Bombay High Court Maharas H T R A State Electricity ... vs This Petition Has Been Filed ... on 18 March, 2009 Bench: R. S. Dalvi This Order is modified/corrected by Speaking to Minutes Order

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IN THE HIGH COURT OF JUDICATURE
AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.374 OF 200 4

Maharas h t r a State Electricity Distribution ...Petitioners
Vs.

DSL Enterprises Pvt. Ltd. ...Responden t s

Mr. S.Rai, Sr. Advocate with Mr. P.P. Chavan
i/b. Little & Co. for Petitioners

Mr. Rafiq Dada, Sr. Advocate with Mr. D.J. Khambat a, Sr. Advocate with Ms. Swati Deshpa n de and Mr. Chirag Balsar

i/b. Mohmedbh ai & Co. for Responde nt s

CORAM: SMT.ROSHAN DALVI, J.

DATED: 18 TH MARCH , 200 9

J U D G M E N T:

1. This Petition has been filed initially by the Mahara s h t r a State Electricity Board (MSEB) (Petitioner No.1) and in which later Maharas h t r a State Distribution Company Limited (MSDC) (Petitioner No.2) came to be added purs u a n t to a transfer scheme under which the rights, liabilities, properties and interests of the former stood vested in the latter.
2. The Petition is filed essentially against Responden t No.1 Company, which has entered into a Work Contract with the Petitioner No.1, the rights and liabilities under which stood transferred to Petitioner No.2. The Petitioners shall be This Order is modified/corrected by Speaking to Minutes Order referred to as "the Petiti on er" . Respondent No.1 Company shall be referred to as "the Respond e n t" .
3. The Respondent as the Lessee of the Petitioner, under the Work Order executed between these parties on 27 th March 1997, had to install what is called a Low Tension Load Management System (LTLMS) for improving the rural distribution of electricity network of the State Electricity Boards in India.
4. Several contract objects being certain panels were to be installed at some 47,987 locations called Distribution Transfer Centers all over Maharas h t r a. Aside from the Responde nt No.2 other parties, one Asian Electronics Ltd. and RMS Automation Systems Pvt. Ltd., were also Lessors of the Petitioner. The locations where the panels had to be fitted were therefore, required to be identified by the Petitioner so that the Respondent could fit them at the correct locales.
5. The Responde nt has installed 17294 panels. The Responde nt further man ufact u red, got inspected and readied further 14206 panels for installation. The Responde nt did not fully man ufact ur e the remaining 16487 panels though it had got the raw material imported for that purpose during This Order is modified/corrected by Speaking to Minutes Order the period of subsistence of the contract between March 1997 to Febru ary 1999 when the Respondent terminated the contract for the panels which could not be fitted due to lack of support from the Petitioner, the Responde nt having offered to continue to maintai n the panels which were already fitted. Upon the Respondent's realisation that there is a total breach of the reciprocal promises on the part of the Petitioner, the Respondent terminated the contract on 21 st April, 1999 and invoked arbitration as per the contract between the parties.
6. In the Arbitration the parties led oral as well as docume nt a ry evidence inter alia and primarily upon the breach alleged to have been committed by the Petitioner. Upon the Learned Arbitrators considering the evidence with regard to the readiness and willingness of the Responden t to perform its part of the contract, the breach committed by the Petitioner, the extent of the damages claimed by the Responde nt upon the breach committed by the Petitioner and the abandon m e n t of the contract and fraud, if any, committed by the Responde nt and the deductions that

were claimed by the Petitioner, an Award came to be passed in favour of the Responde nt herein for Rs.1,85,97,86, 399 / - with interest at the rate of 10% p.a from the date of the Award till realisation upon giving credit to the Petitioner This Order is modified/corrected by Speaking to Minutes Order herein for the amount of Rs.6,81,99,390 / - paid by the Petitioner herein under the interim order passed in the Arbitration and the costs of the Arbitration fixed at Rs.1 Crore. The award granted part amoun t claimed by the Responde nt. The Responden t has not challenged the award. The Petitioner's counterclaim upon certain misrepresent a tion and fraud allegedly practiced by the Respondent has been held not proved and rejected. That rejection has also not been challenged.

7. The Learned Arbitrators have proceeded essentially upon the two basic breaches claimed by the Respondent being:

a) Failure to supply the DTC locations where the panels were to be installed and
b) Failure to renew the letter of credit which was given under the suit contract after April 30, 1999.

