitation of the film.

k). It is submitted by the learned senior counsel that the party claiming damages has to take all reasonable and timely steps within its power to mitigate its damages. Since the respondent has failed to take any reasonable steps to mitigate the loss, learned arbitrator could not have allowed the claim for compensation. In support of this submission, learned senior counsel placed reliance on the judgment of the Supreme Court in case of **Murlidhar Chiranjilal vs. Harishchandra Dwarkadas & Anr. AIR 1962 SC 366** and in particular paragraphs 7 to 13, the judgment of the Kerala High Court in case of **Bismi Abdullah & Sons, Merchants & Commission Agents vs. Regional Manager, F.C.I., AIR 1987, Kerala 56** and in particular paragraphs 6, 7, 9 and 10.

l). It is submitted that the letters exchanged between the IDBI Bank Limited and All India Film Distributor and Venus Records and Tapes Private Limited in the month of July, 2010 would not assist the case of the respondent in view of the fact that the alleged breaches had taken place in the month of September, 2008 / January, 2009 and in view of the fact that the agreement was terminated in the month of March, 2009.

m). It is submitted by the learned senior counsel that the learned arbitrator in the impugned award has not rendered any finding that forfeiture of the amount of Rs.9.25 crores was valid

or was illegal. The validity of the said clause has not at all been considered. Learned arbitrator has also not considered prevailing market price on the date of breach for the purposes of computation of compensation and thus the award shows patent illegality being in violation of section 73 of the Contract Act and Illustration (a), (c), (d) and (g) thereof.

n). Learned senior counsel placed reliance on the judgment of the Supreme Court in case of **Associate Builders vs. Delhi Development Authority, (2015) 3 SCC 49** and in particular paragraphs 40 to 46 in support of the submission that since the award shows patent illegality, this Court has ample power to quash and set aside the said arbitral award.

61. Mr.Joshi, learned senior counsel for the respondent, on the other hand, commenced his arguments with the scope of Section 34 of the Arbitration and Conciliation Act, 1996 and submits that the petitioner has not shown any perversity or patent illegality in the impugned award and thus this Court cannot interfere with the impugned award. He submits that the expression “public policy” has been interpreted by the Supreme Court in the case of **Associate Builders vs. Delhi Development Authority (2015) 3 SCC 49** and in particular paragraphs 41 to 45 thereof. He submits that the principles laid down by the Supreme Court in the said judgment are applicable to the facts of this case. This arbitration petition thus deserves to be dismissed on this ground alone.

62. In support of this submission, learned senior counsel also placed reliance on the judgment of the Supreme Court in the case of **Sutlej Construction Limited vs. Union Territory of Chandigarh**

(2018) 1 SCC 718 and would submit that the learned arbitrator having rendered various findings of facts after appreciation of the evidence and having taken a reasonable and plausible view, this Court cannot re-appreciate the evidence considered by the learned arbitrator under Section 34 of the Arbitration and Conciliation Act, 1996 and cannot interfere with the findings of facts rendered by the learned arbitrator.

63. Learned Senior counsel tendered a separate list of dates in the form of chart dealing with the submissions made by the learned senior counsel for the petitioner on various issues raised during the course of arguments.

64. Learned senior counsel for the respondent relied upon the letter dated 5th February, 2009 from the petitioner to the respondent alleging that globally there was a serious economic recession and thus the entire industry was affected by the then global meltdown and the industry had been hit by the recession like others if not more. In last four months the satellite prices of the films had plummeted to 40% on an average of their original price. There was also liquidity crisis in the market resulting in the sale of even Music and Home Video rights at throw away prices. The petitioner requested the respondent to re-look at the minimum guarantee amount and assessing the financial viability and worth of the film-vis-a-vis the final product ready with the respondent and pursuant to which the parties may mutually take a decision with respect to the balance amount to be payable by the petitioner to the respondent and also the possible release date of the film which would be conducive for gaining optimum profit for both the parties and which would also do justice to the film instead of unnecessarily expediting the release of the film at

an inappropriate time when the film had less chance of doing well at the box office. The petitioner proposes a joint meeting with the respondent.

65. It is submitted that this letter would clearly show that the petitioner itself had requested the respondent not to expedite the release of the film and had informed the respondent about the economic recession and liquidity problems faced by the industry. It is submitted that the petitioner has not terminated the agreement on the ground of delay on the part of the respondent. It is submitted that the petitioner had as a matter of record had repudiated the contract and had refused to comply with their obligation of their agreement.

66. Learned senior counsel placed reliance on the letter dated 17th February, 2009 from the respondent to the petitioner alleging that the petitioner had never shown their readiness and willingness to pay the balance amount and to take delivery and had refused to take delivery at the agreed price. The respondent also brought on record that the petitioner had themselves released two films which had started after the film in question. The respondent informed the petitioner that the respondent were loosing every day by way of interest payable and being paid to IDBI & IFC due to the alleged defaults and/or breaches of the petitioner. The respondent called upon the petitioner to finalize the date of release in consultation with the respondent.

67. It is submitted that the respondent was thus not responsible for any delay in releasing the film. Learned senior counsel placed reliance on the letter dated 23rd March, 2009 from the respondent making the time as an essence of the agreement. It is

submitted that the petitioner was fully aware of the loans taken by the respondent from the IDBI and IFCI and the securities created in their favour. The respondent cancelled and/or terminated the agreement between the parties with immediate effect and forfeited the amount paid by the petitioner.

68. On 26th March, 2009 the petitioner replied to the letter dated 23rd March, 2009 and denied the allegations made therein. The petitioner contended that it was the obligation of the respondent to deliver the film making time bound between the parties. The petitioner contended that the forfeiture of the amount of Rs.9.25 crores was in the nature of the penalty and not towards compensation for any loss of damages caused to the respondent. The petitioner terminated the distribution agreement and called upon the respondent to refund the amount of Rs.9.25 crores paid to the respondent with interest at the rate of 18% per annum. The respondent denied the allegation vide their letter dated 16th April, 2009.

69. Learned senior counsel placed reliance on the letter dated 5th May, 2009 from the petitioner to the respondent referring to the suit filed by the Twentieth Century Fox against the respondent on the ground of plagiarism of the film in question and alleging that the said film was copy of the English film "My Cousin Vinny". It is submitted that the petitioner was thus aware of the said suit filed by the said Twentieth Century Fox against the respondent. By the said notice, the petitioner terminated the agreement.

70. Learned senior counsel placed reliance on the letter dated 30th November, 2009 addressed by the IDBI to the respondent thereby invoking the rights and powers under the loan agreement and

informing the respondent that the respondent had been barred and restrained from exercising any rights in the said film and asked the respondent to take cognizance of the said notice and to act upon the instructions given by the IDBI only. The IDBI placed on record that the said bank was a single chargeholder of the said film.

71. Learned senior counsel placed reliance on the letter dated 30th November, 2009 from the IDBI calling upon the respondent to pay the dues of the bank and instructed the respondent not to release the film or to handover the print to any person or company until authorized by the IDBI in writing. IDBI also enforced and implemented the rights by way of taking possession of the film along with all the properties/rights charged/conferred in their favour including but not limited to the negatives, sound negatives and all other paraphernalia of the said film with all its versions, development, distribution, screening, exhibition etc. The respondent was warned not to deal with film/sell the film or its rights thereof and made it clear that any dealing with the film by the respondent would be subject to the sole first charge of IDBI's loan for an amount of Rs.843.88 lakh and outstanding interest thereon.

72. Learned senior counsel placed reliance on the letter dated 4th January, 2010 and also undated letter annexed at page 313 of the compilation II addressed by All India Film Distributors to IDBI thereby submitting their proposal to clear all the outstanding of IDBI Bank as mutually agreed between the IDBI Bank and the producer as well as the dues of the processing laboratory before the release of the said film. It is submitted that respondent had taken steps to mitigate the losses suffered by the respondent.

73. Learned senior counsel placed reliance on the letter dated 20th February, 2010 from the respondent to IDBI Bank Limited requesting to change the laboratory from Reliance Media Works Limited to Film Lab (a division of PID Limited) promoted by Mr.Sanjay Patel on the ground that the respondent had fear that the petitioner would not support in smooth release of the film, since they had alleged to have committed defaulted of their obligation under the distribution arrangement with the respondent for the same film. The respondent requested the IDBI to instruct the petitioner to transfer the negative of the film to new lab Film Lab i.e. the Film Lab with instruction of the lien of the IDBI Bank on the said film. The respondent informed that it would execute a fresh lab agreement accordingly.

