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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 04.09.2019

Pronounced on: 23.09.2019

+ **O.M.P. (COMM) 192/2016**

GATEWAY IMPEX PVT. LTD.

..... Petitioner

Through: Mr. Ravi Shankar Nanda & Mr. Manish
Verma, Advocates.

versus

TATA AIG LIFE INSURANCE CO. LTD.

..... Respondent

Through: Ms. Swati Sinha & Mr. Aman Bhatnagar,
Advocates.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

1. The present petition has been filed by the petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 ('the Act') for partially setting aside the Award dated 20.11.2014, passed by the Arbitral Tribunal. The petition seeks to challenge the Award to the extent it has partially rejected the claim of the petitioner under Issue No. 1 as also the claims under Issue Nos. 3, 4, 5, 6 and 7(f) and 7(g).
2. It may be noted at this stage that when the matter was heard on 4.9.2019, learned counsel for the petitioner had at the outset stated on instructions, that he would not press the petition with respect to claim Nos. 3, 4, 5, 6 and 7(f) and 7(g), and would only restrict his arguments

to the partial rejection of Claim No. 1. This is so recorded in the order dated 4.9.2019, when the judgment was reserved by this Court.

3. The brief facts which need a mention for deciding the present petition are that vide a duly registered Lease Deed dated 20.12.2004, premises being Unit Nos. 7th and 8th Floor, of Lotus Towers Community Centre, New Friends Colony, New Delhi, having a super built up area of 16810 sq. feet along with fittings and fixtures (hereinafter referred to as 'the premises') were leased out to the respondent for a term of three years commencing with effect from 1.10.2004. The lease rent in respect of the premises was Rs.10,92,650/- per month calculated at the rate of Rs.65/- per sq. feet per month for the super built up area.
4. Respondent had also entered into a maintenance agreement dated 1.10.2004 with the petitioner for availing maintenance services, etc. at the rate of Rs.50/- per sq. feet.
5. Respondent had deposited a sum of Rs.1,31,11,800/- towards interest free security deposit.
6. The lease being for a period of three years expired on 30.9.2007 by efflux of time. The respondent vide its letters dated 6.7.2007 and 22.8.2007 communicated its intention to renew the lease for a further term of 36 months on the earlier terms and conditions, by contending that there was a provision of renewal in the lease deed and agreeing to pay 15% escalation in monthly rent, security deposit and maintenance charges.
7. The petitioner however vide its letters dated 23.10.2007 and 5.11.2007 wrote to the respondent that the lease had expired and by a communication dated 30.9.2007 unequivocally informed the

respondent that he was not interested in renewing the lease any further. The petitioner called upon the lessee to vacate the premises and hand over the peaceful vacant possession within 15 days from receipt of the said letter.

8. It is the case of the petitioner that despite several requests the respondent did not vacate the premises on the expiry of the lease and was in illegal and unauthorized occupation with effect from 1.10.2007 till 5.11.2009.
9. Disputes and differences having arisen between the parties, the petitioner vide its letter dated 26.11.2007 invoked the Arbitration Clause-10(q) of the lease deed. Both the parties nominated their respective Arbitrators and this Court appointed the Presiding Arbitrator.
10. The Arbitral Tribunal on 8.7.2009 framed the following issues on the pleading of the parties:-

“(1) Whether term of lease as per lease deed dated 20.12.2004 expired on 30.09.2007 by efflux of time?”

“(2) Whether the lease deed dated 20.12.2004 can be construed to be a lease for six years, in the sense of creating an initial lease for three years with the right of renewal for another three years?”

“(3) Whether the said lease deed can be construed as creating a right to renewal for three years in favour of the lessee?”

“(4) Whether the term of lease stands renewed for another term of three years i.e. from 0.10.2007 to 30.09.2010. Alternatively, whether the respondent is entitled to specific performance of renewal clause as alleged, for the further term of three years?”

“(5) If issue No. 4 is answered in favour of the claimant, whether the respondent is liable to pay mesne profits /damages for use and

occupation with effect from 01.10.2007 to the claimants? If so, at what rate?

(6) Whether the respondent was liable to hand over the vacant possession of the demised premises on 30.09.2007 to the claimant?

(7) Relief and Costs”

11. The Arbitral Tribunal vide an interim Award dated 31.5.2010 held that there was no covenant of renewal in the lease deed and therefore at the end of three years from 1.10.2004 the respondent was obliged to hand over vacant possession of the premises to the petitioner. This interim award was challenged in this Court by filing an OMP No. 583/2010 by respondent herein. The same was disposed of on 1.10.2010, giving liberty to the respondent to challenge the same with the final Award.
12. The petitioner filed an application for mesne profits/damages, recovery of arrears of maintenance charges, car parking charges, etc. on 26.7.2010 before the Tribunal. The Tribunal on 15.3.2011, framed the following issues on the said application:-

“1 Whether the Claimant is entitled to recovery of mesne profits / damages for use and occupation of the demised premises, @ Rs. 190/- per sq.ft, per month for the period 01-10-2007 to 05-11-2009?

