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

Judgment reserved on: 15.07.2025

Judgment pronounced on: 10.10.2025

+ **O.M.P. (COMM) 363/2020**

NATIONAL COUNCIL OF EDUCATION RESEARCH &
TRAINING

.....Petitioner

Through: Mr. Satya Prakash Sharan and Mr.
Manish Kumar Sharan, Adv.

versus

M/S MURLI INDUSTRIES LTD.

.....Respondent

Through: Mr. Ashutosh Dubey, Adv.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 ("**1996 Act**") seeking to set aside the Arbitral Award dated 25.06.2013 passed in the arbitration proceedings titled as "*M/s Murli Industries Ltd. vs. National Council Of Education Research and Training (NCERT)*", wherein the Sole Arbitrator partially allowed the claims of the respondent and awarded a sum of Rs. 2,04,33,368/- with interest @ 12% p.a. to the respondent.
2. The petitioner before this Court was the respondent in the arbitration proceedings and the respondent herein was the claimant.



FACTUAL BACKGROUND

3. The petitioner i.e., National Council of Education Research and Training frames and develops the National curriculum Framework and also prepares and publishes textbooks for schools throughout the country.
4. The respondent is a Public Limited Company, engaged in the business of paper manufacturing and supplying to various government and semi-government organisations and private entrepreneurs.
5. In July 2010, the petitioner invited Tender (“***Tender***”) for supply of 16,845 MTs of Maplitho Paper and the respondent emerged as the successful bidder. The said Tender contained arbitration clause being Clause Nos. 23.03 and 23.04 of Conditions of Contract of the Tender, which read as under:-

“23.03 The dispute resolution mechanism to be applied pursuant to Clause 23.02 shall be as follows:

(a) A dispute or difference arising between the Purchaser and Supplier relating to any matter arising out of or connected with the contract, such dispute or difference shall be referred to the sole arbitration of an officer in the Ministry of Law, appointed to be the arbitrator by the Director, NCERT. The award of the Arbitrator shall be final and binding on the parties to the contract subject to the proviso that the Arbitrator shall give reasoned award.

(b) The Indian Conciliation and Arbitration Act, 1996, the rules thereunder and any statutory modifications or



re-enactments thereof, shall apply to the arbitration proceedings.

23.04 *The venue of arbitration shall be the place from where the contract is issued.”*

6. A Contract dated 01.12.2010 (“**Contract**”) was executed between the parties for supply of 10,000 MTs Maplitho Paper (3,500 MTs Reel Paper + 6,500 MTs Sheet Paper) worth of approximately Rs. 38.92 crores. As per the terms and conditions of the Contract, 75% of the total supply i.e., 7,500 MTs of Maplitho Paper was to be supplied within 105 days of signing the Contract and the order for the remaining 25% i.e., 2,500 MTs of Maplitho Paper was to be placed after ensuring the paper quality and timely delivery of the first 75%. The supply of 7,500 MTs of Maplitho Paper was divided into three lots and the first lot was to supplied within 45 days of signing the Contract. Consequently, in accordance with Clause No. 32.01 of Instructions/ Informations to Bidders of the Tender, the respondent furnished Performance Security in the form of a Bank Guarantee for an amount of Rs. 2,04,33,368/-.
7. Subsequently, *vide* letter dated 03.01.2011, the respondent requested the petitioner for an extension in the delivery period of the first lot by a minimum period of 20 days on account of delay in processing the ‘Dandy Cover & Water Mark Logo’ and delay in production due to quality issues of the raw material. It was also stated that non-inspection of the first lot by the DSG & D, even after repeated reminders, added to the delay in the production and quoted these as ‘*force majeure*’ circumstances.



8. The samples submitted by the respondent failed the quality test and the petitioner accordingly asked the respondent to improve the quality of the paper. Consequently, the respondent informed the petitioner *vide* letter dated 21.01.2011, that due to technical issues in second stage deinking Cell and the Tackle Disc of Hot Disperser, which was procured from Cellwood, West Germany, they would not be able to achieve 80% brightness, as per the Schedule of Requirements and Specifications of the Tender and requested the petitioner to permit it to produce material with 72% brightness. In response, *vide* letter dated 25.01.2011, the petitioner refused the said request of the respondent and asked the respondent to confirm within two days whether it would be able to supply the paper within the time schedule given in the Contract, otherwise the petitioner would initiate action as per Clause No. 17 of Conditions of Contract of the Tender for forfeiture of the Performance Security amount. In response to the petitioner's letter, the respondent *vide* letter dated 27.01.2011 sought time of three to four months to rectify the technical issues and supply the material as per agreed specifications, and also sought the protection of 'Force Majeure' Clause being Clause No. 20 of Conditions of Contract of the Tender.
9. Subsequently, the petitioner terminated the Contract *vide* letter dated 02.02.2011 and informed the respondent that it will be taking action as per Clause No. 17 of Conditions of Contract of the Tender for forfeiture of the Performance Security amount. Thereafter, the petitioner issued a show cause notice dated 02.06.2011 to the respondent giving the respondent a chance to explain as to why the



Performance Security amount should not be forfeited. The Committee, constituted by the petitioner, after hearing the representatives of the respondent, *vide* order dated 15.11.2011 rejected respondent's plea of '*force majeure*' as a ground for non-performance of its contractual obligations and proceeded to encash the Bank Guarantee for a sum of Rs. 2,04,33,368/- to realize the amount towards compensation and damages for breach of the Contract.

10. Since there were disputes between the parties, the respondent invoked the arbitration process. Consequently, the Sole Arbitrator was appointed.
11. After hearing both parties and considering the documents and evidence placed on record, the Sole Arbitrator passed the impugned Award dated 25.06.2013 in favour of the respondent, awarding a sum of Rs. 2,04,33,368/- i.e., the amount of Performance Security encashed by the petitioner, along with interest @ 12% p.a..
12. Feeling aggrieved by the impugned Award, the petitioner has filed the present petition.

SUBMISSIONS ON BEHALF OF THE PETITIONER

13. Learned counsel for the petitioner has challenged the impugned Award primarily on three grounds.

I. Petitioner is entitled to forfeit Performance Security amount, irrespective of proof of loss

14. Learned counsel for the petitioner submits that shortly after signing the Contract, the respondent expressed its inability to supply paper as per the specification provided in the Tender and accordingly, the petitioner forfeited the Performance Security amount and encashed the



Bank Guarantee, which it is entitled to do under Clause No. 17 of Conditions of Contract of the Tender. It is stated that under Clause Nos. 17 and 18 of Conditions of Contract of the Tender, the Performance Security amount is a 'genuine pre-estimated' liquidated damages, which the petitioner is entitled to realize in event of delay or non-performance of the Contract and it is not by way of penalty. It is further stated that irrespective of any proof of injury or loss, the same could be realized by the aggrieved party by invoking the Security clause/ Bank Guarantee submitted in this regard. Reliance is placed on: (1) *BSNL v. Reliance Communication Ltd.*, (2011) 1 SCC 394; (2) *ONGC v. Saw Pipes Ltd.*, (2003) 5 SCC 705; (3) *National Highways Authority of India v. Ganga Enterprises*, (2003) 7 SCC 410; and (4) *State of Haryana v. Malik Traders*, (2011) 13 SCC 200, amongst others.

II. Plea of Force Majeure is Erroneous

15. Learned counsel for the petitioner submits that the respondent's plea for invoking 'Force Majeure' Clause is not made out for two reasons. Firstly, because as per respondent's own plea due to technical issue their machinery was not able to achieve 80% brightness, however they were able to produce paper of 72% brightness. It is stated that failure to maintain efficiency of manufacturing process cannot be passed off as 'force majeure', since it is not a case of 'complete breakdown of machinery' or something wholly 'unforeseeable' or 'beyond control', instead the cause for non-performance is attributable to lapses on the part of the respondent.
16. Secondly, Clause No. 20.02 of Conditions of Contract of the Tender



defines ‘Force Majeure’ as “an event beyond the control of the Supplier and not involving the Supplier’s fault or negligence and not foreseeable. Such event may include, but are not restricted to, acts of the Purchaser either in its sovereign or contractual capacity, wars or revolution, fires, floods, epidemics, quarantine restrictions and freight embargoes”. It is stated that the use of the words such wars or revolution, fires, floods, epidemics, quarantine etc. in the ‘Force Majeure’ Clause makes it clear that only such events which are ‘not foreseeable’ events would qualify as ‘force majeure’. It is further stated that it is settled law that ‘force majeure’ clause must be interpreted and understood with close attention to words which precede or follow it and with regard to the nature and the general terms of the contract. Reliance is placed on: (1) ***Sahibabad Impex Pvt. Ltd. v. UOI, (2007) Leagle Eagle (DHC) 1405***; and (2) ***Dhanrajamal Gobindram v. Shamji Kalidas & Co., AIR 1961 SC 1285***. Hence, breakdown of machinery is not a ‘force majeure’ event as misunderstood by the Sole Arbitrator.

III. Time is of the essence of the Contract

17. Lastly, the learned counsel for the petitioner submits that the Sole Arbitrator failed to appreciate that time is of the essence of the Contract and merely because there is a provision for providing extension in delivery time does not imply that the respondent could avoid the delivery schedule. It is stated that the petitioner has a tight schedule to follow as books are an integral part of every students academic curriculum. Hence, the petitioner is required to procure the print paper by January and complete the entire process by March end,



so that textbooks are printed and supplied in the market by April, throughout the country as well as abroad.