74. Learned senior counsel invited my attention to the portion of the affidavit in lieu of examination in chief of Mr.Dinesh Pal, one of the witness of the respondent referring to the loan transaction with IDBI and deposing that the petitioner was fully aware of the said loan financial facilities taken by the respondent only for the production of the said film and also referred to a tri-partite agreement dated 4th October, 2007 executed by and between the petitioner, respondent and IDBI Bank. The said witness also deposed that as per the trade custom and/or trade practice and/or trade rule prevalent and/or followed since long years in the film industry at large regarding pre-release publicity, delivery of the prints, the theatrically release of the film on Friday of the work etc. The said witness deposed that the final prints of the film can be kept ready within 12 to 15 days after the final editing work of the film is done on the hard disk. The said witness also deposed about the steps alleged to have been taken by the respondent to mitigate, losses and damages according to the learned

counsel for the respondent.

75. Learned senior counsel also invited my attention to part of the cross examination of the said witness and would submit that there was hardly any cross examination of the said witness on most of the part of the deposition of the said witness and thus it was proved by the respondent that delay if any, was on the part of the petitioner and not on the part of the respondent and that the termination of the contract by the respondent was justified. He submits that the respondent had also proved that the time was of essence of the contract.

76. Learned senior counsel invited my attention to the issues framed by the learned arbitrator and more particularly issue nos. 12 and 13 on the “issue of mitigation” and also relating to trade practice. He also invited my attention to various findings of fact rendered by the learned arbitrator in the impugned award on mitigation of loss and also about the dispute between the respondent and the said Twentieth Century Fox. It is submitted by the learned senior counsel that the learned arbitrator has only awarded the claim based on minimum guarantee in favour of the respondent and has rejected the claim for loss of profit.

77. On the issue of plagiarism raised by the petitioner, learned senior counsel for the respondent would submit that the respondent had carried out independent and new work insofar as the film in question is concerned and there was no copyright in idea. In support of this submission, learned senior counsel placed reliance on the judgment of this court in case of **Arbaaz Khan Production Private Limited vs. Northstar Entertainment Private Limited & Ors.** in

Notice of Motion (Lodging) No.1049 of 2016 and in particular paragraphs 21 to 24 in support of the submission that there was no plagiarism on the part of the respondent in the said film. He submits that merely because the respondent had entered into with the consent terms with the said Twentieth Century Fox in the civil suit filed by the said Twentieth Century Fox against the respondent, it would not indicate that the respondent had committed any breach of copyrights in the said film. It is submitted that in any event no such arguments were advanced by the petitioner before the learned arbitrator nor such plea was raised in the pleadings.

78. It is submitted that even in the written arguments filed by the petitioner before the learned arbitrator, no issue of plagiarism was raised by the petitioner or in support of the case that it was not the case of the adaptation of the film. He submits that Mr.Sunir Kheterpal, the officer of the petitioner was not examined. The respondent had already shown the original film to the said Mr.Sunir Kheterpal. The original film was already with the petitioner. There was no breach of anything copyright etc. proved by the petitioner against the respondent before the learned arbitrator. In support of this submission, learned senior counsel placed reliance on the judgment of Supreme Court in case of **R.G. Anand vs. M/s.Delux Films & Others, (1978) 4 SCC 118** and in particular paragraphs 45, 46 and 61.

79. Insofar as the issue of submission of the learned senior counsel for the petitioner that the forfeiture clause in the agreement was in the nature of penalty and thus the respondent was liable to prove the actual loss alleged to have been suffered by the respondent before the learned arbitrator is concerned, learned senior counsel for the respondent submits that there was no pleading on the part of the

petitioner that the forfeiture clause was in the nature of penalty. Whether a clause is in the nature of the penalty in terrorem or not is a mixed question of fact and law. The learned arbitrator accordingly did not frame and consider any such issue. He submits that the judgments thus relied upon by the petitioner in support of their submission that the forfeiture clause was in the nature of penalty and the respondent was liable to prove the actual loss suffered by the respondent are irrelevant.

80. Learned senior counsel for the respondent placed reliance on the judgment of this court in case of **Ultratech Cement Ltd. vs. Sunfield Resources Pty. Ltd., 2016 SC OnLine Bom. 10023** and in particular paragraphs 46, 47, 85 to 89. It is submitted by the learned senior counsel that the petitioner did not lead evidence to show that the said forfeiture clause was in the nature of penalty. The onus was on the petitioner to show that there was no genuine pre-estimate loss but the same was in the nature of penalty. The respondent is in any event entitled to seek the minimum guarantee amount. Learned senior counsel invited my attention to the prayers in the counter claim filed by the respondent and also the particulars of claim and would submit that the claim for damages was made by the respondent was on the basis of minimum guarantee price guaranteed in the agreement entered into between the parties. It was not the case of the petitioner that the claim made by the respondent was in the nature of penalty in terrorem.

81. The issue raised by the petitioner was whether the respondent was entitled to forfeit the amount paid by the petitioner. In support of this submission, learned senior counsel for the respondent placed reliance on the judgment of Delhi High Court in case of

M/s.Jyoti Limited vs. E.I.H. Limited, 2009 SCC OnLine Del. 754

and in particular paragraphs 3, 10, 12, 14 to 19. It is submitted that the respondent had invested capital in the film and had lost the said film because of the breaches committed by the petitioner. The respondent is thus entitled to forfeit the said amount paid by the petitioner as minimum guarantee amount guaranteed in the said agreement.

82. Insofar as submission of the learned senior counsel that the learned arbitrator has not dealt with the issue as to whether the forfeiture clause was penal in nature is concerned, it is submitted that the burden was on the petitioner to prove that the forfeiture clause was in the nature of the penalty and not upon the respondent. Since no such issue was raised by the petitioner, the learned arbitrator was not required to deal with such issue. Learned senior counsel for the respondent placed reliance on the judgment of Delhi High Court in case of **Ashwani Bahl & Ors. vs. AIR India Ltd., 2014 SCC OnLine Del. 275** and in particular paragraphs 6 to 8 in support of the submission that if the actual damage cannot be calculated and proved, then there is no illegality in awarding fixed/liquidated damages as specified in the contract which in this case has been granted by the learned arbitrator by allowing the minimum guarantee amount provided in the agreement. He submits that the respondent had in fact incurred much more than the minimum guarantee amount reflected in the agreement. He placed reliance on the judgment of Madhya Pradesh High Court in case of **Nonjibhai vs. Ramkishan & Ors., AIR 1977 MP 112** and in particular paragraph 12.

83. Insofar as the submission of the learned senior counsel for the petitioner that the time was an essence of the contract is

concerned, learned senior counsel for the respondent invited my attention to the paragraphs from the written arguments filed by the petitioner before the learned arbitrator in support of the submission that in the arbitral proceedings, the petitioner had urged that the time was not an essence of the contract and was not an issue which arises in the matter. It was only in the alternate plea, the petitioner had urged that the time was an essence of the contract. He invited my attention to the findings rendered by the learned arbitrator in paragraph 46 of the impugned award and would submit that the learned arbitrator has rendered a finding of fact that the respondent was in a position to deliver a film by 30th September, 2008 including the grace period. He submits that this court cannot interfere with such finding of fact.

84. In his alternate submission, it is submitted by the learned senior counsel for the respondent that the time ceased to be an essence of the contract in this matter. The time would have become essence only if the party would have made it an essence of a contract. He submits that in fact the respondent had made a time as an essence of the contract by addressing a letter. He relied upon the letter dated 17th February, 2009 from the respondent to Mr.Sunir Kheterpal of the petitioner calling upon the petitioner to finalize the date of release in consultation with the respondent and to comply with various other obligations provided in the agreement. He submits that instead of complying with that obligation of the petitioner, the petitioner repudiated the contract. In support of the submission that time was an essence of the contract, Mr.Joshi, learned senior counsel for the respondent also referred to and relied upon the judgment of Supreme Court in case of **M/s.Hind Construction Contractors vs. State of Maharashtra, (1979) 2 SCC 70.** It is submitted that the

respondent in this case has made the time as an essence of the contract by letter dated 17th February, 2009.