2 Whether the Claimant is entitled to recovery of Rs. 18,54,979/- as arrears of service tax on the amount of rent / mesne profits for the period 01-10-2007 to 31-03-2008 and from 01-04-2009 to 04-11-2009?

3 Whether the Claimant is entitled to recovery of Rs. 14,12,040/- being the differential amount of maintenance charges @ Rs. 4/- per sq.ft. per month for the period 01-01-2006 to 30-09-2007?

4 Whether the Claimant is entitled to recovery of Rs. 90,854/- as service tax on the above?

5 Whether the Claimant is entitled to recover Rs. 7,39,347/- additional (differential) amount of maintenance charges @ Rs. 1.75 per sq.ft per month for the period 01-10-2007 to 05-11-2009?

6 Whether the Claimant is entitled to recover Rs. 83,426/as service tax on the maintenance charges for the period 01-10-2007 to 05-11-2009?

7 Whether the Claimant is entitled to recovery of following sums from the Respondent:-

(a) Rs. 2,89,973/- as arrears of maintenance charges for November 2007?

(b) Rs. 38,663/- as arrears of maintenance charges for 01-11-2009 to 04-11-2009?

(c) Rs. 5,69,435/- as Service tax on maintenance charges for the period March 2007 to 04-11-2009?

(d) Rs. 1,62,591/- as arrears of car parking charges from April 2004 to 04-11-2009?

(e) Rs. 77,124/- as arrears of service tax on car parking charges from July 2008 to 04-11-2009?

(f) Rs. 9,96,270/- as arrears towards extra hours services in respect of the demised premises from April 2004 to 24-10-2009?

(g) Rs. 94,271/- as Service tax on the above?

(h) Rs. 1,07,156/- as arrears of electricity bills in respect of the demised premises?

(i) Rs. 9096/- as arrears of electricity bill for the period upto 04-11-2009?

(j) Rs. 20,000/- as charges for removal of the material left by the Respondent at the demised premises and the cost of repairs of the damage to the stairs?

8 Whether the Claimant is entitled to interest pendente lite and future @ 12% per annum?

9 Whether the claims referable to the period 2004 to 2006 (on the several heads made by the Claimant) are barred by limitation?

10 Whether the Respondent is entitled to recovery of the following claims from the Claimant?

a. Rs. 14,12,040/- towards maintenance charges (allegedly less paid) @ Rs. 4/- from January 2006 to September 2007 and deducted from the Security Deposit?

b. Rs. 7,39,347/- towards maintenance less paid @ Rs. 1.75 from October 2007 to 04-11-2009 and deducted from the security deposit?

c. Rs. 83,426/- by way of service tax on the above and deducted from the security deposit?

d. Rs. 5,69,435/- withheld by the Claimant on account of service tax on maintenance from March 2007 to November 2009?

11 Whether Service tax is payable on maintenance charges from October 2007 onwards and on the amount of mesne profits?

12 Whether the Respondent is entitled to recover the following amounts from the Claimant:-

a. Rs. 9,54,368/- being excess amount of maintenance (Rs. 2.25 per sq.ft. per month) from October 2007 to 04-11-2009?

b. Rs. 1,62,591/- deducted from the security deposit as arrears of car parking charges from April 2004 to November 2009?

c. Rs. 77,124/- being on car park service tax from July 2008 to 04-11-2009?

d. Rs. 9,96,270/- as arrears towards extra hours of service from April 2004 to 24-10-2009?

e. Rs. 94,271/- as service tax on the above?

f. Rs. 20,000/- deducted from security deposit as cost of repairs of the damage to the stairs and the cost of removing material at the time of vacation of the demised premises?

13 Whether the Claimant could not have deducted any amount from the security deposits for the period referable to the year 2004 to 2006 as being barred by limitation?

