

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION NO. 750 OF 2024

WITH

INTERIM APPLICATION NO. 3887 OF 2024

SECURITRANS INDIA PRIVATE LIMITED

...*Petitioner*: *Versus* :FIS PAYMENT SOLUTIONS AND
SERVICES PRIVATE LIMITED...*Respondent*

Mr. Sharan Jagtiani, Senior Advocate with Ms. Samridhi Lodha, Mr. Tushad Kakalia with Mr. Hormuz Mehta, Mr. Ahsan Allana & Ms. Avantika Kadapatti i/b M/s. J. Sagar Associates, for Petitioner.

Mr. Soli Cooper, Senior Advocate with Mr. Yohann Cooper, Mr. Raghav Seth & Ms. Chandini Sahni i/b M/s. AZB & Partners, for Respondent.

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CORAM : SANDEEP V. MARNE, J.

Reserved on : 10 December 2025.

Pronounced On: 23 December 2025.

JUDGMENT:-

1) By this Petition filed under the provisions of Section 34 of the Arbitration and Conciliation Act, 1996, (**Arbitration Act**) Award of the learned Sole Arbitrator dated 3 May 2023 is sought to be

invalidated. By the impugned Award, the Arbitral Tribunal has awarded sum of Rs. 25,05,79,968/- together with interest @ 18% p.a. upto 16 April 2016 in favour of the Petitioner. The Tribunal has also awarded sum of Rs. 23,26,05,022/- in favour of the Respondent. Petitioner is aggrieved by award of claim of Respondent in the sum of Rs. 23,26,05,022/- and has filed the present Petition.

Facts

2) Petitioner-Securitrans India Pvt. Ltd, **(SIPL)** is an incorporated entity engaged in the business of providing ATM cash replenishment services, cash delivery and pick up services and cash management and consultancy services. Respondent- FIS Payment Solutions and Services Pvt. Ltd. **(FIS)** is also an incorporated entity engaged in the business of providing financial technology solutions including ATM management services and ATM software services to retail and institutional banking industry.

3) Respondent, being a provider of financial technological solutions including ATM management services and ATM software services, entered into independent agreements with its customers which includes banks and financial institutions. Certain portion of services which were supposed to be provided by Respondent to the banks and financial institutions is sub-contracted. Petitioner being service provider of ATM cash replenishment services was outsourced part of contracts entered into between Respondent and Banks, namely the part relating to cash withdrawal and replenishment services to ATM centers serviced by the Respondent. Accordingly, Petitioner and Respondent entered into an Agreement on 16 August 2010, under which Petitioner agreed to provide cash

withdrawal and cash replenishment services to the Respondent. The tenure of the Agreement was renewed from time to time and the same expired on 31 December 2014. On 4 June 2015, Petitioner and Respondent entered into a fresh agreement, under which again the Petitioner agreed to provide cash withdrawal and replenishment services to the ATM centers serviced by the Respondent. The detailed scope of services was set out in Schedule-A to both the agreements. The ATM centers at which services were to be provided were listed at Schedule-C. The agreement came into effect from 1 January 2015 and was to remain valid for initial period of 13 months with automatic renewal upto 21 January 2018. According to the Petitioner, it rendered services under the 2015 Agreement and raised several invoices since January 2015. However, Respondent failed and neglected to honour those invoices and the monies remained unpaid. According to the Petitioner, the total amount of unpaid invoices was Rs. 25,05,79,968/- with further interest payable thereon.

4) On 3 November 2015, representative of Respondent orally informed the Petitioner that it had received a loading difference of Rs. 16,12,50,000/- from Bank of India (BOI) for certain ATMs. On 4 November 2015, Respondent sent an email to the Petitioner stating that the loading difference of Rs. 16,12,50,000/- from BOI was in respect of the ATMs at Chauparan and Barhi. Petitioner was subsequently informed that similar shortage had been detected in respect of ATMs located at Jhumritelaiya. On 5 November 2015, Respondent sent email to the Petitioner providing details of purported loading difference. On 8 November 2015, the Petitioner sent 'incident report' to the police at Jhumritelaiya in respect of its two of its custodians- Bikas Kumar and Rajesh Kumar

Pilania, alleging that they had escaped with keys of ATM, all financial documents, cash balance reports (CBRs) etc. Petitioner also reported about loading difference communicated to it by Respondent/BOI. On 9 November 2015, a meeting was held between the representatives of the Petitioner, Respondent and BOI to discuss the allege cash shortage incidents. On the same day, Petitioner sent email to the Respondent stating that the documents requested by the Petitioner were not made available by the Respondent or by the Bank. Respondent responded by email on the same day stating that partial information requisitioned by the Petitioner was attached and that soft copies of the reports were shared with Bank on regular basis. Respondent accused Petitioner of not submitting hard copies of the reports. Respondent promised to share partial withdrawal slips and indents provided by the BOI with the Petitioner. On 10 November 2015, Petitioner sent email stating that partial withdrawal slips shared by the Respondent were insufficient for discerning the losses. On 11 November 2015, parties met again to arrive at amicable resolution of the issue. On 12 November 2015, Petitioner prepared an audit report for ATMs situated at Banjhedih (Jhumritelaiya) which was inspected in presence of the Respondent and the inspection revealed loading difference of Rs. 6,56,000/-. Similar, audit report was prepared in respect of ATMs situated at Barhi showing loading difference of Rs. 11,89,400/-.

5) Parties thereafter exchanged certain correspondence and met once again on 27 November 2015. Petitioner lodged complaint with the Police Station on 1 December 2015 against Bikash Kumar and Rajesh Kumar Pilaniay alleging theft of Rs.6,56,600/-and Rs.11,89,400/- and Rs.16,14,500/-. Petitioner also lodged FIR with Jhumritelaiya, Barhi and Chauparan Police

Stations. Thereafter, parties again met each other in an effort to settle the matter. Respondent sent to the Petitioner an updated reconciliation of Jhumritelaiya cash difference on 22 December 2015. In January 2016, Respondent submitted details of ATM cash loading discrepancies identified at Barhi Branch. On 19 January 2016, Respondent forwarded to the Petitioners scanned copies of cash withdrawal vouchers of BOI relating to Jhumritelaiya ATMs. On 30 January 2016, Petitioner sent an email to the Respondent summarizing the outstanding ATM cash discrepancies. After some correspondence, Petitioner addressed email to the Respondent on 9 February 2016 stating that it had verified and submitted details and had understood that there was difference of Rs.16,17,53,900/- across several debts at BOI-Barhi and Chauparan feeder branch linked ATMs.

6) On 24 February 2016, Petitioner requested the Respondent to release its payments. On 26 February 2016, Respondent sent email to the Petitioner accusing the Petitioner of not taking steps for recovery of the lost money stolen by its employees and that BOI had withheld Respondent's payments. Respondent called upon the Petitioner to repay the lost amount upon which its payments would be released. Petitioner responded on 27 February 2016 questioning the Respondent in respect of the blame put on the Petitioner. On 29 February 2016, Respondent invited attention of the Petitioner to contractual stipulations to indemnify Respondent in respect of the losses caused by its custodians. In March 2016, Respondent compiled ATM-wise reconciliation statement setting out the amount of misappropriated cash totaling approximately Rs.23.26 crores. On 5 March 2016, Respondent addressed email to BOI for release of amount of Rs.7.5 crores to

which BOI responded on 5 March 2016 releasing ad-hoc amount of Rs.7.5 crores and adjusting amount of Rs.15,89,50,000/- towards Barhi Branch and Rs.7,36,55,022/- for Jhumritelaiya Branch totaling to Rs.23,26,05,022/-. On 25 May 2016, BOI informed the Respondent that Rs.15.89 crores was appropriated by it towards recovery of cash loss at Barhi Branch and Rs.7.36 crores was withheld in sundry account for appropriation of cash loss of Jhumritelaiya branch.

7) On 17 January 2017, Petitioner addressed notice to the Respondent calling it upon to pay Rs.14.54 crores along-with interest towards services rendered by the Petitioner under 2015 Agreement upto to October 2016. On 31 May 2017, Petitioner invoked arbitration clause under 2015 Agreement and nominated a sole Arbitrator. On 23 June 2017, Respondent's advocate objected to invocation of arbitration stating that in case of disagreement, panel of three Arbitrators was to be appointed. Respondent suggested names of two Arbitrators. Respondent also independently invoked arbitration, both under 2010 and 2015 Agreements in respect of the amounts claimed by it from the Petitioner and requested for nomination of common Arbitrator to resolve both the disputes. Petitioner responded on 15 September 2017 disputing Respondent's claim and set off and contended that 2010 Agreement and 2015 Agreement were separate and disputes arising therefrom could not be adjudicated by common arbitrator. In the above background, Respondent filed application under Section 11 of the Arbitration Act seeking reference of disputes under the 2010 and 2015 Agreements. Petitioner filed Petition under Section 9 of the Arbitration Act seeking interim measures. On 9 December 2019, both the Petitions filed under Sections 9 and 11 of the Arbitration Act were disposed of

in terms of consent minutes of the order under which the sole Arbitrator was appointed to adjudicate upon disputes arising out of 2010 and 2015 Agreements.

8) It appears that on 30 January 2018 the Petitioner had already filed Statement of Claim for recovery of dues and other reliefs under the 2015 Agreement, which was lodged before the panel of three Arbitrators in which Respondent had filed Statement of Defence and Counterclaim. After nomination of the learned sole Arbitrator, Respondent filed Statement of Claim for second reference under 2010 agreement to which Petitioner filed Statement of Defense. Petitioner also filed application under Section 16 of the Arbitration Act challenging jurisdiction of the learned sole Arbitrator and arbitrability of certain claims filed by the Respondent. By order dated 17 December 2020, the learned Arbitrator dismissed the Application under Section 16 of the Arbitration Act.

9) Parties led evidence in support of their respective claims. The learned sole Arbitrators passed a common arbitral award in both the References. In the first Reference, Petitioner -SIPL is awarded Rs.25,05,79,968/- being the amount due to it towards services provided under the Agreement along with interest @ 18% p.a. from respective invoice of the due dates upto 16 April 2016. In the second Reference, Respondent-FIS is awarded Rs.23,26,05,022/- along with interest of Rs.1,01,85,645/- subject to adjustment. The Award records that Respondent had earlier paid ad-hoc sum of Rs.2 crores on 17 April 2017 to the Petitioner and therefore the learned Arbitrator has directed that Petitioner could adjust interest on this sum from 17 April 2017 and also credit Rs.35,000/- towards

invoices. Similar amount of Rs.1,01,85,645/- is awarded in favour of the Respondent in the Counterclaim and it is clarified that Respondent would be entitled to claim the said amount either in the Second Reference or in the First Reference and not in both. Aggrieved by the Award dated 3 May 2023, the Petitioner has filed the present Petition under Section 34 of the Arbitration Act. By order dated 9 October 2024, this Court condoned the delay in filing the Arbitration Petition upon imposition of costs. The Arbitration Petition is taken up for final hearing and disposal.

SUBMISSIONS :

10) The learned Senior Advocates appearing for the rival parties have canvassed elaborate submissions in support of their respective cases, which are captured as under:

SUBMISSIONS ON BEHALF OF PETITIONER

11) Mr. Sharan Jagtiani the learned Senior Advocate appearing on behalf of the Petitioner has raised two broad objections for invalidation of the arbitral Award viz. (i) patent illegality in final conclusions on Issue Nos. 9, 10 and 11 wherein the learned Arbitrator has ignored the contractual clauses providing for adoption of mitigating measures, (ii) patent illegality in learned Arbitrator's conclusion on Issue No.7 wherein the learned Arbitrator has held Petitioner employees guilty of theft and has accordingly fastened the liability in respect of entire amount of Rs. 23,26,05,022/- on the Petitioner.

12) So far as the first ground relating to mitigation measures is concerned, Mr. Jagtiani would submit that the findings and conclusions of the learned Arbitrator on Issue Nos.9, 10 and 11 are patently illegal due to his construing the contract in a way, no fair and reasonable minded person would. That the findings are in direct contravention of contractual clauses pertaining to reconciliation of information between the Petitioner and Respondent. That the findings and conclusions are also perverse on account of being rendered in absence of evidence. According to Mr. Jagtiani, Petitioner had based its case on Respondent and BOI failing to perform their obligations to conduct reconciliation of cash on daily basis. Schedule-A of 2015 Agreement which provided for reconciliation of reports/statements to be followed by BOI on day-to-day basis for services provided by the Petitioner. That Petitioner was required to submit Cash Replenishment Reports/Cash Balance Reports (**CBR**), Cash Conciliation and Replenishment Report (**C3R**) and Vault Cash Balance Report (**VCB**) report to Respondent on the next working day basis. That 2015 Agreement expressly provided for conciliation of reports/statements to be followed by BOI on day-to-day basis for services provided by the Petitioner, whereas the 2010 Agreement required FIS to conduct reconciliation to facilitate the reconciliation by the bank. That both the Agreements contemplated some form of reconciliation by Respondent-Bank. That the Arbitral Award totally ignores these contractual clauses in Schedule-A of 2010 and 2015 Agreements while rendering the impugned Award.

13) Mr. Jagtiani would further submit that the impugned Award dealt with the matter of reconciliation in a totally perfunctory manner by conducting inquiry as to whether fraud

could have been discovered by the Respondent from the information provided to it by the Petitioner. That the Award makes no attempt to enquire whether Respondent ever conducted any reconciliation with the bank and whether detection of fraud could have been possible by conduct of such reconciliation between Respondent and the Bank. That the learned Arbitrator ignored that Respondent was bound to conduct reconciliation based not only on the reports/statements provided by the Petitioner but also a separate reconciliation was required to be made with records available with BOI. That the learned Arbitrator ignored the position that Respondent had contractual relationship with BOI and it alone was in a position to reconcile the statement/report provided to it by the Petitioners with the Bank's accounts information. That by this mode of reconciliation, the fraud would have been immediately detected.

