

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	20.07.2018
Pronounced on	06.08.2018

Coram

THE HON'BLE Ms.INDIRA BANERJEE, CHIEF JUSTICE
and
THE HON'BLE Ms.JUSTICE P.T.ASHA

O.S.A.Nos.147 & 201 of 2018

and

C.M.P.Nos.8440, 8441 & 10125 of 2018

1.M/s.Green Vistas Property Development (Private) Ltd.
F3, First Floor, K.G.Eyes Pavithram Building
No.34 & 36 M.G.Road, 7th Avenue
Besant Nagar, Chennai 600 090
Represented herein by its authorized signatory
Mr.Vijay Gulechha

...Appellant in O.S.A.No.147 of 2018

2.Messrs.Leatherex Tanning Company,
rep. by its partners
(1)K.Muhayudin Ghani, and
(2)K.Fazel Ghani

No.6 (New No.13) Kattur Sadayappan Street,
Chennai - 600 003.

...Appellant in O.S.A.No.201 of 2018

Versus

1.M/s.Leatherex Tanning Company
No.6 (new No.13), Kattur Sadayappan Street,
Chennai - 600 003
Represented by its Managing Partner
Mr.M.K.M.Kader Meera Sahib

...1st Respondent in O.S.A.No.147 of 2018

2.Messrs.Green Vistas Property
Development Private Limited,
represented by its Authorized
Signatory, Mr.Vijay Gulechha,
F3, First Floor, KGEYS Pavithram
Building, Nos.34 and 36,
7th Avenue, Besant Nagar,
Chennai - 600 090.

...1st Respondent in O.S.A.No.201 of 2018

3.Hon'ble Mr.Justice Doraiswamy Raju,
Kanaka Durga, No.20, Old No.39,
Puram Prakash Rao Road,
Bajaj Nagar, Royapettah,
Chennai - 600 014.

...2nd Respondent in both O.S.As

Prayer in O.S.A.No.147 of 2018:

Original Side Appeal filed under Order XXXVI read with 1 of the O.S.Rules read with Clause 15 of the Letters Patent Appeal and Section 37(1)(a) of the Arbitration and Conciliation Act, 1996 praying to set aside the judgment and decree of the learned Hon'ble Judge dated 29.01.2018 in Original Petition No.591 of 2014 and allow the appeal.

Prayer in O.S.A.No.201 of 2018:

Original Side Appeal filed under XXXVI Rule 1 of O.S.Rules read with Clause 15 of Letters Patent read with Section 37(1)(a) of the Arbitration and Conciliation Act, 1996 praying to set aside the order and decreetal order of the learned Single Judge made in O.P.No.591 of 2014 dated 29.01.2018 on the file of the Original Side, High Court, Madras, in so far as it has gone as against the Appellant with regard to the quantum of damages payable to the appellant and also with regard to the refund of Earnest Money Deposit are concerned.

For Appellant
in O.S.A No.147/18
and for R1 in OSA No.241/18 : Mr.M.Murari,
Senior Counsel for
Ms.Hema Srinivasan

For Respondent - 1
in O.S.A No.147/18
and Appellant in OSA No.201/18 : Mr.R.Thiagarajan

COMMON JUDGMENT

P.T. ASHA, J,

The above appeals arise against the order of the learned Single Judge in O.P.No.591 of 2014 filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act") to set aside the award dated 28.05.2014 passed by the Arbitral Tribunal/second respondent herein. Since both the appeals arise out of the same Original Petition a common judgment is being pronounced.

2. The facts in a nutshell are as follows:

The appellant herein in O.S.A.No.147 of 2018 and the first respondent had entered into a Memo of Understanding on 26.11.2004 for jointly developing the property belonging to the first respondent herein. The appellant had undertaken to develop the same into an IT Software Park. The Memo of Understanding further provided that the appellant would include the adjacent property which had been acquired by their sister concern M/s.Maan Sarovar Properties Development Private Ltd., (hereinafter referred to as "MSPD"). Since the inclusion of this property would benefit the first respondent as they would get the maximum Floor Space Index (FSI), the appellant had undertaken to have a Tripartite Agreement entered into between themselves, the first respondent and MSPD. In pursuance of this understanding, the appellant/first respondent and MSPD had entered into a Joint Development Agreement (hereinafter referred to as "JDA") on 25.02.2005.