14 Whether the Respondent is entitled recovery of Rs. 88,92,531/- from the Claimant?

15 Whether the Respondent is entitled to interest @ 12% per annum from 05-11-2009 till realization?

16 Relief and Costs?

13. In support of its claim for mesne profits, the petitioner examined two witnesses and brought on record two registered lease deeds in respect of the 3rd and 9th floor in the same building in which 'the premises' was situated. The lease deeds were dated 24.10.2007 and 15.12.2008, i.e. of the same period during which the respondent was in unauthorized occupation. The monthly rent of the two floors as reflected in the Lease Deeds was Rs.190/- per sq. feet and Rs.276/- per sq. ft., respectively.
14. Respondent on the other hand, produced lease deeds, which were mostly in respect of premises which were in the same locality, but not the same building and were of shops with lesser areas or in some cases were basements. One lease deed was produced with respect to a premises in the same building, but this lease deed was a renewal lease deed.
15. The Arbitral Tribunal passed a Final Award dated 20.11.2014, partially allowing Claim No. 1 of the petitioner. The Tribunal awarded to the petitioner a sum of Rs. 3,57,45,058/- towards mesne profits for the period 1.10.2007 to 5.11.2009 during which the respondent remained in unauthorized occupation, which was at the rate of Rs.85/- per sq. feet per month, as against a claim of Rs.190/- per sq. feet per month, or in the alternative @ Rs.75,000/- per day, in accordance with recital 6 in the Lease Deed.

16. The Arbitral Tribunal examined the contentions and the evidence led by both the parties and came to a conclusion that both the parties were taking two extreme views and therefore a rate somewhere in between the two rates, which was just, fair and reasonable to compensate the petitioner had to be determined.
17. Based on the evidence led by the petitioner, Tribunal came to a finding that the two lease deeds produced by CW-1 though, were of the premises situated in the same building, but there was no evidence to show that they were similarly situated in terms of direction, status of furnishing, etc. Secondly, the two units under the lease deeds were earlier under a single tenancy but later, they were split into two tenancies and perhaps that is why the higher rent was being charged. The Tribunal also took note of the fact that while the petitioner had initially claimed a rate of Rs.190/- per sq. feet per month but later he had limited its claim to Rs.75,000/- per day which came to Rs.133.85/- per sq. feet per month. This was based on the recital 6 in the lease deed itself.
18. Learned Tribunal also took into account the deposition of Mr. Pandit that one M/s. INKOR was a tenant in a premises in the same building and the monthly rent was Rs. 77/- per sq. feet.
19. Insofar as the respondent is concerned, the learned Tribunal examined the deposition of his sole witness, Mr. Rahul Dhanotia, who deposed that between the years 2007 to 2010, there was recession in the market and also that the property was lying vacant since 2009 and there were no tenants willing to take the property on lease. Tribunal observed

that the petitioner had not cross-examined the witness on this issue, in rebuttal.

20. Having examined the stands of both parties, the learned Tribunal observed that there was a sharp cleavage of stands between the parties. While the petitioner wanted at least Rs. 75,000/- per day as damages/mesne profits, which worked out to Rs. 133.85/- per sq. ft. per month and was less than the market rate around the said period, on the other hand, as per the respondent, the market rate was not more than Rs. 74/- per sq. feet per month.
21. The learned Tribunal finally arrived at a figure of Rs.85/- per sq. ft. per month by adopting a methodology, distinct and different from both the parties. The relevant part of the Tribunal's order is as under:

48. There is some other material available on record which can help us in finding out a reasonable rate of rent. We have, in para 32 above, extracted and reproduced two clauses from the lease deed dt. 21-12-2004 in respect of the premises under consideration. The rate of rent appointed therein is Rs. 65/- per sq.ft. per month. Clause 6 of the lease deed which provides for the payment of rent @ Rs. 75,000/- per day itself records that it was 'a penal rent'. Though agreed upon by the parties, yet a clause which is penal in nature may be refused to be enforced by a judicial or a quasi judicial forum. On the contrary, Clause 3 provides for payment of rent with an escalation of 15% in the monthly rent (and also in security deposit) on the expiry of three years from 01-10-2004, the date of commencement of tenancy. If only the lease deed would have been liable to be renewed, the landlord would have got an escalation of 15% only. At the same time keeping in view the inflationary market tendencies it will be reasonable to assume that in the event of the premises

being vacated, the landlord would have been in a position to find out another tenant who may have been willing to pay a still higher rate of rent. An additional factor is that not only the rate of rent would have increased, but the landlord would have also got additional interest free security deposit enabling him to earn some more interest.

49. Thus, keeping in view all the relevant facts and circumstances of the case as discussed hereinabove, and in the absence of there being any positive evidence enabling formation of a different view, we are of the opinion that it would meet the ends of justice, if the rate of compensation for use and occupation payable by the Respondent to the Claimant is appointed at Rs. 65/- per sq.ft. per month escalated by 30% i.e. at Rs. 84.50, rounded up to Rs. 85/- per sq.ft. per month. We hold that for the period beginning with 01-10-2007 and continuing up to 05-11-2009, the date on which the premises were vacated by the Respondent the Claimant is entitled to damages by way of compensation for use and occupation by the Respondent of the Claimant's 'premises which comes to Rs. 14,28,850/- (16,810/- multiplied by Rs. 85/-) per month making a total of Rs. 3,57,45,058/- (25 months and five days) for the entire period of the Respondent continuing in occupation.