85. Insofar as submission of the learned senior counsel for the petitioner that the film was not made ready by the respondent even within the grace period is concerned, learned senior counsel for the respondent submits that the petitioner had not relied upon the correspondence exchanged between the IDBI and the respondent before the learned arbitrator nor any arguments were advanced based on such correspondence. Those letters were actually relied upon by the respondent. He submits that in any event, the learned arbitrator has rendered a finding of fact that the film was ready. He placed reliance on paragraphs 33, 44 and 46 of the impugned award. Insofar as the submission of the learned senior counsel for the petitioner that the respondent did not make any offer to deliver the film to the petitioner is concerned, learned senior counsel for the respondent relied upon the finding of fact rendered by the learned arbitrator in paragraphs 33, 44 and 46 and would submit that this court cannot interfere with such finding of fact.

86. Insofar as the alleged breach of not furnishing publicity material by the respondent to the petitioner prior to the date of release of the film is concerned, it is submitted by the learned senior counsel for the respondent that the learned arbitrator has considered this issue in great detail in paragraphs 28, 29, 33, 42 to 46 of the impugned award and has also considered the trade practice prevailing in film industry in detail. These findings of fact rendered by the learned arbitrator are rendered after considering the oral and documentary evidence and cannot be interfered with by this court.

87. Insofar as submission of the learned senior counsel that the respondent had failed to prove the loss alleged to have suffered by the respondent is concerned, it is submitted by the learned senior counsel for the respondent that the submission made by the learned senior counsel for the petitioner before this court are contrary to the pleadings filed by the petitioner before the learned arbitrator. He submits that in case of a film, open market is not available. The film produced by the respondent was tailor made and there was no ready market available for the said film. A film is analogous to goods specifically made to order. The test thus to be applied is not a market price but the contractual price test which in this case is a "minimum guarantee amount". In support of this submission, learned senior counsel placed reliance on the following judgments :-

(i) The judgment of Lahore High Court in case of **G.D.Gear and Company vs. The French Cigarette Paper Co. Ltd., AIR 1931 Lah 742,**

(ii) The judgment of Supreme Court in case of **Maharashtra State Electricity Distribution Company Ltd. vs. M/s.Datar Switchgear Limited & Ors., 2018 SCC OnLine SC 20,**

(iii) The judgment of this Court in case of **Maharashtra State Electricity Distribution vs. DSL Enterprises Pvt. Ltd., (2009) 4 Bom.C.R. 843** (paragraphs 69, 72 to 79)

(iv) The judgment of Punjab and Haryana

High Court in case of **Messrs Shankar Das Rup Lal Aggarwal vs. Governor-General in Council (Now Dominion of India), AIR 1952 P&H 234,**

(v) The judgment of Calcutta High Court in case of **Gambhirmull Mahabirprasad vs. The Indian Bank Ltd. and another, AIR 1963 Cal.163.**

88. It is submitted that since there was no available market, no price of the film was available for comparison of market price for agreed consideration. The petitioner did not lead evidence to show that there was ready market to the said film available. Since the difference in the market price is not the test, the minimum guarantee price would be the quantum of damages. Since the film became stale, the same could not be released.

89. Learned senior counsel for the respondent placed reliance on the deposition of the witness of the respondent in paragraphs 24 and 25 on the issue of mitigation of the loss and the cross examination by the petitioner and more particularly recorded in question nos. 82 to 94 and it is submitted that there was no cross-examination of the said witness by the petitioner on the deposition of mitigation of losses made by the respondent. He also placed reliance on the findings of the learned arbitrator recorded in paragraphs 29 and 30 insofar as censor certificate is concerned. It is submitted that no grounds are raised in the petition that the respondent had not taken any steps to mitigate losses suffered by the respondent. This court cannot re-appreciate the evidence considered by the learned arbitrator. Whether steps were taken by the respondent to mitigate the

loss or not is a mixed question of fact and law. In support of this submission, learned senior counsel placed reliance on the judgment of Supreme Court in case of **M.Lachia Setty and Sons Ltd. vs. The Coffee Board, Bangalore, AIR 1981 SC 162** and in particular paragraph 13 in support of his submission that the question of mitigation is a question of fact and the learned arbitrator having rendered a finding of fact cannot be interfered with by this court. He also placed reliance on the judgment of Rangoon High Court in case of **Ma Hnin Yi vs. Chew Whee Shein, AIR 1925 Rangoon 261** at page 262 in support of the submission that the burden is on the defendant to prove that the plaintiff has the means available and did not take steps to avail himself of the means to mitigate the loss.

90. Learned senior counsel for the respondent placed reliance on the judgment of Supreme Court in case of **Sutlej Construction Limited vs. Union Territory of Chandigarh, (2018) 1 SCC 718** in support of the submission that this court cannot re-appreciate the evidence and cannot interfere with the findings of fact rendered by the learned arbitrator and also in support of the submission that since the learned arbitrator has taken a plausible view, this court cannot function as an appellate court while dealing with the arbitration petition under section 34 of the Arbitration Act.

91. It is submitted by the learned senior counsel for the respondent that if this court comes to the conclusion that the impugned award does not deal with the issue as to whether the forfeiture clause is in the nature of penalty or not, this court may adjourn the proceedings to give an opportunity to the learned arbitrator to eliminate the grounds for setting aside the impugned award under section 34 (4) of the Arbitration and Conciliation Act,

1996. It is lastly submitted that most of the submissions which are advanced before this court were neither advanced before the learned arbitrator nor raised in the pleadings and thus cannot be allowed to be raised for the first time across the bar at this stage.

92. Mr. Rustomjee, learned senior counsel for the petitioner in rejoinder made oral submissions as well as tendered a brief written submissions so as to deal with the submissions made by the learned senior counsel for the respondent. Learned senior counsel submits as under :-

(a) The challenge to the arbitral award in this petition falls within the purview of the section 34(2)(b)(ii) of the Arbitration Act. The award is in conflict with public policy of India. Reliance is also placed on the judgment of Supreme Court in case of **Oil & Natural Gas Corporation Limited vs. Saw Pipes Limited**, (supra) and in case of **Associate Builders** (supra). The learned arbitrator has committed patent illegality on interpretation of the express terms of the contract, *inter alia*, with respect to 'Delivery Date', 'Marketing and Promotions', 'Distribution', 'General Terms and Conditions', 'Consequences of Termination or Expiration' and also in the matter of damages, time being an essence of contract etc.

(b) Learned senior counsel distinguishes the paragraphs of the judgment relied upon by the learned senior counsel for the respondent in case of **Associate Builders** (supra) and partly relied upon the other paragraphs of the judgment which were not relied upon by the respondent. He also distinguished the judgment of Supreme Court in case of **Sutlej Construction Limited** (supra). It is submitted that the learned arbitrator has

not taken a plausible view on many aspects of the matter but has taken arbitrary view of the evidence of many vital aspects. Reliance is also placed on the judgment of Delhi High Court in case of **Hindustan Lever Ltd. vs. Shri Shiv Khullar and Another, (2008) SCC OnLine Del 424** and in particular paragraph 17.

(c) The learned arbitrator has adopted a wrong test or standard in law and has ignored the settled position in law in arriving at various conclusions on the basis of the evidence. The learned arbitrator has ignored and/or misconstrued the provisions of the contract. This court thus has ample power to interfere with such perverse award showing patent illegality.

(d) Insofar submission of the learned senior counsel for the respondent that the petitioner had not raised various issues and more particularly the issue as to whether forfeiture clause was penal in nature of penalty is concerned, it is submitted that all these issues were raised in the statement of claim, reply to the counter claim, rejoinder and/or written submissions filed by the petitioner before the learned arbitrator. The issue of penalty was also raised by the petitioner in the correspondence exchanged between the parties prior to the date of filing of the statement of claim. Some of these issues have been also raised in oral and documentary evidence and have been the subject matter of the cross-examination.

(e) The submission of the respondent is not only hyper technical but the respondent has also adopted selective approach on this issue. The stand taken by the respondent is

contradictory. A strict rules of evidence and pleadings do not apply to the arbitration proceedings. Reliance is placed on section 19 of the Arbitration Act. The basic requirement is that the party must have notice of the case and should be given an opportunity to meet the same which test has been met out in this case. The respondent has itself made various arguments before this court which were not raised before the learned arbitrator.