14) Mr. Jagtiani would further submit that the learned Arbitrator has ignored vital evidence of R.W-1 containing admissions about BOI not periodically sharing information with the Respondent about the exact withdrawal amounts for replenishing the ATMs. That the witness further admitted that the BOI discovered the shortfall when it compared the accounts handed over to the custodian with the amounts deposited in the ATMs as reported in the CBR. That this admission normally demonstrates that if exercise of reconciliation was conducted, timely and periodically, the fraud would have been detected in the initial stages only.

15) That in addition to specific contractual clauses between Petitioner and Respondent, RBI Circulars also made reconciliation mandatory. That contractual stipulations are included with a view to

give effect to such statutory circulars. That the learned Arbitrator has however ignored the effect of RBI Circular by recording perverse findings that if any Circular was violated by the BOI, Petitioners would sue BOI and that such violations could not have any effect on contractual relationships between Petitioners and Respondents.

16) Mr. Jagtiani would rely upon provisions of Section 73 of the Indian Contract Act, 1872 (**Contract Act**) and would invite the attention of the Court particularly to Explanation mandating inquiry into existence of means of remedying the inconvenience caused by non-performance of contract. He would submit that therefore proper inquiry into mitigation measures is mandatory under Section 73 of the Contract Act and in absence of such inquiry damages cannot be awarded in favour of a party alleging breach. That since inquiry into mitigation measures conducted by the Arbitral Tribunal is faulty and patently illegal, the same would have reflection on the award of claim of the Respondent. In support of his contention for need to conduct proper inquiry into mitigation measures and the effect of Explanation to Section 73 of the Contract Act, Mr. Jagtiani would rely upon judgment of Single Judge of this Court in **K.G. Hiranandani Versus. Bharat Barrel And Drum Mfg. Co. Pvt. Ltd.**¹ In support of the contention that Respondent failing to take reasonable steps to mitigate the loss becomes disentitled to claim damages under Section 73 of the Contract Act, Mr. Jagtiani would rely upon judgment of the Apex Court in **Murlidhar Chiranjilal Versus. Harischandra Dwarkadas and Another**². He would rely on the commentary in **MacGregor on Damages** dealing with the concept of mitigation.

1 1968 SCC Online Bom 26

2 AIR 1962 SC 366

17) Mr. Jagtiani would submit that the finding of the learned Arbitrator of fastening the entire liability of Rs.25,05,79,968/- on Petitioner by holding its employees guilty of theft of whole of such amounts is grossly illegal and suffers from patent illegality. That Issue No.7 is answered by the learned Arbitrator in favour of the Respondent by holding that Petitioner and/or its employees are guilty of theft and/or fraudulent misrepresentation in respect of BOI's ATMs at Barhi to the extent of Rs.16,17,53,900/- and in respect of Jhumritelaiya branch of Rs.7,36,55,022/-. That the finding of theft/misappropriation by employees of Petitioner of sum of Rs.16.17 crores and Rs.7.36 crores is based on no evidence. That the learned Arbitrator used two factors for the purpose of recording finding of fact of commission of theft by Petitioner and its employees of Rs.16.17 crores and Rs.7.36 crores viz (i)filing of FIR by the Petitioners against the employees, (ii)alleged admission given by the Petitioner in the email dated 9 February 2016. That so far as the lodging of FIR by the Petitioner against the employees are concerned, the same is in respect of the cumulative amount of Rs.34,59,900/- only and that therefore lodging of FIR cannot be a basis for assuming an admission for commission of theft of Rs.16.17 crores and Rs.7.36 crores by the Petitioner's employees.

18) So far as the email dated 9 February 2016 is concerned, Mr. Jagtiani would submit the same merely sets out the arithmetic calculation of shortfall arising out of reconciliation process. That the email nowhere admits that Petitioner is responsible for the said shortfall. That the email records that based on reconciliation of documents, difference of amount of Rs.16,17,53,900/- was noticed by the Petitioner. The email nowhere contains an admission that the difference is on account of the Petitioner or its employees. That mere

recording of arithmetical figure of difference arising out of reconciliation process has erroneously been construed by the learned Arbitrator as an admission of commission of theft by the Petitioners/its employees of amount of Rs.16.17 crores for Barhi branch and Rs.7.36 crores for Jhumritelaiya branch. That except for two factors of lodging of FIR and email dated 9 February 2016, the learned Arbitrator has absolutely no material to record finding of theft of amounts of Rs.16.17 crores and Rs.7.36 crores by the Petitioner/its employees. That thus the finding is based on absolutely no evidence and is totally perverse.

19) On above broad submissions, Mr. Jagtiani would pray for setting aside part of the Award which grants claims in favour of the Respondent.

SUBMISSIONS ON BEHALF OF RESPONDENT

20) Mr. Soly Cooper the learned Senior Advocate appearing for the Respondent would oppose the Petition submitting that the Petitioner has chosen to challenge the arbitral Award only on two grounds of contractual obligation of FIS to take mitigative measures by conducting reconciliation with BOI (Issue Nos.10 and 11) and conclusion of theft in respect of the entire amount of Rs. 23.26 crores being arrived at by the Arbitral Tribunal on the basis of FIR lodged by SIPL (Issue No.7). That the findings recorded in the award *qua* other issues are not questioned by the Petitioner.

21) So far as the first ground of failure to take mitigative measures is concerned, Mr. Cooper would submit that the principle of mitigation by itself cannot be invoked in the present case as

mitigation is always something to be done by the victim subsequent or consequent upon wrongful action having taken place. The subsequent or consequent action is to avoid or reduce the loss suffered by victim of such wrongful act. Here, the wrongful act is that of theft and there was nothing which FIS could have done to reduce the losses suffered by it on account of act of stealing committed by SIPL. Failure to prevent successive acts of theft cannot constitute failure to take mitigative measures and at the highest the same would constitute contributory negligence. Relying on *Chitty on Contracts*³, Mr. Cooper would submit there is no duty on a party to mitigate before the breach occurs. That even the commentary by *McGregor* (supra) states that mitigation means avoiding of consequences of a wrong. That since subsequent acts of theft do not constitute consequences of earlier acts of theft, taking measures to prevent theft would not be covered by the concept of mitigation. That discovery of theft cannot lessen the loss occasioned by that theft. That Respondents cited judgment in *Standard Chartered Bank Versus Pakistan National Shipping Corpn.*⁴ before the learned Arbitrator in support of the contention that steps or actions to prevent further wrong are necessarily steps in contributory negligence. That the learned Arbitrator has rightly come to the conclusion that allegations raised by the Petitioner would come into the ambit of contributory negligence and that Petitioner did not argue the plea of contributory negligence despite pleading the same in the Statement of Defense.

22) Without prejudice, Mr. Cooper would submit that the Arbitral Tribunal has rightly arrived at the conclusion that FIS could not have, through reconciliation process, discovered any

3 34th Edition, page-2137

4 (2002) UKHL 43

discrepancy as a matter of fact. That any reconciliation by FIS could only be with respect to documents and information provided by SIPL. That it is an admitted position that SIPL never gave any timely information and reports to FIS. That it was SIPL who presented stepwise process, which has been analyzed in detail by the Arbitral Tribunal while answering Issue No.11. That the stepwise process discussed by the Arbitral Tribunal is nothing but a detailed breakdown of the process envisaged in Schedule-A to both 2010 and 2015 Agreements. That the Award discusses SIPL's procedural failures at each stage and notes FIS' inability to discover the fraud due to SIPL's failure of contractual obligations. That the Arbitral Tribunal has interpreted Schedule-A to mean that reconciliation by FIS with Bank was only contingent upon timely submitting of requisite reports by SIPL.

23) Mr. Cooper would further submit that 2010 or 2015 Agreements do not impose any contractual obligation on FIS to do reconciliation with BOI. That this reason can be discerned by various findings recorded by the Arbitral Tribunal. That Schedule-A of both the agreements merely imposed obligations on Petitioner-SIPL to perform various acts. The Arbitral Tribunal has examined each of the act supposed to be performed by SIPL in a stepwise manner and has arrived at the conclusion that SIPL did not provide necessary information to FIS as agreed in Schedule-A. Even if it is held that the Arbitral Tribunal ought to have recorded a further finding that on account of SPIL's failure to timely submit the reports, FIS could not undertake reconciliation process with BOI. However, this reason is not to be explicitly located in the arbitral Award, the same could be discerned from various other findings in the arbitral award. He would rely upon judgment of the Apex Court in OPG Power

*Generation Private Limited Versus. Enexio Power Coolong Solution India Private Limited*⁵ in support of the contention that where the underlying reason which forms basis of award can be discerned and is intelligible, the Court need not set aside the award and can in fact explain existence of that underlying reason while dealing with the challenge laid to the award. He also relies on judgment of this Court in *Central Depository Services (India) Limited Versus, Daksha Narendra Bhavsar and Another*⁶ and *Ravi Raghunath Khanjode and others Versus. Harsiddh Corporation*⁷.

24) Mr. Cooper would further submit that SIPL failed in carrying out its obligations under Schedule-A, which is evidently clear from the evidence on record which the learned Arbitrator has appreciated that SIPL serviced nearly 800 plus ATMs for FIS under the agreements across India for multiple banks. The cash replenishment report (C3R) submitted by FIS to SIPL was consolidated report for all ATMs containing multiple entries for cash replenishment services across India and were not limited to ATM services of Barhi and Jhumritelaiya. That there is express admission of FIS not providing C3Rs on regular basis. That such reports do not reflect the act of theft in any manner. The reports otherwise did not exhibit the exact amount withdrawn from BOI branches and the amount deposited in ATMs by the custodians of SIPL. That Schedule-A was confined to contractual obligations to be performed by SIPL and cannot be read to mean existence of any contractual obligation on FIS to conduct reconciliation with BOI.

5 2025 2 SCC 417

6 CARBP-311/2024 decided on 1 December 2025

7 2025 SCC Online Bom 4505.

25) Mr. Cooper would submit that position of SIPL was that of bailee and therefore under Sections 148 to 171 of the Indian Contract Act, bailee is statutorily obliged to return the goods to the bailor. That the learned Arbitrator has rightly relied on judgment in *Morris Versus. C.W. Martin Sons and Limited*⁸ which is quoted with approval by the Apex Court in *N.R. Srinivasa Iyer Versus New India Assurance Company Limited*⁹. That liability of bailee is statutorily binding and cannot be contracted away from. He would rely upon judgment of the Apex Court in *Taj Mahal Hotel Versus. United India Insurance Company Limited and Others*¹⁰ in support of the contention that parties cannot contract to lessen or reduce the liability of bailee, but private contract can only permit bailee to accept higher standard of liability than the one prescribed under Section 151 of the Contract Act. That the contract also provides for liability of SIPL as a bailee. Having accepted the statutory and contractual responsibility as bailee, the Petitioner cannot be permitted to wriggle out of its obligation to return the money stolen by its employees.

26) Mr. Cooper would further submit that the Petitioner's reliance on Explanation to Section 73 of the Contract Act is misplaced as the burden to establish availability of possible means to FIS for remedying the inconvenience caused due to SIPL's breach was on SIPL and that the same is not discharged in any manner. SIPL undertook the exercise of demonstrating that FIS could mitigate by relying on a note indicating stepwise process. The Arbitral Tribunal has considered each step of the process in the light

8 (1966) 1 QB 716

9 (1983) 3 SCC 458

10 (2020) 2 SCC 224

of evidence on record and has thereafter recorded a finding of fact that there was failure on the part of SIPL to submit timely reports to FIS making it impossible for FIS to carry out any mitigative measures. Mr. Cooper would further submit that the contention of Petitioner that the contract did not provide for absolute liability of SIPL but merely an indemnity is clearly misplaced. He would submit that various clauses of the agreement make it absolutely clear that SIPL was absolutely responsible for compensating Petitioner for loss of money.

27) So far as the second ground of quantum of stolen money determined by the Arbitral Tribunal on the basis of FIR lodged by SIPL is concerned, Mr. Cooper would submit that Petitioner has not disputed the position that theft was committed by its employees at various ATMs in Barhi and Jhumritelaiya branches during cash replenishment activities. Accordingly, Petitioner filed FIR against them and therefore commission of fraud was not required to be proved. The only task before the learned Arbitrator was to determine quantum of money stolen. The quantum has been established through evidence and documentation. That detailed evidence was led to show that there was long process of reconciliation carried out by SIPL, FIS and BOI who sat together for a period of several weeks and large number of documents were exchanged between the parties. That reconciliation established the amounts which was physically handed over to the SIPL employees. It is after receipt of those figures that the final amount of theft could be discerned. That thus, Arbitral Tribunal's finding of loss of money of Rs.23.26 crores is not based merely on the act of the Petitioner lodging FIR. He would submit that by email dated 9 February 2016, the Petitioner specifically admitted correctness of quantum of loss of

money at Barhi ATMs. Now it cannot be permitted to turn around and question correctness of that amount. That so far as reconciliation in respect of Jhumritelaiya ATMs is concerned, detailed evidence is led to prove the exact amount of lost money during replenishment process. Petitioner did not challenge the said evidence in any manner. He would therefore submit that the Arbitral Tribunal has rightly considered the evidence on record for the purpose of arriving at the finding with regard to quantum of lost money. That no interference is warranted in such findings of facts after appreciating the evidence on record.

28) On above broad submissions, Mr. Cooper would pray for dismissal of the Petition.

REJOINDER ON BEHALF OF PETITIONER

29) In rejoinder, Mr. Jagtiani has submitted that the case argued by FIS is contrary to the plain language of Schedule-A which clearly indicates that FIS had the means to remedy the inconvenience caused by SIPL's alleged breach. Even if reconciliation provision in Schedule-A is not to be strictly construed as a duty or obligation owed by FIS to SIPL, it still does not affect the argument of mitigation. Explanation to Section 73 makes it clear that duty to mitigate is statutory and not contractual. That therefore even if it is held that contract did not provide duty to mitigate, still FIS was statutorily bound to take necessary measures to remedy the inconvenience caused by SIPL's alleged breach of the contract. That Issue No.10 was framed in two parts viz. whether FIS had duty to mitigate and whether steps were taken by FIS to mitigate the losses. That the very fact that the Tribunal conducted inquiry into both

steps would clearly indicate implied acceptance of liability to mitigate on the part of FIS.