50. Though the claim is for recovery of mesne profits@ Rs. 190/- per sq. ft. Per month, but as already stated the Claimant has limited its claim to a lower figure. Under para 49 we have set out the amount to which only the Claimant would be entitled to recover. We hold that the Claimant is entitled to be awarded an amount of Rs. 41,63,918/- under this issue calculated as under:-

Mesne Profits for the period 01.10.2007 to 05.11.2009 as per para 49 of the award		3,57,45,058/-
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<i>Amount paid by Respondent to the Claimant under the interim orders of the High Court</i>	3,01,57,052/-	
<i>Amount deducted from the security deposit</i>	12,56,548/- 1,67,540/-	
		3,15,81,140/-
<i>Net entitlement of the Claimant</i>		41,63,918/-

50. Issue No. 1 is answered accordingly.

22. Learned counsel for the petitioner contends that when the lease deed was entered into between the parties, a specific recital of the lease deed provided that if the lessee failed to hand over the vacant possession of the premises to the lessor on the expiry of the lease period, the lessee shall pay a penal rent of Rs. 75,000/- per day to the lessor. He submits that this was a mutually agreed term of the lease deed and it was not open to the Arbitral Tribunal to decide contrary to the terms of the agreement between the parties. Learned counsel relies upon the judgment in ***Delhi Development Authority vs. R.S. Sharma and Company, New Delhi*** reported as 2008 (13) SCC 80 to contend that the Arbitrator who is appointed pursuant to a contract between the parties cannot decide against the explicit terms of the contract.
23. The next contention of the learned counsel for the petitioner is that the Tribunal completely erred in refusing to give effect to clause 6 by holding that the amount mentioned therein was actually a 'penal' rent and therefore, damages which are by way of a penalty cannot be awarded. Learned counsel submits that merely because the word 'penal' has been used in the recital cannot be a factor by itself to treat

the same as penal. Whether the sum mentioned in a clause is in the nature of penalty or a liquidated damage, which is a pre-estimated and reasonable sum agreed between the parties, has to be determined not merely by looking at the language or nomenclature, but by taking into account various factors such as character of the transaction and its special nature; relative situation of the parties; intention of the parties etc. The sum of Rs. 75,000/- could have been held to be penal only if it was exorbitant and unconscionable compared to the loss that the petitioner suffered due to the breach and unauthorized occupation of its premises by the respondent. The learned counsel has relied upon the following judgments in support of the proposition that whether a clause is a liquidated damage or a penalty has to be determined by various factors and not merely by the language:

- a. ***Kailash Nath Associates vs. Delhi Development Authority & Anr.*** reported as 2015 (4) SCC 136;
 - b. ***Bharat Sanchar Nigam Limited vs. Reliance Communication Ltd.*** reported as 2011 (1) SCC 394;
 - c. ***M/s Pawan Hans Helicopters Limited vs. M/s Maritime Energy Heli Air Services Pvt. Ltd.*** reported as 2017 SCC OnLine Del 8773;
 - d. ***Maya Devi vs. Lalta Prasad*** reported as 2015 (5) SCC 588; and
 - e. ***Dunlop Pneumatic Tyre Co. Ltd. vs. New Garage and Motor Co. Ltd.*** reported as (1915) Appeal Cases 79.
24. The next submission by the learned counsel, in the alternative to the submission that the amount mentioned in clause 6 is not penal, is that as per Section 74 read with Section 73 of the Contract Act, the

petitioner was entitled to a reasonable compensation not exceeding the amount provided in the lease deed and Rs. 75,000/- is a reasonable and fair amount as the market rate in the relevant period was much higher. Learned counsel submits that the petitioner in its application claiming mesne profits as well as in the affidavit of its witness, had clearly stated that Rs. 75,000/- per day was a fair and reasonable compensation as the market rate during the relevant period was in the range of Rs.190 to Rs. 276/- per sq. feet, per month, while at the rate of Rs. 75,000/- it only came out to about Rs. 133.85/- per sq. feet, per month and there was no rebuttal to this.