3. Some of the salient features of this Agreement are detailed hereinbelow:

(a) The appellant at their cost, effort and expense was to construct an IT Park by re-constituting the first and second items of the 'A' Schedule Property, 38% of the over all FSI was to be given to the first respondent and in case, they were able to get an extended FSI, 22% of this excess FSI was to be given to the first respondent.

(b) The appellant was to construct and deliver 38,300 Sq.ft. of super built up area to the first respondent in a single floor in a building to be constructed on the 'B' Schedule Property. The remaining was to be shared by the appellant and the MSPD.

(c) The parties were entitled to undivided share in Item Nos.1 & 2 of the 'A' Schedule Property. It was further agreed that once the CMDA approved the plan and after ascertaining the exact FSI, the parties would enter into a Tripartite Supplementary Agreement. The appellant was to pay the first respondent a sum of Rs.40,00,000/- (Rupees Forty Lakhs only) towards Refundable Security Deposit. The JDA provided the schedule of payment in Clause 3.

(d) The parties had further agreed that the entire project would be completed within fifteen months from the date of the Corporation of Chennai/CMDA or the delegated body sanctioning the plan. A grace period of ninety days was also provided. Parties have agreed that time would be essence of the contract barring force majeure conditions.

(e) The first respondent had undertaken to vacate the existing tenant in the first item of the 'A' Schedule Property and to hand over the vacant possession of the same on or before 15.03.2005. The JDA also provided a default clause which was detailed in Clause 12.

(f) Clause 12 of the JDA provided as follows:

"12. In case the Party of the Second Part commits default of delay in handing over the building or the portion of it earmarked for the Party of the First Part, over and above the period of 18 months, then they will be liable to pay Rs.2,50,000/- (Rupees two lakhs fifty thousand only) per month to the Party of the First Part for the delayed period for the Schedule 'B' super built up area of the building earmarked for the Party of the First Part. In the event the Party of the Second Part has not delivered the portion earmarked for the Party of the First Part within 24 months from the date of CMDA/Government approval, the Party of the Second Part shall undertake to pay Rs.5,00,000/- (Rupees five lakhs only), per month, to the Party of the first Part as compensation till the possession of the constructed area is handed over to the Claimant."

(g) The JDA further provided that in the event of any difference between the appellant and the first respondent with reference to the interpretation of the terms and conditions of the JDA and the construction of the proposed

building, the same will be mutually and amicably settled by Arbitration and Conciliatory discussion. In the event of dispute, both parties were to appoint an Arbitrator each and the two of them were to jointly take a decision which would be final and binding on the parties. In the event of there being no consensus among the two arbitrators, they were to jointly appoint an umpire and the decision of the umpire would be the final.

4. It appears that the appellant was unable to obtain the approval of the CMDA and despite several requests by the first respondent to hasten the sanction of planning approval from the CMDA, the appellant was unable to obtain the same. The first respondent had also vacated the tenant, demolished the existing superstructure and handed over possession to the appellant on 01.04.2005. The first respondent had sought information from the CMDA through RTI as to whether the appellant had submitted Applications for the approval and the reply from the CMDA was in the negative. Thereafter, the first respondent had terminated the contract on 09.05.2009. It appears that the appellant had, in keeping with the terms of Clause 12 of the JDA paid a sum of Rs.15,00,000/- (Rupees Fifteen Lakhs only) for the period 15.01.2007 to 15.07.2007 at the rate of Rs.2,50,000/- (Rupees Two Lakhs and Fifty Thousand only) per month and a sum of Rs.65,00,000/- (Rupees Sixty Five Lakhs only) for the period 15.08.2007 to 15.11.2007 at the rate of Rs.5,00,000/- (Rupees Five Lakhs only) per month. The first respondent invoking the Arbitration Clause referred the dispute to Arbitration. They had issued a legal notice dated 07.06.2010 calling upon the appellant and MSPD to pay a sum of Rs.25,89,05,294/- (Rupees Twenty Five Crores Eighty Nine Lakhs Five Thousand Two Hundred and Ninety Four only) within a period of ten days failing which they had informed the appellant and the MSPD that they would be initiate the Arbitral proceedings.

