

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

FAO-2731-2020(O&M)
Date of Decision: 10.10.2022

**M/s. Amar Chand Sharma Engineers and Contractors and
another** Appellant(s)
Versus

**The Registrar Cooperative Societies Punjab, Chandigarh and
another** Respondent(s)

CORAM:- HON'BLE MRS. JUSTICE LISA GILL

Present: Mr.Naresh Markanda, Senior Advocate with
Mr.Rohan Markanda, Advocate
for the appellant.

Mr. R.K. Sharma, Advocate
for respondent no.2.

LISA GILL, J.

Appellant-Contractor has filed this appeal challenging order dated 13.03.2020, passed by learned Additional District Judge, Chandigarh whereby objections under Section 34 of the Arbitration and Conciliation Act, 1996 (for short the Arbitration Act) preferred by it have been dismissed. Appellant also seeks setting aside of the Arbitral award dated 07.04.2006, passed by the Arbitrator.

Brief facts necessary for adjudication of the matter are that agreement dated 04.07.1995 was entered into between the parties for construction of a building for the bank at Sector 34, Chandigarh at an approved value of Rs.4,20,59,151/-, with the work to be completed within 24 months. According to the agreement, contract work was to start from 07.07.1995. As per the claimant-

bank, the contractor-appellant could not complete the work within the stipulated period, on which time limit for completion of constitution was extended up to 14.10.1997, thereafter to 31.12.1997 and finally up to 31.10.1998. However, work was not completed even during the extended period. Executive Engineer/Incharge of the construction work of the bank vide registered letter dated 15.07.1999 levied 10% penalty of the total estimated cost of the work i.e. Rs.42,00,000/- under Clause 27 of Agreement and asked the contractor to resume work within 10 days, failing which action under clause 31 of the contract agreement it is stated would be taken. Thereafter, letter dated 28.07.1999 was issued noting that though work has been resumed but the progress is very slow and that the work should be completed at the earliest. When the work was still not completed, letter dated 25.09.1999 was issued by the claimant-bank mentioning in detail the communications to the respondent-contractor and the factum of the work not being completed within the stipulated period. Accordingly, action under clause 31(b) and (c) of the contract agreement for execution and completion of the balance work either departmentally or through other agency after re-allotment of the work, it is stated was taken.

As per said clause excess amount incurred over and above the rates as per terms and conditions of the agreement are recoverable from the contractor.

Subsequent to issuance of letter dated 25.09.1999, the contractor i.e. the present appellant filed an appeal seeking waiver of penalty imposed vide memo dated 15.07.1999, which was

disposed of on 06.03.2000 by the Registrar Cooperative Society, Punjab while observing as under:-

“I tend to agree with the contention of the Bank that in a job of this magnitude, the contractor should have envisaged some difficulties and delays. The Bank has been extremely liberal with him by allowing repeated extensions and opportunities to complete the work. The applicant has not admitted any delay on his part, whereas the Bank has admitted delay of 241 days against which it has allowed extension of 693 days, which I feel are sufficient to enable the applicant to complete the work, despite difficulties. Even after imposing the penalty of Rs.42.00 lakh on 15.7.1999 which the Bank is entitled to as per clause 27 of the agreement of 4.7.1995, the Bank provided him sufficient opportunity to complete the work. It has been admitted by the applicant that he has done work of more than Rs.9.00 lakh after 15.7.1999, but the work is still not complete. In these circumstances, I find no merit in the contention of the applicant that he has been penalized for delay in completion of work which is not his creation. He has not been able to mobilize enough resources to complete the work and as a result, the building is still incomplete. Thus, the penalty of Rs. 42.00 lakh by the Bank vide its letter No.Tech Cell/6645 dated 15.7.1999 as per clause 27 has been rightly imposed and therefore the prayer of applicant to waive of the penalty is rejected being without merit.”

The bank was held entitled to impose 10% amount of the established cost but in case any amount of the contractor was being retained beyond provisions of Agreement, the contractor would be entitled to receive such amount. In respect to non-scheduled items it was held that as per Clause 17 of the agreement, it was incumbent upon the contractor to undertake such other works

as may be necessary. The bank and the applicant, it was ordered, would settle the rates thereof and determine final payment and in case payments retained by the bank are over and above the penalty that can be levied on the total amount that can be retained by the Bank, the same also need to be settled. Application of the contractor was thus disposed of accordingly.