30) Mr. Jagtiani would further submit that the Respondent never argued before the Arbitrator that each of theft constituted separate wrong and that failure to prevent successive wrongs would not amount to mitigation or would amount to contributory negligence. That his reliance on passage in *Chitty on Contracts* is misplaced as the author clearly suggested that once a breach is alleged to have occurred, the Plaintiff is not under duty to take steps to prevent further breach under the same contract. In any case, Explanation to Section 73 of the Contract Act is wide enough to cover all steps that FIS could have taken to reduce damage caused by non-performance of contract.

31) Mr. Jagtiani would submit that Respondent is attempting to read reasons into the Award which do not exist by having recourse to ratio of the judgment in *OPG Power Generations*. That the case involves total ignorance of FIS' duty to carry out reconciliation with the BOI and the Tribunal has not traveled to the stage of examining whether such reconciliation was carried out by FIS or not. That therefore the case involves total absence of reasons on the issue of mitigative steps to be taken by the Petitioner with BOI. Mr. Jagtiani would pray for setting aside the impugned Award.

REASONS AND ANALYSIS

32) Respondent-FIS provides financial and technical solutions including ATM management services and ATM software services to bankers. It appears that FSI secured contracts from

various banks and financial institutions across the country for servicing their ATMs. For performing its overall contract of managing ATMs, FIS engaged services of SIPL to the limited extent of the ATM cash replenishment services. Under the arrangement, it was the duty of the Petitioner to withdraw cash from banks and replenish the same in ATMs. One such contract for management of ATMs is secured by FIS was with BOI, which was subcontracted to Petitioner for cash replenishment services.

33) FIS and Petitioner initially entered into Agreement dated 16 August 2010 and thereafter on 4 June 2015. SIPL provided ATM replenishment services to FIS and during performance of contract in November 2015, FIS noticed loading difference of Rs.16,12,50,000/- in respect of the ATMs of BOI. Thereafter, parties sat together to reconcile the accounts and FIS finally concluded that there was cash difference of Rs.15.89 crores for Barhi ATMs and Rs.7.36 crores for Jhumritelaiya ATMs of BOI. BOI accordingly appropriated amounts of Rs.15.89 crores and Rs.7.36 cores from amounts payable to FIS. On this ground, FIS did not pay to SIPL the due amount payable towards performance of the contract. This dispute between FIS and SIPL was referred to arbitration at the instance of SIPL.

34) The two References were made to the learned sole Arbitrator. In the first Reference, SIPL was the Claimant, who filed Statement of Claim dated 30 January 2018 and claimed an amount of Rs.31,34,42,430/- comprising of amount of Rs.25,05,79,968/- towards principal and the balance towards interest. The amount was towards invoices raised by SIPL to FIS towards performance of services under the contract. FIS filed Statement of Defence and denied the claim of SIPL. Additionally, the FIS also filed

counterclaim in the first Reference claiming amount of Rs.23,26,05,022/- from SIPL towards amount recovered by BOI from FIS, being the shortfall amount involved in replenishment of BOI's ATMs at Barhi and Jhumritelaiya. Out of the said amount of Rs.23,26,05,022/- it appears that FIS had withheld amount of Rs.16,73,63,100/- and prayed for direction to pay balance amount of Rs.14,28,12,203/-. The SIPL opposed the counterclaim by filing its statement of defense.

35) In the second Reference, FIS was the Claimant, who filed Statement of Claim, for the purpose of recovery of Rs. 23,26,05,022/- from SIPL along with interest. SIPL filed statement of defense in the second Reference.

36) The Arbitral Tribunal framed 15 issues in the claim filed in the first Reference and five issues in the counterclaim. In the second Reference, seven issues were framed. The Arbitral Tribunal has allowed the claim of SIPL in the sum of Rs. 25,05,79,968/- together with interest @ 18% p.a. for the period from which its invoices became due upto 16 April 2016. The claim of FIS in the second Reference is also allowed by directing Petitioner-SIPL to pay to FIS sum of Rs.23,26,05,022/-. Additionally, prayer clause (b) of FIS claim in second reference is also allowed in the sum of Rs.1,01,85,645/- by directing that the amount be adjusted against the amount of interest computed on the said sum of Rs. 2 crores and further sum of Rs.35,000/-. FIS' Counterclaim is also granted in the same of amount of Rs.1,01,85,645/- with liberty to FIS to enforce the same either through claim in the first reference or counterclaim in the second reference. The operative part of the Award reads thus:

1st Reference:

448. SIPL is awarded a sum of Rs. 25,05,79,968/- together with interest at 18% per annum for the period from which its invoices became due up to 16th April 2016.

2nd Reference:

449. FIS is awarded a sum of Rs. 23,26,05,022/-.

450. There shall be an award in favor of FIS in terms of prayer clause (b) of the 2nd Reference computed at Rs 1,01,85,645/-. However, against this must be adjusted the amount of interest computed on the said sum of Rs. 2 crores and a further sum of Rs. 35,000. Further, as it is also granted in the Counter Claim, SIPL would be entitled to claim this amount either in the 2nd Reference or in the 1st Reference and not in both.

Counter Claim:

451. There shall be an award in favor of FIS in terms of prayer clause (e) of the Counter Claim computed at Rs. 1,01,85,645/-. However, against this must be adjusted the amount of interest computed on the said sum of Rs. 2 crores and a further sum of Rs. 35,000. The question of interest from the date of the Award does not arise.

452. Mr. Cooper agree that prayer clause (f) does not arise as no amount is due to FIS.

453. There shall be no order as to costs in either of the References or in the Counter Claim.

37) It must be observed at this stage that FIS has not challenged the arbitral Award, which directs it to pay amount of Rs. 25,05,79,968/- together with 18% interest. Only SIPL is aggrieved by part of the award to the extent it allows claim of FIS in the sum of Rs.23,26,05,022/-. Also, there is no challenge to the direction in Paras 450 and 451 of the Award.

38) Though Petitioner has pleaded several grounds for challenging the impugned arbitral Award, before me only two

grounds are pressed by SIPL, which relate to Issue Nos.9,10, 11 and Issue No.7. The first ground is with regard to failure on the part of FIS to take steps to mitigate its losses and the second ground is about quantum of loss determined by the Arbitral Tribunal by recording finding of theft by employees of SIPL for awarding claim in favour of FIS. Thus, the scope of inquiry in the present Petition lies in an extremely narrow compass of deciding Petitioner's two objections to the arbitral award. Having crystallized the exact scope of inquiry to be conducted in the present Petition, I now proceed to examine both the objections urged on behalf of the Petitioner.

OBJECTION OF FIS' FAILURE TO TAKE STEPS TO MITIGATE ITS LOSSES

39) This challenge pertains to the findings recorded by the Arbitral Tribunal while answering Issue Nos. 9, 10 and 11, which were framed as under:

9. Whether the Respondent proves that it suffered a loss as a result of the actions of the Claimant and/or its employees, and if so, in what amount;

10. Whether the Claimant proves that it was incumbent upon the Respondent to take steps to mitigate its losses and if so what steps as alleged by the Claimant;

11. If the answer to Issue 9 & 10 above is in the affirmative, whether the Respondent proves that it took all necessary steps to mitigate its losses;

40) So far as Issue No.9 is concerned, the same related to FIS' burden to prove suffering of losses as a result of actions of SIPL and/or its employees. SIPL does not seriously dispute that some loss is suffered by FIS on account of its actions of its employees. In that sense, challenge to the findings recoded by the Arbitral Tribunal

while answering Issue No.9 is meaningless. This appears to be the reason why Petitioner-SIPL has concentrated mainly on the aspect of reduction of its liability by pressing into service the doctrine of mitigation.

41) Petitioner's case of mitigation is premised on statutory provisions as well as contractual obligations. So far as statutory provisions are concerned, reliance is placed on Explanation to Section 73 of the Contract Act, which provides that while estimating the loss or damage arising from breach of contract, the means which existed of remedying the inconvenience caused by non-performance of the contract must be taken into account.

42) In addition to the provisions of Section 73 of the Contract Act, Petitioner has additionally relied on stipulations of Schedule-A of 2010 and 2015 Agreements to make good its case of mitigation. According to the Petitioner, Schedule-A to both 2010 and 2015 Agreements created contractual obligation on FIS to carry out reconciliation on day-to-day basis with BOI with respect to the services provided by SIPL. Reconciliation process referred to in Clause (vi) is reconciliation by FIS with BOI. It is contented that if there is any ambiguity in 2010 Agreement, the same is clarified by 2015 Agreement in which there is a clear stipulation that reconciliation of the reports/statement should be followed by the bank on day-to-day basis for services provided by the Company.

43) This is how Petitioner has pitched the case of statutory obligation to mitigate by FIS conducting daily reconciliation process by relying on Explanation to Section 73 of the Contract Act and contractual obligation of FIS to carry out daily reconciliation with

BOI. According to the Petitioner, Schedule-A to both the Agreements clearly proves existence of 'means' within the meaning of Explanation to Section 73.

TRIBUNAL'S FINDINGS ON MITIGATION

44) Petitioner however contends that the Arbitral Tribunal has not dealt with the aspect of availability of means that FIS could take to reconcile the reports with BOI. It would therefore be necessary to consider the manner in which the issue relating to mitigation is approached by the Arbitral Tribunal and how conclusions therein are reached. It appears that the Arbitral Tribunal was driven by the parties to 13 step process for the purpose of adjudicating the issue of mitigation. It appears that Petitioner submitted 'Stepwise Note' on the cash replenishment process in ATMs. To counter the said Note, FIS also submitted its own Note. The Arbitral Tribunal has compared versions of both the parties on 13 step process. The 13 steps examined by the Arbitral Tribunal are enumerated below:

RE: STEP 1: ALLOTMENT OF ATM AND CREATION OF THE CRA ACCOUNT

RE: STEP 2: APPOINTMENT OF THE AUTHORIZED REPRESENTATIVES

RE: STEP 3: SUBMISSION OF THE LIST OF CUSTODIANS

RE: STEP 4: STEP 4: PREPARATION AND ISSUANCE OF CASH INDENT

RE: STEP 5: WITHDRAWAL REQUEST ISSUED BY SIPL FOR COLLECTION OF CASH FROM NODAL BRANCH

RE: STEP 6: REVISED CASH INDENT

RE: STEP 7: DEBIT ENTRY BY THE BANK IN THE CRA

RE: STEP 8: TRANSPORTATION OF THE CASH AND REPLENISHMENT OF THE CASH

RE: STEP 9: TRIGGER TICKET

RE: STEP 10: PREPARATION AND SUBMISSIONS OF THE CASH BALANCE REPORT ("CBR") and CASH REPLENISHMENT REPORT ("C3R")

RE: STEP 11: DAILY RECONCILIATION BY THE BANK AND MSP OF ANY DISCREPANCIES

RE: STEP 12: ONLY AFTER SUBMISSION OF THE CBR, FRESH CASH IS ISSUED BY THE BANK

RE: STEP 13: PASSING OF CREDIT ENTRY BY THE BANK OF THE CRA ACCOUNT

45) The Arbitral Tribunal has recorded its findings on versions submitted by SIPL and FIS with the regard to each step. In respect of Step Nos.1 to 3, there was not much dispute between the parties, one of the major disputes was with regard to Step No.4 about preparation and issuance of cash indent. The Arbitral Tribunal concluded that BOI did not receive real time and electronic update of cash being loaded into the ATM. It has further accepted FIS' case that ATM is a dumb machine and that the switch software did not know the actual physical cash in the ATM. The Arbitral Tribunal thus concluded that the amounts were not entered in ATM machines automatically or electronically and without human intervention and that the amount shown in electronic journal were derived as a result of data physically entered on respective ATM machine counters. In short, the Arbitral Tribunal concluded that the ATM machine did not have means of recognizing the exact amount of cash loaded in it. The custodians made entries of cash loaded in the ATMs. The Arbitral Tribunal then considered Step-5 relating to withdrawal request

issued by SIPL for collection of cash from nodal branch. After analyzing versions of both the sides, the Arbitral Tribunal concluded that there was no evidence to support SIPL's contention that the amounts withdrawn by custodians were intimated to FIS. The Arbitral Tribunal then went into further steps upto Step No.10 relating to preparation and submissions of Cash Balance Report (CBR) and Cash Replenishment Report (C3R).

46) The Arbitral Tribunal thereafter arrived at the most vital step for the purpose of deciding the issue of mitigation which was Step No.11 'daily reconciliation by the bank and MSP of any discrepancy'. It would be apposite to reproduce the findings recorded by the Arbitral Tribunal *qua* Step No.11 :-

RE: STEP 11: DAILY RECONCILIATION BY THE BANK AND MSP OF ANY DISCREPANCIES

SIPL'S Version	FIS'S Version
The standard industry practice is that upon submission of the CBR and C3R as above, the Nodal Branch and the MSP are /required to carry out a daily reconciliation and notify SIPL of any discrepancies in the said CBR and C3R Reports as against the records available with the Nodal Branch and the MSP.	1. Even though SIPL was obligated to submit the CBR and C3R on the T+1 basis, there were instances wherein the CBRs and C3Rs by SIPL was often delayed. SIPL also issued-revised CBRs and C3Rs. circumstances In such it is physically impossible to detect any shortfall. 2. FIS, at best, would only get the consolidated Cash Replenishment ("C3R") and not the CBRs for individual ATMs. The only document FIS would receive is the C3R. This can only be reconciled in the amount mentioned in the switch. The amounts mentioned in the switch and the C3R do tally.