18. It is further stated that the respondent is bound by the Performance Security Clause being Clause No. 32 of Instructions/ Informations to Bidders of the Tender, and is required to abide by the time-schedule set out in the Contract, failing which the Performance Security is to be forfeited by the petitioner. It is stated that this specific Performance Security Clause is set out in every contract of supply by the petitioner, and has been mentioned in the present Tender and Contract at several places being Section VI (Bid Submission Form) of the Tender, Clause Nos. 17, 18 and 27 of Conditions of Contract of the Tender, which shows that time is of the essence of the Contract.
19. It is further stated that the Sole Arbitrator wrongly recorded that the other suppliers being M/s Abhishek Industries Ltd. and M/s Shakumbhri Straw Products Ltd. were awarded contract later, without following due process of tendering. It is stated that these two contractors' bids were considered along with the respondent, however, since the respondent's bid was lowest, it was awarded the lion share of the supply contract.
20. On the above mentioned grounds, the learned counsel for the petitioner submits that the impugned Award passed by the Sole Arbitrator is in conflict with the public policy of India and patently illegal and hence, liable to be set aside.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

21. The learned counsel for the respondent in response to the contentions raised by the learned counsel for the petitioner makes the following



submissions:-

I. Petitioner is not entitled to forfeit Performance Security Amount, as it did not suffer any loss

22. The learned counsel for the respondent submits that the petitioner's claims that since the respondent failed to fulfil its obligations under the Contract, forfeiture of Performance Security amount is a 'genuine pre-estimated liquidated Damages', as per Clause Nos. 17 and 18 of Conditions of Contract of the Tender is wrong. It is stated that 'genuine pre-estimated liquidated damages' are different from Performance Security, as Clause No. 18 of Conditions of Contract of the Tender specifies how the liquidated damages are to be calculated.
23. It is further stated that the petitioner has not sustained or suffered any loss, as it gave the contract to M/s Abhishek Industries Ltd. and M/s Shakumbhri Straw Products Ltd. on the same rate as was placed on the respondent. Moreover, the petitioner did not furnish any calculation of liquidated damages in terms of Clause No. 18 of Conditions of Contract of the Tender nor has it claimed any damages in their Counter Statement/ Reply to the Statement of the respondent. It is submitted that the petitioner did not sustain any loss and hence, not entitled to forfeit the Performance Security amount, reliance is placed on (1) *Fateh Chand v. Balkishan Dass, AIR 1963 SC 1405*; and (2) *Maula Bux v. Union of India, AIR 1970 SC 1955*.

II. Plea of Force Majeure

24. The learned counsel for the respondent submits that due to a technical snag in the second stage deinking Cell and the Tackle Disc of Hot Disperser, which the respondent procures from Cellwood, West



Germany as the same is not available in India, the respondent was unable to achieve 80% brightness as mentioned in Schedule of Requirements and Specifications of the Tender. It is stated that as per Clause No. 20.03 of Conditions of Contract of the Tender, the respondent promptly notified the petitioner of the said situation and requested the petitioner to consider the matter under '*Force Majeure*' Clause, as the situation was beyond the control of the respondent and not due to respondent's fault or negligence and was unforeseeable. It is further stated that the respondent offered to supply paper with 72% brightness, however, the same was rejected by the petitioner.

25. The learned counsel for the respondent in support of its contention that the situation was a '*force majeure*' condition relies upon the following judgments: (1) ***Dhanrajamal Gobindram (supra)***; and (2) ***Md. Serajuddin v. State of Orissa, AIR 1969 Ori 152.***

III. Time is not of the essence of the Contract

26. Lastly, the learned counsel for the respondent submits that the time is not of the essence of the Contract, as there is a provision being Clause No. 17.03 of Condition of Contract of the Tender which allowed extension in delivery period. The respondent places reliance on: (1) ***Hind Construction Contractors v. State of Maharashtra, AIR 1979 SC720***; and (2) ***Arosan Enterprises Ltd. v. Union of India, (1999) 9 SCC 449.***
27. It is further stated that despite respondent's request to extend the delivery period, the petitioner did not give extension and terminated the Contract. However, the petitioner later gave the contract to M/s Abhishek Industries Ltd. and M/s Shakumbhri Straw Products Ltd.



and even extended their delivery period to enable them to complete their contract. It is stated that the last date for delivery of M/s Abhishek Industries Ltd. was 11.08.2011 whereas the supply was completed on 19.08.2011 and in case of M/s Shakumbhri Straw Products Ltd. the last date of delivery was 13.05.2011 whereas supply was completed on 08.07.2011, which is implied extension of delivery period and shows that time was not the essence of the Contract.

28. In view of above, it is submitted that the Sole Arbitrator has rightly appreciated the complete conspectus of the case and has passed a well-reasoned Award, which needs no interference.

ANALYSIS AND FINDINGS

29. I have heard learned counsels for the parties and perused the material available on record including the judgments cited.
30. To set aside an Arbitral Award, the same must fall under any of the categories as mentioned in Section 34 of the 1996 Act. One of the grounds, amongst other, pertains to public policy of India and Explanation 1 of Section 34(2)(b)(ii) of the 1996 Act provides that the Award in conflict with inter alia, the fundamental policy of Indian law or the most basic notions or morality or justice can be set aside, reliance is placed on *OPG Power Generation (P) Ltd. v. Enxio Power Cooling Solutions (India) (P) Ltd., (2025) 2 SCC 417*.¹
31. Another ground for setting aside an Award under Section 34 of the 1996, pertains to patent illegality. Section 34(2A) of the 1996 Act provides that an Arbitral Award, arising out of arbitrations other than international commercial arbitrations, can be set aside if patently

¹ Refer: paragraphs No. 55, 56 and 63.



illegal on the face of the Award. The proviso of the said sub-section further provides that an Award shall not be set aside merely on the ground of an erroneous application of the law or by reappraisal of evidence, reliance is placed on ***Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India, (2019) 15 SCC 131.***²

32. The principles with regard to the limited scope of interference by a Court under Section 34 of the 1996 Act against the Arbitral Award have been reiterated time and again by the Hon'ble Supreme Court, reliance is placed on ***Consolidated Construction Consortium Limited v. Software Technology Parks of India, 2025 INSC 574*** and more particularly paragraph No. 23, which reads as under:-

“23. Scope of Section 34 of the 1996 Act is now well crystallized by a plethora of judgments of this Court. Section 34 is not in the nature of an appellate provision. It provides for setting aside an arbitral Award that too only on very limited grounds i.e. as those contained in sub-sections (2) and (2A) of Section 34. It is the only remedy for setting aside an arbitral Award. An arbitral Award is not liable to be interfered with only on the ground that the Award is illegal or is erroneous in law which would require re-appraisal of the evidence adduced before the arbitral Arbitrator. If two views are possible, there is no scope for the court to re-appraise the evidence and to take the view other than the one taken by the arbitrator. The view taken

² Refer: paragraphs No. 37 and 38.



by the arbitral Arbitrator is ordinarily to be accepted and allowed to prevail. Thus, the scope of interference in arbitral matters is only confined to the extent envisaged under Section 34 of the Act. The court exercising powers under Section 34 has perforce to limit its jurisdiction within the four corners of Section 34. It cannot travel beyond Section 34. Thus, proceedings under Section 34 are summary in nature and not like a full-fledged civil suit or a civil appeal. The Award as such cannot be touched unless it is contrary to the substantive provisions of law or Section 34 of the 1996 Act or the terms of the agreement.”

(Emphasis added)

33. A bare perusal of the paragraph, reproduced above, shows that the Court under Section 34 of the 1996 Act does not sit in appeal over the Award or re-appreciates the evidence. It is the prerogative of the Arbitral Tribunal to interpret the terms of the contract and if the Arbitral Tribunal has adopted a view which is plausible, the Court in absence of any of the grounds under Section 34 of the 1996 Act, is not to re-examine the facts to find out whether a different decision can be arrived at, even if an alternate view is possible or seems more appropriate.
34. It is well settled law that the Court under Section 34 of the 1996 Act can only set aside an Arbitral Award and not modify or rewrite it. However, the Court's power to set aside an Award also includes the power to partially set aside an Award. The portions of the Award which fall under any of the categories as mentioned in Section 34 of



the 1996 Act, can be severed from rest of the Award and set aside. However, the same can only be done when the claims are not so interconnected that one cannot be segregated from the other, without vitiating the remaining findings in the Award. Reliance is placed on ***National Highways Authority of India v. Trichy Thanjavur Expressway Ltd., 2023 SCC OnLine Del 5183***³, wherein a Coordinate Bench of this Court observed as under:-

“87. The Court thus records its conclusions as follows:—

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I. Once an award is understood as consisting of separate components, each standing separately and independent of the other, there appears to be no hurdle in the way of courts adopting the doctrine of severability and invoking a power to set aside an award partly. The power so wielded would continue to remain one confined to “setting aside” as the provision bids one to do and would thus constitute a valid exercise of jurisdiction under Section 34 of the Act.

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L. The power to partially sever an offending part of the award would ultimately depend on whether the said decision is independent and distinct and whether an annulment of that part would not disturb or impact any other finding or declaration that may have been returned by the AT. The question of severability would have to be

³ Upheld by the Hon’ble Supreme Court in ***Gayatri Balasamy v. ISG Novasoft Technologies Ltd., (2025) 7 SCC 1, paragraph Nos. 250 and 251.***



decided bearing in mind whether the claims are interconnected or so intertwined that one cannot be segregated from the other. This for the obvious reason that if the part which is sought to be set aside is not found to stand independently, it would be legally impermissible to partially set aside the award. A partial setting aside should not lead to a component of the award being rendered vulnerable or unsustainable. It is only when the award relates to a claim which is found to stand on its own and its setting aside would not have a cascading impact that the Court could consider adopting the aforesaid mode.