In the meantime, after termination of the contract by the claimant-bank on 25.09.1999 the bank allotted the work to other entities for completion of the balance work and claimed that amount of Rs.2,67,233/- and Rs.2,65,799/- was incurred for completion of the balance work left out from being done by the contractor.

A civil suit seeking declaration was filed by the contractor pursuant to passing of order dated 06.03.2000. The bank filed an application under Section 8 of the Arbitration and Conciliation Act, 1996. Learned trial Court directed the parties to approach the Arbitrator - Mr. C.M. Sharma, Punjab, Chandigarh in accordance with the agreement with the bank. Application for rectification of said order dated 08.05.2001, passed by the learned trial Court was moved by the bank pointing out that the name of Mr. C.M. Sharma was a typographical mistake as it is the Registrar Cooperative Society, who was the Arbitrator in terms of the contract agreement. This application was allowed by the learned trial Court on 04.04.2000. Same was challenged by the contractor vide Civil Revision No.3052 of 2003, which was dismissed by this High Court on 28.07.2003 holding that there is no illegality in the order of learned trial Court holding the arbitration to be before the Registrar Cooperative Societies. This order was admittedly upheld by the

Hon'ble Supreme Court in SLP No.1959/2004, filed by the contractor.

Accordingly, proceedings before the Arbitrator i.e. the Registrar Cooperative Societies were carried on and concluded. Learned Arbitrator concluded that penalty of 10% had been correctly imposed by the bank as sufficient time had been afforded to the contractor to complete the work. In spite of extension of over a year and quarter the contractor, it was concluded, failed to finish the work and furthermore there was nothing on record to indicate that the bank was responsible for the delay. The bank it was held, had established that penalty of Rs.42,00,000/-, which was imposed as a last resort after due consideration was valid and within the ambit of agreement between the parties. The amount of Rs.2,65,799/- raised by the bank on account of bills paid for removal of defects was found to be valid but claim of Rs.2,67,733/- on account of completion of balance work was not awarded to the bank. It was noted that as per the bank itself a sum of Rs.31,33,192/- was payable to the contractor, therefore, said amount was to be deducted from the amount sought to be recovered by the bank. The Arbitrator thus awarded sum of Rs.13,32,607/- with interest @ 15% per annum from 25.09.1999 till the date of arbitral award i.e. 14.03.2003 and thereafter as per the Act with the details as under:-

Amount of penalty imposed on respondent Rs.42,00,000/-
Contractor:

Amount of work done at the cost of Contractor:

- i) On account of removal of defects by M/s Soni Rs.2,65,799/-
Construction:
Sub Total Rs.44,65,799/-

Less amount lying with the Bank: Rs.31,33,192/-

Total Rs.13,32,607/-

Objections filed by the contractor under Section 34 of the Arbitration Act were dismissed by the learned Additional District Judge, Chandigarh vide impugned order dated 13.03.2020 finding no merit therein. Aggrieved therefrom present appeal has been filed.

Learned counsel for the appellant raised various arguments but was unable to deny that keeping in view order dated 13.08.2020, passed in this appeal, it is only one question which would remain alive for consideration i.e. whether the bank was liable to prove actual damages, if any, even in the face of a specific clause for liquidated damages in the agreement, in view of the judgment of the Hon'ble Supreme Court in ***Kailash Nath Associates Vs. Delhi Development Authority and another, 2015(4), SCC 136.*** It was argued that the award suffers from a patent illegality on this account and thus should be set aside.

Learned counsel for respondent no.2 refuted the argument/s raised on behalf of the appellants and sought dismissal of this appeal.

At this stage it is relevant to refer to order dated 13.08.2020, passed by the co-ordinate Bench, which reads as under:-

“Challenge in the present appeal has been directed against order dated 13.03.2020 passed by the Additional District Judge, Chandigarh whereby objections filed under Section 34 of the Arbitration and Conciliation Act, 1996 (in short 'the Act') against award dated 07.04.2006 (Annexure A1) passed by the

Registrar, Cooperative Societies, Punjab (Sole Arbitrator) have been dismissed and award has been upheld.

