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

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Date of decision: 7.5.2018

+ O.M.P. (COMM) 339/2017

XL ENERGY LIMITED

..... Petitioner

Through Mr.Sanjay Jain, Sr.Adv. with
Mr.Abhijit Mittal, Mr.Dhruv Rohtagi, Mr.Abhinav
Sharma and Mr.Sarfaraz Ahmad, Advs.

versus

MAHANAGAR TELEPHONE NIGAM LIMITED..... Respondent

Through Ms.Ekta Sikri, Mr.Pranav Sharma and
Ms.Niyati Patwardhan, Advs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

IA No. 10422/2017 (exemption)

Exemption is allowed subject to all just exceptions.

Application stands disposed of.

O.M.P. (COMM) 339/2017 and IA No. 10421/2017

1. This petition is filed under section 34 of the Arbitration and Conciliation Act, 1996 (herein referred to as "The Act") seeking to impugn the Award dated 3.6.2017. The brief facts are that the respondent invited bids and thereafter issued three purchase orders to the petitioner on 27.3.2003, 23.5.2003 and 7.8.2004 for procuring CDMA WLL Subscriber Terminals (hereinafter referred to as "handsets"). The petitioner thereafter completed

delivery of the handsets. However, to ensure that the handsets continued to operate the respondent entered into three Annual Maintenance Contracts (AMC's) dated 5.6.2004, 24.11.2004 and 3.11.2005 for the said handsets. The petitioner also gave three Performance Bank Guarantees (PBG's) of even dates amounting to a total of Rs.1,13,99,500/-. It is the case of the petitioner that with the advent of new technology the use of handsets was decreasing. Out of a total of 95,000 handsets about 19,000 to 20,000 customers of the respondent were stated to be using the old handsets. It is also the case of the petitioner that on account of the fact that only limited number of handsets was being used, the petitioner sent a proposal dated 11.12.2006 to the respondent proposing that the petitioner would provide repair service through eight service centers on chargeable basis. With dissolution/termination of the AMC's the respondent need not pay a sum of Rs.70 lacs which was payable to the petitioner as fixed AMC charges and the petitioner in return would benefit by way of waiver, of liquidated damages and release of PBG's of the petitioner. According to the petitioner the respondent by letter dated 30.3.2007 conveyed its acceptance to the proposal. It is also stated that there were no communications from the respondent qua levy of any liquidated damages or penalty on the petitioner till that date. The petitioner state that shockingly vide a demand notice dated 18.5.2007 the respondent levied a penalty of Rs.2,47,43,500/- on the petitioner for alleged delay in repairing of the handsets under the AMC. Thereafter the respondent proceeded to encash the Bank Guarantees.

2. The petitioner filed W.P. (C) No.4502/2007 on 6.6.2007 against invocation of the PBG's. This court vide order dated 6.6.2007 stayed the

invocation of the PBG's. In the said Writ Petition vide order dated 20.5.2011 the Court referred the claim of the respondent to arbitration. However, the claim for penalty of only Rs.1,13,99,500/- was referred to arbitration as the balance claim of the respondent was held barred by limitation. However, in an appeal preferred by the respondent against the said order dated 20.5.2011, the Division Bench in LPA No.763/2011 by its order dated 19.9.2011 modified the order of the Single Judge and referred the entire claim of the respondent amounting to Rs.2,47,43,500/- to be adjudicated in accordance with law by the learned Arbitrator.

3. The learned Arbitrator on 16.3.2012 framed the following issues:-

- “1) Whether the Claimant is entitled to claim no. 1? OPC
- 2) Whether the claim no. 1 or any part thereof is barred by limitation? OPR
- 3) Whether the demand for liquidated damages after dissolution of AMC is maintainable in law? OPC
- 4) Whether the AMC stood novated after the respondent's proposal dated 11.12.2006 was accepted by the Claimant on 30.03.2007? OPR
- 5) Whether the Claimant is estopped from raising a claim of liquidated damages after the novation of AMC? OPR
- 6) Whether the claim no. 1 is vitiated by fraud and unjust enrichment? OPR
- 7) Whether the Respondent was entitled to any benefit of capping of penalties for handsets as applicable? OPR
- 8) Whether the claimant is entitled to claim no. 2 i. e. litigation expenses? OPC
- 9) Whether the claimant is entitled to interest? OPC
- 10) Costs, if any.
- 11) Relief.”