(f) Insofar as the correspondence exchanged between the respondent and Mr.Sunir Khetarpal during the period 2008 and 2009 is concerned, it is submitted that though those letters were addressed to Mr.Sunir Khetarpal by the respondent who was the Chief Operating Officer, the response to those letters were addressed by the other persons. In the large organization such as the petitioner, it is quite possible and even likely that the responsibility of dealing with correspondence of this kind rested with personnel other than Mr.Sunir Khetarpal. The respondent also has not raised such plea before the learned arbitrator. The respondent vide their letter dated 24th September, 2008 addressed to IDBI had specifically stated that there was recession in the film industry.

(g) The petitioner had raised a plea and had also highlighted in the written arguments before the learned arbitrator that the respondent had failed to comply with various obligations under the Distribution Agreement such as finalizing, marketing and promotional material for the film, incurring the costs for publicity designer, still photography and publicity design, providing Quota Publicity, Digi-Betas, DVDs, prints,

teaser trailer, theatrical trailer, song, medley, dialogue promotions, making available the key cast and crew for the marketing and promotions of the film, some of the aforesaid material was required as early as 90 days before the theatrical release date. These issues raised by the petitioner are also evident from the cross-examination of the witness of the respondent and more particularly recorded in answers to questions in question nos. 100 to 115. The respondent has not dealt with this submission in the arguments except reading part of the perverse findings rendered by the learned arbitrator.

(h) It is the respondent's case that it had agreed to release film in January, 2009 which was much beyond even the grace period. The pre-publicity materials were to be provided by the respondent well before that date. It is not the case of the respondent that any materials were provided by the respondent for publicity, marketing, promotion at any stage.

(i) Insofar as the submission of the learned senior counsel on the issue of plagiarism and the failure to provide an original film in response to the petitioner's submission is concerned, it is submitted by the learned senior counsel for the petitioner that the petitioner had raised this issue in the pleadings including in the statement of claim [COD, Volume I, page 13, paragraph 4(xviii); page 20, paragraph 5(ii)(b)], in the reply to the counter claim [COD, Volume III, page 345, paragraph 7; page 348, paragraph 15], in the rejoinder of the petitioner [COD, Volume III, page 337, paragraph 21]. It is submitted that though the issue is not mentioned in the written submission of the petitioner before the learned arbitrator in the points for

determination, it is clear from the award itself that the petitioner had argued this issue and has been referred by the learned arbitrator in the impugned award but not dealt with.

(j) My attention is invited to paragraph 47 of the impugned award observing that the petitioner had alleged that the respondent had not produced an original film and had thereby committed a breach of the said Distribution Agreement and it was entitled to refund of Rs.9.25 crores on this ground also. It is thus clear that the issue was not only contained in the pleadings but had been dealt with by the respondent to the extent it thought fit in its own pleadings but was but was not dealt with by the learned arbitrator.

(k) Insofar as the submission of the learned senior counsel for the respondent that the petitioner did not discharge its onus or burden of proof, an adaptation of a film is also an original work, it is submitted that the petitioner has clearly discharged its onus of proof by placing on record and making reference to the correspondence exchanged between the respondent and the Twentieth Century Fox, the consent terms between them, surrounding circumstances etc. It is an admitted position that the said film was Indian version of "My Cousin Vinny", the respondent however never informed the petitioner of this position. Though the respondent was in talks with Twentieth Century Fox who were the owner of the copyright in "My Cousin Vinny" and the said Twentieth Century Fox had permitted the respondent to take the film idea but did not permit any protected elements of the film. The respondent has not disputed that the said Twentieth Century Film had initiated the proceedings

alleging violation of copyrights and on the ground of plagiarism against the defendant in respect of the said film "My Cousin Vinny".

(l) The correspondence exchanged between the respondent and the said Twentieth Century Fox also would clearly indicate that the respondent was involved in such violation of copyrights of the said Twentieth Century Fox. The respondent has also paid a substantial amount of US\$ 2 lacs to the said Twentieth Century Fox for settling the dispute in the month of August, 2009. The respondent never informed the petitioner of its dealing with Twentieth Century Fox including the filing of the said suit by the said company against the respondent and about the settlement arrived at between them.

(m) It is submitted that there is distinction between burden of proof and onus of proof. The onus of proof may shift to the defendant during the depending on the facts and circumstances of the particular case. Reliance is placed on the judgment of Supreme Court in case of Addagada Raghavamma vs. Addagada Chenchamma and Anr., (1964) 2 SCR 933, (paragraph 12), and also the judgment of Supreme Court in case of R.V.E. Venkatachala Gounder vs. Arulmigu Viswesaraswami, (2003) 8 SCC 752 (paragraphs 28 to 30). It is submitted that in any event, the material produced by the petitioner and the facts and circumstances on record were sufficient to discharge the initial onus of proof and to shift the onus of proof upon the respondent. It is submitted that it was reasonable to conclude, on the basis of these material, that the respondent's film was merely an Indian version or copy of "My

Cousin Vinny”.

(n) If according to the respondent, the film was an adaptation of “My Cousin Vinny” which differed from the original in such a manner as to constitute it an original work, the onus of proof to prove such contention was on the respondent which the respondent failed to discharge. Learned senior counsel for the petitioner distinguished the judgment of Supreme Court in case of **R.G. Anand** (supra).

(o) It is submitted that the agreement between the parties did not give the petitioner the right to deal with the film in any other capacity. The possession of the film for the petitioner in its capacity as a processing laboratory. The petitioner was not aware of that the film was a copy of “My Cousin Vinny” and could not have thus compared with it until it become aware of the position. In any event, the said film was not available to the petitioner at the time of the arbitration proceedings as IDBI had in exercise of its rights, had taken possession of the said film.

(p) Insofar as the submission of the learned senior counsel for the respondent that Mr.Sunir Kheterpal had seen the film in August, 2008 is concerned, the petitioner has disputed this allegation of the respondent. The respondent has failed to prove the said allegation. The learned arbitrator in any event has not properly dealt with this issue on merits and has incorrectly proceeded on the basis that the settlement arrived at between the Twentieth Century Fox and the respondent was determinative of the issue.

(q) It is submitted that though the issue as to whether the forfeiture was in the nature of penalty or not was raised in the correspondence and also in the written submissions filed by the petitioner, it has not been dealt with by the learned arbitrator in the impugned award at all [COD, Volume III, page 431, paragraph 7.3]. The issue was also raised in the context of issue no.6 whether the respondent was entitled to forfeit the amount of Rs.9.15 crores. The issue was also raised in the termination notice dated 26th March, 2009 annexed in [COD, Volume III, page 465, paragraphs 13 and 26].

(r) The issue of penalty is also covered by issue nos. 6 and 7 i.e. whether the respondent was entitled to forfeit the amount of Rs.9.15 crores or was liable to refund it to the petitioner with interest. In his alternate submission, it is submitted that this submission being a legal submission on the interpretation of the Distribution Agreement, the same could be raised and considered even if not specifically pleaded, as it arose on a plain reading of the agreement and the relevant provisions of law. The Distribution Agreement itself is a piece of evidence and the penal nature of the clauses *ex-facie* claimed.

(s) A forfeiture clause which permits a party to forfeit all the monies not in the nature of earnest money without any relation to the loss likely to be suffered and without the party having to permit/deliver its part of the contract, amounts to a penalty. In such a case, the injured party is required to prove its loss to determine the extent of compensation to which it is entitled. Learned senior counsel placed reliance on paragraphs 3 to 6 of the judgment of Supreme Court in case **Maula Bux** (supra).

Since the respondent failed to prove its loss, was not entitled to any damage.

(t) In his alternate submission, it is submitted that even if the amount was held to have been forfeited by the respondent by way of damages and the same was not in the nature of penalty, it could only be by way of liquidated damages under section 74 of the Contract Act and in any event, no question would have arisen of the respondent claiming or being awarded any amount in excess of the said amount of Rs.9.25 crores, the amount fixed in the clause being a maximum that could be claimed. The submission of the respondent that the said amount was paid in the nature of minimum guarantee amount is without any basis.

(u) The onus was on the respondent to establish the price which could have obtained from the market for the rights in the film at around the date of the alleged breach which the respondent failed to do and thus was not entitled to any damages. In paragraph 11.2 of the written submissions filed by the petitioner before the learned arbitrator, the petitioner had urged that the damages could only be measured by comparing the expected revenue, if the film was released in September-October, 2008 through the petitioner against the revenue that the respondent would have earned by releasing of the film in September-October, 2008 through another distributor. The difference between the two amounts could alone be the loss of the respondent which the respondent failed to prove. The petitioner had also urged in the written submissions that it was erroneous on the part of the respondent to claim the damages

in the form of the balance price payable under the contract when the respondent had itself terminated the contract. These contentions have not been dealt with by the learned arbitrator.