25. Learned counsel next contends that the petitioner in order to prove the market value of the premises had placed on record through the witnesses, two lease deeds of the premises in the same building on the 3rd and the 9th floor. He submits that there was no rebuttal to this evidence produced by the petitioner. Learned counsel submits that what the respondent had sought to produce were actually lease deeds of different buildings/premises in the same locality but not of the same building. Those premises were either smaller or were in the basement and were not comparable with the demised premises and thus those rates could not be considered for determining the mesne profits/damages. He submits that the Tribunal has erred in making an artificial distinction between premises in the same building and those 'similarly situated'. Thus, the submission of the learned counsel is that the award being contrary to the recitals in the lease deed as well as the law on liquidated damages and provisions of Section 28(3) of the

Act, deserves to be set aside, insofar as it partially allows the claim of the petitioner.

26. *Per contra* learned counsel for the respondent has submitted that major part of the award is in favour of the petitioner and therefore, in effect, the petitioner is seeking modification of the award which is impermissible in law. She relies on the judgement in the case of:

a. ***Puri Construction Pvt. Ltd. vs. Larsen & Toubro Ltd.*** reported as 2015 SCC OnLine Del 9126.

27. Learned counsel next contends that the Arbitral Tribunal has interpreted the terms of the lease deed in a particular manner and has arrived at a particular methodology to calculate the mesne profits/damages payable to the petitioner and it is not open for this Court in a judicial review to interfere with the interpretation of the Tribunal under Section 34 of the Act. Reliance is placed on the following judgments:

a. ***Associate Builders vs. Delhi Development Authority*** reported as 2015 (3) SCC 49;

b. ***McDermott International Inc. vs. Burn Standard Co. Ltd. & Ors.*** reported as 2006 (11) SCC 181;

c. ***Kailash Nath Associates vs. Delhi Development Authority & Anr.*** reported as 2015 (4) SCC 136;

d. ***Oil & Natural Gas Corporation Ltd. vs. Saw Pipelines Ltd.*** reported as 2003 (5) SCC 705; and

e. ***Monet Ispat and Energy Ltd. vs. M/s. Aneja Construction (India) Ltd.*** reported as 2017 SCC OnLine Del 7951.

28. Learned counsel further contends that Section 73 and Section 74 of the Contract Act have a different scope. If the sum mentioned in the contract is for a breach of contract and is fair and reasonable, it is a pre-estimated damage and is a reasonable compensation for a breach. It is in the nature of a liquidated damage, where no loss is required to be proved. However, if the amount payable is an exorbitant amount far beyond what the aggrieved party would be entitled for a breach, and is in the nature of enforcement or performance of a contract by the party, it is not in the nature of liquidated damage and such a penal amount cannot be awarded. Learned Counsel relies on the following judgments to support this contention:
- a. *Union of India vs. Raman Iron Foundry* reported as 1974 (2) SCC 231; and
 - b. *Fateh Chand vs. Balkishan Dass* reported as AIR 1963 SC 1405
29. Lastly learned counsel for the respondent has submitted that even on the question of the market rent during the period of 2007-2009, the lease deeds produced by the respondent were of the surrounding area and the market rent was far below than Rs.190 to Rs.276/- per sq. feet per month as claimed by the petitioner and was only in the range of Rs.70/- to Rs.77/- per sq. feet, per month.
30. She further submits that even if the petitioner has placed on record the lease deeds of the premises in the same building wherein 'the premises' were situated, it cannot be of any help to the petitioner as it is not necessary that all the premises in the same building would fetch the same rent. According to her, the rent would vary with the height at

which a floor is located, the extent of furnishing, the direction in which it faces, and the super area in question etc.

31. I have heard the learned counsels for the parties and examined the rival contentions.
32. There is no dispute between the parties that a lease deed was entered into between them on 20.12.2004 for a period of three years. Although initially the respondent had made attempts to seek a renewal of the lease but the respondent had categorically refused to renew the same. There is also no dispute between the parties that the lease expired on 30.09.2007 and that the respondent vacated the premises on 05.11.2009. In the interim majority award given by the Arbitral Tribunal on 31.05.2010, it had held that the term of the lease had expired on 30.09.2007 and that the same was never renewed for a period beyond 1.10.2007.
33. The said interim award was challenged in this Court by the respondent under Section 34 of the Act and the same was disposed of on 01.10.2010 giving liberty to the respondent to challenge the interim award at the appropriate stage along with the final award. When the proceedings started before the present Tribunal after the order of this Court, it was noted that only issue Nos. 5 and 7 as framed on 08.07.2009 were to be decided.
34. However, subsequently, as noted above, on 15.03.2011, fresh issues were framed on the application for mesne profits/damages and it was on these issues that the adjudication took place.
35. That the respondent was in unauthorized occupation of 'the premises' from 1.10.2007 to 5.11.2009 is not open to any debate at this stage.