5. Thereafter, the first respondent had filed Applications under Section 9 of the Act in O.A.Nos.47 & 57 of 2010 for protection and preservation of the subject matter of the property and Application No.162 of 2010 for a direction to the appellant to furnish security. By an order dated 16.04.2010, this Court was pleased to direct the parties to maintain status-quo and the appellant was directed to furnish Bank guarantee or immovable property a security to the tune of Rs.60,00,000/- (Rupees Sixty Lakhs only). Thereafter, the first respondent had filed an application under Section 11 of the Act in O.P.No.528 of 2010 for appointing an Arbitrator. The second respondent was appointed by this Honourable Court by consent of the parties.

6. Meanwhile, the first respondent had filed a claim before the second respondent Arbitral Tribunal for the following reliefs:

(a) For recovery of a sum of Rs.104,76,71,414/- with future interest at the rate of 18% p.a from this date till the award and its realisation from the respondent towards the loss suffered by the Claimant under Claim Nos.1 to 9 as mentioned in the paragraph

60 of the Claim Petition;

(b) Directing the respondent to reimburse to the claimant the costs that may be incurred by the claimant for erection and completion of the compound wall, shed and other structures at New No.4/585, I.T.Express Highway, Old Mahabalipuram Road (Rajiv Gandhi Salai), Kottivakkam, Chennai - 600 041 more fully described in the schedule hereunder, which were originally in existence prior to the execution of the Joint Development Agreement dated 25.02.2005.

(c) Directing the respondent to pay the Claimant the sum of Rs.5 Lakhs per month as liquidated damages as per the penalty clause of the Joint Venture Agreement dated 25.02.2005 from the date till the award and its realisation.

(d) Grant an interim mandatory injunction to permit the claimant to construct sheds and other structures in an extent of 20,000 Sq.ft at Old No.141, New No.4/585, I.T.Express High Way, Old Mahabalipuram Road (Rajiv Gandhi Salai), Kottivakkam, Chennai - 600 041, more fully described in the schedule, after obtaining necessary planning permission and permit from the statutory authorities for its purpose for commencement of the manufacturing unit of Leather Garment and Upper shoes for its own purpose.

(e) Directing the respondent to furnish security to the extent of Rs.2,69,00,000/- by furnishing bank guarantee or any other unencumbered city immovable property at the first instance failing which direct attachment of the property particulars to be furnished at a later date pending passing of an award by the Arbitral Tribunal till date of realization.

(f) For a permanent injunction restraining the respondent, their men, agents and servants or any one claiming through them from interfering with the peaceful possession and enjoyment of the schedule property including the construction activities of the Claimant that may be undertaken by it pursuant to such permission that may be accorded by the Arbitral Tribunal; and

(g) Direct the respondent to pay cost of this Arbitration Claim.

7. The first respondent had quantified its losses and damages under nine heads and had made a total claim of Rs.104,76,71,414/- (Rupees One Hundred and Four Crores Seventy Six Lakhs Seventy One Thousand Four Hundred and Fourteen only)

(i) As per Claim No.1: Loss of Rental on Account of Eviction of Tenants including interest.

(ii) As per Claim No.2: Liquidated Damages - Past Damages & Future Damages including interest.

(iii) As per Claim No.3: Removal of Piles/Plinth Beams and claim on Account of Refilling: removal of the piles including column rods.

(iv) As per Claim No.4: Loss of Rental Income - As on

October 2006.

(v) As per Claim No.5: Loss Sustained on Account of Failure to deliver the Constructed Area:

(vi) As per Claim No.6: Damages - Additional Cost of Construction to be incurred if the project to be completed as originally envisaged.