4. The parties led their evidence by way of affidavit. The respondent/claimant filed the affidavit of Shri Ramesh Chand and Shri

B.K.Gupta who were examined as CW-1 and CW-2 and have exhibited documents Ex.CW1/1 to Ex.CW1/88; and Ex.CW2/1 to Ex.CW2/7. The petitioner led the evidence of Shri Pramod Kumar Jain who was examined as RW-1. He placed reliance on Ex.RW1/1 to RW1/11.

Issues 3, 4 and 5 being inter-connected were adjudicated upon together. The learned Arbitrator held on these issues that it is clear that the original AMC's was dissolved w.e.f. 14.2.2007 and that the petitioner was to extend repair facility to the customer of the respondent through its Authorised Service Centers in Delhi on chargeable basis alongwith extended Warranty Support to the customer of the respondent till actual date of expiry of the AMC's. The Award holds that Section 62 of the Contract Act applies to the present case. The entire original contract does not terminate and rather a new alternate contract has come into force. The alteration of the contracts took place w.e.f. 14.2.2007 and therefore, liquidated damages remained leviable by the respondent upto the said date i.e. 14.2.2007.

On issues No.1,6 and 7 the learned Arbitrator held that on perusal of the supporting documents the claim of the respondent for Rs.2,47,43,500/- is on account of penalty for late repairing of the handsets for the period upto 14.2.2007. It noted the relevant clause in the AMC'Ss regarding the penalty and concluded that the calculations are proved and the said figure claimed is correct. The Award also held that the said amount claimed is neither vitiated by fraud nor amounts to undue enrichment.

On the issue of limitation the learned Arbitrator held that the claim other than the amount of Rs.1,13,99,500/- was barred under provisions of the

Limitation Act. Hence, an award for the said sum of Rs.1,13,90500/- was passed in favour of the respondent.

5. I have heard learned counsel for the parties. Learned senior counsel for the petitioner had made the following submissions challenging the Award:-

(i) He submits that in view of the proposal dated 11.12.2006 sent by the petitioner for dissolution of the AMC'Ss and acceptance of the said proposal by the respondent vide its communication dated 30.3.2007 the AMC stood dissolved. He further submits that till the said date i.e. 30.3.2007 the respondent, at no stage, demanded payment of any liquidated damages or penalty for delay in repairing the phone handsets in question. Hence, the claim raised after dissolution of the AMC's was illegal.

(ii) He further submits that the respondent has not led any evidence to show that they suffered any loss or damages on account of the delay in repair of the handsets. Hence, it is pleaded relying upon the judgment of the Supreme Court in *Kailash Nath Associates vs. Delhi Development Authority*, (2015) 4 SCC 136 that no amount was payable to the respondent. He also relied upon judgment of the Bombay High Court in *Continental Transport Organization Pvt. Ltd. vs. Oil and Natural Gas Corporation Ltd.*, MANU/MH/0694/2015.

6. Learned counsel for the respondent, however, submits that as far as the first plea of the petitioner is concerned, it is misconceived as admittedly there has been numerous delays in repair of the handsets. She relies on clause (1) of the AMC's which provides that if the petitioner fails to repair

the handset and delivers the same within the stipulated period of 14 days the petitioner was liable to pay penalty for the entire period from the date of making over the faulty handset @Rs.100/- per day. She further stresses that while making payments to the petitioner appropriate amounts on account of penalty for the delay in delivery of the handsets has been deducted. Hence, it is urged that the petitioner cannot argue that the demand was raised on the petitioner for the first time. She further submits that nature of damages suffered by the respondent was such that no evidence could be led by the petitioner. She relies upon pleadings and evidence to stress that the respondent was entitled to the said amount on account of the acts of the petitioner. She has relied upon the judgment of this court in ***Saisudhir Energy Ltd. vs. NTPC Vidyut Vyapar Nigam Ltd., (2016) SCC Online Del 5093.***

7. I will now deal with the pleas of the learned senior counsel for the petitioner. As far as the first plea is concerned, it is clear that the same is absolutely without merits. It is a fact recorded by the learned Arbitrator based on the agreement and documents placed on record that a sum of Rs.2,47,43,500/- became payable on account of the delays by the petitioner.