(Emphasis added)

35. With these principles in mind, I shall now proceed to consider the contentions raised by both the parties.
36. From the facts and the submissions made by counsels for both the parties, the controversy that falls for consideration before this Court is whether the Sole Arbitrator was correct in directing the petitioner to return the sum of Rs. 2,04,33,368/- to the respondent, which the petitioner forfeited as Performance Security by encashing the Bank Guarantee provided by the respondent, along with interest @ 12% p.a..
37. As per Clause No. 17 of Conditions of Contract of the Tender any “unexcused-delay” by the respondent in performance of its delivery obligations shall entitle the petitioner to forfeit the Performance Security, impose liquidated damages and/ or terminate the Contract. The said Clause No. 17 of Conditions of Contract of the Tender is



extracted below:-

“17. Delays in the supplier’s Performance

17.01

17.02 Any unexcused-delay by the Supplier in the performance of its delivery obligations shall render the supplier liable to any or all of the following sanctions:

- > forfeiture of its Performance Security,*
- > imposition of Liquidated Damages and/or*
- > Termination of the Contract for defaults*

17.03 If at any time during performance of the contract, the Supplier should encounter conditions impeding timely delivery of the Goods, the Supplier shall promptly notify the Purchaser in writing of the fact of the delay, its likely duration and its causes(s). As soon as practicable after receipt of the Supplier’s notice, the Purchaser shall evaluate the situation and may, at its discretion, extend the Supplier’s time for performance with or without liquidated damages, in which case the extension shall be ratified by the parties by amendment of the contract”

- 38.** However, as per Clause No. 20 of Conditions of Contract of the Tender i.e., the ‘*Force Majeure*’ Clause, in event of a ‘*force majeure*’ event, which leads to the delay in performance of the contractual obligations by the respondent, the petitioner would not be entitled to forfeit the Performance Security, impose liquidated damages and/ or terminate the Contract. The said Clause No. 20 of Conditions of Contract of the Tender is extracted below:-



“20. Force Majeure

20.01 Notwithstanding the provisions of Clauses 17 and 18, the Supplier shall not be liable for forfeiture of its Performance Security, Liquidated Damages or Termination for Default, if and to the extent that, its delay in performance or other failure to perform its obligations under the contract is the result of an event of Force Majeure.

20.02 For purposes of this Clause, “Force Majeure” means an event beyond the control of the Supplier and not involving the Supplier’s fault or negligence and not foreseeable. Such event may include, but are not restricted to, acts of the Purchaser either in its sovereign or contractual capacity, wars or revolution, fires, floods, epidemics, quarantine restrictions and freight embargoes.

20.03 If a Force Majeure situation arises, the Supplier shall promptly notify the Purchaser in writing of such conditions and the cause thereof. Unless otherwise directed by the Purchaser in writing, the Supplier shall continue to perform his/her obligations under the contract as far as is reasonably practical, and shall seek all reasonable alternative means for performance not prevented by the Force Majeure event.”

- 39.** Since, as per Clause No. 20.01 of Conditions of Contract of the Tender, in event of ‘force majeure’ the petitioner is not entitled to forfeit the Performance Security, the first issue that needs to be



determined is whether breakdown of a part of the machinery (namely technical snag in second stage deinking Cell and Tackle Disc of Hot Disperser) leading to delay in delivery of paper by the respondent, which ultimately led to the petitioner terminating the Contract and forfeiting the Performance Security, would fall under the ‘*Force Majeure*’ Clause of the Tender.

40. The Sole Arbitrator dealt with the said issue in paragraph Nos. 87 to 93 of the impugned Award, which are reproduced below:-

“87. On the question of “Force Majeure”, the Counsel for the Claimants vehemently argued that their case is covered under Clause 20 of the Condition of Contract as they could not supply the paper on account of breakdown of machinery i.e. technical snag in second stage deinking Cell and Tackle Disc of Hot Disperser, which was procured from Cell Wood, West Germany, which could not be operated upon. This fact promptly informed in writing to the Purchaser (the Respondents) as the sudden technical snag/breakdown of machinery was not foreseeable on account of Supplier’s fault or negligence.

88. The Supplier was eagerly entered to complete the Contract as it was a major contract for them for an amount of about Rs.39 crore, from which, if it is completed, they would have got the benefit of profit.

The Claimants have also referred the following judgements in support of their claim:



(1) *Dhanrajamal Gobindram vs. Shamji Kalidas & Company AIR 1961 SC 1285, wherein it was held that -*

(2) *In another judgement in the matter of Md. Serajuddin vs. State of Orissa AIR 1969 ORRISA 152, wherein Hon'ble Court has held that*

(3) *In another case of Satyabrata Ghosh vs. Mugneeram Bangur & Co. AIR (1954) SCR 310, AIR 1954 SC 44 it was laid down by Hon'ble Supreme Court that -*

89. *The Counsel for the Respondent vehemently rebutted the Claim of the Claimants saying that the case of Claimants do not comes within the purview of "Force Majeure" condition as mentioned in the Clause 20 of Conditions of Contract as request of the Claimants to consider the case under Clause 20 was referred to a Committee under the Chairmanship of JD (C) NCERT, Legal Adviser of NCERT and Head Publication Department and its Members and the personal hearing was given by the Committee on 4.11.2011 in which Mr. Murli Maloo, Executive Director, Mr. Anand Chandak, CFO of M/s. Murli Industries Limited and Mr. Chaitanya Deshpande, Counsel of M/s. Murli Industries Limited appeared before the Committee and was of the view that failure of some parts of the Machinery cannot be said to be unforeseenable and breakdown of machinery is quite a common phenomenon. Therefore, the Contractor has failed to perform their obligation undertaken by them under the Contract. Alongwith Order dated 15.11.2011 a rejection*



Memo dated 31.11.2011 was also given to the Claimants. It is also stated by the Counsel for the Respondents that the judgements referred by the Counsel for the Claimants are not authority on the question of "Force Majeure". The Counsel for the Respondents did not give any Supreme Court judgement in support of his arguments.

90. Since the Claimants have intimated promptly about the failure/breakdown of machinery to the Respondents, which fulfils one of the Conditions as laid down in Clause 20 of the Conditions of Contract which is "Force Majeure" and have also requested the Respondents to grant three-four months time, so that they could procure the parts from West Germany, which led to breakdown of machinery. The Respondents given only two days time to confirm whether Claimants can supply the material or otherwise. In other words, they have not considered the request of the Claimants regarding extension of Delivery Period. They have not given even less time, than the time sought by the Claimants. They cancelled the Contract of the Claimants and placed orders without inviting bids of risk purchase tender, which shows that they have scuttled the procedure as laid down for procurement of stores for official purpose.

91. The law laid down by Hon'ble Supreme Court in the matters of M/s Dhanrajmal Gobindram vs. M/s Shamji Kalidas and Co. AIR 1961 SC 1285 and Md. Serajuddin vs.



State of Orissa, AIR 1969 ORRISA 152 clearly said that breakdown of machinery are included in "Force Majeure".

This case relates to breakdown of machinery and is covered by the law laid down by the Hon'ble Supreme Court ibid.

92. *At page 883 of the book "The Indian Contract and Specific Relief Acts" by Pollock & Mulla (14th Edition 2012), it is said that –*

"A party is excused of non-performance, if it proves that non-performance was due to an impediment beyond its control, and it could not have reasonably been foreseen by it at the time of making of the Contract, nor could it have avoided or overcome it or its consequences. If the impediment is temporary, the excuse will be had for the reasonable period, during which it has an effect on the performance of the Contract. It is necessary that the party failing to perform must give notice to the other party of the impediment and its effect on its ability to perform, failing which, there may be liability for damages for non-receipt of notice.

Where the factual situation can be considered as hardship and of Force Majeure, the affected party may decide which remedy to pursue. The remedy for hardship will enable it to renegotiate the Contract and keep it alive, and the remedy for the latter - to have its non-performance excused."



93. In this case, the Claimants have given notice of impediment i.e. breakdown of machinery, which could not be seen at the time of making of the Contract, it can be said that the Claimants have perform this obligation under Clause 20 of Conditions of Contract. In addition to the above, the breakdown of machinery was not foreseeable at the time of Contract. Therefore, I decide this issue in favour of the Claimants.”

41. A perusal of the paragraphs reproduced above show that the Sole Arbitrator found that the technical issue with the respondent's machinery i.e., technical snag in second stage deinking Cell and Tackle Disc of Hot Disperser, is breakdown of machinery and the same was not foreseeable at the time of making of the Contract. Hence, the Sole Arbitrator held that the same is covered under the 'Force Majeure' Clause of the Tender.
42. I am unable to agree with the said finding of the Sole Arbitrator. The Clause No. 20.02 of Conditions of Contract of the Tender defines 'force majeure' as an event 'not foreseeable' and 'beyond the control' of the respondent and not involving respondent's 'fault or negligence'. In my view, it cannot be said that technical issue in one part of the machinery was a 'not foreseeable' event. The respondent is a company engaged in the business of paper manufacturing and such technical issues are not only foreseeable but is in fact normal in such business. It cannot be said that a company engaged in the business of paper manufacturing cannot foresee with reasonable certainty that there could occur some technical issue with its machinery.