	3. Neither the Initial Agreement nor the Renewal Agreement requires FIS to carry out any other reconciliation nor is it possible for FIS to do so. 4. It is an admitted position that on the basis of the documents submitted to FIS it is impossible for it to detect any shortfalls or defalcation committed by the Custodian .
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The process at Step 11 is of no assistance to SIPL for more than one reason. It is admitted that the CBR and the C3R were not. always submitted on the same day or even on the next day. RW-1's evidence apart, CW-1 in answer to Q.105 stated that although as a practice C3R are usually sent on a T-1 basis, on some occasions, these may have been delayed. In answer to Q.106, he s merely stated that he was unable to recall whether on several occasions the C3Rs were not sent at all. Further, RW-1 deposed that on occasions revised CBRs and C3Rs were issued. The evidence does not indicate the contrary.

308. With reference to Step 4, CW-1's cross-examination at Q.102 and 103 was quoted. CW-1 admitted that SIPL had sent on the C3Rs and MIS to FIS and neither of these documents mention the amount withdrawn by the custodians from the bank and that it would not be possible for FIS to discover from these documents the discrepancies between the amount withdrawn by SIPL from the banks and the amounts replenished in the ATMs.

309. As mentioned earlier, RW-1 in paragraph 8 of his Affidavit of Evidence inter alia stated that it would not be possible for FIS to detect any fraudulent activity on the basis of the information supplied to it.

310. In his cross-examination, he inter alia stated that only the CBRs are submitted by SIPL to FIS. He further stated that it was impossible for FIS to detect shortfalls where CBRs are not submitted timely and as the cash indents do not match the amounts loaded in the ATMs (Q.54 to Q.59 of RW-1's cross-examination).

CW-1's cross-examination from Q.50 to 85 and Q.94 to 103 was referred to by Mr. Cooper. It does not support the industry practice alleged by SIPL and in any event it does not establish that this alleged industry practice was followed in the present case.

Q.50 to 58 were dealt with earlier and the observations would apply equally here. CW-1 was unaware of various aspects including whether there was a Vault Closing Balance (VCB) at all and whether the Daily Loading Report (DLR), which is at times used in place of the VCB was ever sent by SIPL to FIS. In view of the same, he was obviously asked on what basis the withdrawal amounts would be included in the VCB or DLR if no record of the withdrawal amount was maintained by SIPL. He stated that it was based on the declaration of SIPL's employees, but did not know whether the declarations were in writing. He agreed that the custodians would withdraw various amounts from the nodal branches in respect of several ATMs each day and replenish the ATMs with the same. It is difficult to accept CW-1's deposition that each pair of custodians would be in a position to remember the specific amounts withdrawn by them from the banks. He was unable to answer with certainty as to what actually transpired or even what could have transpired in the preparation of the DLR. From his evidence it is not possible to come to the conclusion that FIS was in a position to detect the fraud on the basis of the information supplied to it.

47) Thus, the Arbitral Tribunal did notice the fact that Step No.11 involved 'daily reconciliation by bank'. However, in the findings recorded by it in paras-308 to 310, it appears that the Arbitral Tribunal has not discussed whether such reconciliation by the Bank was necessary and how it impacted SIPL's case of mitigation. Before proceeding further, it must be observed that SIPL was also possibly not very confident in pressing the claim that reconciliation with Bank was statutory or contractual obligation of FIS. Instead of referring to the provisions of Section 73 or to Schedule-A of the Agreements, SIPL relied on 'standard industry practice', under which the Nodal Branch and the MSP (which in the present case is FIS) were required to carry out daily reconciliation and notify SIPL of any discrepancy.

48) After completing the analysis up to the 12th step, the Arbitral Tribunal has recorded findings on Issue Nos.10 and 11 in paras-316 to 326 of the Award as under :-

316 In the circumstances, the procedure as pleaded by the parties and the evidence thereof adduced by or on behalf of the parties does not establish that FIS could have discovered the fraud. In fact the evidence indicates that it could not have discovered the fraud. The question therefore of FIS having failed to mitigate its loss does not arise.

317. Mr. Andhyarujina relied upon the circulars issued by the Reserve Bank of India (RBI) in support of his contention that the Bank of India had failed in complying with its duties stipulated therein which if it had, would have averted the fraud.

318. The first circular he relied upon is dated 3rd November 2006. The circular is addressed to all Scheduled Commercial Banks (excluding RRBs). It commences with the following words: "Guidelines on Managing Risks and Code of Conduct in Outsourcing of Financial Services by banks". The entire circular issues guidelines essentially to protect the banks. Mr. Andhyarujina relied upon paragraph 5.5.1, 5.9 to 5.9.3. Paragraph 5.5.1 refers to the terms and conditions governing the contract between the bank and the service provider, which in this case is FIS. Mr. Andhyarujina relied upon the second, third and eighth bullet points, which require the banks to ensure that they have the ability to access books, records and information relevant to the outsourced activity available with the service provider, the contract to provide for continuous monitoring and assessment by the bank of the service provider so that necessary corrective measure can be taken immediately, and which provide the bank with the right to conduct audits on the service provider and matters connected therewith. Clause 5.9 is titled "Monitoring and Control of Outsourced Activities". Clauses 5.9.1, 5.9.2 and 5.9.3 emphasize that the banks should have in place a management structure to monitor and control its outsourcing activities and to conduct regular audits.

319. Even assuming that the circulars are mandatory and even assuming that they were not followed by the banks, FIS cannot be held responsible for the same. The disputes between SIPL and Bank of India are a different matter. SIPL is always at liberty to take action against the bank if it so

desires. Moreover, it is neither possible nor permissible for the Arbitral Tribunal to consider the role of the Bank of India, especially when it involves the allegation of negligence against the bank, in this reference. Bank of India is not a party to this reference. No action has been taken against the Bank of India till date. FIS cannot be held liable for the alleged default of Bank of India in any event. Mr. Andhyarujina, however, contended that it must be presumed that the bank followed the circular and that in the course of the implementation thereof, the possibility of the irregularities would have been noticed. This involves far too much speculation. There has been no attempt to lead any evidence in support of the presumptions that the Arbitral Tribunal is called upon to draw.

320. In any case, it is difficult to absolve SIPL of its liability to FIS for the alleged defaults on the part of the Bank of India. The difficulty is enhanced by a complete lack of evidence on the factual aspect and the absence of any action having been filed by SIPL against Bank of India. If speculation and presumption are permissible, they must be raised against FIS on account of it having failed to take any action against the Bank of India to date. In the normal course of human conduct, if it was of the view that the Bank of India was guilty of negligence on account of which the fraud went unnoticed, it would have filed some action against the Bank of India.

321. Mr. Andhyarujina then relied upon a circular dated 11th March 2015. The circular also commences with the words: "Guidelines on Managing Risks and Code of Conduct in Outsourcing of Financial Services by banks". It refers to the above circular dated 3rd November 2006. It appears to have been issued on account of concerns that the instructions in the earlier circulars were not being adhered to. In view of Mr. Andhyarujina's strong reliance on this circular, paragraphs 2 to 5 thereof, which constitute the entire circular are quoted hereunder:

2. In view of concerns raised that these instructions are not being adhered to, we reiterate that outsourcing of any activity by the bank does not diminish its obligations, and those of its Board and senior management, who have the ultimate responsibility for the outsourced activity. Banks have been advised to take steps to ensure that the service provider employs the same high standard of care in performing the services as would be employed by the banks, if the activities were conducted within the banks and not outsourced. Further, banks should not engage in

outsourcing that would result in their internal control, business conduct or reputation being compromised or weakened.

3. Instances of non adherence with the aforementioned guidelines have been observed with regard to subcontracting by the primary outsourced vendors and the engagement of subcontractors by the outsourced service providers without the prior consent of the bank. It is clarified that the Guidelines on Managing Risks and Code of Conduct in Outsourcing of Financial Services by Banks apply mutatis mutandis to subcontracted activities, as well. Attention is invited to paragraph 5.5.1 of the guidelines, wherein banks have inter-alia been advised that the outsourcing contract should provide for prior approval/ consent by the bank of the use of subcontractors by the service provider for all or part of an outsourced activity. Before giving their consent, banks should review the subcontracting arrangements and ensure that these arrangements are compliant with the extant guidelines on outsourcing.

4. Certain cases, like outsourcing of cash management, might involve reconciliation of transactions between the bank, the service provider and its sub-contractors. In such cases, banks should ensure that reconciliation of transactions between the bank and the service provider (and/or its subcontractor), are carried out in a timely manner. An ageing analysis of entries pending reconciliation with outsourced vendors should be placed before the Audit Committee of the Board (ACB) and banks should make efforts to reduce the old outstanding items therein at the earliest.

5. A robust system of internal audit of all outsourced activities should also be put in place and monitored by the ACB of the bank."

322. The observations in respect of the circular dated 3rd November 2005 would apply equally to this circular. It may only be clarified that each of these observations independently answers SIPL's case based on both the circulars. It addition it must be noted that paragraph 4 which requires the outsourcing of cash management, might involve reconciliation of transactions between the bank, the service provider and its sub-contractors. SIPL is a sub-contractor. There is complete silence as to why SIPL never called upon the bank or FIS to reconcile the transactions if according to it, there was a failure on the part of the bank to do so

mandatorily. Assuming there was such a duty, SIPL cannot take advantage of its own wrong.

323. Mr. Andhyarujina then relied upon the circular issued by National Payments Corporation of India (NPCI) dated 20th May 2014 to all members of National Financial Switch (NFS). The subject. reiterates the daily reconciliation of ATM transactions. The circular expressly states that it merely recommends the process to be followed by the banks for efficiency in reconciliation and handling exceptional transactions. Detailed suggestions have been given. The observations and findings in respect of the RBI circulars apply equally if not with greater force to this circular. Even assuming that Bank of India had failed to comply with its alleged obligations, FIS cannot be penalized for the same.

324. In paragraph 6(e) of its Statement of Defence in the 2nd Reference, SIPL states that the fraud or theft ought to have been discovered by Bank of India and FIS in real time by end of day on the basis of the various documents already referred to, if reasonable diligence had been exercised. This is followed by a reference to the above circulars. Only a few of the contents of the circulars are mentioned briefly. Even assuming that the Bank of India and/or FIS were bound to comply with the circulars, there has been no attempt to adduce any evidence to establish the facts necessary to hold either FIS or the Bank of India guilty of negligence.

325. SIPL's defence appear to be one of contributory negligence on the part of FIS. However, Mr. Andhyarujina repeatedly, expressly stated that SIPL's defence to FIS's claim is not one of contributory negligence. He confined his case to one of FIS's failure to mitigate the damages. In view of this clear stand, it is not necessary to mention Mr. Andhyarujina's reasons for this stand.

326. In the circumstances, Issue Nos. 10 and 11 are answered in favor of FIS and against SIPL.

49) The Arbitral Tribunal has thus recorded a finding that evidence produced before it could not establish that FIS could have discovered the fraud and that therefore the question of FIS having to mitigate its losses did not arise. The Arbitral Tribunal thereafter considered RBI Circulars relied upon by SIPL. In one of the Circulars

dated 3 November 2006, RBI mandated continuous monitoring and assessment of the bank of the service provider.

50) However, the Arbitral Tribunal held that if BOI breached any RBI circulars, SIPL was at liberty to take action against BOI. The Tribunal refused to consider the role of BOI in the light of allegation of negligence leveled against it since BOI was not party to the Reference. The Arbitral Tribunal took note of the fact that SIPL did not take any action against BOI or called it upon to reconcile transactions if there was any failure on the part of FIS and BOI to do so. The Tribunal thus concluded that even if it is assumed that there was any duty on the part of FIS or Bank to undertake reconciliation, since SIPL did not insist on such reconciliation, it could not take benefit of its own wrong.

OBJECTION OF TRIBUNAL IGNORING SCHEDULE-A TO AGREEMENTS

51) It is Petitioner's contention that while answering Issue Nos.10 and 11 relating to mitigation and particularly while discussing Step No.11 relating to daily reconciliation by Bank, the Arbitral Tribunal has not specifically referred to clauses in Schedule-A of 2010 Agreement and 2015 Agreement. To demonstrate before this Court that attention of Tribunal was invited to Schedule A, Mr. Jagtiani has placed on record copy of 'Stepwise Note' submitted before the Arbitral Tribunal by Petitioner-SIPL and in paragraph 18 whereof, it was stated as under:-

18. Upon submission of the CBR and C3R as above, the Nodal Branch and the MSP are required to carry out a daily reconciliation and notify SIPL of any discrepancies in the said CBR and C3R Reports as against the records available with the Nodal Branch and the MSP.

See Clause 4 of Schedule A of Exhibit C-1 @ page 177 of the Convenience Compilation]

(see para 2(o) at page 77 of the AOE AOE of of CW-2]

52) Thus attention of the Arbitral Tribunal was apparently invited to Clause 4 of Schedule-A of 2015 Agreement. It is therefore contended by the Petitioner that the Arbitral Award is rendered in ignorance of specific contractual arrangement between the parties and is therefore perverse and patently illegal. True it is that the Arbitral Tribunal has not referred to Clause-4 of Schedule-A of 2015 Agreement while answering the issue relating to mitigation in favor of FIS and against SIPL. However by omission of such reference, whether the entire award allowing claim of Respondents in the sum of Rs.23,26,05,022/- would be rendered invalid? The answer, to my mind, appears to be in the negative. Petitioner's contention of Arbitral Tribunal ignoring contract clause 4 in Schedule A arises out of skewed and myopic reading of the award. Firstly, Petitioner itself chose to rely on 'standard industry practice' of reconciliation rather than referring to Clause-4 of Schedule A in the main part of the Note dealing with the step of daily reconciliation. Clause 4 of Schedule A was added towards end of the Note and it is highly doubtful whether contractual obligation of reconciliation was even argued before the Tribunal. In a given case, it may happen that several points are pleaded or incorporated in written submissions, but the counsel appearing for parties may not canvass each of those points. Even before me while several grounds are pleaded, Mr. Jagtiani has chosen to press only two grounds during the course of his submissions. Courts and Tribunals tend to decide the issue the way the same is argued. It is unfair to criticise an award which decides everything that is argued by parties by contending before Section 34

Court that the Award ignores something which does not figure prominently in a note of submissions. If clause 4 of Schedule A was the sheet anchor of Petitioner in support of its mitigation plea, why it relied on 'standard industry practice' and RBI Circulars by putting reference to Schedule A towards the end of the Note has not been explained in any manner. The reason could be that Petitioner itself never believed that FIS was under any contractual obligation to undertake daily reconciliation with BOI. In latter part of the judgment, I have held that there was no such contractual obligation.