The main controversy between the parties is with regard to the claim of mesne profits/damages and centres around the interpretation of recital no. 6 in the lease deed, which is extracted hereunder:

“6. In case the Lessee fails to handover vacant possession of the demised premises (including the car parking spaces) to the Lessor on the expiry of termination of the Lease Deed despite the Lessor being willing to refund the security deposit as provided in Clause 5.1 above, then without prejudice to the Lessor's right to take legal action, the Lessee shall pay a penal rent of Rs.75,000.00 (Seventy five thousand only) per day to the Lessor. Nothing in this clause shall apply if the Lessee has not returned the demised premises on account of non-refund of the security deposit by the Lessor.”

36. While the petitioner contends that the parties had agreed to a rent of Rs. 75,000/- to be paid by the lessee in case it failed to hand over the vacant possession, after the expiry of the lease period, learned counsel for the respondent contends that this was a ‘penal’ rent and could not be awarded and in any case, the petitioner had not been able to substantiate that the market rent of the said premises during the relevant period was much higher than this sum of Rs. 75,000/-, to enable the Tribunal to come to a conclusion that this was a reasonable pre-estimated damage agreed upon between the parties.
37. The Arbitral Tribunal was of the view that both the parties were taking an extreme view and that the evidence led by them failed to provide a sound and satisfactory basis to the Tribunal to arrive at a figure of rate of rent at which the subject premises could have been let out during the period of unauthorized occupation. The Tribunal also interpreted the recital in the lease deed and came to a finding that the rent at the

rate of Rs. 75,000/- per day mentioned in the said recital itself is referred to as a 'penal rent' in the recital and since the rate of rent at which the premises were let out was only Rs. 65/- per sq. feet per month, this amount being double, was actually exorbitant and hence 'penal'. Interpreting the clause, the Tribunal has further held that though the parties had agreed upon the said figure of Rs. 75,000/- yet a clause which is penal in nature can be refused to be enforced by a judicial or a quasi-judicial forum.

38. The Tribunal, thereafter, having interpreted recital no. 6 adopted a methodology to arrive at a figure which would provide a reasonable and fair compensation/damage to the petitioner. The Tribunal relied on clause 3 of the lease deed which provided for payment of rent with an escalation of 15% on the expiry of three years from 01.10.2004. Therefore, if the lease deed would have been renewed, the petitioner would have got an escalation of 15% only. However, the Arbitral Tribunal also took cognizance of the fact that if the premises had been vacated at the end of the expiry of the lease, the landlord would have inducted another tenant who would have paid a still higher rate of rent than a mere escalation of 15%. The Tribunal thus awarded an additional factor of 15% and thereby calculated the rate of compensation by taking Rs. 65/- per sq. feet per month escalated by 30%, which worked out to Rs. 84.50/- rounded upto Rs. 85/- per sq. feet per month. Thus, the Arbitral Tribunal has awarded to the petitioner Rs. 3,57,45,058/- @ Rs. 85/- per sq. feet per month towards damages by way of compensation for the entire period in which the respondent was in unauthorized occupation. A reading of the relevant

portion of the award shows that the Arbitral Tribunal has given an interpretation to recital no. 6 holding that the rent envisaged @ Rs. 75,000/- is penal. In my view, this Court cannot, in exercise of its power under Section 34 of the Act interfere with the interpretation of the terms of the contract, given by the Arbitral Tribunal.

39. The Apex Court in the case of *Associate Builder (Supra)* has reiterated the limitation on the powers of the Court in matter of interpretation of the contract in the following words:

“42. In the 1996 Act, this principle is substituted by the “patent illegality” principle which, in turn, contains three subheads:

XXXXXX

42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

“28. Rules applicable to substance of dispute.—

*(1)-(2) * * **

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

43. In McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co.

Ltd., (2006) 11 SCC 181] , this Court held as under: (SCC pp. 225-26, paras 112-13)

“112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. 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. [See Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission [(2003) 8 SCC 593 : 2003 Supp (4) SCR 561] and D.D. Sharma v. Union of India [(2004) 5 SCC 325] .]

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.”

44. *In MSK Projects (I) (JV) Ltd. v. State of Rajasthan [(2011) 10 SCC 573 : (2012) 3 SCC (Civ) 818] , the Court held: (SCC pp. 581-82, para 17)*

“17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined

within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. (See Gobardhan Das v. Lachhmi Ram [AIR 1954 SC 689] , Thawardas Pherumal v. Union of India [AIR 1955 SC 468] , Union of India v. Kishorilal Gupta & Bros. [AIR 1959 SC 1362] , Alopri Parshad & Sons Ltd. v. Union of India [AIR 1960 SC 588] , Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji [AIR 1965 SC 214] and Renuagar Power Co. Ltd. v. General Electric Co. [(1984) 4 SCC 679 : AIR 1985 SC 1156])”

45. *In Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [(2012) 5 SCC 306] , the Court held: (SCC pp. 320-21, paras 43-45)*

“43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in SAIL v. Gupta Brother Steel Tubes Ltd. [(2009) 10 SCC 63 : (2009) 4 SCC (Civ) 16] and which has been referred to above. Similar view has been taken later in Sumitomo Heavy Industries Ltd. v. ONGC Ltd. [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows: (Sumitomo case [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] , SCC p. 313)

'43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in Kwality Mfg. Corpn. v. Central Warehousing Corpn. [(2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding.'''