(vii) As per Claim No.7: Damages - Loss of Rental Revenue Due to Abandonment of the Project.

(viii) As per Claim No.8: Loss of Rental Receivable by the claimant

(ix) As per Claim No.9: Compensation for the structures existed prior to Joint Venture Agreement which were demolished as per the Clause contained therein.

8. The appellant in its counter affidavit contended that despite their best efforts, submitting the plans in time, sanctioning of the same was being delayed as the Government had deferred sanctioning plans in the IT corridor and further the second master plan was in the anvil and therefore, the reluctance to approve the plan which resulted in the delay in the project. The appellant would further contend that though the plans were prepared and submitted, the first respondent had not provided all the documents which also contributed to the delay. Further an extent of 6 cents on the frontage was been acquired for road widening and Notification under the Land Acquisition Act was issued on 24.10.2005 and this process took a year, till which time, the CMDA did not grant sanction. The appellant would further contend that the first respondent was kept informed about the steps taken by the appellant to have the plan approved and the contention of the claimant that they were kept in the dark is absolutely false. The appellant had questioned the unilateral cancellation of the contract on 09.05.2009 by the first respondent. By an award dated 28.05.2014, the second respondent Arbitral Tribunal had passed the following award: Towards Claim No.1, a sum of Rs.14,49,540/- (Rupees Fourteen Lakhs Forty Nine Thousand Five Hundred and Forty only) was awarded, against Claim No.2, a sum of Rs.2,00,00,000/- (Rupees Two Crores only), Claim No.3, a sum of Rs.12,00,000/- (Rupees Twelve Lakhs only) and a sum of Rs.1,28,84,800/- (Rupees One Crore Twenty Eight Lakhs Eighty Four Thousand and Eight Hundred only) towards Claim No.9. The Arbitral Tribunal further directed the first respondent to adjust, set off and appropriate the sum of Rs.40,00,000/- (Rupees Forty Lakhs only) which is paid as Refundable Security Deposit. The first respondent was also awarded interest at the rate of 9% per annum and the sums awarded from 01.03.2012 till the date of payment. The Arbitral Tribunal dismissed all other claims.

9. Aggrieved by the above award, the appellant herein had filed O.P.No.591 of 2014 under Section 34 of the Act, the learned Single Judge by his order dated 29.01.2018 partly allowed the petition. The learned Single Judge had set aside the award of the Tribunal in so far as it related to Claim No.2 by restricting the payment of the sum of Rs.5,00,000/- (Rupees Five Lakhs only) per month for the period 15.11.2008 to

09.05.2009 since the termination by the first respondent was on 09.05.2009. With reference to the award relating to Claim Nos.1, 3 & 9, the award of the Tribunal was upheld. Challenging this order, the appellant herein had filed O.S.A.No.147 of 2014 and with reference to the portion that has been modified/disallowed, the first respondent has filed O.S.A.No.201 of 2018.

10.1. Mr.R.Murari, the learned Senior Counsel appearing on behalf of the counsel for the appellant would argue that the learned Single Judge has erred in confirming an award which is passed contrary to the Contract and the provisions of the Section 73 of the Indian Contract Act, 1972 relating to the damages. The learned Senior counsel would contend that the learned Single Judge had totally misinterpreted the construction of general damages which has led to the erroneous order. He would argue that the time schedule which has been detailed in Clause 4 of the JDA was to commence only from the time of the approval being granted by the CMDA. The Arbitral Tribunal had provided its own interpretation to the same and by confirming the Arbitral Tribunal's award, the learned Single Judge has also committed the same error. He would further argue that the first claim with reference to the loss of rental income is totally contrary to the agreement between the parties since as per the terms of the JDA, the existing structure was to be demolished and the new one constructed thereon. It is in pursuance of this agreement that the existing structure has been demolished and irrespective of whether there was an breach or otherwise the respondent would not have received rental income from this demolished structure. Therefore, the first respondent has not suffered any loss of rental income. No amounts should have been granted under this head.