53) Also the Award has to be read in its entirety and the finding of perversity can be recorded when there are absolutely no reasons for reaching the conclusion. An arbitral award is not to be readily set aside on the ground of inadequacy of reasons. Where the reasons do not appear to be sufficient, Section 34 Court can consider all the documents and discern the underlying reason from reading of the entire award. Here, the judgment of the Apex Court in OPG Power Generation Private Limited (supra) would be relevant, in which the Apex Court has held in paragraphs 168 and 169 as under:-

168. We have given due consideration to the above submission. In our view, a distinction would have to be drawn between an arbitral award where reasons are either lacking/unintelligible or perverse and an arbitral award where reasons are there but appear inadequate or insufficient 124. In a case where reasons appear insufficient or inadequate, if, on a careful reading of the entire award, coupled with documents recited/relied therein, the underlying reason, factual or legal, that forms the basis of the award, is discernible/intelligible, and the same exhibits no perversity, the Court need not set aside the award while exercising powers under Section 34 or Section 37 of the 1996 Act, rather it may explain the existence of that underlying reason while dealing with a challenge laid to the award. In doing so, the Court does not supplant the reasons of the

Arbitral Tribunal but only explains it for a better and clearer understanding of the award.

169. In the instant case, the appellate court took pains, and rightly so, to understand and explain the underlying reason on which the claim of Enexio was found within limitation. As noticed above, Para 16.03(d) of the award contains the reason based on which the Arbitral Tribunal concluded that Enexio's claim was within limitation. However, in Para 16.03(d), the Arbitral Tribunal failed to state, in so many words, that it was treating the minutes of meeting dated 19-4-2018 as an acknowledgment within the meaning of Section 18 of the 1963 Act. This omission on the part of the Arbitral Tribunal was trivial and did not travel to the root of the award, therefore, in our view, the appellate court was well within its jurisdiction to explain the underlying legal principle which the Arbitral Tribunal had applied; and in doing so, it did not supplant the reasons provided in the award. In this view of the matter, the impugned order 1 of the Division Bench does not suffer from any legal infirmity. Sub-issue (e) is decided in the aforesaid terms.

54) Thus in a case where reasons appear to be insufficient or inadequate, but on a careful reading of the entire Award, the underlying reason is intelligible, the Court need not set aside the Award and rather it can explain the existence of that underlined reason while examining the issue of invalidation of Award. Mere omission on the part of Arbitral Tribunal to refer to a particular contractual clause would not *ipso facto* render the conclusion recorded by Arbitral Tribunal perverse. The Court can make meaningful reading of the entire reasons recorded by the Arbitral Tribunal and can explain what exactly is meant to be said by the Arbitral Tribunal. The ratio of the judgment in OPG Power Generation Ltd. (supra) has been followed by me in CDSL vs. Daksha Narendra Bhausar (supra) in which it is held in paragraph 76 as under:

In the present case, the Arbitral Tribunal has recorded the underlying reason of BRH acting in its capacity as DP during some of its negligent and fraudulent acts and has accordingly

applied the provisions of Section 16 of the Depositories Act and Clause 5.3.2 of CDSL Bye laws. The underlying reason discernible from reading of the award cannot be termed as perverse. The manner of enquiry conducted by Arbitral Tribunal or the detailed findings recorded by it may not be to the liking of the Petitioner, however so long as this Court has not found the final conclusion of Arbitral Tribunal treating role of BRH as DP to be not perverse, there is no warrant for exercising the powers under Section 34 of the Arbitration Act for invalidating the Award.

55) The ratio of the Apex Court judgment in OPG Power Generation Limited (supra) has also been followed by me in Ravi Raghunath Khanjode (supra) in which it is held that the Award need not be set aside on the ground of inadequacy of reasons so long as the ultimate conclusions reached by the Arbitral Tribunal are found to be correct. It is held in paragraphs 46 and 47 as under:

46. It is also settled law that the Award need not be set aside on the ground of inadequacy of reasons so long as the ultimate conclusions reached by the Arbitral Tribunal are found to be correct. Reference in this regard can be made to the judgment of the Apex Court in OPG Power Generation Private Limited v. Enexio Power Cooling Solutions India Private Limited 14 in which it is held in para-168 as under :-

xxx

47. Therefore even if the reasons recorded by the arbitral tribunal for repelling the objection of requirement to secure permission under Section 43 of BTAL Act or Section 36A of the MLRC are to be construed as inadequate or insufficient, I am of the view that the Award is not rendered bad on that ground alone. It is not that the learned Arbitrator has recorded absolutely no reasons. I am in agreement with the ultimate conclusion reached by the learned Arbitrator for the reasons indicated in the later part of the judgment. The objection of failure to record reasons is accordingly rejected.

56) Having held that mere inadequacy of reasons or omission to refer to the contractual clause in the Agreement cannot

be a reason for invalidating the same, I now proceed to examine whether omission on the part of the Arbitral Tribunal in referring to Clause 4 of Schedule-A of 2015 Agreement has impacted its conclusion on Issue Nos.10 and 11. The Arbitral Tribunal has conducted an enquiry into Petitioner's contention of requirement for reconciliation by FIS with BOI, by referring to the 'standard industry practice' and RBI circulars. In fact RBI guidelines referred to in paragraph 318 of the Award mandated incorporation of stipulation for continuous monitoring in the contracts between Bank and service provider for the purpose of taking necessary corrective measures immediately. In that sense, though there is no reference to Clause 4 of Schedule-A of 2015, Agreement the Arbitral Tribunal has taken into consideration the argument of duty of FIS to reconcile with BOI. Furthermore while discussing Step No.11 the Arbitral Tribunal has arrived at the conclusion that CBR and C3R were not always submitted by SIPL to FIS on the same day or even on the next day. The Tribunal has further held that based on documents submitted by SIPL, it was not possible for FIS to discover the discrepancies between the amounts withdrawn by SIPL from the banks and the amounts replenished in the ATMs. Thus a finding is recorded on the basis of evidence that FIS was not in a position to detect fraud on the basis information supplied to it.

57) However, the above findings are sought to be criticized by Petitioner-SIPL by contending that the inquiry by Arbitral Tribunal in paragraphs 307 to 310 is with respect to reconciliation between Petitioner and FIS and that they do not deal with reconciliation by FIS with BOI. This contention is premised on alleged contractual obligation for FIS to undertake reconciliation with BOI. I accordingly proceed to examine whether 2010

Agreement or 2015 Agreement created any contractual obligation on FIS to mandatorily undertake reconciliation with BOI.

WHETHER AGREEMENTS IMPOSED DUTY ON FIS TO RECONCILE WITH BOI

58) It would be first necessary to take into consideration the contractual stipulations of the two Agreements executed between the parties. The first Agreement was executed on 16 August 2010. Under clause 1.1 of the Agreement, Petitioner-SIPL was to perform services provided for in Schedule-A. Clause 1.1 reads thus:-

1.1 The services to be provided hereunder by the Company is further described in "Schedule A of this Agreement. However, due to changing needs and requirement, Schedule A of the Agreement may be amended from time to time with the consent of FIS and the Company.

(emphasis added)

59) Schedule-A to the Agreement dated 16 August 2010 dealt with scope of service of service provider and responsibility of FIS. Under Part-A of the Schedule, dealing with scope of services to be provided by SIPL, the parties agreed for the following arrangement:

A. SCOPE OF SERVICE OF SERVICE PROVIDER

The 'Company' agrees to provide the following services to FIS on all days and will ensure a No Cash out situation at any point of time.

Replenish cash in the ATM, collect instruments/deposit covers from the ATM/drop boxes, attend FLM/SLM calls at the ATM center at the sites located as listed in attached Schedule C' The Schedule 'C can be amended from time to time with the addition/deletion of ATM sites. Such amendment shall be duly signed by both the parties.

1. Cash withdrawal and replenishment services:

- The Company's representative will collect cash from the designated branch of the Bank or as directed by the designated branch on every working day for the replenishment of ATMs. Cash-in - transit will be done in company's security vans having a crew of a driver, two armed security guards and two ATM operators
- Necessary Board resolution will be passed by the Company Incorporating the names of authonsed signatories who will sign the requisition slips and withdraws cash from the Bank Company also provides a list of officials with specimen signatures, who will produce the ID cards and collect the cash from Bank.
- On the basis of the limits fixed by the Bank for each ATM. cash will be always drawn on the day of replenishment.
- The Bank will issue ATM fit cash to the Company for the purpose of replenishment of ATM.
- The Company' shall count and verify the cash in all respect including genuineness of the notes in the secured area provided by the bank in their premises, satisfy themselves and acknowledge the receipt of the same.
- At the ATM location, 2 ATM officers get down with the cash meant for that location and go the ATM room duly escorted by armed guard who will stop outside the ATM location.
- Both the ATM officers will open the ATM by using their respective combination.
- They will follow the add cash system for replenishing the ATMs and then do the operations
- The responsibility for sale keeping of the combination would be with the Company. Further the liability for loss of combination would also rest with the Company.
- **The operation activity will consist of:**
 - i. A Checking the amount of cash available in the ATM and accordingly replenish upto the limit of the ATM

ii. Check for any excess or short dispense in case of short dispense, the cash diverted to purge tiin is taken out and put back in the respective cassette ans in case of excess dispense, the officer will immediately call for the hardware vendor and procures a report regarding the nature of fault and recover the amount from the vendor Both the cases of excess and shortage are reported to the concerned official of the Bank

iii. Ensure that all consumables such as rolls, deposit envelopes etc are adequately stocked at the site/ATM.

iv. Clear purge bin and put back all ATM fit notes into the respective cassettes.

v. Clear deposit bins and count the number of packets collected and cross check the same.

vi. Collect all the captured cards and hand it over to the designated branch of Bank.

vii. Update the switch counter for the replenishments made or any adjustments to be done after confirmation from Bank.

vi. Prepare operation report for the submission of the same to the designated branch of the "Bank along with the audit journal roll.

ix. Copy the electronic journal from the hard disk into a floppy, Fioppy would be provided by "Bank".

x. Close the ATM Collect deposit covers from the drop box.

xi. Submit the report, audit journal, cash balance after ATM replenishinent, instruments/ deposit covers from the ATM as well as from the drop boxes to the designated branch of the Bank" before 3.00 pm.

xii. Submit a consolidated report ATM wise to FIS on Cash loading, excess cash and short cash at all siles managed by the company on a daily basis.

DAILY RECON: In order to facilitate Daily Recon by the respective Banks, Company to ensure:

i. Cash Balance Report (CBR) in centralized formal on 1+1 day. No exception allowed.

ii. As far as possible no revised CBR to be provided in the eventuality of any error or any noncompliance in submission of reports by Company, consequent losses due to such noncompliance are to be indemnified by Company.

iii. Admin Card to be used on all ATMs every day and EOD activity will be carried out along with cash replenishment activity. In case of admin card not used, which may lead to cash differences are to be settled by Company, any such disputes leading to Cash losses are to be recovered from Company.

iv. CBR and cash settlement reports is a must and Company to ensure a water tight process, any aberrations if observed/reported by the Bank.

v. Company to obtain no liability certificate from all the customer touch points.

vi. FIS would carry out reconciliation on day to day basis for the services provided by SIPL. In case of any discrepancy FIS should inform SIPL within 3 working days upon submission of CBR details from SIPL. At the end of per month FIS issue a certificate to the effect that there is no liability on the fall of SIPL, basis on no liability certificate to be obtained by SIPL from all the customer touch points where SIPL collect cash for the replenishment.

60) After the parties entered into subsequent Agreement dated 4 June 2015, under Clause 1.1 it was the responsibility of Petitioner to perform services in Schedule C, which were further elucidated in Schedule A. Clause 1.1 of 2015 Agreement reads thus:-

1.1 The Company shall provide the services described hereunder in respect of ATM Centers mentioned in Schedule C, which is further described in Schedule A of this Agreement. However, due to changing needs and, requirement, Schedule A of the Agreement may be amended from time to time with the written consent of both the parties.

(emphasis added)

61) Schedule-A of 2015 Agreement, dealing with daily reconciliation provided thus:

4. DAILY RECONCILIATION

In order to facilitate Daily Reconciliation by the respective Banks, the Company to ensure:

The reconciliation of the reports/statements should be followed by the Bank on day to day basis for the services provided by the Company subject to the provisions of the agreement. In case of any errors or discrepancies found during the verification the Customer or Bank should inform or notify the Company within maximum 30 (thirty) days from the time the reports/statement submitted by the Service Provider, (Cases/queries beyond 30 days will also be considered and closed mutually on case to case basis) failing which the Company will assume the statement/reports to be correct. Cash Balance Report (CBR) in centralized format on T+1 day, no exception allowed. FIS to issue indent to Company specifying denomination-wise replenishment to be performed by Company on several ATMs. On the basis of indent, Company withdraws cash from Nodal Branch and carries out replenishment activity in ATMs depending on vaulting and non-vaulting facility provided at locations. With cash replenishment activity, EOD is performed on the ATM machine as specified by FIS and switch is updated accordingly. Company submits the cash replenishment report (CBR) C3R and VCB reports) to FIS on next working day basis before 11 AM.