43. Further, although the occurrence of some technical issue in a machinery is not in control of any manufacturer but to stay prepared if such thing occurs is not only in control of a manufacturer but also expected of it. True, it cannot be said that technical snag in second stage deinking Cell and Tackle Disc of Hot Disperser was something in ‘control’ of the respondent or its ‘fault’, however, it was respondent’s negligence that it was not prepared for such occurrence, especially when it has entered into a Contract with the petitioner for such huge amount of supply of paper.
44. The law with regards to ‘*force majeure*’ has been crystalized by the Hon’ble Supreme Court in ***Energy Watchdog v. CERC, (2017) 14 SCC 80*** and a Coordinate Bench of this Court in ***Halliburton Offshore Services v. Vedanta Ltd., 2020 SCC OnLine Del 2068*** has summed up the same as under:-

“64. The law relating to Force Majeure has been recently settled by the Supreme Court in the case of Energy Watchdog v. Central Electricity Regulatory Commission, (2017) 14 SCC 80. The principles laid down by the Supreme Court in paragraphs 34-42 are as under:

- a) Force Majeure would operate as part of a contract as a contingency under section n 32 of the Indian Contract Act 1872 (‘ICA’).*
- b) Independent of the contract sometimes, the doctrine of frustration could be invoked by a party as per Section 56, ICA.*



c) *The impossibility of performance under Section 56, ICA would include impracticability or uselessness keeping in mind the object of the contract.*

d) *If an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered their agreement it can be said that the promisor finds it impossible to do the act which he had promised to do.*

e) *Express terms of a contract cannot be ignored on a vague plea of equity.*

f) *Risks associated with a contract would have to be borne by the parties.*

g) *Performance is not discharged simply if it becomes onerous between the parties.*

h) *Alteration of circumstances does not lead to frustration of a contract.*

i) *Courts cannot generally absolve performance of a contract either because it has become onerous or due to an unforeseen turn of events. Doctrine of frustration has to be applied narrowly.*

j) *A mere rise in cost or expense does not lead to frustration.*

k) *If there is an alternative mode of performance, the Force Majeure clause will not apply.*



l) The terms of the contract, its matrix or context, the knowledge, expectation, assumptions and the nature of the supervening events have to be considered.

m) If the Contract inherently has risk associated with it, the doctrine of frustration is not to be likely invoked.

n) Unless there was a break in identity between the contract as envisioned originally and its performance in the altered circumstances, doctrine of frustration would not apply.

xxxxxxx

70. It is the settled position in law that a Force Majeure clause is to be interpreted narrowly and not broadly. Parties ought to be compelled to adhere to contractual terms and conditions and excusing non-performance would be only in exceptional situations. As observed in Energy Watchdog (supra) it is not in the domain of Courts to absolve parties from performing their part of the contract. It is also not the duty of Courts to provide a shelter for justifying non-performance. There has to be a ‘real reason’ and a ‘real justification’ which the Court would consider in order to invoke a Force Majeure clause.”

(Emphasis added)

- 45.** The paragraphs reproduced above clearly show that in order to enforce a ‘force majeure’ clause the doctrine of frustration has to be applied and that too narrowly. The ‘force majeure’ clause is an exception clause which permits a party to wriggle out of its contractual



obligations without there being any adverse consequences. The same is only due to the reason that the contract becomes incapable of performance due to events beyond the control of that party. If breakdown of a part of a machinery is to be construed as a '*force majeure*' event then the performance of every contract would be in jeopardy. It is incumbent upon a manufacturer to be prepared for breakdown of any part of the machinery.

46. Further, the Sole Arbitrator relied on ***Dhanrajamal Gobindram (supra)*** and ***Md. Serajuddin (supra)*** to hold that the breakdown of machinery is a '*force majeure*' event and since, the situation of the respondent relates to breakdown of machinery the same is covered under the '*Force Majeure*' Clause. The reliance placed by the Sole Arbitrator on ***Dhanrajamal Gobindram (supra)*** and ***Md. Serajuddin (supra)*** are misplaced in the context of the present case.
47. The Hon'ble Supreme Court in ***Dhanrajamal Gobindram (supra)***, while dealing with the issue whether the agreement is said to be void because of vagueness and uncertainty arising from the use of the phrase "subject to the usual force majeure clause", gave broad interpretation of the term '*force majeure*' as under:-

"17. McCardie J. in Lebeaupin v. Crispin ([1920] 2 K.B. 714), has given an account of what is meant by "force majeure" with reference to its history. The expression "force majeure" is not a mere French version of the Latin expression "vis major". It is undoubtedly a term of wider import. Difficulties have arisen in the past as to what could legitimately be included in "force majeure". Judges have



agreed that strikes, breakdown of machinery, which, though normally not included in “vis major” are included in “force majeure”. An analysis of rulings on the subject into which it is not necessary in this case to go, shows that where reference is made to “force majeure”, the intention is to save the performing party from the consequences of anything over which he has no control. This is the widest meaning that can be given to “force majeure”, and even if this be the meaning, it is obvious that the condition about “force majeure” in the agreement was not vague. The use of the word “usual” makes all the difference, and the meaning of the condition may be made certain by evidence about a force majeure clause, which was in contemplation of parties.”

(Emphasis added)

48. A perusal of the paragraph reproduced above shows that the Hon’ble Supreme Court in ***Dhanrajamal Gobindram (supra)*** gave a general interpretation that ‘force majeure’ include events over which the party has no control like breakdown of machinery. The ratio of ***Dhanrajamal Gobindram (supra)*** does not hold that “breakdown of machinery” falls within the ‘force majeure’ circumstances. The observation given in paragraph No. 17 of the said judgment is only in the passing and not a binding precedent.
49. Further, the present case is not of breakdown of machinery. In the present case, due to some issues in the second stage deinking Cell and the Tackle Disc of Hot Disperser, the respondent was not able to



achieve 80% brightness in the paper but was able to produce paper with 72% brightness. The part required to achieve the 80% brightness in the paper was to be brought from West Germany but the respondent was requiring three to four months to get the said part. Breakdown of machinery cannot be expanded to encompass situations where the machinery works but with reduced efficiency. Also, as discussed above, the technical issue was not something unforeseeable by the respondent. Hence, the reliance placed by the Sole Arbitrator on ***Dhanrajamal Gobindram (supra)*** is misplaced in the context of the present case.

50. Further, the Hon'ble Orrisa High Court in ***Md. Serajuddin (supra)*** while interpreting a 'Force Majeure' clause relied on ***Dhanrajamal Gobindram (supra)*** and held as under:-

“38. Mr. Justice McCardie in Lebeaupiri v. Crispin, (1920) 2 KB 714 gave an account of what is meant by “force-majeure”. Their Lordships of the Supreme Court in DhanrajmalGtbindram v. Shamji Kalidas and Co., AIR 1961 SC 1285 have been pleased to refer with approval to Mr. Justice MacCardie's account of what is meant by “force-majeure”. We find therefrom that the expression “force-majeure” is not a mere French version of the Latin expression “vis major”, and that strikes, breakdown of machinery and such things which, though normally not included in “vis-major”, are incuded in “force-majeure”.

...



39. ... I In the present case, the words “force-majeure” do not stand alone, but the clause in which it occurs in the lease contains examples of what was intended to be conveyed by this expression. The intention with which this term “force-majeure” is used in Clause 5 of Part IX has been explained therein as follows:—

“In this clause the expression “Force-majeure” means act of God, War, Insurrection, Riot, Civil Commotion, Strike, Earthquake, Tide, Storm, Tidal Wave, Flood, Lightning, Explosion, Fire and any other happening which the lessee could not reasonably prevent or control.”

40. .. The words “any other happening which the lessee could not reasonably prevent or control” are to be read and understood ejusdem generis with the words preceding this expression. According to Mr. Justice McCardie the “Force Majeure” clause should be construed with a close attention to words which precede or follow it, and with due regard to the nature and the general terms of the contract. ... In this view of the matter, non-availability of land and electric power and the grounds on which the defendant pleaded inability to set up the Plant, in our view, are not such happenings which would come within Clause 5 of Part IX of the lease, and”

51. As bare perusal of the paragraphs reproduced above shows that in **Md. Serajuddin** (*supra*) the alleged ‘force majeure’ event was ‘non-



availability of land and electric power’ and even that was not construed as ‘*force majeure*’ event. Hence, not only is **Md. Serajuddin** (*supra*) distinguishable on facts but was completely misinterpreted by the Sole Arbitrator.

52. The Sole Arbitrator further observed that the respondent promptly intimated the petitioner about the technical issue with the machinery and requested for three to four months’ time to overcome the said issue and make the delivery and thereby by doing so the respondent fulfilled the conditions under the Clause No. 20.03 of Conditions of Contract of the Tender. While I agree that the respondent fulfilled its obligation of informing the petitioner of the ‘*force majeure*’ event that has arisen, however, it is pertinent to note that the respondent *vide* letter dated 03.01.2011 requested the petitioner for an extension in the delivery period of the first lot of paper on account of delay in processing the ‘Dandy Cover & Water Mark Logo’, delay in production due to quality issues of the raw material and non-inspection of the first lot by the DSG & D, and quoted these as ‘*force majeure*’ circumstances. It was only later that the respondent *vide* letter dated 21.01.2011 informed the petitioner that due to technical issues in their second stage deinking Cell and the Tackle Disc of Hot Disperser, they were not able to achieve 80% brightness in the paper and requested permission to produce paper with 72% brightness. The said request was rejected by the petitioner, *vide* letter dated 25.01.2011. Subsequently, the respondent *vide* letter dated 27.01.2011 sought three to four months to rectify the technical issues and supply the material as per agreed specifications, while seeking protection of



'Force Majeure' Clause of the Tender. The said letters dated 03.01.2011, 21.01.2011, 25.01.2011 and 27.01.2011 are extracted below:-

MURLI INDUSTRIES LTD.

MURLI

Ref : MIL/TENDER/W&P/2010 -11 /22
Date : 3rd January, 2011.

To
The Head,
Publication Department,
NCERT
Shri Aurobindo Marg,
New Delhi - 110 016.