10.2. The learned Senior Counsel submitted the following argument towards the award of compensation under the Claim 3 viz., removal of piles and plinth beams and refilling. He would contend that the plinth, beams and piles which have now been put up by the appellant can always be used by the respondent for putting up any future construction unless the same is not suitable for such construction. The earth that was removed from the first respondent property was only used to level the adjacent property belonging to MSPD so as to bring it on level with the first respondent's property. The issue of damages would have arisen only if the first respondent had led in evidence to show that the subsequent builder could not use the said beams and without such proof awarding damages under this head was without any basis. The learned Senior Counsel would question the order of the learned Single Judge insofar as it confirms the award passed by the Arbitral Tribunal with reference to Claim No.9 by contending that the JDA had contemplated demolition of the existing building and therefore directing the appellant to pay the cost for erecting the demolished factory building is totally against the terms of the JDA. The learned Judge further overlooked the fact that the demolition had been done by the first respondent voluntarily though under the JDA it was for appellant to demolish the

property. The first respondent without even waiting for the plan approval being given has hastened to demolish the existing structure.

10.3. He further argued that despite terminating the contract as early as on 09.05.2009 till date no steps have been taken by the first respondent to develop the property and the first respondent therefore has not taken any steps to mitigate the loss. Therefore, the learned Senior Counsel would argue that the first respondent was not entitled to claim damages, particularly, when the default clause in Clause No.12 of the JDA has clearly made provision for award of damages and had quantified the same.

11. The learned Senior Counsel would rely on the following judgments in support of his arguments regarding general damages under Section 73 of the Act.

- In the case of Murlidhar Chiranjilal Vs. Harishchandra Dwarkadas and Another reported in AIR 1972 SC 366, the Honourable Supreme Court observed that there exists two principles on which damages are to be calculated in case of breach of a contract. The Honourable Supreme Court held that when a person proved a breach, he is entitled to be compensated to such extent as he would have had the contract been performed. It was further held that in order to avail these damages onus is cast upon the person complaining of the breach to take such reasonable steps so as to mitigate the loss arising out of the breach and in case such steps has not been taken by the person complaining of the breach, then he is debarred from claiming any damages.
- In Kanchan Udyog Limited Vs. United Spirits Limited reported in 2017(7) SCALE 69, the Honourable Supreme Court observed that since the appellant therein failed to take steps to mitigate the damages they were not entitled to any expectation loss towards anticipated profits granting such a relief would be tantamount to giving benefit for a breach which had occurred on account of its own lapse.
- Pannalaljanakidas Vs. Mohanlal and Another reported in AIR 1951 SC 144 is a case where goods were destroyed on account of an explosion and the appellants therein who were a firm of Commission Agents had not insured the goods, as a result of which the defendant had suffered a loss. The Honourable Supreme Court held that agent was liable to make good the damage which arose directly from his neglect but not indirectly or remotely caused by such neglect or misconduct.

12. The Honourable Supreme Court in the case of Sir Chunilal Mehta & Sons Ltd., Vs. Century Spinning and Manufacturing Co. Ltd. reported in AIR 1962 SC 1314 held that where compensation is provided in express terms, the right to claim damages under the general law is excluded and therefore,

held that the appellant was not entitled to state that his right is left uneffected. On the aspect of liquidated damages being a cap on damages, the learned Senior Counsel once again relied on the judgment of the Honourable Apex Court in the case of Sir Chunilal Mehta & Sons Ltd., Vs. Century Spinning and Manufacturing Co. Ltd. reported in AIR 1962 SC 1314.

13. Mr. R. Thiagarajan, the learned counsel appearing for the first respondent in O.S.A.No.147 of 2018 and the appellant in O.S.No.201 of 2018 would contend that the award can be interfered with only if it is so unreasonable and irrational that no reasonable person would have arrived at the decision. The learned counsel would submit that the Arbitral Tribunal had analysed the pleadings and terms of the JDA, rights of both parties and the evidence before him to arrive at the award. He would submit that the Court should not substitute its conclusion to the conclusion arrived at by the Arbitrator. Unless such conclusion is irrational, perverse, arbitrary and contrary to the fundamental policy, interest of India, justice or morality.