8. The relevant clause of the contract reads as follows:

“TERMS & CONDITIONS OF THE AGREEMENT:

1. If the contractor fails to repair the faulty WLL terminals (Handheld Type) and deliver the same in the concerned MTNL office within stipulated period of 14 days as mentioned above, the contractor shall be liable to pay penalty for the entire period counted from the date of making over the faulty terminals in his

repair center to the actual date of repair and delivered including Saturdays, Sundays, and holidays as under

Rs. 100/- per day per terminal.”

9. Hence, the terms and conditions of the AMC clearly provides that if the petitioner fails to deliver the repaired handsets within the stipulated period of 14 days the petitioner shall be liable to pay a penalty @ Rs.100/- per day per terminal. In view of the specific clause merely because there was a delay in raising of the bill would not do away the liability of the petitioner under the said clause.

10. I may now deal with the second contention raised by the learned senior counsel for the petitioner, namely, that in the absence of evidence of any damages suffered by the respondent, no damages could be awarded by the learned Arbitrator to the respondent. In this context reference may be had to the judgment of the Supreme Court in the case of ***Kailash Nath Associates vs. Delhi Development Authority (supra)***. That was a case in which the petitioner therein had made a bid for purchase of a plot which bid was accepted and 25% advance was paid. There was a default in making payment of the balance amount. The DDA/respondent forfeited the said amount holding it a case of forfeiture of earnest deposit. In those facts the Supreme Court noted that subsequent to forfeiture of the deposit, DDA re-auctioned the plot and received a much higher amount. The court noted that the most basic principle on the award of damages is that compensation can only be given for damages or loss suffered. If no damage or loss is suffered the law does not provide for a windfall. The court stated as follows:-

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

1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.
2. Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.
3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.
4. The Section applies whether a person is a Plaintiff or a Defendant in a suit.
5. The sum spoken of may already be paid or be payable in future.
6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

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

11. Hence, where a sum is named in a contract as liquidated amount payable by way of damages, the party complaining of a breach can receive such amount only if the amount is a genuine pre-estimate of damages fixed by both the parties and found to be such by the Court. In other cases where a sum is named in the contract as liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount, so stated. Reasonable compensation is to be fixed on well known principles that are applicable to the law of contract. Damage/loss caused is a *sine qua non* for applicability of the section.

12. Similarly, reference may also be had to the judgment of the Supreme Court in ***Oil and Natural Gas Corporation Ltd vs. Saw Pipes Ltd. (2003) 5 SCC 705***. That was also a case dealing with a clause that provided for recovery of agreed liquidated damages where there was default on the part of the Respondent to deliver within the period fixed for delivery. In those circumstances, the Supreme Court held as follows:-

“64. It is apparent from the aforesaid reasoning recorded by the arbitral tribunal that it failed to consider Sections 73 and 74 of Indian Contract Act and the ratio laid down in Fateh Chand's case (supra) wherein it is specifically held that jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; and compensation has to be reasonable. Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him

which the parties knew when they made the contract to be likely to result from the breach of it. This Section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia [relevant for the present case] provides 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, the party complaining of breach is entitled, whether or not actual 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. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach. Take for illustration: if the parties have agreed to purchase cotton bales and the same were only to be kept as a stock-in-trade. Such bales are not delivered on the due date and thereafter the bales are delivered beyond the stipulated time, hence there is breach of the contract. Question which would arise for consideration is-- whether by such breach party has suffered any loss. If the price of cotton bales fluctuated during that time, loss or gain could easily be proved. But if cotton bales are to be purchased for manufacturing yarn, consideration would be different.”