8. The Arbitrators have found the Petitioner in total breach of the requiremen t of giving the list of locations, but not in respect of the non - renewal of the letter of credit. The decision of the Learned Arbitrators with regard to the letter of credit has also not been challenged.
9. In this Petition, therefore, the seminal aspect for This Order is modified/corrected by Speaking to Minutes Order consideration is the breach, if any, of giving the list of the DTC locations by the Petitioner to the Responden t, such as to constitute it such a funda me n t al breach, that the Responde nt would not be able to perform its part of the contract enabling it to terminate the contract and claim damages.
10. It would, therefore, do well to see only whether there was any breach of the admitted contract between the parties as seen by the Arbitrators and upon such breach whether the damages awarded by the Arbitrators is in accorda nce with law. For that purpose the parameters under Section 34 of the Arbitration and Conciliation Act, 1996 (the Act) would have to be borne in mind. To that end the Petitioner would require to furnish proof that the Arbitral Award is based upon matters beyond the scope of Arbitration. It is contended by Mr. Rai on behalf of the Petitioner that the Arbitral Award is against the law governing the parties with regard to the breach, if any, committed under the contract and the damages, if any, which are awardable for such breach. It need hardly be mentioned that the scope of interference with such Award is extremely narrow and it is for the Petitioner to make out a case for setting aside the Arbitral Award under Section 34(2)(iv) of the Act. This Order is modified/corrected by Speaking to Minutes Order
11. It will be fruitful to see the relevant and importan t clauses of the contract

between the parties which have been considered by the Learned Arbitrators.

12. Under Clause 5.1 of the Contract the supply and installation of the LTLMS was to commence within 4 months from the date of the contract or opening of the letter of credit or receipt of the complete list of locations of DTCs, whichever was later . Such supply and installation was to be completed within 20 month s thereafter . Since there were as many as 47,987 DTC locations to be supplied, that would be expected to take much time. The 4 month s period for commenceme n t of the contract which would otherwise be from the date of the contract would, therefore, be after the DTC locations were supplied. Since supply of as many as 47987 locations would take an inordinate amou nt of time, neither party would reasona bly contemplate the commenceme n t of the contract years after it was signed. The term with regard to the receipt of the complete list of DTC locations would, therefore, have to be reasona bly interpreted, understood and complied by the parties. If this was not done by the party who was to receive such lists, it would not stand the test of judicial reasona blenes s. Indeed the parties did comply with as well as enforce the said term reasona bly. The admitted corresponde nce between the parties shows how from time to This Order is modified/corrected by Speaking to Minutes Order time lists of certain locations were provided by the Petitioner and upon such list being received, the panels were installed by the Respondent at various locales.

13. It is the case of the Petitioner that though many more lists were provided to the Respondent than the ones in which panels have been installed by the Responde nt, in several of them the Respondent has failed to install the panels and hence, abando ned the contract, an aspect which has been considered and negatived in the Arbitral Award and which has not been challenged. That part of the Petitioner's claim is, therefore, laid to rest. Conseque ntly only whether or not, the list of all the DTC locations were provided by the Petitioner as per the terms of the contract reasona bly understood and enforced by the parties would have to be seen. The Arbitral Award shows that admittedly 17294 installations have been made by the Respondent. For the remainder 30,693 the evidence between the parties has been appreciated by the Learned Arbitrators to conclude how the Responde nt was prevented from performing its part of the reciprocal promises of installation of the panels, by the Petitioner not providing the lists of the DTC locations , so that the contract became voidable at the option of the Responde nt who became entitled to be compens ated for the losses suffered due to the Petitioner's nonperforma nce of its This Order is modified/corrected by Speaking to Minutes Order part of the contract under Section 53 of the Indian Contract Act. It has further been seen as to how the loss suffered by the Respondent could be compens a te d upon the breach of the contract by the Petitioner being the loss which nat ur ally arose in the usual course of things from such breach which the parties knew, when they entered into the contract, to be a likely result of

the breach as per the provision contained under Section 73 of the Indian Contract Act.