14.

13.2. The respondent has relied upon the judgment of the Honourable Supreme Court in (1999) 9 SCC 283 [Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises]. The learned counsel appearing for the respondent has relied upon this judgment in support of his argument that the arbitrator by ignoring the clauses of the agreement had travelled beyond his jurisdiction since the award was ultimately not reconcilable to the clauses. This judgment has also been quoted to show the various circumstances under which an award of an Arbitrator cannot be interfered with by the Court.

13.3. In support of his arguments that an award which is contrary to the substantive provisions of Law or the provisions of Act or against the Terms of the Contract, which would be patently illegal and therefore, subject to interference under Section 34(2) of the Act, the learned counsel has relied on the judgment of the Honourable Supreme Court reported in (2003) 5 SCC 705 [ONGC Limited Vs. Saw Pipes Limited].

13.4. The judgment in AIR 2002 SC 258 [State of Rajasthan Vs. Nav Bharat Construction] has been quoted in support of the arguments that where the award passed by the Arbitrator is a reasoned one there can be no interference by the Court.

13.5. In the case of M.Chalamayya Vs. M. Venatram reported in AIR 1972 SC 1121, the Honourable Supreme Court held that when the award is one and indivisible, a direction to give effect to a part of the award and not the whole award would amount to modifying the award and such a direction, was impermissible. However, where a severable part of an award cannot be given effect due to lawful reasons, there is no bar to enforce the part to which effect could be justly given.

<https://hcservices.ecourts.gov.in/hcservices/>

13.6. In the case of NHA Vs. ITD Cementation reported in (2015) 14 SCC 21, the Honourable Supreme Court has held that it

is for the Arbitrator to decide the construction of the terms of a Contract. He is entitled to take a view which he holds to be correct on consideration of the material available before him and interpreting the provisions of the Contract. The Court while considering the challenge to an arbitral award does not sit in appeal and interfere in the decision unless the award of the arbitrator is so arbitrary or unreasonable that no fair minded or reasonable person would arrive at such a conclusion.

13.7. In support of the respondent's contention that they are entitled to damages for breach of contract. The learned counsel for the respondent had submitted the following Judgments:

- State of Madras Vs. Gannon Dunkerly & Co. reported in AIR 1958 SC 560
- Shiva JuteBailings Limited Vs. Hindley and Co. Ltd. reported in AIR 1959 SC 1357
- Murlidhar Chiranjilal Vs. Harishchandra Dwarkadas and another reported in AIR 1962 SC 366
- Chunilal Vs. Mehta and sons v. Century Spg. & Mfg. Co. Ltd. reported in AIR 1962 SC 1314
- Fateh Chand Vs. Balkishan Das reported in AIR 1963 SC 1405
- MaulaBux Vs. Union of India reported in 1969 (2) SCC 554
- ONGC Limited Vs. Saw Pipes Limited reported in 2003 (5) SCC 705
- Ghaziabad Development Authority Vs. Balbir Singh reported in 2004 (5) SCC 65
- MeDermott International Inc. Vs. Burn Standard Co. Ltd. and others reported in 2006 (11) SCC 181
- K.N. Sathyapalan Vs. State of Kerala and another reported in 2007 (13) SCC 43

These Judgments have been relied upon by the counsel for the respondent in support of his contentions that Section 74 of the Indian Contract Act, 1872, has to be read along with Section 73 of the Act in cases where there is a breach of contract and not in every case should the person aggrieved be asked to prove the actual loss or damage suffered by him. It is well within the jurisdiction of the Court to award reasonable compensation in case of breach even if no actual damage is proved.

14. The appellant herein has challenged the order of the learned Single Judge insofar as the Award with reference to claim Nos.1, 3 and 9 has been confirmed. The issue which requires consideration in this appeal is whether the first respondent is entitled to damages for breach in addition to the liquidated damages provided under Clause 12 of the JDA.