40. Thus, as per settled law, this Court cannot interfere in the interpretation of the word penal given by the Arbitrator which is a matter squarely in the domain of the Arbitral Tribunal as long as it is a reasonable construction and is based on the intent of the parties gathered from circumstances. Learned counsel for the petitioner has himself placed reliance on a judgment of the Apex Court in ***Bharat Sanchar Nigam Limited (Supra)*** in which the Apex Court was

examining the issue whether an amount incorporated in a contract payable by one party to the other at the time of breach is to be considered as a penalty or a pre-estimate of reasonable compensation for the loss. The Apex Court has in paragraph 47 extracted a portion from Chitty on contract as under:

“whether a provision is to be treated as a penalty is a matter of construction to be resolved by asking whether at the time the contract was entered into the predominant contractual function of the provision was to deter a party from breaking the contract or to compensate the innocent party for breach. The question to be always asked is whether the alleged penalty clause can pass muster as a genuine pre-estimate of loss.”

41. Further in para 48, an extract had been relied upon from the law of contract by G.H.Traitel which is extracted hereunder:

“a payment stipulated as in terrorem of the offending party to force him to perform the contract. If, on the other hand, the clause is an attempt to estimate in advance the loss which will result from the breach, it is a liquidated damages clause. The question whether a clause is penal or pre-estimate of damages depends on its construction and on the surrounding circumstances at the time of entering into the contract.”

42. A reading of the two paragraphs quoted above, clearly leads to a conclusion that the question whether a clause is penal or a pre-estimate damage would depend on its construction and the surrounding circumstances at the time of entering into the contract. Since this is a matter of construction, the Arbitral Tribunal has construed the nature of the recital and has come to a finding that the rate of rent agreed upon at the time of entering into the contract was

Rs. 65/- per sq. feet per month, and thus the amount of Rs. 75,000/- payable on breach was more than double the rate of rent payable and was thus in the nature of a penal rent and not a reasonable compensation. Thus, even otherwise going by the judgment relied upon by the counsel for the petitioner, the interpretation and finding of the Arbitral Tribunal is neither patently illegal nor perverse requiring interference by this Court.

43. I may also note here that the Apex Court has repeatedly held in various judgments that a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by it and not by way of penalty and that too the stipulated amount being the maximum limit. In this context, para 11 of the judgment in the case of **Raman Iron Foundry (Supra)** reported as 1974 (2) SCC 231 is extracted hereinunder:

“11. Having discussed the proper interpretation of clause 18, we may now turn to consider what is the real nature of the claim for recovery of which the appellant is seeking to appropriate the sums due to the respondent under other contracts. The claim is admittedly one for damages for breach of the contract between the parties. Now, it is true that the damages which are claimed are liquidated damages under Clause 14, but so far as the law in India is concerned, there is no qualitative difference in the nature of the claim whether it be for liquidated damages or for unliquidated damages. Section 74 of the Indian Contract Act eliminates the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the

parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty, and according to this principle, even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him, the stipulated amount being merely the outside limit.”

44. The Apex Court in the case of ***Fateh Chand*** (*supra*) held as under:

“8. ...Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty.

9. The second clause of the contract provides that if for any reason the vendee fails to get the sale-deed registered by the date stipulated, the amount of Rs 25,000 (Rs 1000 paid as earnest money and Rs 24,000 paid out of the price, on delivery of possession) shall stand forfeited and the agreement shall be deemed cancelled. The covenant for forfeiture of Rs 24,000 is manifestly a stipulation by way of penalty.

10. Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of

deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damage"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach."

45. Further in the case of ***Kailash Nath Associate (Supra)*** the Apex Court while examining the law on compensation for breach of contract under Section 74 of the Contract Act held as under:

"43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is

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

46. To the same extent are the observations of the Apex Court in para 46 of the judgment in the case of **Saw Pipes Ltd.(Supra)**, which are reproduced as under:

“46. From the aforesaid sections, it can be held that when a contract has been broken, 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. Further, in case where the court arrives at the conclusion that the term contemplating damages is by way of penalty, the court may grant reasonable compensation not exceeding the amount so named in the contract on proof of damages. However, when the terms of the contract are clear and unambiguous then its meaning is to be gathered only from the words used therein. In a case where agreement is executed by experts in the field, it would be difficult to hold that the intention of the parties was different from the language used therein. In such a case, it is for the party who contends that stipulated amount is not reasonable compensation, to prove the same.”