13. Hence, where compensation named in the contract is a genuine pre-estimate of the loss that the parties knew when they made the contract likely to result from the breach then no proof of loss is required and such party is not required to lead evidence to prove the actual loss suffered. The Supreme Court held that the burden is on the other party to lead evidence for proving that no loss is likely to occur by breach of contract.

14. The plea of the petitioner is that the respondent suffered no damages due to delay in delivery of the handsets and hence the respondent is not entitled to any damages/penalty. Hence, it is pleaded that the Award is vitiated being contrary to the principles of law and public policy.

15. The learned Arbitrator held that on facts that no case is made out to show that if the stipulated amount as per agreement is awarded to the respondent, the respondent will reap unjust enrichment.

16. Reference may be had to the claim petition and affidavit by way of evidence filed by the respondent. A plea has been taken that the respondent did suffer damages. The following table as pleaded summarizes the damages claimed by the respondent. The table reads as follows:-

S. No.	Qty.	Model of handsets	Payment due	Liquidated Damages LD due to late repairing	LD due to audit objections for faulty repairs	Total LD	Net payment due Payable	<u>Deduction</u>
1	K2235	30,000	11,16,667	22,44,300	90,79,000	1,13,23,300		98,85,800
2	K2235	15,000	3,20,833					
		Total	14,37,500/-					

3	K112	40,000	8,99,900/-	32,18,900	1,17,43,900	1,57,57,600		
	KE 414	10,300			7,94,800			1,48,57,700
			23,37,400		1,25,38,700	2,70,80,900		2,47,43,500

17. We may look at the cross-examination of the witness of the respondent Mr.Ramesh Chand (CW1). Some of the relevant questions and answers read as follows:-

“Q94: I put it to you that you have not received any complaints from your customers due to the alleged delay made by the respondent in returning the handsets.

A: Complaints were received at the Garuda service centre for defective sets and customers used to ask for exchange of defective sets but since we had no spare sets we could not give any sets in exchange and this was so because the respondent was making delay in delivery of repaired sets.

Q95: Have you filed any of these complaints before this arbitral tribunal?

A: No. Though, there were written complaints and also oral complaints, the Garuda service centre was dealing with these complaints.

Q96: I put it to you that the MTNL had never received any complaints from its customers on account of the respondent.

A: The customer will lodge complaints only with MTNL and doesn't even know as to from where we were getting the defective sets repaired. Therefore, the

suggestion is wrong. In reality the blames for non repair comes on the respondent.

.....

Q99: Did MTNL pay any compensation to any of its customers for the alleged delay in handing over of the handsets?

A: I do not know because the compensation, if any, might have been given by the service department of the MTNL. (Vol.) However, MTNL suffered loss for the period the customer remained deprived of the telephone service because of delay by the respondent.

Q100: I put it to you that you have not filed any documents to show that MTNL had paid any compensation to its customers for the alleged delay in handing over of handsets.

A: It is correct. We have not filed any such document.”

18. A perusal of the above cross-examination of Shri Ramesh Singh shows that he has clearly pointed out that the customers of the respondent had to suffer as there was delay in return of the handsets. It is manifest that the reputation of the respondent suffered. In an industry disgruntled customers do not help in expansion of business. It is quite clear that when a manufacturer of mobile telephones is unable to speedily repair defective telephones supplied to its customers it is bound to cause a loss of reputation/image. Such loss of reputation/image would lead to loss of revenue. Such damages/loss of revenue cannot easily be quantified as is sought to be argued.