15. As already discussed, the appellant had undertaken to complete the project within a period of 15 months from the date of receipt of the sanction of Plan Approval from the Corporation of Chennai/CMDA or its delegated body subject to a grace period of 90 days and also subject to the first respondent handing over vacant possession. The parties had agreed that the time is to be the essence of the Contract. The fact that the time was the essence of the contract, is evident from the default clause incorporated in Clause 12 of the JDA, which says that in case,

the possession was not handed over within the period of 18 months (15 months + 90 days extension), the appellant was to pay a sum of Rs.2,50,000/- per month from the 19th month. In case, such delivery was not possible even after the expiry of 24 months from the date of approval then under the terms of Clause 12 of the JDA, the appellant was liable to pay a sum of Rs.5,00,000/- per month to the party of the First Part till the possession was handed over to them.

16. The records show that the vacant possession was handed over to the appellant on 01.04.2005 itself and it is also seen that the appellant was not able to get the Plan Approval within the given time, despite the first respondent performing their part of the obligations. It is on account of this breach the claimant had gone to Court claiming damages under various heads. It is also seen that the appellant had paid the compensation stipulated in Clause 12 till 09.05.2009, when the appellant had terminated the Contract.

17. In order to appreciate the claim of the first respondent, it is necessary to refer to the provisions of Sections 73 and 74 of the Contract Act. Section 73 of the Contract Act provides as follows:

"73. Compensation for loss or damage caused by breach of contract.—When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

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

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

Section 74 of the Contract Act provides as follows:

"74. Compensation for breach of contract where penalty stipulated for.—1 [When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is

proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

18. It is seen that the first respondent on the assurance given by the appellant had vacated the tenant and demolished the superstructure (though demolition by the first respondent has not been contemplated under the Agreement) and handed the vacant possession of the property to the respondent as early as on the 01.04.2005. From that date till the date of termination of the Contract by the first respondent, the Plans for constructing the superstructure had not been approved by the Corporation of Chennai/CMDA and in fact have not even been submitted to the Authorities. In response to the first respondent's query under the RTI, the CMDA, as latest on 23.11.2012, has replied that they have not received any application from the appellants. This clearly demonstrates the fact that the appellant has not taken any steps to get the Plan approved from the year 2005. Apart from paying the refundable deposit of Rs.40,00,000/-, there is no positive act taken by the appellant towards commencing the development activity on the property.

19. By reason of this breach, the first respondent has not only lost the rental income that they were getting from the property but they had also been deprived of the buildings that was earning the rental income. However, it is seen that the appellant had complied with the provisions of Clause 12 of the JDA by paying a compensation of Rs.2,50,000/- per month from 15.01.2007 to 15.08.2007 and thereafter, at the rate of Rs.5,00,000/- per month till 09.05.2009, when the Contract was terminated. Therefore, from the 18th month the appellant had been paying the compensation to the first respondent. In fact, the first respondent was receiving much more than the monthly rent that they had been receiving. After the termination of the Contract on 09.05.2009 and when the property in question was in the possession of the first respondent, no steps whatsoever has been taken by the first respondent to put the property to use. This could be on account of the proceedings that the first respondent had initiated against the appellant under Sections 9 & 11 of the Act. It is clear that the first respondent had hastened to demolish the existing superstructure only on the promise given by the respondent that within 15 months they would complete the construction of the IT Park and the 1st respondent by demolishing the same had suffered a loss which was directly attributable to the breach committed by the appellant.

20. In the case of Shiva Jute Baling Ltd Vs. Hindley & Co., Ltd. reported in AIR 1959 SC 1357, the Honourable Supreme Court has held as follows:

"Section 73 provides for compensation for loss or damage caused by breach of contract. It lays down that when a contract has been broken, the party who suffers by such breach is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose

in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Section 74 provides for breach of contract where penalty is stipulated for or a sum is named and lays down that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be the penalty stipulated for. What Cl. (12) of the contract provides in this case is the measure of liquidated damages and that consists of two things, namely (i) the difference between the contract price and the market price on the date of default, and (ii) an addition of 10s per ton above that. There is nothing in S.73 or S.74 of the Contract Act which makes the award of such liquidated damages illegal."