47. Traversing through the various judgments, the well settled law on the liquidated damages to put it pithily is that even if there is a stipulation in the nature of liquidated damages, a party complaining of breach of

contract can recover only reasonable compensation for the injury sustained by it, the stipulated amount being merely an outer limit. The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 of the Contract Act, only a reasonable compensation. It is also clear that if the liquidated sum mentioned in the contract appears to be in the nature of a penalty, the Courts cannot enforce the payment of the said amount.

48. While this Court cannot interfere with the interpretation of the terms of the contract between the parties given by the Arbitrator, but applying the law laid down by the Apex Court, even otherwise the sum of Rs. 75,000/- is in fact 'penal' in nature since this was more than double the rent at which the property was actually let out by the parties in 2004 and was thus correctly described as 'penal' by the parties.
49. Looked at from another angle, in my view, the Arbitral Tribunal has devised a methodology to grant a reasonable compensation to the petitioner and there is no patent illegality in the formula so adopted. The Apex Court in the case of *McDermott International Inc. (Supra)* has clearly held that the formula/methodology adopted by an Arbitral Tribunal is not in the domain of the courts to interfere with. The relevant paragraph is reproduced as under:

“104. It is not in dispute that MII had examined one Mr D.J. Parson to prove the said claim. The said witness calculated the increased overheads and loss of profit on the basis of the formula laid down in a manual published by the Mechanical Contractors Association of America entitled “Change Orders, Overtime, Productivity” commonly known as the Emden Formula. The said formula is said to be widely accepted in construction

contracts for computing increased overheads and loss of profit. Mr D.J. Parson is said to have brought out the additional project management cost at US\$ 1,109,500. We may at this juncture notice the different formulas applicable in this behalf.

(a) *Hudson Formula:* In Hudson's Building and Engineering Contracts, Hudson Formula is stated in the following terms:

$$\frac{\text{“Contract head office overhead and profit percentage”}}{\text{xxx}} \times \frac{\text{Contract sum}}{\text{xxx} \times \text{Contract period}} \times \frac{\text{Period of delay”}}{\text{xxx}}$$

(b) *Emden Formula:* In Emden's Building Contracts and Practice, the Emden Formula is stated in the following terms:

$$\frac{\text{“Head office overhead and profit”}}{100} \times \frac{\text{Contract sum}}{\text{Contract period}} \times \text{Period of delay”}$$

(c) *Eichleay Formula:* The Eichleay Formula was evolved in America and derives its name from a case heard by the Armed Services Board of Contract Appeals, Eichleay Corporation.

$$\frac{\text{xxx}}{\text{xxx}} \times \frac{\text{xxx}}{\text{xxx}} \times \text{xxx}$$

This formula is used where it is not possible to prove loss of opportunity and the claim is based on actual cost. It can be seen from the formula that the total head office overhead during the contract period is first determined by comparing the value of work carried out in the contract period for the project with the value of work carried out by the contractor as a whole for the contract period. A share of head office overheads for the contractor is allocated in the same ratio and expressed as a lump sum to the particular contract. The amount of head office overhead allocated to the particular contract

is then expressed as a weekly amount by dividing it by the contract period. The period of delay is then multiplied by the weekly amount to give the total sum claimed. The Eichleay Formula is regarded by the Federal Circuit Courts of America as the exclusive means for compensating a contractor for overhead expenses.

105. *Before us several American decisions have been referred to by Mr Dipankar Gupta in aid of his submission that the Emden Formula has since been widely accepted by the American courts being *Nicon Inc. v. United States* [Decided on 10-6-2003 (USCA Fed Cir), 331 F. 3d 878 (Fed. Cir. 2003)] , *Gladwynne Construction Co. v. Mayor and City Council of Baltimore* [Decided on 25-9-2002, 807 A. 2d 1141 (2002) : 147 Md. App. 149] and *Charles G. William Construction Inc. v. White* [271 F 3d 1055 (Fed. Cir. 2001)] .*

106. *We do not intend to delve deep into the matter as it is an accepted position that different formulae can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the arbitrator.”*

50. In view of the above, I find no merit in the present petition filed by the petitioner and the same is accordingly dismissed.

JYOTI SINGH, J

SEPTEMBER 23rd , 2019

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