14. Under clause 5.2 of the contract the Responde nt was to commence installation of the panels indicated in the schedules contained in annex ures B-I, B-II and B-III. The quantities indicated in annexu re B-I was to be completed first followed by the quantities indicated in annexures B-II and B-III. The 3 zones in which the installations were to be made were Kolhapur, Nashik and Aurangab ad in that sequence.
15. Under Clause 5.3 of the contract the installation was to be put up at the site and commissioned within the stipulated time, the time being the essence of the contract for such purpose. This time was 20 months after the list of DTC locations was given. It was for the Respondent to adhere to such time upon the locations being provided during the pendency of the contract. This Order is modified/corrected by Speaking to Minutes Order
16. Considering the mandate under clause 5.1 of the contract between the parties the requireme nt of providing the list of DTC locations was seminal. The annex ure to the contract on the internal commu nication of the Petitioner shows that the list was to be provided within 15 days of the direction in that behalf to the Superinte ndi ng Engineers. It was not so provided. Time was not of the essence for providing such list. The Respondent requested for the lists. In the Petitioner's letter dated 14 th July 1997 the list of circle -wise allocation was enclosed. The list of locations on which the panels were to be installed was stated to be ready with the Circle Officers. The Responden t was requested to contact "the concerned" and collect the list for starting the installation. The annexure to the letter showed the various circles in the 3 zones of Kolhapur, Nashik and Aurangaba d divided into various Districts having specified quantities for the installation. It did not show the precise locations.
17. There has been a lot of corresponde nce between the parties with regard to these locations all of which has been considered in the evidence before the Learned Arbitrators and which need not be considered again. However, certain internal commu nications between the Chief Engineer and the relevant Superintendi ng Engineers of the Petitioner is the This Order is modified/corrected by Speaking to Minutes Order direct pointer to the fact that lists of locations in various Districts of each of the zones were not provided until atleast those letters were addressed. One such letter is dated 26 th May 1998 which shows that the Lessors - not only the Responde nt but also the 2 other Firms - were not given the lists of the locations causing delay in installation. The Circle Officers were asked to supply the list within 15 days of that letter. The conseque nce of failure was also stated. Hence, a year after the execution of the contract between the parties also certain lists admittedly remained to be given.
18. It appears that parties entered into a novation in Ju ne 1998 under which they agreed that lists of whichever locations that could be given in any of the 3 zones would be provided so that the already man ufact u re d panels

could be installed speedily. A letter of the Chief Engineer to the relevant Superinten ding Engineer dated 13 th July 1998 gives directions in that behalf. The letter of the Chief Engineer to the relevant Superintendi ng Engineer dated 2 nd September 1998 once again shows default in providing locations and gives directions to be scrup ulou sly followed. Despite the instr uction s there were various road - blocks encoun tered by the Responden t from the field staff at the site inter alia for showing the locations. The letter of the Responden t dated 18 th November 1998 makes a grievance in that behalf. This Order is modified/corrected by Speaking to Minutes Order However, during the period between Ju ne 1998 to December 1998 17 2 9 4 installations were made and were commissioned.

19. On 21 st December 1998 the specific terms of the contract between the parties were sought to be enforced by the Petitioner. This was on the premise that commencing work simulta neo u sly in all the zones as per the convenience of the Responde nt created a chaos for identifying the locations . Conseque n tly the requireme nt ig under clause 5.2 of the contract came to be imperatively extracted / e nforced.

Conseque n tly, the locations in annexure B-I took precedence over those in annex ures B-II and B-III; Kolhapu r zone took precedence over Nashik and Aurangab ad zones. It is interesting to note that the B-I list in Kolhapu r zone was to be first listed for installation. 20. It is contended by Mr. Dada on behalf of the Respondent that the B-I list having not been provided, it was impossible for the Respondent to install the panels in list B-II or B-III of Kolhapur or in any of the other locations in Nashik or Aurangab ad zones. It is contended on behalf of the Petitioner that though the Respondent had man ufact u red panels and though they were stated to be lying at the site, they were not installed and the Responde nt defaulted in carrying out its This Order is modified/corrected by Speaking to Minutes Order part of the reciprocal promises under the contract. This being the specific case of the Petitioner, it must be seen whether the list of locations in annexure B-I of Kolhap ur were in fact provided. I called upon Mr. Rai to show me only that aspect. He was unable to do so. This is the ultimate test of the Petitioner's case against the Responden t's defaults, if any. 21. It is contended by the Responde nt that within 2 days of the receipt of the letter dated 21 st December 1998 the Responde nt responded to what would be the aftermat h of that unilateral decision by its letter dated 23 rd December 1998. This letter was followed by the letter dated 7th Jan u a ry 1999 of the Responde nt showing confusion that was created at the field level amongst the Petitioner's staff so that the work had come to the stand still. The letter from the technical member of the T & D Network of the Petitioner dated 11 th February 1999 addressed to the relevant Superinte nding Engineer as well as the Chief Engineer of the Petitioner shows how the Responde nt as well as the other Lessors were not provided the lists of DTC locations so even the panels which were cleared by the Inspection Teams could not be installed. The letter shows that in Nashik circle where DTC locations were provided the scheme was successfully implemented. It is, therefore, seen that the This Or-