- a. Along with the query, FIS to specify the exact difference encountered and provide supporting to validate the query
- b. Upon submission of the query with valid supporting, Company reconciliation department to analyze the difference and revert back with conclusive justification
- c. If required, FIS to enable switch transaction listing for the same.

62) It is relying on the clauses of Schedule-A to both 2010 and 2015 Agreements that the Petitioner-SIPL contends that there was contractual duty on the Respondent-FIS to reconcile with BOI, which was the means available for FIS to mitigate the losses.

63) Schedule-A to 2010 Agreement was in two parts. Part (a) related to scope of service of SIPL and Part (b) dealt with responsibilities of FIS. Part (a) incorporated a provision for 'DAILY RECON'. Under that heading, SIPL was put under certain obligations in opening portion of the paragraph stating '*in order to facilitate Daily Recon by respective Banks, Company to ensure :*' The Company in the Agreement is SIPL. Thus the stipulation sought to be relied upon by the Petitioner actually imposed obligation on SIPL to do the six enumerated things. Petitioner has relied upon Item VI of the said enumerated acts. However Item VI, on its own, does not impose any obligation on FIS to reconcile with the bank. It talks of reconciliation by itself on the basis of information provided by SIPL. Mere use of the word 'respective banks' in Schedule-A does not mean that any contractual obligation was created on FIS to reconcile the transactions with BOI. The correct way of reading the relevant part of Schedule-A of 2010 Agreement is to mean that SIPL was under contractual obligation to perform six enumerated acts in order to facilitate daily reconciliation by respective banks. If a duty is imposed on SIPL for facilitating an act, it does not mean that the party for whose facility, SIPL was obliged to do something, is also contractually obliged to do the act which is facilitated by SIPL. I am therefore unable to read any contractual duty on FIS to undertake daily reconciliation with BOI under Schedule-A of 2010 Agreement.

64) Coming to 2015 Agreement, Clause 4 of Schedule-A again imposed contractual duty on SIPL to perform the enumerated acts as Clause 4 again provided that "in order to facilitate Daily Reconciliation by respective Banks, the Company to ensure". Thus what is provided in Clause 4 of Schedule-A to 2015 Agreement is again a contractual duty put on SIPL. The said clause cannot be read

to mean any contractual obligation for FIS to conduct daily reconciliation with BOI.

65) I am in agreement with the ultimate conclusion reached by the Arbitral Tribunal about absence of any contractual duty for FIS to conduct daily reconciliation with BOI. Since contractual clause does not impose any such duty on FIS, mere omission by the Arbitral Tribunal to refer to the said contractual clause, cannot be a ground for invalidating the impugned Award.

STATUTORY DUTY TO MITIGATE LOSSES

66) Relying on Explanation to Section 73 of the Contract Act, it is contended on behalf of the Petitioner that it was learned Arbitrator's duty to take into account the means available for remedying the inconvenience caused by SIPL's non-performance of the contract. According to Mr. Jagtiani, the principle of mitigation applies statutorily, irrespective of what parties agree upon. He has accordingly contended that even if Schedule A to the Agreement is not read as contractual duty to mitigate, the Respondent-FIS cannot escape the statutory duty to mitigate. Section 73 of the Contract Act provides thus:-

73.Compensation for loss or damage caused by breach of contract

When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

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

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

(emphasis added)

67) Mr. Jagtiani has also relied on judgment of the Apex Court in ***Murlidhar Chiranjilal*** (supra) which has discussed the two principles for award of damages, which are recognised in Section 73 of the Contract Act. The first principle is to put the Plaintiff in the same position he would have been, if the breach was not committed. But the first principle is subject to the second one under which, Plaintiff must prove that he took all possible steps to mitigate the losses. Mr. Jagtiani has relied on following observations in paragraph 9 of the judgment, which read thus:-

9. The two principles on which damages in such cases are calculated are well-settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps: (British Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Railways Company of London 1). These two principles also follow from the law as laid down in Section 73 read with the Explanation thereof. If therefore the contract was to be performed at Kanpur it was the

respondent's duty to buy the goods in Kanpur and rail them to Calcutta on the date of the breach and if it suffered any damage thereby because of the rise in price on the date of the breach as compared to the contract price, it would be entitled to be reimbursed for the loss. Even if the respondent did not actually buy them in the market at Kanpur on the date of breach it would be entitled to damages on proof of the rate for similar canvas prevalent in Kanpur on the date of breach, if that rate was above the contracted rate resulting in loss to it. But the respondent did not make any attempt to prove the rate for similar canvas prevalent in Kanpur on the date of breach. Therefore it would obviously be not entitled to any damages at all, for on this state of the evidence it could not be said that any damage naturally arose in the usual course of things.

(emphasis added)

68) Mr. Jagtiani has also relied upon judgment of learned Single Judge of this Court in *K. G. Hiranandani* (supra) in which this Court has held in paragraph 3 as under :-

3. Before I proceed to deal with the rival contentions of the learned counsel on either side, it would be convenient to refer to material portions of Section 73 of the Contract Act which is the section which lays down what may be called the measure of damages in case of breach of contract. The substantive portion of that section lays down the basic rule that a party who suffers by the breach is entitled to receive from the party in breach "compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach." The Explanation to the section lays down that in estimating the loss or damage arising from the breach of a contract, "the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account." Though what the Explanation enacts is popularly called the "rule" in regard to mitigation of damages, and has been so referred to even in some decided cases and standard works, and though it is loosely called a "duty" to mitigate, the position really is, as our legislature has rightly stated, merely this, that what the Explanation enacts is not in the nature of an independent rule or duty but is merely a factor to be taken into account in assessing the damages naturally arising from the breach, for the purpose of the main part of Section 73. That is precisely the reason why it is enacted, not as a sub-section or a separate paragraph, but

as an "Explanation" to the substantive rule in the first part of Section 73. Support is to be found for this view which I am taking in a passage in Mayne on Damages (12th ed.) para 149, point (2), in which it is stated that the expression "duty to mitigate" is the common and convenient way of stating the position, but that expression is a somewhat loose one, since there is no duty which is actionable or which is owed to any one by the plaintiff. It is further pointed out in the said passage that the plaintiff cannot owe a duty to himself, and that the position is similar to that of a plaintiff whose damages are reduced because of his contributory negligence. If means existed of remedying the inconvenience caused by the breach of contract which have not been availed of by the plaintiff, the damages claimed by him cannot be said to arise "naturally" from the breach within the main part of Section 73 of the Contract Act or, to put it in another way, the means, if any, of remedying the inconvenience caused by the breach of contract are factors that go to reduce the damages that might otherwise have been said to have arisen "naturally" from the breach. That, in my opinion, is the proper construction that should be placed upon, what is popularly called the rule in regard to mitigation of damages.

69) The judgment in *K. G. Hiranandani* again explains the concept of mitigation referring to Explanation to Section 73 of the Contract Act. This Court has held that damages to Plaintiff do not naturally arise out of Section 73 of the Contract Act and in the event if it is established that there existed means to remedy the inconvenience caused to the Plaintiff due to breach of contract, the damages would automatically get reduced.

70) While there can be no dispute about the general proposition that a Plaintiff suing for damages must take necessary steps for mitigating the losses. However for proving the '*existence of means for remedying the inconvenience caused by breach*' the Petitioner ultimately relies on Schedule A of the Agreement. The whole case of the Petitioner is that Schedule-A to the Agreements provided for means available for remedying the inconvenience.

However, I have already held that Schedule-A of the Agreements did not impose any duty on FSI to conduct daily reconciliation with BOI. In absence of contractual duty to reconcile, the argument of existence of means to remedy the inconvenience falls to the ground. Petitioner therefore cannot independently rely on Section 73 of the Contract Act for invoking the doctrine of mitigation. It has to ultimately prove existence of contractual duty on FIS to reconcile with BOI and since it has failed in proving so, it cannot be contended that there were means available for detecting the acts of thefts and failure to adopt those means would make Petitioner entitled to substantiate any amount from the one awarded by the Arbitral Tribunal to Respondent-FIS.

71) In the present case, what has happened is that the employees/custodians of SIPL used to carry indent issued by FIS to the branches of BOI for withdrawal of cash. However, actual amount withdrawn from the bank depended on availability of cash in desired denominations. Therefore on several occasions withdrawal amount of cash did not match with the amounts indicated in the withdrawal slip/indent. Therefore FIS did not actually know the exact amount of cash handed over to employees of SIPL. Furthermore, when the employees of SIPL put the cash in the ATM machines, the said machines were incapable of reading the exact amount of cash loaded in them. Therefore employees were required to physically enter the amount of cash replenished in each ATM. Therefore, there was a room for mismatch between the exact amount loaded and the amount entered in the software of the particular ATM. Thus pilferage of cash could take place at two stages viz. when cash was withdrawn from BOI branches and when cash was replenished in the

ATM's. The theft of money by employees of SIPL has occurred at these two stages.

72) After assessing evidence on record, the Arbitral Tribunal has recorded findings of fact that there was delay in submitting CBR and C3R by Petitioner and these findings are not seriously challenged before me. The Arbitral Tribunal has also conducted in depth stepwise enquiry about possibility of FIS discovering mismatch of cash. The issue has been answered in the negative. In the light of this, the only hope for Petitioner-SIPL was to rely on the defence of contractual duty of FIS to conduct reconciliation with BOI on daily basis. There is no doubt to the position that only BOI had the information about the exact amount handed over to employees of SIPL. It also had necessary details to find out the exact amount replenished in the ATM based on withdrawals made by its customers. There is also no dispute to the position that the exact defalcated amount was determined after conducting reconciliation between Petitioner, FIS and BOI. Petitioner therefore contends that if this exercise of reconciliation was done on daily basis, FIS and Petitioner would have discovered the fraudulent activities of SIPL employees and preventive measures could have been taken. However, I have already concluded above that the FIS did not have any contractual duty to conduct daily reconciliation with BOI. In that view of the matter, it cannot therefore be contended that any means were available for FIS for remedying the inconvenience caused due to non-performance by SIPL. In that view of the matter, reliance by the Petitioner an Explanation to Section 73 of the Contract Act is inapposite.

MITIGATION DOCTRINE NOT ATTRACTED

73) SIPL's case of mitigation is otherwise baseless. The case involves act of theft committed by employees of Petitioner. Petitioner doesn't deny this position and has in fact lodged FIR against its employees accusing them of having committed theft. It only disputes the quantum of monies stolen, which aspect is being dealt with in later part of the judgment. However there is no dispute to the position that the case involves element of theft by the employees of SIPL.

74) In a case involving theft, where the monies are stolen, there can be no question of existence of means for remedying the inconvenience caused by theft. As rightly contended by Mr. Cooper mitigation is always something to be done by the victim 'after' wrongful act takes place. To illustrate, if 'A' places order for supply of goods on 'B', but refuses to accept the delivery when goods are supplied to him. 'B' keeps the goods to himself and does not sale to 'C', when 'C' expresses willingness to buy them. In the claim filed by 'B' to claim compensation, the opportunity to 'B' to sell the goods to 'C' becomes existence of means for remedying the inconvenience caused by non-performance of contract by 'A'. In this illustration, the contract is broken by 'A' and the event occurring after breach of contract i.e. willingness by 'C' to purchase the goods, is the means for 'B' to remedy the consequences of breach within the meaning of Explanation to Section 73 of the Contract Act. Thus the means became available after the wrong is done.

75) However in case involving theft, there is nothing which can be done once monies or goods are stolen. Merely because there

are series of acts of theft on different dates, it does not mean that failure on the part of owner person to take remedial measures to prevent further acts of thefts, becomes a handle for the thief to retain some part of the stolen money/goods. As rightly pointed out by Mr. Cooper, failure to adopt measures to avoid theft may amount to contributory negligence. To illustrate, if 'A' hands over goods to 'B' for storage and 'B' acts negligently and fails to lock the premises in which goods are stored. Some part of goods are stolen. 'B' informs 'A' of first act of theft stating that the goods are of such size that it is impossible to lock the premises and 'A' fails to take sufficient measures to aid 'B' to lock premises and subsequent act of theft takes place, failure on the part of 'A' to take measures for providing aid for locking of premises by 'B' is contributory negligence and not existence of means for remedying the inconvenience caused due to breach of contract. Contributory negligence is plaintiff's unreasonable actions *before or during* an incident that help cause the harm, reducing his awarded damages by sharing the blame, while the duty to mitigate concerns plaintiff's unreasonable failure *after* the harm, to take steps to minimize his own losses. In a case involving series of acts of thefts, each act of theft constitutes a harm, making the person with whom goods are entrusted liable to return/pay for the same. There is nothing Plaintiff can do qua that harm after the act of theft is committed. If the Plaintiff fails to perform acts to prevent further acts of theft 'before' the next act of theft is committed, the principle of contributory negligence would apply.

76) The learned Arbitrator has rightly appreciated the above position while concluding in paragraph 325 that SIPL's defence was

actually of contributory negligence. However Petitioner-SIPL chose not to press the principle of contributory negligence.

77) In McGregor on Damages (supra) relied upon by both the sides, the author has expressed that principle meaning of the term 'mitigation' concerns the avoiding of consequences of a wrong.

The principal meaning of the term "mitigation", with which alone this chapter deals, concerns the avoiding of the consequences of a wrong, whether tort or breach of contract, and forms probably the only exact use of the term. Even if the subsidiary or residual meanings enumerated below cannot strictly be called incorrect, it would be well if the use of the term "mitigation" in connection with them was qualified, if not completely discarded, as matters are only confused by employing one term to describe disparate concepts.

(emphasis and underlining added)

78) The above statement of the author is relied on by Mr. Cooper, who submits that the concept of mitigation does not apply where there are no consequences of a wrong like in case of a theft. On the other hand Mr. Jagtiani has relied on the three rules for applying the principle of mitigation discussed by the author in McGregor on Damages :

The principal meaning itself comprises three different, although closely interrelated, rules. This analysis into three rules, although clearly implicit in the cases, is one which had not, at the first time of writing in the late 1950s, been given explicit statement in English law. It is submitted that such a division lends clarity to a difficult topic. The three rules are these.