(v) Learned senior counsel for the petitioner distinguished the judgment of Supreme Court in case of **Maharashtra State Electricity Distribution Company Ltd.** (supra) on the ground that the said judgment has no application in the facts of this case. In that case the goods manufactured were custom made as per the technical specifications of the buyer and could not be disposed of in the market or even be used otherwise. The said situation was totally different and could not be compared with a Bollywood film starring popular filmstars. It cannot be contended by the respondent that there would be no market for such a film. The agreement entered into between the parties does not indicate that the film was tailor made to the specific requirements of the respondent but was in the nature of a general distribution agreement for a film. The rights of the distribution of the petitioner under the said distribution agreement were limited. The arrangement contemplated a different distributor for overseas distribution and also did not assign satellite TV rights to the petitioner.

(w) Such films are regularly and routinely sold and dealt with by various well known entities in the market. The respondent itself had produced correspondence between IDBI and two parties i.e. All India Film Distributors and Venue Records and Tapes Pvt. Ltd. before the learned arbitrator annexed at pages 717 to 720 of Volume IV of COD. Even according to the respondent, the said All India Film Distributors

had offered 12.35 crores for distributorship rights and Venus Records and Tapes Pvt. Ltd. had offered Rs.3 crores for electronic media rights. Even as late as in July, 2010, i.e. after the termination of the distribution agreement by the respondent, there was clearly a market for the said film.

(x) Learned senior counsel for the petitioner distinguished the judgment of Rangoon High Court in case of **Ma Hnin Yi** (supra) on the ground that the film is the plainly commercial and marketable goods and thus the respondent was not disabled from selling the rights in the same to another distributor. The onus was thus on the respondent to establish that it had mitigated its loss by making efforts to dispose of the rights in the film in the market at or around the date of the breach. The respondent did not produce any material to indicate even remotely that the respondent had made any such efforts to mitigate the loss.

(y) Insofar as the evidence of Mr.Dinesh Pal examined by the respondent on the issue of mitigation or loss is concerned, it is submitted that the said witness had in his single bald statement in paragraph 25 of the examination in chief had stated that even after the termination of the suit agreement, the respondent tried their best to find out another distributor-buyer but in vain. It is submitted that the said statement was vague and bereft of any substantiation or even detail that it is of no evidentiary value and would not prove the case of the respondent.

(z) Insofar as issue as to whether time was an essence of

contract or not, learned senior counsel for the respondent distinguished the judgment of Supreme Court in case of **M/s.Hind Construction Contractors** (supra) on the ground that the respondent had committed breach of distribution agreement. There was thus no question of the party in breach prescribing a timeline for performance of the contract to the injured party. In any event, the respondent could not unilaterally decide the period of performance on the part of the petitioner.

(aa) Insofar as alternate submission of the learned senior counsel for the respondent that the proceedings can be adjourned to eliminate the grounds of challenge under section 34(4) of the Arbitration Act is concerned, it is submitted that this request of the respondent cannot be granted on the ground that the learned arbitrator has not appreciated and applied the facts and law in proper perspective on several issues. It is not the case of any isolated issue or finding that is capable of remedied by having recourse to section 34(4). The oral submission of the learned senior counsel thus would not be within the parameter of section 34(4) of the Arbitration Act.

(bb) It is lastly submitted that if the request of the respondent to adjourn the proceedings to eliminate the grounds of challenge is now granted, the parties will be subjected to grave and irreparable prejudice as significant time and monies have already been expended on the arbitration and the present petition. Learned senior counsel for the petitioner distinguished the other judgments relied upon by the respondent on the ground that the facts before the courts in those judgments were different than the facts before this court in this case.

REASONS AND CONCLUSIONS

93. It is not in dispute that the IDBI had sanctioned financial assistance to the respondent on 20th September, 2007 of about Rs.750 lakhs for the said film titled "Pappu Pass Ho Gaya" on certain terms and conditions. A loan agreement was entered into between the responded and the IDBI on 3rd October, 2007. The respondent admitted the first charge on the negatives of the said film "Pappu Pass Ho Gaya" in favour of the IDBI. A tripartite Laboratory Agreement was thereafter executed on 4th October, 2007 between the petitioner, the respondent herein and IDBI. On 14th March, 2008, the petitioner and the respondent had entered into Distribution Agreement under which the respondent granted exclusive distribution rights to the petitioner in respect of the film "Banda Yeh Bindass Hai" which was a changed title of the original title film "Pappu Pass Ho Gaya".

94. Under the said Distribution Agreement, the petitioner had paid a sum of Rs.7.00 crores to the respondent on 31st March, 2008 and had agreed to pay the balance amount upon the compliance of various obligation on the part of the respondent. The parties had agreed that the delivery of the film would be by the respondent to the petitioner on or before 30th June, 2008 with grace period of three months. The consideration agreed by and between the parties was at Rs.1840 lakhs inclusive of all applicable taxes and stamp duties which were to be borne by the respondent. Rs.600 lakhs were payable on or before signing of the said Distribution Agreement, Rs.100 lakhs within 15 days before the start of shoot or 29th February, 2008 whichever is later, Rs.225 lakhs at the end of principal photography of the film or 31st March, 2008 whichever was later and

the balance payment of Rs.915 lakhs was payable by the respondent on the delivery of the film.

95. Learned senior counsel for both the parties invited my attention to the various correspondence exchanged between the petitioner and the respondent and also to the correspondence exchanged between the respondent and the IDBI and between the respondent and Twentieth Century Fox in support of their rival contentions on the issue as to whether the breaches of the distribution agreement were committed by the petitioner or the respondent, whether time was an essence of the contract or not, whether the respondent had committed breaches of their obligation to deliver the film which was the original work according to the respondent, about the suit filed by the Twentieth Century Fox against the respondent in this court for recovery of substantial amount alleging various breaches on the part of the respondent etc.

96. The respondent could not demonstrate before this court or even before the learned arbitrator that the repayment of the loan obtained by the respondent from IDBI was dependent upon the payment of various amount from the petitioner to the respondent under the said distribution agreement or otherwise. The respondent had already obtained loan from the IDBI prior to the date of entering into a distribution agreement with the petitioner. None of the correspondence exchanged between the respondent and the IDBI would indicate that the respondent had blamed the petitioner for the respondent not fulfilling its obligation to repay the loan taken from the IDBI.

97. I am thus not inclined to accept the submission of Mr.Joshi,

learned senior counsel for the respondent that because of the alleged non-compliance of the obligation of the petitioner to pay the balance amount under the distribution agreement to the respondent as per schedule agreed in the said distribution agreement, the respondent committed default in making repayment of loan to IDBI and as a result thereof, the IDBI exercised their rights under the loan agreement and recalled the loan and took physical possession of the print of the said film "Banda Yeh Bindass Hai" from the respondent.

98. Insofar as the alleged delay in delivery of the said film within the time agreed in the distribution agreement including the grace period is concerned, a perusal of the correspondence on record indicates that though on 7th June, 2008, the respondent in its letter dated 7th June, 2008 had alleged that the shooting of the said film was over and had requested the petitioner for release of the under production amount of Rs.1.25 crores, the fact remains that the respondent could not deliver the said film to the petitioner even within the grace period.

99. A perusal of the correspondence exchanged between the respondent and IDBI indicates that the respondent had alleged delay in releasing the film due to burning of a film set at Film City and matching of dates of the Artists, the post production work of the film being in progress, releasing in shifting of the date of resale of the film to January, 2009. Based on those reasons recorded by the respondent in a letter dated 24th September, 2008 to the IDBI, the respondent had requested the IDBI for extension of period of repayment of loan to 28th February, 2009 whereas the grace period agreed by and between the parties under the distribution agreement was to come to an end on 30th September, 2008. The said letter does

not indicate that the respondent had alleged any breaches on the part of the petitioner for such shifting of the date of release for any reasons attributable to the petitioner.