der is modified/corrected by Speaking to Minutes Order complaint that was made was in respect of the zone in which there was an insistence of the Petitioner that the work should commence though the locations were not provided. This letter shows the sizing- up of the situation by an independen t expert, albeit of the Petitioner itself. 22. It is the case of the Responde nt that this needless counter- productive direction triggered off the ultimate termination of the contract. The Responden t was prevented from performing its part of the reciprocal promises under the contract when the Respondent had not insisted upon strict compliance of clause 5.1 to commence the work only after receipt of complete list of locations, but had reasona bly complied with the spirit of that clause by keeping the panels ready for installation and in fact installing the same as and when lists from various locations came pouring in. Since the novation between the parties for simulta neo u s execution at various locations was unilaterally altered, and since that caused tremendo u s confusion at site, the Responde nt by its letter dated 19 th Februa ry 1999 contended that the rent payable to the Responden t for a period of 10 years of the Lease became payable up- front while absolving the Responde nt of all its obligations under the contract. Yet the Responde nt offered to maintain the equipment s already installed upon the Respondent receiving the rent for the This Order is modified/corrected by Speaking to Minutes Order same. The Respondent sought not to install any further panels. 23. The Petitioner contends that that was the default of the Responde nt. The Petitioner has not terminated the contract upon the breach, if any of the Respondent. The Petitioner contend s that having committed default in further executing the contract by installing further panels as directed strictly as per clause 5.2 of the contract, the Responde nt cannot terminate the contract as it has sought to do. Nevertheless the Petitioner paid rent for the quarter ending March 1999. The stalemate continued with regard to further installations. 24. The Respondent finally terminated the contract on 21 st April 1999 and claimed damages upon it being wrongfully prevented from performing its part of the contract and invoked the Arbitration clause under the contract. The Petitioner did not pay the rent for the next quarter ending Ju ne 1999 and thereafter. 25. Upon such premise the Arbitration proceeded. The Learned Arbitrators had to essentially consider which was the contracting party at fault. Much would depend upon that decision. The Learned Arbitrators have considered the contract between the parties and more specially the clause This Order is modified/corrected by Speaking to Minutes Order relating to supply and installation. They have considered also how the parties have sought to reasonably interpret the contract so as to extract its enabling provision. They have appreciated the novation by the parties agreeing not to strictly adhere to the requireme nt of the locations in the lists in the 3 zones, but to work on each of them simultaneo u sly for the mut u al convenience as well as benefit of the parties. They have repelled the suggestion of the Petitioner that the Responde nt should have waited until after all the lists of the 47,987 locations were supplied to commence execution of the contract. That unreason a ble argumen t has been advanced even whilst challenging the Award. 26. It is contended by Mr. Rai on behalf of the Responde nt that the Responde nt