Ref : Letter No. F.NO. 16-2/2010-Pub (PW) dated : 13th November, 2010
Sub : Delay in Delivery Due to Unavoidable circumstances.

Dear Sir / Madam,

The Publication Department has been kind enough to award us the order for the supply of 7500 MT of 80 gsm Maplitho Paper vide Letter No. F.NO. 16-2/2010-Pub (PW) dated : 13th November, 2010.

The design of "Water Mark" was given to us on 01.12.2010 with the contract form. As per the terms of contract the first lot has to be supplied within 45 days from the signing of the contract but due to some unforeseen circumstances mentioned below we request you to extend the delivery period of first lot by a minimum of 20 days.

As your kind office is well aware that the time required for manufacture of Dandy Cover & Water Mark Logo is minimum four weeks from the date of Order, after signing of Contract on 01st December, 2010 we have placed an order for Water Mark on the 2nd December, 2010 because of the tremendous rush at the sole manufacturer of Water Marks in India by Various Mills meant to supply to different Government Departments, there was delay in processing the same and after great persuasion we managed to the Monogram from them on 29th December, 2010. A copy of the Bill mentioning the date of receipt of Water Mark Logo is attached herewith for your perusal.

Secondly, we have been sending repeated reminders to D.G.S & D asking them to confirm the date of inspection of the First Lot, as you are well aware of the



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Market Conditions our Inventory Levels has reached the optimum point and we at this moment of time cannot hold any Stocks in our Godown, as we still do not have any intimation from D.G.S & D informing about their inspection date.

Further, as our preventive maintenance of our Captive Power Plant is due and we will be compelled to take up the same in next ten days time or else it will lead to a major breakdown in our Power Plant, this will further add up to delay in production.

Further continuing the string of bad luck, the raw material procured for manufacturing the first lot was not upto the mark and we are facing serious quality issues in our production. Hence we would require some time for procuring the same.

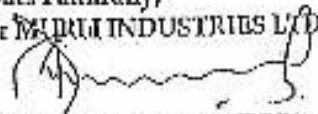
Keeping in view the above circumstances it is evident there is no intentional delay in supplying the material from our end. The same can be confirmed from our past performance where in we had fulfilled our obligation in time to other Govt. Departments i.e Oriasa Text Book Corp. (Qty 7000 MT), National Curriculum for Text Book, Bangladesh (Qty 8000 MT) and also the extra quantity awarded to us was supplied by us on time.

As the Department is fully aware of the facts and in view of force majeure circumstances, and our satisfactory past performance record with other Govt Departments we earnestly request you to consider our case sympathetically and extend our delivery period for the first lot for a minimum of 20 days i.e. BY 5th of Feb 2011.

We once again request your kind office to consider our request favorably and extend our delivery period for the requested time and send us a copy of confirmation for the same.

Thanking You,

Yours Faithfully,
For MURL INDUSTRIES LTD.


AUTHORISED SIGNATORY.



MURLI

MURLI INDUSTRIES LTD.

Ref : MH/TENDER/W&P/2010-11/31
Date : 23rd January, 2011.

To
The Head,
Publication Department,
NCERT
Shri Aurobindo Marg,
New Delhi - 110 016.

Dear Sir / Madam,

Ref : Letter No. F.NO. 16-2/2010-Pub (PW) dated : 13th November, 2010
Sub : Unable to achieve 80% brightness due to sudden breakdown at
Deinking Stage.

Dear Sir / Madam,

The Publication Department has been kind enough to award us the order for the supply of 7500 MT of 80 gsm Maplitho Paper vide Letter No. F.NO. 16-2/2010-Pub (PW) dated : 13th November, 2010.

We would like to bring forward a few points for your perusal which are beyond our control. As per Section VII point 17.03 of conditions of Contract we would like to intimate that one stage of our deinking process has failed due to technical reasons and we are unable to achieve 80% brightness as mentioned in Section V schedule of Requirements and Specifications of the tender with single stage deinking of recycled fiber and has been the major cause for inadvertent delay in coping up with the supply schedule of Department.

Our Process consists of two stage deinking wherein the imported Waste is processed twice to get good quality pulp which is required for getting the required i.e., 80% brightness and cleanliness in paper as mentioned by the department in Section V of the tender form. But due to technical snag in our second stage deinking cell and the Tackle Disc of our Hot Dispenser which was procured from Cellwood, West Germany and are not operational. We are not able to cope up with the requisite quality parameters in terms of 80% brightness only, as the same is a tailor made product from West Germany it will take three



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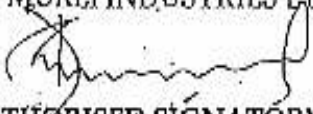
to four months for us to procure the same from West Germany. As we are totally dependent on recycled fibre and to achieve the required brightness parameter, it is compulsory for us to follow the double deinking process which unfortunately is not operational and we are left with no other option but to produce material of 72 % brightness only as per BIS specifications.

Further taking into consideration our Moral Responsibility towards Children Education / Society, we are keen to supply and complete the valuable order awarded to us by your kind office hence we request you to consider our request to supply material as per BIS specification 1848 : 2007 with latest amendments i.e., of 72% brightness and 85% opacity only.

As you are aware about our sincere efforts for coping up with the situation and our keen intention to complete the order as per given schedule, we sincerely request your kind office to advise us in this situation and guide us to complete the order and consider our request if department can accept 72% brightness paper with 85% Opacity only other parameters remaining same as per norms mentioned in the tender form.

Thanking you and looking forward for your kind consideration in this matter and waiting for your guidelines to proceed further. Once again we apologize for the inconvenience caused to your kind office in this regard due to unavoidable circumstances mentioned above at our end.

Thanking You,
For MURLI INDUSTRIES LTD


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राष्ट्रीय शैक्षिक अनुसंधान
और प्रशिक्षण परिषद्



NATIONAL COUNCIL OF EDUCATIONAL
RESEARCH AND TRAINING

F-16-2-2010 Pub (PW)

Dated: 25-01-2011

M/S Murli Industries Ltd.
Radha House
239, East Wardman Nagar
Nagpur 440008

Subject: Unable to achieve 80% brightness due to sudden breakdown at deinking stage.

Dear Sirs,

Please refer to your letter no MIL/TENDER-W&P.2010-11:31 dated 21st January 2011 regarding the subject cited above.

In this connection we would like to state that your request for supply of paper with 72% brightness as against 80% cannot be accepted.

The NCERT will accept the paper as per specification mentioned in section V-Schedule of Requirement and Specification. If you are in position to supply the paper as per tender specification and within time schedule given in the agreement, the same may be confirmed by fax(no. 26567716) within 2 days of this letter. In case of non receipt of your reply by the stipulated time it will be presumed that you are not able to supply the paper as per tender terms/agreements.

Under the circumstances NCERT is free to cancel the order and initiate the action in accordance with clause 17 of Tender Document.

Thanking you,

Yours faithfully

(Signature)
(SIVARCMAR)

Chief Production Officer/
Officiating Head



MURLI

MURLI INDUSTRIES LTD.

Ref: MIL/TENDER/W&P/2010-11/32
Dt.: January 27, 2011

To
National Council of Education
Research and Training
Sri Aurobindo Marg
NEW DELHI: 110 016

K. and Attn: Mr. Shly Kumar
Chief Production Officer - Officialing Head

Ref: Letter No.F.No.16-2/2010 Pub (PW) dt 13.11.2010

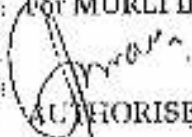
Dear Sir,

We refer to your letter of 25th Jan (received by us over fax at 09:35 PM) and would like to express that we are keen to supply the material to the Department. But, due to certain unforeseen circumstances, as explained to the department vide our letter dated 21.01.11, we could not achieve the desired product specification in terms of brightness only.

Further we would request your kind office to depute a technical team to certify that due to failure in our second stage of die inking cell and the Tackle Disc of our Hot Disperser, which was procured from Cellwood, West Germany we are not able to achieve the required specifications in terms of brightness only, we would be highly obliged if we are given time of Three to Four Months to procure the same from West Germany and supply material to the department as per your Specifications.

Under the circumstances, it is our humble request to the department to consider the matter under Force Majeure clause and favour us with your valued decision.

Thanking You,
For MURLI INDUSTRIES LTD


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53. The Sole Arbitrator failed to take into consideration that the respondent *vide* letter dated 03.01.2011 requested the petitioner for an extension in the delivery period and quoted delay in processing the ‘Dandy Cover & Water Mark Logo’, delay in production due to quality issues of the raw material and non-inspection of the first lot by the DSG & D as ‘*force majeure*’ circumstances. It was only later *vide* letter dated 27.01.2011 that the respondent sought protection of ‘*Force Majeure*’ Clause due to technical issue with the machinery, after the petitioner rejected the respondent requested to supply paper with 72% brightness. This shows that even before the respondent’s faced the technical issue it was seeking extension and protection of the ‘*Force Majeure*’ Clause.
54. I am conscious of the limited power of this Court to interfere with an Arbitral Award under Section 34 of the 1996. However, in view of the principles set by the Hon’ble Supreme Court pertaining to interpretation of ‘*force majeure*’ and specific facts of this case, I am unable to agree with the finding of the Sole Arbitrator that breakdown of a part of the machinery leading to decrease in efficiency could be regarded a ‘*force majeure*’ event. The said finding of the Sole Arbitrator cannot be said to be reasonable or even a plausible one. Hence, it is liable to be set aside.
55. Moving to the next issue as to whether the time was of the essence of the Contract. The learned counsel for the petitioner avers that the Sole Arbitrator erroneously held that time is not of the essence of the Contract, merely because there is a provision in the Tender for providing extension in delivery time. The learned counsel for the



petitioner states that the same does not imply that the respondent could avoid the delivery schedule and that the specific Performance Security Clause read along with other provisions such as Section VI (Bid Submission Form) of the Tender, Clause Nos. 17, 18 and 27 of Conditions of Contract of the Tender, shows that time is the essence of the Contract.