Counsel for the appellants has assailed the impugned order primarily on two counts. It has been argued that as per the agreement dated 04.07.1995 entered between the parties for construction of bank building in Sector 34, Chandigarh at an approved value of Rs.4,20,59,151/-, the work was to be completed within 24 months. The time limit for completion of work was extended upto 14.10.1997 and then to 31.12.1997 and finally upto 31.10.1998. It is argued that as the last extension for completion of work expired on 31.10.1998, order imposing penalty of Rs.42 lakhs under Clause 27 of the agreement vide registered letter dated 15.07.1999 cannot be allowed to sustain. For this purpose, reliance has been placed upon judgment of Hon'ble the Supreme Court JG Engineers Private Ltd. Vs. Union of India and anr., 2011(5) SCC 758.

The second submission made by counsel for the appellants is that even if there was agreement for payment of liquidated damages (Clause 27), respondent No.2 i.e. the Punjab State Cooperative Bank Ltd. (hereinafter referred to as 'the bank') has to prove actual damages, if any, suffered by the bank on account of delay in execution of work by the appellants. In support of his contention, he has relied upon judgment of Hon'ble the Supreme Court KailashNath Associates Vs. Delhi Development Authority and anr., 2015(4) SCC 136.

Indisputably, delay in execution of the work has been attributed to the appellants. Counsel for the appellants is fair enough to concede that the said factual finding is not amenable to challenge in appeal

as the appeal can be entertained only on legal questions.

Counsel for the appellants has not challenged correctness of findings of the Arbitrator with regard to various dates, relevant in the present context. The extended period was from earlier date of finishing the contract which is 05.07.1997 upto 31.10.1998. In spite of extension of over a year and quarter, the contractor failed to finish the work contracted for. It took another 8½ months before letter dated 15.07.1999 was issued to the contractor by the bank imposing 10% penalty of the estimated cost amounting to Rs.42 lakhs. In spite of invoking penalty clause, the bank vide letter dated 28.07.1999 still asked the contractor to complete the work and also issued him a notice as per Clause 31 of the agreement. Getting no response even after 2 months of issuance of this letter, in spite of a proper notice of 25.09.1999, the bank finally determined that the contractor was not willing to complete the work and hence, invoked Clause 31(i)(b)&(c) cancelling the contract and undertaking to get it completed from other agencies.

In JG Engineers Private Ltd.'s case (supra), Hon'ble the Supreme Court, in para 30 of the judgment has held, quoted thus:-

As noticed above, the stipulated date for completion was 9.1.1995. The respondents granted the first extension upto 31.7.1995 without levy of liquidated damages, vide letter dated 24.8.1995. In fact the respondent had paid the escalation in prices under clause 10(cc) upto June 1995. The contractor was however permitted to continue the work without levy of any liquidated damages, until termination on 14.3.1996. It was only on 30.9.1999 after the contractor had submitted its statement of claim

on 17.4.1997, the respondents chose to levy liquidated damages for the period 10.01.1995 to 14.3.1996. In view of the finding of the Arbitrator that the contractor was not responsible for the delay, the contractor was entitled to second extension from 1.8.1995 also without levy of penalty. In fact, having extended the time till 31.7.1995 without any levy of liquidated damages, the respondents could not have retrospectively levied liquidated damages on 30.9.1999 from 10.1.1995. Be that as it may.

When the facts of the referred authority are compared with the aforesaid facts noticed in the award of the Arbitrator, the appellants cannot derive any advantage to their contention from what has been held in para 30 quoted hereinbefore. In the referred case, the appellant was not held responsible for delay. On the contrary, the respondent had paid the escalation in price under Clause 10(cc) upto June, 1995. The contractor was permitted to continue the work without levying any liquidated damages until termination on 14.03.1996. It was only on 30.09.1999, the respondents chose to levy liquidated damages for the period 10.01.1995 to 14.03.1996. In the given circumstances, it was held that having extended time till 31.07.1995 without levy of liquidated damages, the respondents could not have retrospectively levied liquidated damages on 30.09.1999 from 10.01.1995. Counsel for the appellants has failed to draw similarity between facts of the case of referred authority vis-a-vis facts of the case in hand to convince this Court that the judgment passed in JG Engineers Private Ltd.'s case (supra) has bearing thereon. **In this view of the matter, first contention raised by the appellants is**

fallacious and accordingly rejected. (emphasis added)

In order to appreciate second contention in the light of para 43.6 of the judgment in Kailash Nath Associates's case (supra), it is necessary to go through the original records to find out if the appellants raised a factual dispute before the Arbitrator and later the Court that the respondent is required to prove actual damage or loss and it is possible for the respondent to prove the same.