21. The Honourable Supreme Court in a judgment reported in AIR 1963 SC 1405 [Fateh Chand Vs. Balkishan Das] had observed that Section 74 of the Indian Contract Act deals with the measure of damages in respect of two cases (1) where the contract names a sum to be paid in a case of breach and (2) where the Contract contains any stipulation by way of a penalty. The Honourable Supreme Court has held that the Court has jurisdiction to award reasonable compensation in case the aggrieved party has suffered a loss.

22. In the case of Sir Chunilal Mehta and Sons Limited Vs. Century Spinning and Manufacturing Co., Ltd. reported in AIR 1962 Supreme Court 1314 (V 49 C 195), the Honourable Supreme Court has held that where a sum is specified as liquidated damages, it is deemed to exclude the right to claim an unascertained sum of money as damages. The Honourable Supreme Court has observed as follows:

"Where the parties have deliberately specified the amount of liquidated damages there can be no presumption that they, at the same time, intended to allow the party who has suffered by the breach to give a go-by to the sum specified and claim instead a sum of money which was not ascertained or ascertainable at the date of the breach."

23. In the case of Oil & Natural Gas Corporation Ltd., Vs. Saw Pipes Ltd., reported in (2003) 5 SCC 705 the Honourable Supreme Court has observed that from a reading of Sections 73 and 74 of the Contract Act, it can be held that when a contract has been breached, the party who suffers by such breach is entitled to receive compensation for any loss which naturally arises in the usual course of things from such breach. These Sections further contemplate, that if parties knew when they made the contract that a particular loss is likely to result

from such breach, they can agree for payment of such compensation. In such a case, there may not be any necessity of leading evidence for proving damages, unless the Court arrives at the conclusion that no loss is likely to occur because of such breach.

24. The Honourable Supreme Court after discussing the various authorities has held as follows:

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

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

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

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

25. In the judgment reported in (2006) 11 SCC 181 [Mcdermott International Inc vs Burn Standard Co. Ltd. And others], the Honourable Supreme Court has held as follows:

"The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law."

26. In the case on hand, it is seen that the appellant had not taken any steps to obtain the approvals from the Corporation of Chennai/CMDA, though vacant possession of the property had been handed over as early as in the month of April 2005. It is seen that the first respondent had addressed several letters

calling upon the appellant to honour its commitment to complete the construction. Further, it is only on the promise of the appellant, that it would complete the construction within 15 months from the date of handing over the vacant possession that the first respondent had proceeded to demolish the building. This has resulted in a loss being suffered by the first respondent which is a direct consequence of the breach and which is not covered within the circumstances contemplated under Clause 12 of the JDA. Therefore, the appellant is bound to compensate this loss. The learned Single Judge has rightly observed that the stipulation of liquidated damages in the contract would not take away the right of the first respondent to claim damages or otherwise for its act of demolishing the buildings in anticipation of the appellant honouring the terms of the JDA.

27. Further, with reference to Claim No.2, the same is squarely covered under Clause 12 of the JDA and the first respondent having terminated the Contract on 09.05.2009, cannot claim compensation after the termination of the Contract. Therefore, the order of the learned Single Judge in modifying the Award with reference to Claim No.2 is in order and does not require interference.

28. In the result, these Original Side Appeals are dismissed. The order of the learned Single Judge is confirmed and consequently, the Award insofar as it relates to the Claim Nos.1, 3 and 9, is confirmed and with reference to Claim No.2 stands modified as per the order of the learned Single Judge. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (CCC)

// True Copy//

Sub Assistant Registrar

To

1 The Sub Assistant Registrar,
Original Side,
High Court, Madras

2 The Sub Assistant Registrar,
Judicial Side,
High Court, Madras

+4 cc to Mr.R.THAGARAJAN, Advocate SR.No.54382 & 54383
+1cc to M/s.HEMA SRINIVASAN, Advocate SR.No.53827

Common Judgment in
O.S.A.Nos.147 & 201 of 2018

NRI (CO)

<https://hcservices.courts.gov.in/hcservices/>
SM/21.08.2018