- 56.** The Sole Arbitrator dealt with the said issue and contentions of the petitioner in paragraph Nos. 77 to 86 of the impugned Award, which are reproduced below:-

“77. The Counsel for the Claimants vehemently argued that the time was not the Essence of the Contract as there is provision of extension of time in Clause 17.3 of the Conditions of Contract, wherein it is stated that

78. The Claimants (Supplier) have intimated the reasons of delay very promptly to the Purchaser. Firstly, ...

79. The Claimants were very much eager to supply the material and to complete the Contract well within the time. It is evident from the fact that they had deposited the Performance Security by way of Bank Guarantee, an amount of Rs.2,04,33,368/- from State Bank of Hyderabad, Nagpur Branch, Maharashtra.

80. During the course of arguments it is also alleged that the Contracts were placed on M/s Abhishek Industry Ltd. and M/s Shakumbhri Straw Product Ltd. on the same Terms & Conditions as is evident from the copies of the Contract provided by the Respondents. It is also stated that the



Delivery Period was extended in the case of M/s Abhishek Industry Ltd. and also in the case of M/s Shakumbhri Straw Product Ltd., it is evident from the comparative statement submitted by the Respondents on the request of the Claimants, in which it is shown that in the case of M/s Abhishek Industry Ltd. last delivery was to be given by 11.8.2011, whereas last delivery was given on 19.8.2011 and in the case of M/s Shakumbhri Straw Product Ltd. the last lot was to be given on 13.5.2011 where as it was supplied on 8.7.2011, which shows implied extension of time by the Respondents.

It is also alleged by the Counsel of the Claimants that when extension can be given to these two firms, similarly, it could have been given to the Claimants in order to complete their Contract, keeping in view the Force Majeure Condition. In the case of M/s Murli Industries Ltd. (the Claimants), only two days' time was given to decide whether they can supply the paper or otherwise, which was insufficient and beyond thinking of any Supplier to decide the issue within two days. It is not understood that how they have placed the Contract as no document relating to inviting the Bid, its examination relating to awarding, of Contract is produced by the Respondents nor they have mentioned anything in their Written Statement about this. It is not understood as to why they have concealed this information for the consideration of the Arbitrator. It is also put a question mark on such a



deal by scuttling the procedure for concluding a Contract for supply of any material.

81. *The Counsel for the Claimants relied upon Five Judges Bench's decision of Hon'ble Supreme Court in the matter of M/s Hind Constructions Contractors vs. State of Maharashtra AIR 1979 SC 720, wherein it was held that-*

“The question whether or not time was the essence of the contract would essentially be a question of the intention of the parties to be gathered from the terms of the contract. Even where the parties have expressly provided that time is the essence of the contract such a stipulation will have to be read alongwith other provisions of the contract and such other provisions may, on construction of the contract, exclude the interference that the completion of the work by a particular date was intended to be fundamental, for instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such causes would be construed as rendering ineffective the express provision relating; to the time being of the essence of contract.”

82. *He also referred the judgement of Hon'ble Supreme Court in the matter of M/s Arosan Enterprises Ltd. vs. Union of India & another 1999 (3) ARB. LR 310 (SC), wherein it was held that –*



“When the Contract itself provides for extension of time, the same cannot be termed to be the “Essence of the Contract”

83. *The Counsel for the Respondents vehemently argued that time was the grave essence of the Contract as the Purchaser has to purchase the paper for printing the books to be supplied to the students well before April, 2011, for which the Claimants failed to supply the paper as per Specifications and have sought time, which may extend up to July and the programme of the NCERT, the Respondents herein this case would be failed.*

84. *The Counsel for the Claimants has stated that then why they have granted the extension to M/s Abhishek Industry Ltd. and M/s Shakumbhri Straw Product Ltd. as is evident from comparative statement filed by the Respondents relating to delivery schedule and supply received by the Respondents, which clearly established that the time was not the essence of the Contract.*

85. *As the provision relating to extension of time in Delivery Period is provided in Clause 17.03 of the Conditions of Contract as well as provision for imposition of Liquidated Damages on account of delay in supplies. The case of the Claimants is covered by the law laid down by the Hon'ble Supreme Court in the matters of M/s Hind Constructions Contractors vs. State of Maharashtra AIR 1979 SC 720, M/s Arosan Enterprises Ltd. vs. Union of India & another 1999 (3) ARB. LR 310 (SC), Union of India vs. Panipat Food Ltd.*



1995 (60) DLT 258 and Union of India vs. Grain Growth Federation Hon'ble High Court 266/2000 decided by Justice Valmiki Mehta.

86. Therefore, keeping in view the provision of extension of time in Clause 17.3 and levy of Liquidated Damages in case of delay in supply and the law laid down by the Hon'ble Supreme Court, I decide this issue in favour of the Claimants as no Liquidated Damages were levied or claimed by the Respondents."

57. I find no error with the said finding of the Sole Arbitrator. The law on the issue of when time is of the essence of the contract is no longer *res integra*. It is settled law that just having a clause which says that 'time is of the essence' is not conclusive and whether time is of the essence of the contract, has to be determined by reading the contract in its entirety and taking the facts and circumstances into consideration. Reliance is placed on ***Welspun Specialty Solutions Ltd. v. ONGC, (2022) 2 SCC 382***, wherein it was held:-

"35. It is now settled that 'whether time is of the essence in a contract', has to be culled out from the reading of the entire contract as well as the surrounding circumstances. Merely having an explicit clause may not be sufficient to make time the essence of the contract. As the contract was spread over a long tenure, the intention of the parties to provide for extensions surely reinforces the fact that timely performance was necessary. The fact that such extensions



were granted indicates ONGC's effort to uphold the integrity of the contract instead of repudiating the same.

xxxxxxxxxx

42. This Court cannot interfere with this award, as the award is a plausible view for the following reasons:

42.1. The Arbitral Tribunal's interpretation of contractual clauses having extension procedure and imposition of liquidated damages, are good indicators that 'time was not the essence of the contract'.

(Emphasis added)

58. In light of the said principle as laid by the Hon'ble Supreme Court in ***Welspun Specialty Solutions (supra)***, the finding of the Sole Arbitrator cannot be said to be perverse or implausible. The Sole Arbitrator made a factual finding that the petitioner placed the contract on M/s Abhishek Industries Ltd. and M/s Shakumbhri Straw Products Ltd. and extended their delivery period, based on the Comparative Statement of Delivery Schedule submitted by the petitioner during the arbitral proceedings, which is extracted below:-



2. Comparative statement of Delivery Schedule:

Schedule of supply of M/s Murli Industries Ltd. from contract date 01.12.2010	Schedule of supply of M/s Abhishek Industries Ltd. from contract date 28.02.2011	Schedule of supply of M/s Shakumbhari Straw Product Ltd. from contract date 28.02.2011
For Paper in Sheets (6500 MTs) 1st Lot - 1200 MTs within 45 days i.e. up to 14.01.11 2nd Lot - 1190 MTs within 75 days i.e. up to 13.02.11 3rd Lot - 1200 MTs within 105 days i.e. up to 05.03.11 (The delivery schedule of 1285 MTs was to be given before completion of 3rd lot and the order for balance 25 % quantity was to be given after accessing the performance)	For Paper in Sheets (3000 MTs) 1st Lot - 300 MTs within 45 days i.e. up to 13.03.11 2nd Lot - 500 MTs within 75 days i.e. up to 13.04.11 3rd Lot - 600 MTs within 105 days i.e. up to 13.05.11 4th Lot - 700 MTs within 135 days i.e. up to 12.06.11 5th Lot - 900 MTs within 165 days i.e. up to 11.07.11	For Paper in Reels (1000 MTs) 1st Lot - 400 MTs within 45 days i.e. up to 13.03.11 2nd Lot - 300 MTs within 75 days i.e. up to 13.04.11 3rd Lot - 300 MTs within 105 days i.e. up to 13.05.11
For Paper in Reels (3500 MTs) 1st Lot - 800 MTs within 45 days i.e. up to 14.01.11 2nd Lot - 800 MTs within 75 days i.e. up to 13.02.11 3rd Lot - 500 MTs within 105 days i.e. up to 05.03.11 (The delivery schedule of 4th lot of 525 MTs was to be given before completion of 3rd lot and the order for balance 25 % quantity was to be given after accessing the performance)	For Paper in Reels (2500 MTs) 1st Lot - 700 MTs within 45 days i.e. up to 13.03.11 2nd Lot - 600 MTs within 75 days i.e. up to 13.04.11 3rd Lot - 600 MTs within 105 days i.e. up to 13.05.11 4th Lot - 600 MTs within 135 days i.e. up to 12.06.11	



4. Time Schedule given to M/s Abhishek Industries Ltd. and M/s Shakumbhari Straw Product Ltd. has already been given at Sr. no.2 above. No extension of time in delivery schedule was given to either firm. The firm had supplied the paper as per details given below:

Supply/ Received date of Paper from M/s Abhishek Industries Ltd.,		Supply/ Received date of Paper from M/s Shakumbhari Straw Product Ltd.,	
Quantity In MTs	Date of Receipt	Quantity In MTs	Date of Receipt
460.047 MTs	Up to 25.03.2011	337.595 MTs	Up to 19.04.2011
359.955 MTs	Up to 07.04.2011	62.405 MTs	Up to 29.04.2011
768.418 MTs	Up to 13.05.2011	300.317 MTs	Up to 29.06.2011
562.074 MTs	Up to 20.05.2011	299.536 MTs	Up to 08.07.2011
520.46 MTs	Up to 02.06.2011		
686.068 MTs	Up to 15.06.2011		
580.192 MTs	Up to 04.07.2011		
278.594 MTs	Up to 14.07.2011		
738.609 MTs	Up to 03.08.2011		
542.976 MTs	Up to 19.08.2011		

59. The said Comparative Statement of Delivery Schedule, as reproduced above, shows that in the case of M/s Abhishek Industries Ltd. the last scheduled date of delivery was 11.07.2011, whereas last date of receipt of material was 19.08.2011 and in the case of M/s Shakumbhari Straw Products Ltd. the last schedule date of delivery was 13.05.2011, whereas last date of material of delivery was 08.07.2011. This clearly shows that the petitioner accepted delayed delivery in case of M/s Abhishek Industries Ltd. and M/s Shakumbhari Straw Products Ltd..
60. Further, the Sole Arbitrator after taking into consideration that there is a provision for extension of delivery time as well as provision for imposition of liquidated damages on account of delay, held that an overall view of the terms of the Contract and the conduct of the petitioner of allowing extension in delivery to M/s Abhishek Industries Ltd. and M/s Shakumbhari Straw Products Ltd. shows that time was not of the essence of the contract. The Sole Arbitrator relied



on *Hind Construction Contractors (supra)*, *Arosan Enterprises (supra)*, and other judgments in support of his said finding.

61. In view of the aforesaid, I am satisfied that the Sole Arbitrator correctly held that time was not of the essence of the Contract. The petitioner by allowing extension to M/s Abhishek Industries Ltd. and M/s Shakumbhri Straw Products Ltd., has itself diluted its contention of time being the essence of such contracts. Further, the Sole Arbitrator's interpretation that existence of a provision for extension of the delivery time and for imposition of liquidated damages on account of delay show that time was not of the essence of the Contract, is the correct and a plausible view, as observed in *Welspun Specialty Solutions (supra)*.
62. Lastly and most importantly is the issue whether the petitioner was entitled to forfeit the Performance Security by encashing the Bank Guarantee. The learned counsel for the petitioner primarily avers that under Clauses No. 17 (reproduced above) and 18 of Conditions of Contract of the Tender, the Performance Security amount is a 'genuine pre-estimated' liquidated damages, which the petitioner is entitled to realize in the event of delay or non-performance of the Contract and the same is not by way of penalty. It is further contended that irrespective of any proof of injury or loss, the same could be realized by the aggrieved party.
63. The Sole Arbitrator has dealt with the said issue in paragraph Nos. 94 to 106 of the impugned Award. Paragraph Nos. 104 to 106 and 108 of the impugned Award contains the reasoning of the Sole Arbitrator and the same read as under:-



“104. In view of the para-6.02 of the Conditions of Contract, the proceeds of the Performance Security was to compensate any loss resulting from the supplier’s failure to complete his obligation under the Contract.

105. No loss alleged to have been sustained by the Purchaser herein in this case and as per the judgement in the matter of IOC Ltd. vs. Lloyds Steel Industries Ltd. 2008 (1) RAJ 170 Delhi. The amount of the Performance Security is intended to secure performance of the Contract. It is a penalty and not a genuine pre-estimated loss, because the genuine pre-estimated damages/losses as mentioned in Clause 18 of Conditions of Contract relating to Liquidated Damages, wherein it is defined as to how the damages are to be calculated due to delayed supplies, which could be deducted from the Contract price. Nowhere in the Contract, it is mentioned that forfeiture of Performance Security would be genuine pre-estimated damages or the Contract price.

106. Since Issues No. 1 & 2 are decided in favour of the Claimants, the Issue No.3 is also decided in favour of the Claimants.

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108. In view of the above, I award Rs.2,04,33,368/-, which was deposited by the firm in the way of Bank Guarantee as the same is encashed by the Respondents, NCERT and they could not prove the loss sustained by them. I hereby direct



the Respondent, NCERT to return the amount of Rs.2,04,33,368/- to the Claimants, M/s Murli Industries Limited.”

64. A bare perusal of the said paragraphs, reproduced above, show that the Sole Arbitrator found that Performance Security is a penalty and not ‘genuine pre-estimated loss’. The Sole Arbitrator observed that as per Clause 06.02 of Conditions of Contract of the Tender the Performance Security is ‘compensation’ for loss incurred by the petitioner due to respondent’s failure to fulfil its delivery obligations and Clause No. 18 of Conditions of Contract of the Tender provides when and how ‘pre-estimated’ liquated damages can be claimed by the petitioner. Clause Nos. 06.02 and 18 of Conditions of Contract of the Tender are extracted below:-

“06. Performance Security

06.01 ...

06.02. The proceeds of the Performance Security shall be payable to the Purchaser as compensation for any loss resulting from the Supplier's failure to complete his/her obligations under the contract.

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18. Liquidated Damages

18.01 For delays

Time and date of delivery shall be essence of the contract. If the Supplier fails to deliver any or all of the Goods within period(s) specified in the contract, the Purchaser shall, without prejudice to its other remedies under the contract,



deduct liquidated damages from the Contract Price not by way of penalty. This is an agreed, genuine pre- estimate of damages duly agreed by the parties. Recovery from the supplier as agreed liquidated damages will be calculated @ Rs. 2/- for goods worth Rs. 1000/- per day for each day of delay and such recovery of liquidated damages may be up to 5% (Five per cent) of the Contract Price of whole unit of goods, which the Supplier has failed to deliver within the period fixed for delivery,...”

65. A bare perusal of the Clause No. 18.01 of Conditions of Contract of the Tender, shows that it is the liquidated damages deducted from the Contract Price which are the ‘pre-estimate of damages duly agreed by the parties’. Clause 06.02 of Conditions of Contract of the Tender shows that the Performance Security proceeds is payable as ‘compensation for any loss’ incurred by the petitioner due to respondent’s failure to complete its contractual obligations. Hence, though the petitioner avers that it is entitled to forfeit the Performance Security, under Clauses No. 17 and 18 of Conditions of Contract of the Tender (reproduced above), as the same is a ‘genuine pre-estimated’ liquidated damages, however, Clause No. 06.02 of the Conditions of Contract of the tender, which is an express provision of the Tender, is to the contrary.
66. The learned counsel for the petitioner has relied on catena of judgments including *Saw Pipes (supra)* and *BSNL (supra)*, which provide that liquidated damages can be awarded without proof of loss, if it constitutes a genuine pre-estimate of loss/ damages. However, the



same is not the case here. As observed above, the Performance Security is not a genuine pre-estimated loss/ damages but compensation for loss incurred by the petitioner due to respondent's failure to fulfil its delivery obligations. Therefore, the judgments relied upon by the learned counsel for the petitioner including *Saw Pipes (supra)* and *BSNL (supra)* are not relevant.

67. Additionally, the learned counsel for the petitioner has also relied upon *Ganga Enterprises (supra)*, wherein the Hon'ble Supreme Court upheld the validity of forfeiture of bid security, as the bidder withdrew the bid within validity period and on *Malik Traders (supra)*, which reiterated the same by relying on *Ganga Enterprises (supra)*. However, both these judgments are not relevant in the present matter as they concern bid security furnished during bidding process before any contract is executed and forfeiture is the result of the withdrawal of the bids. The present case deals with Performance Security under a executed contract and the forfeiture was result of alleged breach of the Contract, but as compensation for loss.
68. The Sole Arbitrator has made a factual finding that the petitioner suffered no loss due to the alleged breach of the Contract by the respondent and this finding leads to the ineluctable conclusion that the petitioner wrongly forfeited the Performance Security. In support of the said finding, the Sole Arbitrator has relied upon *Indian Oil Corporation v. Lloyds Steel Industries Ltd., (2007) SCC OnLine Del 1169*, wherein a Coordinate bench of this Court observed as under:-

"52. No doubt, the parties to a contract may agree at the time of contracting that, in the event of breach, the party in



default shall pay a stipulated sum of money to the other. However, the stipulated sum has to be a genuine pre-estimate of damages likely to flow from the breach and is termed as 'liquidated damages'. If it is not a genuine pre-estimate of the loss, but a amount intended to secure performance of the contract, it may be a penalty. In Fateh Chand (supra), the Supreme Court explained this principle in the following words:

“....Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of parties predetermined or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party. It merely declares the law that notwithstanding any term in the contract for determining the damages or providing for forfeiture of any property by way of penalty, the Court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated.”