Let original records of Arbitration case No.483 of 2013 be sent for.

Be listed on 06.10.2020.”

Perusal of the file reveals that notice of motion was issued by another co-ordinate bench on 07.01.2021 while noting the contention of learned Senior Counsel for the appellants that even though, there was a clause regarding liquidated damages in the contract the respondents were bound to prove the actual loss suffered on account of delay and that this matter has been ignored by the learned Court/the Arbitrator.

It is pertinent to note that the scope of interference in a petition under Section 37 of the Arbitration Act is limited. Admittedly, an award can be set aside under Sections 34/37 of the Arbitration Act on the limited grounds as are provided in the Act. Section 34(1), (2) and (2A) of the Arbitration Act read as under:-

“34 Application for setting aside arbitral award. —

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or”

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

[Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

- (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
- (ii) it is in contravention with the fundamental policy of Indian law; or
- (iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]

It is specifically provided in Explanation 2 of Section 34(2) of the Arbitration Act, that the test as to whether there is contravention of fundamental policy of Indian law shall not entail a review on the merits of the dispute. In this regard reference can be made to a recent judgment of the Hon'ble Supreme Court in *Haryana Tourism Limited Vs. M/s Kandhari Beverages Ltd., 2022(3) SCC 237*.

The Hon'ble Supreme Court in State of *Chhatisgarh and another Vs. M/s. Sal Udyog Private Limited, 2021 AIR (SC) 5503* has observed that the law on interference in matters of Awards

under the Arbitration Act has been circumscribed with the object of minimizing interference by courts in arbitration matters. While observing that an award may be set aside on the ground of “patent illegality”, it was held as under:-

“What would constitute "patent illegality" has been elaborated in **Associate Builders v. Delhi Development Authority**, [2015] 3 SCC 49, where "patent illegality" that broadly falls under the head of "Public Policy", has been divided into three sub-heads in the following words:-

"...42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads: 42.1. (a) A contravention of the substantive law of India would result in the death knell of an Arbitral Award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:

"28. Rules applicable to substance of dispute. - (1) Where the place of arbitration is situated in India- (a) In an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;" 42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality - for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside. 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." (emphasis added)

Reference has been made in the abovesaid case to the earlier decision of the Hon’ble Supreme Court in *Ssangyong Engineering and Construction Company Ltd. Vs. National Highways Authority of India (NHAI)*, [2019] 15 SCC 131 as under:-

“14. In *Ssangyong Engineering and Construction Company Ltd. Vs. National Highways Authority of India (NHAI)*, [2019] 15 SCC 131, speaking for the Bench, Justice R.F. Nariman has spelt out the contours of the limited scope of judicial interference in reviewing the Arbitral Awards under the 1996 Act and observed thus:

xx xx xx xx xx

36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of *Associate Builders v. DDA* (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204), or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of *Associate Builders v. DDA* (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204]. Explanation 2 to Section

34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 (2014) 5 SCC (Civ) 12], as understood in Associate Builders [Associate Builders v. DDA (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204], and paras 28 and 29 in particular, is now done away with.

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. **Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality. (emphasis added)**

38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA(2015) 3 SCC 49: (2015) 2 SCC (Civ) 204], namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an Arbitral Award. Para 42.2 of Associate Builders [Associate

Builders v. DDA (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204), however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

It is further observed by the Hon'ble Supreme Court in para 15 of the judgment of *M/s. Sal Udyog Private Limited (supra)*, as under:-

“15. In Delhi Airport Metro Express Pvt. Ltd. (supra) referring to the facets of patent illegality, this Court has held as under:

"26. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression patent illegality'. Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression patent illegality'. What is prohibited is for courts to re-appreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as courts do not sit in appeal against the Arbitral Award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or

interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An Arbitral Award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression patent illegality."