100. A perusal of the letter dated 2nd December, 2008 from the respondent to IDBI indicates that in the said letter the respondent had informed the IDBI that the respondent was expecting the release of the film in the month of August, 2008, however due to crash in the market and inflow of the big films, the respondent was unable to release the said film and was accordingly was scheduled to be released on or before March, 2009. The respondent also informed the IDBI that Global melt down had affected the business of the respondent. The respondent had also informed that the respondent had also invested in Deepa Mehta's two films, "Heaven on Earth" and "Stella" but those two films also could not be released due to current scenario. The respondent requested the IDBI Bank Limited to bear with them at that moment and assured to repay the entire interest with principal before release of the film.

101. A perusal of the letter addressed by the IDBI Bank to the respondent dated 30th November, 2009 clearly indicates that it was the case of the IDBI that the period of loan was extended by IDBI at the request of the respondent from 1st September, 2008 to 28th February, 2009. However, the respondent had failed and neglected to repay the said loan and had committed various defaults. The said letter further indicates that it was the case of the IDBI that the said bank was a single first charge holder of the film along with all the copyrights of the film. IDBI Limited enforced their rights and security by the said letter by taking possession of the film along with all the properties/rights charged/conferred in favour of the bank including

negative of the film with all its versions, development, distribution, screening, exhibition, hire, lease or otherwise exploitation of the film for any or all the territories all over the world. IDBI also warned the respondent not to deal with the said film or sale the said film or its rights in favour of any other party.

102. On the other hand, the petitioner also had addressed letters belatedly to the respondent, in view of the changed scenario after delivery period including the grace period was over and the respondent had failed to deliver the film to the petitioner, requesting the respondent to shift the date of release to the date to be mutually agreed upon. Both the parties had contended before this court that time was an essence of the contract. This court is thus not required to go into the argument advanced by both the parties as to whether any of the party had made the time as an essence of the contract before issuing a letter of termination of the distribution agreement. The fact remains that the said film could not be released within the grace period or even thereafter at any point of time till date.

103. A perusal of the impugned award however indicates that the learned arbitrator has rendered a finding that the respondent was ready and willing and was in position to effect the delivery of the film to the petitioner prior to 30th September, 2008. This finding of the learned arbitrator in my view is *ex-facie* perverse and totally ignoring and overlooking the correspondence exchanged between the parties and also between the respondent and the IDBI alleging various factors affecting the period of delivery in those letters without attributing the same against the petitioner or for shifting the date of release much beyond the grace period of delivery of such film under the distribution agreement. It was not even the case of the respondent

that the respondent had kept the film ready for delivery prior to 30th September, 2008 by producing any concrete evidence in support of such case.

104. A perusal of the record indicates that the learned arbitrator has not dealt with the correspondence exchanged between the petitioner and the respondent and the respondent and IDBI on the aspect of delay in releasing the film on or before the grace period. None of the correspondence exchanged between the parties would indicate that the respondent had admittedly did not provide the pre-release publicity and promotion material in accordance with the terms and conditions of the agreement to the petitioner at any point of time. Since the respondent had failed to provide pre-release publicity and promotion material to the petitioner admittedly prior to the date of release, question of the respondent being in a position to keep the film ready on or before the grace period did not arise.

105. In so far as the issue as to whether the respondent had provided pre-release publicity and promotion material prior to the date of release or not is concerned, learned arbitrator has placed reliance heavily on the evidence of witness examined by the respondent namely Mr.Dinesh Paul. The said witness examined by the respondent in his cross-examination of chief has deposed that according to the trade practice in the film industry, pre-release publicity material could be supplied few days prior to the date of release of film. No such trade practice was pleaded or proved by the respondent. Be that as it may, the learned arbitrator could not have decided the said issue against the petitioner on the basis of the alleged trade practice and that also based on the evidence of the accountant of the respondent who was the only witness examined by

the respondent and that also without any pleadings in that regard.

106. In my view, since the agreement entered into between the parties clearly provided that the respondent was under an obligation to provide under its specific role, pre-release material at a minimum cost of Rs.300 lakhs and based on such delivery of publicity material, the petitioner was required to lead all marketing efforts and spend before release of film, application of trade practice by the learned arbitrator on the said issue shows perversity. Question of applicability of trade practice would apply only if the agreement between the parties on that issue was silent. In my view, trade practice cannot be pressed in service when there is a specific provision providing for a particular obligation by and between the parties. I am thus not inclined to accept the submission of Mr.Joshi, learned senior counsel for the respondent that the finding of the arbitral tribunal that according to the trade practice allegedly proved by the witness examined by the respondent cannot be faulted with in this petition filed under Section 34 of the Arbitration and Conciliation Act, 1996.

107. A perusal of the award clearly indicates that the learned arbitrator has rendered a finding contrary to the agreement entered into between the parties based on such alleged trade practice. In my view, this trade practice is not proved by the respondent.

108. Learned arbitrator has rejected the submission of the petitioner on the issue of the respondent not having provided pre-release publicity material to the petitioner and did not spend amount upto Rs.3 crore or otherwise for that purpose on the ground that the petitioner had at no time prior to February, 2008 demanded delivery

of film from the respondent nor alleged any breach of distribution agreement by the respondent on account of such alleged delivery. It was not the case of the respondent before the learned arbitrator nor was it proved that prior to the grace period of delivery agreed upon by the parties in the agreement or even thereafter, the respondent had delivered any such pre-release publicity material to the petitioner or had called upon the petitioner to take delivery thereof. In my view, the finding of the learned arbitrator, in these circumstances that the respondent was in a position to delivery the film on or before 30th September, 2008 is ex facie perverse.

109. A perusal of the agreement entered into between the parties indicates that the respondent had made a representation to the petitioner that the respondent was a sole and exclusive owner of all the rights including intellectual property in a film and was the original work of the respondent. The respondent however did not dispute before the learned arbitrator that Twentieth Century Fox Films Corporation had alleged infringement of their copyright of the film "My Cousin Vinny" against the respondent. The respondent had suppressed the filing of suit by the said Twentieth Century Fox Films Corporation against the respondent alleging infringement of their copyright of the film "My Cousin Vinny." When the petitioner came to know about the said suit, the petitioner placed these facts on record. The respondent also suppressed from the petitioner that the said Twentieth Century Fox Films Corporation and the respondent had filed a consent terms on 4th August, 2009 in the said Suit No.1925 of 2009 filed by the Twentieth Century Fox Films Corporation.

110. Under the said consent terms arrived at between the

Twentieth Century Fox Films Corporation and the respondent, the respondent had agreed and undertaken to make payment to the Twentieth Century Fox Films Corporation, a sum of USD 200,000 subject to the other compliance of all their obligations under those consent terms and was allowed to release the said film "Banda Yeh Bindass Hai" only upon the compliance with the obligations provided in the said consent terms including the payment of USD 200,000. In the said consent terms, "a Press Release" was annexed. It was specifically mentioned in the Press Release that the said Twentieth Century Fox Films Corporation had filed a suit alleging copyright infringement of the screenplay and the film "My Cousion Vinny" and associating their film "Banda Yeh Bindaas Hai" with Vinny. It was further mentioned in the said press release that the said Twentieth Century Fox Films Corporation and the respondent which had large libraries of their respective copyrighted works, emphasize the importance of producers securing adaptation rights from the owners of the original motion picture before making any version thereof.

111. In my view, there is thus no substance in the submission of the learned senior counsel for the respondent that the said film was the original work of the respondent. The respondent had agreed to pay substantial amount to the said Twentieth Century Fox Films Corporation for adaptation of the said film. Learned arbitrator however in the impugned award has rejected the contention of the petitioner simplicitor on the ground that the said suit between the Twentieth Century Fox Films Corporation and the respondent was settled on 4th August, 2009 and was filed only in the month of June, 2009 i.e. much after the termination of the said Distribution Agreement entered into between the petitioner and the respondent. Learned arbitrator totally overlooked the emails exchanged between the

respondent and the Twentieth Century Fox Films Corporation from August, 2007 to October, 2007. Learned arbitrator thus could not have rendered a finding that the petitioner had committed breach of its obligation under the Distribution Agreement.

112. A perusal of the award also indicates that the learned arbitrator has rendered a perverse finding that on account of failure of the petitioner to pay balance amount of Rs. 9.15 crore and take delivery of film, the respondent was unable to pay the dues of IDBI which was due and payable to the IDBI to the knowledge of the petitioner. Learned arbitrator totally overlooked the admitted fact that in none of the correspondence between the respondent and the IDBI, it was the case of the respondent that the respondent was unable to make repayment of loan taken from the IDBI on the ground that the petitioner had committed breaches of their obligation in making balance payment to the respondent under the Distribution Agreement. It was also not the case of the respondent that it was in the Tripartite Agreement dated 4th October, 2007 between the petitioner, the respondent and the IDBI or under the Distribution Agreement, it was an obligation of the petitioner to make any payment to the IDBI on behalf of the respondent towards repayment of loan obtained by the respondent from the IDBI.