19. Reference in this context may be had to the judgment of this Court in *Saisudhir Energy Ltd. vs. NTPC Vidyut Vyapar Nigam Ltd., (supra)*. This court followed the judgment of the Supreme Court in the case of *ONGC vs. Saw Pipes Ltd., 2003(5) SCC 705* and noted as follows:-

“96. The Supreme Court had reversed the finding of the Arbitral Tribunal and held that liquidated damages would be payable as genuine estimate of the losses and made the following observations:-

“64. It is apparent from the aforesaid reasoning recorded by the Arbitral Tribunal that it failed to consider Sections 73 and 74 of the Indian Contract Act and the ratio laid down in *Fateh Chand* case wherein it is specifically held that jurisdiction of the court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; and compensation has to be reasonable. Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides 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, the party complaining of breach is entitled, whether or not actual 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. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine

pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach. Take for illustration: if the parties have agreed to purchase cotton bales and the same were only to be kept as a stock-in-trade. Such bales are not delivered on the due date and thereafter the bales are delivered beyond the stipulated time, hence there is breach of the contract. The question which would arise for consideration is — whether by such breach the party has suffered any loss. If the price of cotton bales fluctuated during that time, loss or gain could easily be proved. But if cotton bales are to be purchased for manufacturing yarn, consideration would be different.....

... 66. In *Maula Bux case* the Court has specifically held that it is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree and the court is competent to award reasonable compensation in a case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. The Court has also specifically held that in case of breach of some contracts it may be impossible for the court to assess compensation arising from breach.

67. Take for illustration construction of a road or a bridge. If there is delay in completing the construction of road or bridge within the stipulated time, then it would be difficult to prove how much loss is suffered by the society/State. Similarly, in the present case, delay took place in deployment of rigs and on that basis actual production of gas from platform B-121 had to be changed..... In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that the party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provisions

of Sections 73 and 74 of the Indian Contract Act. There was nothing on record that compensation contemplated by the parties was in any way unreasonable. It has been specifically mentioned that it was an agreed genuine pre-estimate of damages duly agreed by the parties. It was also mentioned that the liquidated damages are not by way of penalty..... There was no reason for the Tribunal not to rely upon the clear and unambiguous terms of agreement stipulating pre-estimate damages because of delay in supply of goods.....

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

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

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

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

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

20. In my opinion, this was clearly a case where the respondent had suffered damages. The nature of damages suffered would be such where it would not be easy to lead evidence to assess the nature of damages suffered. The damages quantified in the contract can be said to be a genuine pre-estimate of the damages. The learned Arbitrator rightly concluded that award of the said damages as stipulated in the contract does not lead to unjust enrichment of the respondent.

21. Quantification of damages by an Arbitrator would be within the realm of the learned Arbitrator. Reference may be had to the judgment of Supreme Court in the case of *McDermott International Inc. vs. Burn Standard Co. Ltd. and Ors. (2006) 11 SCC 181*, where the Court held as follows:-

"ACTUAL LOSS : DETERMINATION OF

109. Sections 55 and 73 of the Indian Contract Act do not lay down the mode and manner as to how and in what manner the computation of damages or compensation has to be made. There is nothing in Indian law to show that any of the formulae adopted in other countries is prohibited in law or the same would be inconsistent with the law prevailing in India.

110. As computation depends on circumstances and methods to compute damages, how the quantum thereof should be determined is a matter which would fall for the decision of the arbitrator. We, however, see no reason to interfere with that part of the award in view of the fact that the aforementioned formula evolved over the years, is accepted internationally and, therefore, cannot be said to be wholly contrary to the provisions of the Indian law.

22. The Supreme Court in *Associate Builders. vs. DDA., (2015) 3 SCC 49* held as follows:-

“33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows:“General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong”.It is very important to bear this in mind when awards of lay arbitrators are challenged.] . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In *P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.* [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the

first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

Hence, it is not for this Court to reassess the evidence to negate the findings of fact recorded by the learned arbitrator.

23. Further, the learned Arbitrator on account of the fact that part of the claim of the respondent was barred by limitation only awarded about 50% of the amount claimed by the respondent as damages for late repairing of the handsets. The above is in any case a reasonable compensation for damages suffered by the respondent and cannot be said to be contrary to Section 74 of the Contract Act. The amount awarded is not contrary to the principles laid down in the judgment of the Supreme Court in *Kailash Nath Associates vs. DDA (supra)*.

24. There is no merit in the petition. Petition is accordingly dismissed.

JAYANT NATH, J.

May 7, 2018/n