It has also been held by the Hon'ble Supreme Court in ***NTPC Ltd. Vs. M/s. Deconar Services Pvt. Ltd., 2021 AIR (Supreme Court) 2588*** that to merely show existence of another reasonable interpretation or view on the basis of material on the record is not sufficient to allow for interference.

In context of the present matter, it is relevant to refer to Clause 27 of the Agreement, which is reproduced as here under:-

27. LIQUIDATED DAMAGES :

The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be reckoned from the 10th date on which the order to commence work is given to the contractor. The work shall throughout the stipulated period of the contract be proceeded with all due diligence (time being deemed to be of the essence of the contraction the part of the contractor) and the contractor shall pay as compensation and amount equal to one percent, or which the Ex. Engineer/EIC may levy on the

amount of the estimated cost of the whole work as shown for every day that the work remains uncommenced or unfinished after the proper dates and further, to ensure good progress during the execution of the work, the contractor shall be bound in all cases in which the time allowed for any work exceeds one month, to complete one fourth of the whole of the work before one fourth of the whole time allowed under the contract has elapsed, one half of the work before one half of such time has elapsed, and three-fourths of the work before three-fourth of such time has elapsed, in the event of the contractor failing to comply with this condition he shall be liable to pay as compensation an amount equal to one percent or which the Ex-Engineer may levy on the said estimated cost of the whole work for every day that the due quantity or work remains incomplete. Provided always that the entire amount of compensation to be paid under the provisions of this clause will not exceed ten percent on the estimated cost of work as shown in the tender. The RCS may on representation from a contractor reduce the amount of compensation and his decision in writing shall be final.”

Clause 30 provides for termination of the contract and Clause 31 enables the Bank to have the incomplete work concluded through another agency and recover the expense thereof from the contractor.

In the present case indisputably the appellant has not raised the question of the respondent being obligated to have proved actual damage either before the Arbitrator or before the learned Additional District Judge, Chandigarh. Record has been perused with the assistance of learned Senior counsel for the appellants, who is unable to point out such a plea having been raised. Be that as it may, reliance by learned counsel on the decision of Hon’ble

Supreme Court in ***Kailash Nath's*** case (supra) is of no avail to the appellants. It is to be noted that Hon'ble Supreme Court in Kailash Nath's case was considering the matter of forfeiture of earnest money deposited by the auction purchaser when there was no breach of contract or loss caused to DDA. It is in this respect that it was observed by the Hon'ble Supreme Court as under:-

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.

Learned senior counsel for the appellants had argued that at best the loss suffered by the bank could be the rent for that period which the bank would have had to pay for the extended period i.e. for the period during which the building in question was not erected in Sector 34, Chandigarh. It is to be noticed that there is nothing on record to indicate that rent of the entire building of the dimensions as are specified, in Sector 34, Chandigarh, for the period in question would in any case be less than the liquidated amount, neither was learned counsel for the appellants able to assert so. Plea that such factual aspect would have been addressed by the appellants and be subject to adjudication only if the Bank had tried to prove 'reasonable compensation' and that the impugned award should be set aside, at best with liberty to the Bank to agitate for reasonable compensation is meritless in the given factual matrix. Judgment of the Hon'ble Supreme Court in ***Kailash Nath's*** case (supra) is not applicable in the facts and circumstances of this case.

In the given facts and circumstances, it cannot be said that the Arbitrator has construed the contract in a manner which no fair minded or reasonable person would. It cannot be said that there is any patent illegality appearing on the face of the Award, which goes to the root of the matter.

Learned Senior counsel for the appellant is unable to point out any ground whatsoever, which calls for interference by this Court for setting aside order dated 13.03.2020, passed by

learned Additional District Judge, Chandigarh and the Arbitral award dated 07.04.2006, passed by the Arbitrator.

No other argument was addressed.

Appeal is accordingly dismissed with no order as to costs. Pending applications, if any, are disposed of accordingly.

(LISA GILL)
JUDGE

10.10.2022

Sunil

Whether speaking/reasoned: Yes/No
Whether reportable: Yes/No