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55. *It is clear from the above that Section 74 does not confer a special benefit upon any party, like the petitioner in this case. In a particular case where there is a clause of liquidated damages the Court will award to the party*



aggrieved only reasonable compensation which would not exceed an amount of liquidated damages stipulated in the contract. It would not, however, follow therefrom that even when no loss is suffered, the amount stipulated as liquidated damages is to be awarded. Such a clause would operate when loss is suffered but it may normally be difficult to estimate the damages and, therefore, the genesis of providing such a clause is that the damages are pre-estimated. Thus, discretion of the Court in the matter of reducing the amount of damages agreed upon is left unqualified by any specific limitation. The guiding principle is 'reasonable compensation'. In order to see what would be the reasonable compensation in a given case, the Court can adjudge the said compensation in that case. For this purpose, as held in Fateh Chand (supra) it is the duty of the Court to award compensation according to settled principles. Settled principles warrant not to award a compensation where no loss is suffered, as one cannot compensate a person who has not suffered any loss or damage. There may be cases where the actual loss or damage is incapable of proof; facts may be so complicated that it may be difficult for the party to prove actual extent of the loss or damage. That the party complaining of breach of contract and claiming compensation is entitled to succeed only on proof of 'legal injury' having been suffered by him in the sense of some loss or damage having been



sustained on account of such breach, is clear from Sections 73 and 74. In a case when the party complaining of breach of the contract has not suffered legal injury in the sense of sustaining loss or damage, there is nothing to compensate him for; there is nothing to recompense, satisfy, or make amends. Therefore, he will not be entitled to compensation [see State of Kerala v. United Shippers and Dredgers Ltd., AIR 1982 Ker 281]. Even in Fateh Chand (supra) the Apex Court observed in no uncertain terms that when the section says that an aggrieved party is entitled to compensation whether actual damage is proved to have been caused by the breach or not, it merely dispenses with the proof of ‘actual loss or damage’. It does not justify the award of compensation whether a legal injury has resulted in consequence of the breach, because compensation is awarded to make good the loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach. If liquidated damages are awarded to the petitioner even when the petitioner has not suffered any loss, it would amount to ‘unjust enrichment’, which cannot be countenanced and has to be eschewed.”

(Emphasis added)

69. A perusal of Clause No. 06.02 of the Conditions of Contract of the Tender clearly shows that Performance Security is payable as compensation for any loss resulting from respondent’s failure to



complete its contractual obligations. The law is clear that if amounts are payable as compensation from loss, the loss must be averred and proved before it can be claimed. Hence, the next question which needs to be answered is whether the respondent suffered any loss due to respondent's failure to fulfil its delivery obligations. The Sole Arbitrator has observed that the petitioner did not suffer any loss due to non-performance of contractual obligation by the respondent, since the petitioner placed the contract on M/s Abhishek Industries Ltd. and M/s Shakumbhri Straw Products Ltd. on the same rate, as is evident from the copies of the Contracts with M/s Abhishek Industries Ltd. and M/s Shakumbhri Straw Products Ltd. and Comparative Statement of Rates, provided by the petitioner during the arbitral proceedings.

- 70.** The said Comparative Statement of Rates provided by the petitioner during the arbitral proceedings, are extracted below:-



PUBLICATION DIVISION

NCERT

SUBJECT: Arbitration Case no. 4/2012 between M/s Murli Industries Limited & NCERT

Shri R.K.Singh, advocate in the case of M/s Murli Industries Limited has asked to submit certain information/documents. The same are furnished as under:

1. Comparative statement of rates:

Rates quoted by M/s Murli Industries Ltd. & accepted by NCERT and order placed	Rates on which the order was placed with M/s Abhishek Industries Ltd.	Rates on which the order was placed with M/s Shakumbhari Straw Product Ltd.
For Paper in Sheets (6500MTs) Delhi/Noida/ Sahibabad -Rs.39,242.00 per MT Ahmedabad-Rs.38,342.00 per MT Bangalore-Rs.39,142.00 per MT Kolkata-Rs.39,342.00 per MT Guwahati-Rs.40,042.00 per MT	For Paper in Sheets (3000MTs) Delhi/Noida/ Sahibabad -Rs.39,242.00 per MT Ahmedabad-Rs.38,342.00 per MT Bangalore-Rs.39,142.00 per MT Kolkata-Rs.39,342.00 per MT Guwahati-Rs.40,042.00 per MT (Rs.365.78 per MT was paid extra as enhanced excise duty w.e.f. 01.03.2011 for supply at Delhi/Noida/Sahibabad, as all the paper supplied at these destinations only)	No Order for supply of paper in Sheets was placed
For Paper in Reels (3500MTs) Delhi/Noida/ Sahibabad -Rs.38,324.00 per MT Ahmedabad-Rs.37,424.00 per MT Bangalore-Rs.38,224.00 per MT Kolkata-Rs.38,424.00 per MT Guwahati-Rs.39,124.00 per MT	For Paper in Reels (2500MTs) Delhi/Noida/ Sahibabad -Rs.38,324.00 per MT Ahmedabad-Rs.37,424.00 per MT Bangalore-Rs.38,224.00 per MT Kolkata-Rs.38,424.00 per MT Guwahati-Rs.39,124.00 per MT (Rs.356.51 per MT was paid extra as enhanced excise duty w.e.f. 01.03.2011 for supply at Delhi/Noida/Sahibabad, as all the paper supplied at these destinations only)	For Paper in Reels (1000MTs) Delhi/Noida/ Sahibabad -Rs.38,324.00 per MT Ahmedabad-Rs.37,424.00 per MT Bangalore-Rs.38,224.00 per MT Kolkata-Rs.38,424.00 per MT Guwahati-Rs.39,124.00 per MT (Rs.356.51 per MT was paid extra as enhanced excise duty w.e.f. 01.03.2011 for supply at Delhi/Noida/Sahibabad, as all the paper supplied at these destinations only)



71. A perusal of the Comparative Statement of Rates, reproduced above, shows that the petitioner placed the contracts on M/s Abhishek Industries Ltd. and M/s Shakumbhri Straw Products Ltd. on the same rate as was placed on the respondent. Further, it is learned counsel for the petitioner's own contention that the bids of M/s Abhishek Industries Ltd. and M/s Shakumbhri Straw Products Ltd. were considered along with the respondent's bid. Hence, it also cannot be said that the petitioner suffered loss or damages by placing the contracts on these other two entities due to the non-performance of its contractual obligations by the respondent.
72. At this stage it is important to answer the question whether an amount deposited as security for performance of a contract can be forfeited by the aggrieved party, in absence of any loss suffered by the aggrieved party. The Hon'ble Supreme Court has answered the said question in negative in *Union of India v. Rampur Distillery & Chemical Co. Ltd.*, (1973) 1 SCC 649, wherein it held as under:-

“3. Only one contention was urged on behalf of the appellants before us: that the security deposit was taken from the respondents in order to ensure the due performance of the contract and respondents having defaulted, the entire amount was liable to be forfeited. A similar contention was advanced before this Court but was rejected in Maula Bux v. Union of India [(1969) 2 SCC 554 : (1970) 1 SCR 928]. The appellant therein had entered into a contract with the Government of India for the supply of certain goods and had deposited a certain amount of



security for the due performance of the contract. As in the instant case, it was stipulated in the contract there that the amount of security deposit was to stand forfeited in case the appellant neglected to perform his part of the contract. On the appellant committing default in the supply, the Government rescinded the contract and forfeited the security deposit. It was held by this Court that forfeiture of earnest money under a contract for sale of property does not fall within Section 70 of the Contract Act, if the amount is reasonable, because the forfeiture of a reasonable sum paid as earnest money does not amount to the imposition of a penalty. But, “where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty”. It was further held that the amount deposited by way of security for guaranteeing the due performance of the contract cannot be regarded as earnest money.

4. It is important that the breach of contract caused no loss to the appellants. The stipulated quantity of rum was subsequently supplied to the appellants by the respondents themselves at the same rates. The appellants, in fact, made no attempt to establish that they had suffered any loss or damage on account of the breach committed by the respondents.



5. Following the decision in *Maula Bux case* [(1969) 2 SCC 554 : (1970) 1 SCR 928] , we hold that the High Court was right in rejecting the appellants' claim that they are entitled to forfeit the security deposit.”

(Emphasis added)

73. Additionally, in *Kailash Nath Associates v. DDA*, (2015) 4 SCC 136 the Hon’ble Supreme Court has laid down the principles regarding requirement of proof of loss in cases of compensation for breach of contract, as following:-

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

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



43.2. Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.

43.4. The section applies whether a person is a plaintiff or a defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

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

(Emphasis added)

74. As observed above, the petitioner did not suffer any loss due to the alleged non-performance of delivery obligations by the respondent.



Further, the petitioner has not proved any claims pertaining to loss suffered by it due to alleged breach of the Contract by the respondent. Hence, the petitioner is not entitled to forfeit the Performance Security as it suffered no loss due to the alleged breach of the Contract by the respondent, reliance is placed on *Rampur Distillery (supra)* and *Kailash Nath (supra)*.

75. In view of the above discussion, I am satisfied that the finding of the Sole Arbitrator that the petitioner is liable to refund the Performance Security amount, which it forfeited by encashing the Bank Guarantee furnished by the respondent, is the correct and a plausible view.

CONCLUSION

76. The finding of the Sole Arbitrator that breakdown of machinery is a ‘*force majeure*’ event is not even a plausible view and hence, the said finding is set aside. The said finding is independent and severable from rest of the findings provided in the Award. It does not affect the other two findings of the Sole Arbitrator i.e., first that time is not of the essence of the Contract and second that refund of the Performance Security to the respondent due to absence of proof of loss. Hence, partially setting the impugned Award only to the extent of the finding pertaining to breakdown of machinery as a ‘*force majeure*’ event, would not render other findings in the impugned Award unsustainable.
77. In view of the aforesaid, the impugned Award except the finding of the Sole Arbitrator regarding the applicability of ‘*Force Majeure*’ Clause is not in contravention with the public policy of India or patently illegal. I find no merit in the contentions raised by the learned counsel for the petitioner to set aside the award granted by the Sole



Arbitrator of Rs. 2,04,33,368/- with interest @ 12% p.a. to the respondent.

78. Consequently, the Award dated 25.06.2013 is partially set aside, only to the extent of finding on the issue of '*force majeure*'. The other two findings including the award for a sum of Rs. 2,04,33,368/- along with interest @ 12% p.a. awarded to the respondent, is upheld.
79. The present petition is disposed with pending applications, if any.

OCTOBER 10th, 2025/(HG)

JASMEET SINGH, J