113. Insofar as the submission of the learned senior counsel for the respondent that Mr. Sunir Kheterpal, CEO of the petitioner was shown the film of the respondent and the learned arbitrator has rendered a finding on that issue against the petitioner is concerned, in my view, the respondent had failed to prove that the film was ready on or before the agreed date of the delivery including the grace period. Even after expiry of the grace period, the respondent

had applied for extension of time from time to time from the IDBI to release the film for various reasons not attributable to the petitioner. Even otherwise, merely by producing an alleged voucher in support of the plea that the said Mr.Kheterpal was provided with some refreshment on the date of showing the alleged movie would not prove that the respondent was in a position to release the film within the grace period. Merely because Mr.Kheterpal was not examined by the petitioner as a witness, burden of proof which was on the respondent was not discharged.

114. In so far as the claims made by the petitioner before the learned arbitrator are concerned, the petitioner had made a claim for refund of a sum of Rs.9.25 crore with interest @18% p.a. thereon and had prayed for declaration that the respondent had illegally terminated the Distribution Agreement. The respondent, on the other hand, had made a counter claim inter alia praying for declaration that termination of the Distribution Agreement by the respondent was lawful and binding and also praying for an order and directions against the petitioner to pay a sum of Rs.9.15 crore with interest @18% p.a. from the date of filing of counter claim till payment.

115. The learned arbitrator had answered the points for determination nos.3, 4 and 5 i.e. "(3) Whether the claimant has committed breach of its obligation under the Distribution Agreement ? (4) Whether the termination of the Agreement dated 14th March 2008 by the respondent by its letter dated 23rd March 2009 is lawful and valid ? and (5) Whether the termination of the Agreement dated 14th March 2008 by the claimant by its letter

dated 26th March 2009 is lawful and valid ?” in favour of the respondent and has held that the petitioner had committed breaches under the obligation of the Distribution Agreement. It is held that the termination of the agreement by the respondent by its letter dated 23rd March 2009 was lawful and valid and that the termination of the agreement by its letter dated 26th March 2009 was not lawful and valid.

116. In so far as the claim of the petitioner is concerned, the learned arbitrator answered the points for determination nos.6 and 7 i.e. “(6) Whether the respondent is entitled to forfeit the amount of Rs.9.25 crore ? and (7) Whether the respondent is bound and liable to refund to the claimant the amount of Rs.9.25 crore ? If so, is the claimant entitled to claim interest on the amount of Rs.9.25 crore and at what rate and for what period ?” in favour of the respondent and has held that the respondent was not bound and liable to refund to the petitioner the amount of Rs.9.25 crore.

117. In so far as the counter claim of the respondent is concerned, the learned arbitrator has framed points for determination no.14 i.e. “(14) Whether the claimant is liable to pay to the respondent the amount stated in paragraph 3(i) read with prayer (b) of the counter claim together with interest ? If so, at what rate and for what period ?” and has held that the petitioner was liable to pay to the respondent the amount stated in paragraph 3(i) read with prayer (b) together with interest. Learned arbitrator has however rejected the claim for loss on profit.

118. In so far as the point for determination no.12 i.e. “(12) Whether the respondent did its best to mitigate the losses as set out

in paragraph 3(1) of the counter claim ?” is concerned, learned arbitrator has held that the said point did not arise since the IDBI had taken possession of the film.

119. In so far as the claim made by the petitioner for refund of a sum of Rs.9.25 crore is concerned, the learned arbitrator has rejected the said claim simplicitor on the ground that the petitioner had committed breaches of its obligations under the said Distribution Agreement. There was alleged failure on the part of the petitioner in not finalising the date of release and not taking steps for pre-release publicity, although the film, to the knowledge of the petitioner, was ready in August 2008. Even if the respondent had failed to obtain Censorship Certificate, it would not lead to the conclusion that the respondent was not ready and willing to delivery the prints.

120. A perusal of the Distribution Agreement indicates that the petitioner had agreed to pay the sum of Rs.9.25 crore to the respondent before end of Principal Photography of the film or 31st March 2008 whichever is later and the balance amount of Rs.9.15 crore on delivery of the film. It was provided in the agreement that in the event the said agreement is terminated due to the default of the licensor i.e. the respondent, then the licensor shall forthwith refund all the monies received by the licensor by the licensee till such date of termination along with a cost of money payable @ 18% p.a. It was further provided that in the event the said agreement is terminated due to the default of the licensee i.e. the petitioner then, the licensor shall be entitled to retain/forfeit all the monies received by the licensor from the licensee till the date of such termination and all the rights of the said film, granted by the licensor to the licensee, shall revert to the licensor.

121. A perusal of the record including the correspondence exchanged between the parties clearly indicates that it was the case of the petitioner all throughout that the said forfeiture clause permitting the respondent to forfeit the amount paid by the petitioner in the event of default of the licensee was in the nature of penalty. The petitioner had also contended before the learned arbitrator that in such event, the entitlement of the respondent at the highest would have been to recover the reasonable compensation for the losses suffered on account of alleged breaches, if any, on the part of the petitioner. The respondent had failed to prove that it had suffered losses or damages. There was no provision in the contract that the said amount of Rs.9.25 crore paid by the petitioner was a reasonable and genuine pre-estimate of the losses on account of breaches, if any, on the part of the petitioner.

122. A perusal of the points for determination framed by the learned arbitrator are concerned, though this issue was raised not only in the pleadings and written arguments but also in the correspondence prior to the date of invocation of the arbitration agreement, the learned arbitrator did not frame any point for determination as to whether the said forfeiture clause was in the nature of the penalty or not and if so, whether the same was a genuine pre-estimate of the losses or as to whether the respondent has to prove any losses suffered by the respondent or not arising out of the alleged breaches committed by the petitioner.

123. Submission of the learned senior counsel for the respondent, on the other hand, is that no such plea was raised by the petitioner or in the alternate, was not urged before the learned

arbitrator and thus the learned arbitrator did not frame any point for determination on the said submission alleged to have been made by the petitioner. It is urged by the learned senior counsel for the respondent that in any event, the question as to whether a clause of forfeiture is in the nature of the penalty or not is a mixed question of fact and law. Since no such issue was raised by the petitioner, learned arbitrator did not frame any point for determination. In my view, the submission of the learned senior counsel for the respondent that no such issue was raised by the petitioner in the pleadings or across the bar is factually incorrect. Such issue was raised by the petitioner not only in the pleadings but also in the correspondence itself and more particularly in the letter dated 26th March 2009 while denying the claim of the respondent that the respondent was entitled to forfeit the amount of Rs.9.25 crore or was entitled to terminate the Distribution Agreement that the forfeiture of the said amount was in the nature of the penalty and not towards the compensation of losses alleged to have been suffered by the respondent.

124. Learned arbitrator however has neither formulated any point for determination nor has dealt with the said submission at all in the impugned award. I am thus not inclined to accept the submission of the learned senior counsel that the said issue was not raised by the petitioner and thus the learned arbitrator was not bound to formulate such point for determination or to deal with the said submission in the impugned award. Be that as it may, the respondent did not lead any evidence to show that the amount of Rs.9.25 crore was a reasonable and genuine pre-estimate that would have been suffered by the respondent arising out of the breaches, if any, on the part of the petitioner nor led any oral or documentary evidence on the said issue.

125. In my view, even if the finding of the learned arbitrator to the effect that the petitioner had committed breaches of its part of the obligation and that the respondent had rightly terminated the Distribution Agreement is accepted as correct, the respondent would not become entitled to claim of forfeiture of the entire amount of Rs.9.25 crore towards losses alleged to have been suffered by the respondent without proving such loss. The respondent was bound to prove the actual losses suffered, if any, by the respondent arising out of such alleged breaches. In my view, the alleged losses, if any, suffered by the respondent arising out of the breaches alleged to have been committed by the petitioner were capable of computation and proved which the respondent failed to prove. The learned arbitrator therefore could not have refused to allow the claim for refund of Rs.9.25 crore forfeited by the respondent without proof of any actual loss. In my view, learned arbitrator has wrongly rejected the claim of the petitioner. This Court however cannot allow such rejected claim by the learned arbitrator in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 and leave the parties to seek remedy available to the petitioner in law.