(1) The first and most important rule is that the claimant must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided

but has failed, through unreasonable action or inaction, to avoid. Put shortly, the claimant cannot recover for avoidable loss.

(2) The second rule is the corollary of the first and is that, where the claimant does take reasonable steps to mitigate the loss to him consequent upon the defendant's wrong, he can recover for loss incurred in so doing; this is so even though the resulting damage is in the event greater than it would have been had the mitigating steps not been taken. Put shortly, the claimant can recover for loss incurred in reasonable attempts to avoid loss.

(3) The third rule is that, where the claimant does take steps to mitigate the loss to him consequent upon the defendant's wrong and these steps are successful, the defendant is entitled to the benefit accruing from the claimant's action and is liable only for the loss as lessened; this is so even though the claimant would not have been debarred under the first rule from recovering the whole loss, which would have accrued in the absence of his successful mitigating steps, by reason of these steps not being ones which were required of him under the first rule. In addition, where the loss has been mitigated other than by steps taken by the claimant subsequent to the wrong, the claimant can again recover only for the loss as lessened, provided that the benefit gained is not to be regarded as collateral. Put shortly, the claimant cannot recover for avoided loss.

79) Going further McGregor on Damages distinguishes the concepts of mitigation and contributory negligence as under :-

This meaning of the term "mitigation" deals with the manner in which damages resulting from a breach of contract by the claimant can be deducted from the claim made by the claimant in respect of that contract. It is analogous to cases of contributory negligence' in that both parties are at fault and a subtraction is made: **nevertheless a reduction of damages on the ground of contributory negligence is not referred to as "mitigation"**. Indeed the cases, which are all very old, refer only to reduction of the damages so that in this context the term "mitigation" does not surface.

(emphasis added)

80) Though not fully relevant at this stage, McGregor on Damages also deals with the question of mitigation of damages being a question of fact and once Trial Court records a finding of fact on failure to mitigate, even Appellate Court cannot take a different view. The author states thus :-

(b) A question of fact or a question of law. In *Payzu v Saunders* both Bankes and Scrutton L.JJ. said that the question of mitigation of damage is a question of fact; in *The Solholt* Sir John Donaldson M.R. said that whether a loss is avoidable by reasonable action on the part of the claimant is a question of fact not law" and that "this was decided in *Payzu v Saunders*". It has never been doubted since; today it tends to be regarded as trite law. One result of this is that, once a court of first instance has decided that there has been, or has not been, a failure to mitigate, it is difficult to persuade an appellate court to come to a different view. Mitigation being a question of fact, "it is therefore rarely appropriate", said Potter L.J. in *Standard Chartered Bank v Pakistan National Shipping Corporation*,²⁷ "to interfere with the conclusions of the trial judge based as they are on the evidence (or lack of satisfactory evidence) before him"

81) In the present case, the Arbitral Tribunal has recorded a finding of fact that FIS neither had the means nor has failed to adopt those means for mitigating its losses. As per McGregor on Damages, even Appellate Court cannot reverse the said finding and the question of court exercising power under Section 34 of the Arbitration Act reversing the said finding on fact would simply be out of question.

82) Coming back to the concept of mitigation, Mr. Cooper has relied on passage in Chitty on Contracts (supra) in which the author has observed that there is no duty on a party to mitigate before there has been a breach. The author has observed as under:-

The time for mitigating action there is no duty on a party to mitigate before there has been a breach or, normally, an anticipatory repudiation that the party has accepted. The time when the claimant should have mitigated may depend on when he discovered or ought to have discovered that the defendant had broken his contractual obligation. So, as soon as the claimant discovers that an item supplied to him by the defendant is unsafe because it is defective (in breach of the contract) he cannot continue to use it at the defendant's risk; he must either make it safe or replace it, since he cannot recover damages from the defendant for any loss which arose after he discovered the defect but which he could reasonably have avoided by taking remedial steps. After he knows (or ought to have known) of the breach, the claimant still has a reasonable time, depending on all the circumstances, before he must decide how to mitigate. In the case of damages for the cost of repairs or reinstatement, it may be reasonable for the claimant to delay getting the repairs or remedial work done so long as there is a reasonable chance that the defendant will repair or cure the defect, or until the time when the defendant has accepted liability or been held liable.

(emphasis added)

83) Thus the position appears to be well settled that mitigation concerns the avoiding of consequences of wrong. It involves taking of steps to prevent or control the loss 'after' the harm is caused. Failure to take steps to avoid future wrongs is not mitigation, but it would be contributory negligence.

84) In my view therefore, there is no question of application of principle of mitigation or invoking Explanation to Section 73 of the Contract Act in the facts and circumstances of the present case. The case involves plain act of theft by employees of SIPL. It cannot be contended by SIPL that because FIS did not catch it for first act of theft, the stolen money arising out of subsequent acts of theft must be permitted to be retained by SIPL. This is exactly what the case of SIPL is. It is attempting to take shelter behind alleged failure to take reconciliation exercise by FIS with BOI for early detection of fraud

for the purpose avoiding the liability to return stolen money to FIS. Merely because it was possible for FIS and BOI to detect the acts of theft by employees of SIPL by conducting daily reconciliation, it does not mean that SIPL can be permitted to retain the stolen money by its employees.

85) The present case involves theft to which the principles of mitigation would not apply. Even otherwise, there was no contractual duty on the Respondent to reconcile with BOI. Therefore alleged failure on the part of FIS in catching SIPL (and its employees) in respect of the first act of theft cannot be a reason for involving the principle of mitigation and deducting some amount from the damages. The case involves simple principle of returning the monies entrusted with SIPL, which are found to have been stolen by its employees. In a case involving liability to return the stolen money, there is no question of damages and for this reason also, the principle of mitigation would not apply. SIPL's liability to return the monies entrusted to it as a bailor is discussed in the latter part of the judgment.

ABSOLUTE RESPONSIBILITY OR MERE INDEMNITY

86) It is contended on behalf of SIPL that there was no absolute obligation on the part of SIPL to account for every money resulting out of mismatch. It is contended that the case involves mere indemnity given by SIPL to indemnify FIS of liability arising out of proven damage to FIS due to non-performance or contravention of terms and conditions of Agreement. Reliance is placed on Clause 15 of the 2015 Agreement, which read thus:-

15.1. The Company agrees and undertakes to indemnify FIS, its directors, officers: employees etc, and further undertakes to fully compensate FIS in case of any prejudice, proven claim or any proven loss, lawsuits, attorneys fees arising or accruing to FIS on account of any act, commission or omission attributable to the Improper handling of FIS machines, software, infrastructure, documents or to the negligence of any person of the Company and/or its employments, or to the negligence of any disclosure of the confidential information or tampering with cash, cheques and/or envelopes, or fraud, non-performance and/or delay's on part of the Company, in undertaking and performing the services; or otherwise whatsoever.

15.2 The Company shall indemnify FIS/ FIS Participant Banks and keep the FIS/FIS Participant Banks indemnified at all times against any loss resulting from fraud on a captured/seized card(debit or credit cards), perpetrated by the Company's Representatives from the time the card is removed by the Company representative from the ATM, as evidenced by the transaction log, until the captured card is delivered to FIS Participant bank by the Company, subject to a maximum liability of Rs. 50 Thousand only. The foregoing indemnity shall only be applicable for the period until Banks are mandated by the RBI not to deploy dip card ATM machines.

87) However, various other clauses of the Agreement leave no manner of doubt that SIPL had the absolute liability to make good loss of money resulting out of performance of contract by it. In Clause 6 of the Agreement it was SIPL's obligation to load cash into respective ATMs. Clause 6.3 of the Agreement made SIPL liable for safe keeping and holding the cash at its own risk and made it liable in case of proven loss or theft. Clause 6.3 provided thus:

6.3.During each of the aforesaid operations at 6.1 above, cash and cheques shall be in custody and control of the Company and the Company shall be liable for its safekeeping and hold the same at entire risk of its own and **shall be liable in case of any proven loss and/or theft.**

Clause 14.11 read thus:-

14:11 Nothing in this clause 14 or anywhere else shall prejudice the rights of FIS Under the indemnities from the Company under this Agreement, and/or release, the Company from its absolute obligations and liabilities to FIS under the indemnities to pay to FIS, FIS Participant Bank (as may be directed by FIS) the amounts under the indemnities.

The Company shall not be responsible for losses due to reasons stated as under.

(1) Misdispensation due to any kind of Technical fault whether the fault is detectable/Undetectable by ATM Machines all India, (Mis-dispensation due to wrong placement of cassettes will be service provider's responsibility).

(2) Cash received from FIS participant bank for Replenishment Short note in Bundle of the cash withdrawn from Bank wherever cash counting machine is not provided by the Bank,

(3) Any Wrong Software Problem Related with Host Updation, cassette.configuration Cause Mis-dispense from particular ATM's, Cause Cash Shortage Issues, losses due to Power failure.

Further, clauses 5.7 and 5.13 of the Agreement read thus :-

5.7 The Company shall compensate FIS for any proven loss and/or damage caused to FIS as a consequence of non-compliance of all or any of the terms of this Agreement or for the misconduct or negligence of all or any of its employees, representatives or any individual assigned for the performance of the services herein mentioned. In the event of such a claim for loss or damages being made by FIS, FIS shall be entitled to adjust such amounts as claimed against the future of outstanding payment due. If no such payment is outstanding, the Company shall be liable to make good such proven loss or damages by way of outright payment in the following manner:

- Up to Rs. 10. Lacs-within 07 days from the date it is proven to be SIPL's fault

- Above Rs. 10 lacs - within 30 days from the date it is proven to be SIPL's fault.

Any such claim for loss and/or damage made by FIS shall not amount to waiver of FIS's right to terminate this Agreement or any of the other rights available to FIS either under this Agreement otherwise whatsoever.

5.13. The company shall make good the proven losses/damages arising out of the occasions such as theft, fire dacoity, accident to the security van, robbery, burglary, dishonest act of the employees of the company etc while transportation of cash to the respective ATMs, loading of cash, transportation of packets/envelops collected from the ATMs to the designated branch(es) in the following manner

- Up to Rs. 10 Lacs within, 07 days from the date it is proven to be SIPL's fault
- Above Rs: 10 lacs within 30 days from the date it is proven to be SIPL's fault

(emphasis and underlining added)

88) Thus Petitioner had the liability to make good the entire loss suffered by the Respondent due to dishonest acts of its employees. This liability is absolute. The indemnity clauses relate to liabilities arising out of malfunctioning of ATM machines. However when it comes to liability to make good the loss of money due to misconduct of SIPL's employees, the liability is absolute.

89) Thus above contractual clauses would leave no manner of doubt that it was absolute responsibility of SIPL to return the lost money given in its custody for replenishment of ATMs. The case does not involve limited liability but absolute liability. In any case the Award does not indicate that the argument of absence of absolute liability was even raised. The objection is thus only stated to be rejected.

SIPL'S CAPACITY AS BAILEE

90) Clause 6.2 of 2010 Agreement described the role of SIPL while handling the operations relating to cash and cheques in its custody as 'Bailee' for FIS. Clause 6.2 reads thus:

6.2. During each of the aforesaid operations mentioned at 6.1 above, cash and cheques in custody of the Company will be held as a **bailee** for FIS and in trust for FIS and the Company shall not claim any right or lien of any kind over the said cash and or cheques for any purpose/payment/claim by the Company against FIS of whatsoever nature.

(emphasis added)

91) Under Section 151 of the Contract Act, a bailee is bound to take as much care of goods bailed to him as a man of ordinary prudence would. Under Section 152 of the Contract Act, the Bailee, in absence of any special contract, is absolved of responsibility for loss, destruction or deterioration of the thing bailed if he has taken amount of care of it described in Section 151 of the Contract Act. Sections 151 and 152 of the Contract Act provide thus :-

151. Care to be taken by bailee.—In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

152. Bailee when not liable for loss, etc., of thing bailed.—The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.

92) Thus the obligation of bailee is not just contractual but statutory. The Arbitral Tribunal has dealt with the issue of bailment while discussing the issue of vicarious liability and has relied upon

English judgment in *Morris versus. CW Martin* (supra) in which it is held as under :-

"Bailment for reward. Once a man has taken charge of goods as a bailee for reward, it is his duty to take reasonable care to keep them safe: and he cannot escape that duty by delegating it to his servant. If the goods are lost or damaged, whilst they are in his possession, he is liable unless he can show - and the burden is on him to show - that the loss, or damage occurred without any neglect or default or misconduct of himself or of any of the servants to whom he delegated his duty. This is clearly established by *Reeve v. Palmer*, *Coldman v. Hill* and *Building and Civil Engineering Holidays Scheme Management Ltd. v. Post Office*. There is an old case at nisi prius apparently to the contrary. It is *Finucane v. Small*. Lord Kenyon is there reported to have said that the bailor must prove that the loss was caused by the negligence of the bailee. That was clearly wrong. The bailee, to excuse himself, must show that the loss was without any fault on his part or on the part of his servants. If he shows that he took due care to employ trustworthy servants, and that he and his servants exercised all diligence, and yet the goods were stolen, he will be excused: but not otherwise. Take a case where a cleaner hands a fur to one of his servants for cleaning, and it is stolen. If the master can prove that thieves came in from outside and stole it without the fault of any of his servants, the master is not liable. But if it appears that the servant to whom he entrusted it was negligent in leaving the door unlocked - or collaborated with the thieves - or stole the fur himself, then the master is liable: see *Southcote's case*, *United Africa Co. Ltd. v. Saka Owoade* and *Reg. v. Levy Bros. Co. Ltd.*"

37. Furthermore, in the concurring judgment in the case Lord Diplock held:

"If the bailee in the present case had been a natural person and had converted the plaintiffs fur by stealing it himself, no one would have argued that he was not liable to her for its loss. But the defendant bailees are a corporate person. They could not perform their duties to the plaintiffs to take reasonable care of the fur and not to convert it otherwise than vicariously by natural persons acting as their servants or agents. It was one of their servants to whom they had entrusted the care and custody of the fur for the purpose of doing work upon it who converted it by stealing it. Why should they not be vicariously liable for this breach of their duty by the vicar whom they had chosen to perform it? Sir John Holt, I think, would have answered that they were liable

"for seeing that someone must be the loser by this deceit it is more reason that he who employ and puts a trust and confidence in the deceiver should be the loser than a stranger": Hem v. Nichols."