126. In so far as the counter claim made by the respondent for recovery of the balance amount of Rs.9.15 crore with interest @18% p.a. is concerned, submission of the learned senior counsel for the respondent is that the respondent was entitled to recover the said amount as "Minimum Guarantee Amount" payable under the Distribution Agreement by the petitioner to the respondent. On the other hand, it was the submission of the learned senior counsel for the petitioner that since the respondent had committed breaches on their part of the obligations under the Distribution Agreement and the

petitioner had rightly terminated the Distribution Agreement, question of the respondent recovering the balance amount from the petitioner did not arise.

127. The film “Banda Yeh Bindass Hai” admittedly was never delivered to the petitioner by the respondent at any point of time. The possession of the film was already taken by the IDBI by exercising their right against the respondent. Even if, the findings of the learned arbitrator that the petitioner had committed breaches of their obligations under the Distribution Agreement and the said agreement was rightly terminated by the respondent are accepted as correct, the respondent could not have recovered the said amount without proving that the respondent had taken steps to mitigate the alleged losses suffered by the respondent. In my view, a party who complains the breach and claims damages arising out of such breach has to take steps to mitigate the losses under Section 73 of the Contract Act and not having taken such steps to mitigate the losses cannot be allowed to recover any loss or compensation from the other party.

128. In this case, though the learned arbitrator has formulated the points for determination i.e. at Serial No.12 “whether the respondent did its best to mitigate the losses as set out in paragraph 3(1) of the counter claim ?,” the learned arbitrator has held that the said issue did not arise since the IDBI had already taken possession of the film. The learned arbitrator has accordingly not rendered a finding on the said issue as to whether the respondent had actually taken steps to mitigate the losses or not.

129. Be that as it may, a perusal of the record clearly indicates

that the respondent did not take any steps to mitigate the alleged losses. I am not inclined to accept the submission of the learned senior counsel for the respondent that the film "Banda Yeh Bindass Hai" was a tailor-made movie and there was no market for the said film and thus the respondent was entitled to recover the balance amount as and by way of "Minimum Guarantee Amount" from the petitioner. The correspondence between the IDBI and the respondent, as well as another third party shows that they had shown some interest in the film and had offered some amount. It is not the case of the respondent that the right of distribution all over world was given to the petitioner.

130. A perusal of the impugned award indicates that the learned arbitrator has not allowed the counter claim by the respondent on the ground that the respondent had suffered any losses due to alleged breaches on the part of the petitioner and that the losses allowed in favour of the respondent was as and by way of "Minimum Guarantee Amount." There is thus no merit in the submission of the learned senior counsel for the respondent that the counter claim allowed by the learned arbitrator was as and by way of "Minimum Guarantee Amount" and thus cannot be set aside by this Court on that ground. Be that as it may, the respondent having failed to deliver the film to the petitioner at any point of time, could not claim minimum guarantee amount.

131. The judgment of the Delhi High Court in the case of **M/s.Jyoti Limited vs. E.I.H. Limited** (supra) and judgment of Punjab and Haryana High Court in the case of **M/s.Watkins Mayor & Co. Vs. The Jullundur Electric Supply Company Limited, AIR 1955 P & H 133** relied upon on this issue by the learned senior counsel for

the respondent thus would not assist the case of the respondent. On the other hand, the judgment of this Court in the case of **Board of Trustees of Trust vs. Pioneer Engineer and Anr.(supra)** relied upon by the learned senior counsel for the petitioner judgments of Supreme Court in cases of **Fateh Chand vs. Balkishan Dass (supra)**, **Maula Bux Vs. Union of India, (supra)** and **Oil & Natural Gas Corporation Limited vs. Saw Pipes Limited (supra)**, judgment of this Court in the case of **Smt.Panna Sunit Khatau & Ors. vs. Dilip Dharamsey Khatau & Ors.(supra)** and the judgment in the case of **Hadley & Anr. vs. Baxendale & Ors. (supra)** would squarely apply to the facts of this case and would assist the case of the petitioner.

132. In so far as the judgment of the Supreme Court in the cases of **Associate Builders vs. Delhi Development Authority (supra)**, **Sutlej Construction Limited vs. Union Territory of Chandigarh (supra)** and **Maharashtra State Electricity Distribution Company Ltd. vs.M/s.Datar Switchgear Limited & Ors.(supra)** relied upon by the learned senior counsel for the respondent on the scope of Section 34 of the Arbitration and Conciliation Act, 1996 is concerned, there is no dispute about the prepositions of law laid down by the Hon'ble Supreme Court in those judgments. However, the Hon'ble Supreme Court in those judgments has also clearly held that if the findings of the arbitral tribunal are totally perverse and the award shows patent illegality, such award can be interfered with by the Courts under Section 34 of the Arbitration and Conciliation Act. In my view, the principles of law laid down by the Supreme Court in the aforesaid judgments would squarely apply to the facts of this case. The impugned award shows total perversity and patent illegality and thus this Court has ample power to set aside such impugned award while exercising power

under Section 34 of the Arbitration and Conciliation Act, 1996.

133. In so far as the judgment of this Court in the case of **Ultratech Cement Ltd. vs. Sunfield Resources Pty.Ltd. (supra)** and the judgment of the Supreme Court in the case of **M.Lachia Setty and Sons Ltd. Vs. The Coffee Board, Bangalore, AIR 1981 SC 162** on the issue of mitigation are concerned, the same would not assist the case of the respondent since the learned arbitrator has not answered the said issue holding that the said issue would not arise. Even otherwise, in my view, the respondent had clearly not taken any steps to mitigate the alleged losses and thus those judgments would not even otherwise assist the case of the respondent. Similarly, the judgment in the case of **Ma Hnin Yi Vs. Chew Whee Shein, AIR 1925 Rangoon 261** also would not assist the case of the respondent.

134. In so far as the reliance placed on the judgment of the Supreme Court in the case of **Kalyan Singh Chouhan Vs. C.P. Joshi, (2011) 11 SCC 786** by the learned senior counsel for the respondent is concerned, the said judgment was delivered by the Supreme Court considering the pleadings in a Election Petition and would not assist the case of the respondent. Be that as it may, the petitioner had pleaded before the learned arbitrator that the forfeiture was in the nature of the penalty and thus the losses, if any, suffered by the respondent was required to be proved.

135. The judgment of the Supreme Court in the case of **R.G.Anand vs. M/s.Delux Films & Others (supra)** and judgment of this Court in the case of **Arbaaz Khan Production Private Limited vs. Northstar Entertainment Private Limited & Ors.(supra)** on the

issue that the respondent had not committed any infringement of copyright of Twentieth Century Fox Films Corporation is concerned, in my view, those judgments would not assist the case of the respondent. The respondent had suppressed the facts from the petitioner that the said film "Banda Yeh Bindass Hai" was not the original work of the respondent. The allegation of the respondent are falsified in view of the said Twentieth Century Fox Films Corporation filing a suit against the respondent and those parties filing consent terms in that suit and the respondent paying substantial amount to the said Twentieth Century Fox Films Corporation.

136. In so far as the judgment of the Supreme Court in the case of **Kalyan Singh Chouhan Vs. C.P. Joshi (supra)** relied upon by the learned senior counsel for the respondent is concerned, in support of the submission that the evidence contrary to or in absence of pleadings cannot be relied upon is concerned, this judgment of the Supreme Court would not assist the case of the respondent in view of the fact that the petitioner had pleaded sufficiently that the forfeiture clause was in the nature of the penalty and that the respondent had not proved the actual losses suffered by them.

137. In so far as the judgment of the Supreme Court in the case of **Daman Singh & Ors. Vs. State of Punjab & Ors. (1985) 2 SCC 670** relied upon by the learned senior counsel for the respondent is concerned, in my view, the said judgment is clearly distinguishable in the facts of this case. The petitioner had urged before the learned arbitrator that the forfeiture was in the nature of the penalty. The petitioner had also raised this issue subsequently in the written submission filed before the learned arbitrator. In my view, the petitioner has made out a case for setting aside the impugned award.

138. I therefore pass the following order :-
- (i) The impugned award dated 10th December 2012 passed by the learned arbitrator is set aside.
 - (ii) Arbitration petition is allowed in aforesaid terms.
 - (iii) There shall be no order as to costs.

R.D. DHANUKA, J.