93) Thus where servants of bailee are negligent, the master is liable in respect of bailed goods. It is only in case where the master can prove that the thieves came from outside and stole the goods without the fault of its servants, the master is not held liable. In the present case the act of theft is committed by SIPL's own employees and therefore applying the principles under Sections 151 and 152 of Contract Act, SIPL is liable for loss of the bailed money.

94) The expression 'in absence of any special contract' appearing in Section 152 has been interpreted by the Apex Court in Taj Mahal Hotel (supra) to mean that special contract cannot lessen the liability of bailee but contract can be entered into only for acceptance of higher standard of liability by bailee than under Section 151 of the Contract Act. The Arbitral Tribunal has considered the ratio of the judgment in Taj Mahal Hotel in paragraph 243 of the Award, in which it is held as under:-

243. Mr. Cooper relied upon the judgement of the Supreme Court in Taj Mahal Hotel v. United India Insurance Co. Ltd., (2020) 2 SCC 224. In paragraph 20.8, the Supreme Court held that the Respondent was liable although the valet parking was purely complimentary and the customer i.e. the bailor had not paid for the same. In paragraph 22.3, it was held that Sections 151 and 152 of the Contract Act do not distinguish between a gratuitous bailee and a bailee for reward. In paragraph 37, the Supreme Court held:

"37. It is important to clarify that though courts may have construed the phrase "in the absence of any special contract" in Section 152 to mean that a bailee can reduce his liability under Section 151, such an interpretation is incorrect. The words "in the absence of

any special contract" in Section 152 clearly indicate that it is open to the bailee to accept a higher standard of liability than Section 151 under contract, and not otherwise."

95) In my view the findings recorded by the Arbitral Tribunal in paragraphs 253 to 256 holding SIPL liable as FIS' bailee in respect of cash given to it does not warrant any interference in exercise of power under Section 34 of the Arbitration Act.

ARBITRAL TRIBUNAL'S FINDINGS ON ISSUE NO.7

96) The second objection raised by SIPL to the Arbitral Award is in respect of quantum of loss assessed by the Arbitral Tribunal by holding SIPL and its employees guilty of theft. According to the Petitioner, there is no material on record to hold that the whole of the amount of Rs. 23,26,05,022/- is stolen by the employees of SIPL. Issue No.7 framed by the Arbitral Tribunal was as under:-

Whether the Respondent proves that the Claimant and/or its employees were involved and/ or guilty of theft and/ or fraudulent misappropriation in respect of Bank of India's ATMs at Barhi and Jhumritalaiya branches, during the period December, 2012 to October, 2015, as alleged by the Respondent, and if so, to what extent;

97) For answering Issue No.7, the Arbitral Tribunal has evaluated the oral and documentary evidence on record. The criticism of the Petitioner that the quantum of amount stolen is arrived at by the Arbitral Tribunal on the basis of the act of filing of FIR by SIPL against its employees appears to be far from correct. In fact, the learned counsel who appeared for FIS before the Arbitral Tribunal had fairly admitted that FIR, by themselves, were not

admissions of quantum of stolen amount. This is clear from following observations made by the Arbitral Tribunal.

133. As Mr. Cooper rightly submitted, the evidence clearly establishes that SIPL made enquiries and concluded that the said custodians had accumulated properties by utilizing the said amount; that the Board of Directors of SIPL authorized the filing of the FIR against the said custodians; that the contents of the FIR were never modified or retracted or supplemented and that SIPL was of the view and had admitted that its employees had committed the said theft Mr. Cooper fairly stated that the FIRs by themselves were not admissions of the quantum but only of the fact that the said custodians had committed the theft.

98) On the other hand, the Arbitral Tribunal has conducted analysis of the entire evidence on record for concluding that the act of theft/fraud was indeed committed by the employees of the Petitioner. The analysis of evidence on this issue runs into over 60 pages. After holding that theft and fraud was committed by SIPL's employees, the Arbitral Tribunal thereafter conducted independent inquiry therein on quantum of defalcation at Barhi Branch and Jhumritelaiya Branch. In respect of Barhi Branch the Arbitral Tribunal has considered the evidence on record by taking note of several correspondence exchanged between the parties. One of the additional factors taken into consideration by the Arbitral Tribunal is email dated 9 February 2016 which reads thus:

Subject: RE: Barhi & Chauparan loading differences

Attachments: ATT00001.txt; ATT00002.htm

Dear Upendra,

In line with our discussion, we have verified the submitted details and understand there is a difference of 16,17,53,900

across several dates on BOI Barhi and Chauparan feeder branch linked ATMs.

Best regards,

Anand K. Iyer"

99) Email dated 9 February 2016 sent by Petitioner clearly talks on the 'verification of submitted details' and 'understanding' that there was difference of Rs.16,17,53,900/- across various dates on BOI Barhi and Chauparan Feeder Branch linked ATMs. The Arbitral Tribunal has dealt with contention of Petitioner that email dated 9 February 2016 was not an admission of quantum of money defalcated by its employees. In paragraphs 165 to 167 it is held as under:-

165. Mr. Andhyarujina contended that SIPL's email dated 9th February 2016 is not an admission of the quantum of money having been defalcated by its employees. He contended that SIPL's case is this. SIPL only computed the details furnished by Bank of India and FIS. SIPL indulged only in an arithmetical exercise. In doing so, SIPL did not imply that the data furnished was verified as correct. There is no evidence of the exact data furnished by FIS to SIPL. The totality of the available evidence is unknown. Important material such as withdrawal slips were not available. SIPL often requested material, but the same was not furnished. The contents of the data given by Bank of India was not proved. With respect to the material furnished at Exhibit R-46, he reiterated that SIPL merely carried out an arithmetical exercise to arrive at the final figure based on the material furnished without accepting the correctness of the material. This was Mr. Andhyarujina's contention in respect of the entire material that has been narrated earlier in this Award.

166. Mr. Andhyarujina rightly submitted that the entire evidence must be read as a whole. Mr. Cooper supported this submission. This indeed would be the correct approach. This is not a case where a clear conclusion can be arrived at by reading only one or even a few documents in isolation. This is a case where relevant documents must be read together and the documentary evidence must be read with the oral evidence and the conduct of the parties. When all these facts are taken together, they in fact strengthen Mr. Cooper's

contention that the same culminated in an admission by SIPL that its employees, the said custodians had defalcated the said amounts from the Barhi branch ATMs and that an amount of Rs. 16,17,53,900/- had been defalcated. A finding to the contrary would be illogical and contrary to common commercial sense.

167. SIPL admitted that its officers had interacted with the officers of Bank of India as well as the officers of FIS. SIPL admits that the interaction was for the purpose of reconciling the account. Those in the commercial and business field know the sharp difference between a mere computation and reconciliation. A mere computation to arrive at the balance on the basis of the figures furnished would not involve days of interaction between officers of the enterprises concerned. A mere computation would not require days of effort by officers at the senior, in fact senior most level. It is the process of reconciliation which would require such involvement and participation. Normally, the process of reconciliation of accounts requires not merely striking a balance at the foot of the account on the basis of admitted figures, but a verification regarding the correctness of the data/figures furnished as well. There is nothing to indicate that in the present case, the reference to reconciliation indicated otherwise. In other words, there is nothing on the record that indicates that the parties while using the term "reconciliation" merely meant an arithmetical exercise of arriving at the final figure based on data that was blindly accepted without verification.

On the basis of this analysis, there can be little doubt that SIPL in its email dated 9th February 2016 at 7:23 p.m. confirmed that it had not merely computed the data furnished, but had also considered and verified the correctness thereof. Had it been otherwise, the entire language of the email would have been different. Undoubtedly, the language in the email ought not to be interpreted as one would interpret a statutory provision. It must be construed in a commonsense manner. While doing so, it is necessary to keep in mind the facts that preceded the email, the conduct that preceded the email as well as the facts and conduct that transpired thereafter. It is also important to note that SIPL and FIS are involved in this very business and that they deputed officers familiar with the process to participate in the reconciliation process. This was rightly not denied. The email clearly indicates that the intention was not to convey the result of a mere arithmetical exercise. It does not for instance merely state that the balance struck by the bank or FIS in respect to the data relating to the Barhi branch was correct. It clearly stated that SIPL had "verified the submitted details".

Considering all the facts and circumstances of the case, SIPL used the expression "verified the submitted details" consciously to indicate that it had verified the correctness of the details.

100) The Arbitral Tribunal has also taken note of oral evidence, which supported the statement in the email of verification of submitted details. After analyzing the oral evidence on record, the Arbitral Tribunal concluded that FIS established through evidence that the amount defalcated by the custodians in respect of ATMs in Barhi was to the extent of Rs.16,17,53,900/-. The analysis of evidence by Arbitral Tribunal while determining quantum of amount of defalcation at Barhi Branch runs into about 42 pages and it cannot be contended that the said finding is arrived at merely on the basis of contents of email dated 9 February 2016. The said email is only considered as supporting factor by the Arbitral Tribunal in addition to other oral and documentary evidence on record.

101) So far as defalcated amount at Jhumritelaiya Branch ATMs are concerned, the Arbitral Tribunal has again conducted a detailed analysis of evidence on record. It went through various reports placed on record as well as oral testimony of the witnesses. It has thereafter recorded a finding of fact that the defalcated amount at Jhumrietlaiya Branch was Rs.7,38,00,000/-. However, the said amount was ultimately settled at Rs.7,36,55,022/- which was the amount deducted by BOI.

102) I do not see any element of perversity in the above findings of fact recorded by the Arbitral Tribunal. I am not supposed to re-appreciate the evidence on record and arrive at the finding different than the one recorded by the Arbitral Tribunal. The

findings on quantum of defalcated amount do not suffer from the vice of perversity. The said findings are well supported by evidence on record. Accordingly, I do not find any merit even in the second objection raised on behalf of the Petitioner.

CONCLUSIONS

103) In the light of findings recorded above, I am of the view that the Petitioner has thoroughly failed to make out any of the enumerated grounds under Section 34 of the Arbitration Act for invalidation of well-considered and well-reasoned Arbitral Award. Conclusions recorded by the Arbitral Tribunal cannot be said to be arbitrary, irrational or something which no fair minded person can ever record. On the contrary, every fair minded person would arrive at the same conclusion as is recorded by the Arbitral Tribunal. In fact SIPL's case of permitting it to retain money stolen by its employees is something which no fair minded person would ever record.

104) It is also seen that the Arbitral Tribunal has reached to well-balanced conclusions. It has awarded the entire sum due to Petitioner-SIPL in respect of services performed by it under the contract by allowing its claim in the sum of Rs.25,05,79,968/-. It has even awarded interest in favour of SIPL at the rate of 18% per annum up to 16 April 2016. All that is directed against SIPL is to return the amount of cash lost by it on account of acts of its employees and due to its own negligent acts while performing replenishment services for FIS. There can be no dispute to the position that 'someone' has to account for BOI's lost money while performing replenishment services in the ATM. BOI has already

deducted its lost money from amounts payable to FIS. There is sufficient evidence on record for holding that Petitioner's employees have stolen money during performing ATM replenishment activities. That 'someone' is identified by the Arbitral Tribunal, in the facts and circumstances of the case, to be Petitioner-SIPL. Therefore holding Petitioner SIPL responsible for the lost money cannot be termed as an impossible view which no fair-minded person would ever take.

105) Therefore, there is no warrant for interference in the impugned Award by exercising power under Section 34 of the Arbitration Act. The Arbitral Award has not travelled beyond the contractual terms. The Arbitral Tribunal has not foisted a new commercial bargain on the parties. It has acted within the four-corners of the contractual clauses. Interpretation of the contractual clauses was within its domain and its interpretation of contractual clauses is not irrational. Its findings are well supported by evidence on record. The Award records detailed reasons. Mere omission to refer to contractual clause in Schedule A does not render the ultimate conclusion recorded by the Arbitral Tribunal invalid. The underlying reason for rejecting the contention of Schedule-A imposing any duty on FIS to reconcile with BOI can easily be discerned for various reasons recorded by the Arbitral Tribunal. Therefore no case is made out by the Petitioner for invalidating the Arbitral Award. The Award, to my mind, appears to be unexceptionable warranting dismissal of the Arbitration Petition.

106) Since the Arbitration Petition is dismissed, ordinarily this Court would have been justified in awarding costs of the present proceedings in favor of Respondent. It is however observed that the Arbitral Tribunal has not awarded costs of the arbitration in favour

of FIS particularly considering the position that both SIPL and FIS have succeeded in their respective claims. The Arbitral Tribunal has also held that except the activities committed by its employees, for which SIPL has been held to be vicariously liable, there was no intention on the part of SIPL as such to commit any fraudulent activity. SIPL is also not found to be the beneficiary of proceedings of the fraud. I am in full agreement with the above findings of the Arbitral Tribunal and I use the same for not awarding costs against SIPL, who has exercised its legitimate right in questioning correctness of Award before this Court. Therefore I deem it appropriate not to award costs while dismissing the Arbitration Petition.

ORDER

107) Arbitration Petition is accordingly **dismissed**. Considering the facts and circumstances of the case I deem it appropriate not to award costs.

108) In view of the disposal of the Commercial Arbitration Petition, nothing would survive in the Interim Application and the same is also disposed of accordingly.

[SANDEEP V. MARNE, J.]