breached the contract. It is contended by Mr.Rai that since the Respondent waived the requireme nt of the receipt of "complete list of locations of DTCs" under clause 5.1 of the contract, the Responden t must thereafter perform the contract in its entirety, a submission made and repelled even by the Learned Arbitrators. The legal conseque nce of the waiver imputed upon the Respondent has also been argued. Reliance is placed upon the decisions in the case of (i) Biru & Co. Vs. His Highness Thakur Sahib Shree Lukhdirji of Morvi State A. 1925 P.C. 188 @ 183 ; (ii) Union of India Vs. S. Kesar Singh 1978 Ja m m u & This Order is modified/corrected by Speaking to Minutes Order Kashmir 102; United Australia Ltd. Vs. Baralays Bank Ltd. 1940 AC 1 @ 30 (H.L.); (iii) Clande - Lila Parulekar Vs. Sakal Papers (1 - 2005) (2 - SCC 73); (iv) Ramdev Food Products Pvt. Ltd. Vs. Arvindbhai Rambh ai Patel (2006) 8 SCC 726 . 27. Just how implausible such interpretation would be can be guaged from the expansive purview of the contract. If 47987 locations were to be shown on a given day and if the Responde nt was to wait until all of them are given and shown, he would then have to commence and complete the work within 20 months for each of those 47987 locations. On a simple arithmetical calculations the Responde nt would be required to install about 240 0 panels per day ! It is required to be noted with despair that the most reason able offer and act of the Responde nt in taking lists, one at a time as and when provided to the mut u al benefit of both the contracting parties has been attacked by the Petitioner and this is despite the fact that the Petitioner itself from time to time acceded to the same by providing lists and getting parts of the contract executed at those locations. It may be mentioned that though stricto - senso an Act which has not been insisted upon, but waived calls upon the other contracting party, then to honour its commitme nt upon the waiver, such a provision would prevail and be applicable to a single act of such party. It may be further extended and This Order is modified/corrected by Speaking to Minutes Order applied to a series of such acts provided those acts fall as a part of the reciprocal promises upon the act of waiver. It is impossible to accept the contention that a waiver once made would be applicable in respect of 47,987 different acts to be performed under different set of circum st a n ce s as would prevail during the pendency of the contract. 28. The most essential factor to be appreciated is, therefore, the position of the parties at the time of the termination of the contract. It is easy to see that the Respondent was constr ained and driven to terminate its own contract despite having man ufact u red, got inspected and kept ready several panels which were to be installed. The letter of the technical expert of the Petitioner gives a complete lie to the case of the Petitioner that it was the Responde nt who defaulted in performance of his part of the contract and upholds the Responde nt's contention that it was prevented by the acts of the officers of the Petitioner in performing its part. This aspect rings clear from a reading of the Award. 29. Paragrap h 7 of the Award shows the correspon de nce between the parties for the period between the execution of the contract and its termination. 30. Paragrap h 8 shows the oral evidence, (quantitative to This Order is modified/corrected by Speaking to Minutes Order the complete exclusion of qualitative) led by the Petitioner, and the sole evidence of the Responde

nt that has been considered for its qualitative worth. It may be mentioned that the aforesaid evidence shows the relevant Superinte nding Engineers who were informed, requested and directed to provide the lists have not been examined at all. (Only one Superinten di ng Engineer from Sangli came to be examined where not a single panel was installed !). 31. Paragrap h 9 of ig the Award has considered the Responde nt's case of it having been prevented from

performing the contract by the Petitioner's officers

deliberately withholding supply of the lists of DTC locations. It considers installation of 172 9 4 panels though 315 0 0 were already manufact ured, inspected and cleared for installation. The narrowing down of the dispute in paragrap h 9 shows how the Learned Arbitrators considered the two most importa nt aspects which were the core contentions of the parties - failure to provide the locations and the failure to renew the letter of credit. 32. After the failure to provide the locations is seen, which indeed is apparent from the admitted corresponde nce itself, the breach on the part of the Petitioner is clear and complete. The conseque nces under the Indian Contract Act This Order is modified/corrected by Speaking to Minutes Order must, therefore, follow. The reference to arbitration made by the Respondent is, therefore clearly justified. 33. Not only the corresponde nce, but also the defences, flimsy as they are, have been considered by the Learned Arbitrators in paragrap h 10 of the Award. The contention of the Petitioner that one Mr. Mathew of the Responde nt was provided with the lists has been extensively considered. The oral evidence relating to the file which is stated to have been given to him and which was to be xeroxed by him was seen. The cross examination of the Petitioner's witness No.1 with regard to giving the files to Mr. Mathew shows the sorry state of affairs with regard to the initial stateme nt made by the witness in the examination- in- chief. Paragrap h 111 of the examination recited in paragrap h 19 of the Award shows how the file of Pune circle was not given in the list, the column of location was blank, certain other lists were not in accorda nce with the format, all the colum n s except 3 were missing and the files were given by the wrong Superinte nding Engineers to the witness which the witness did not check to ascertain whether the content s were properly furnished. This singular evidence, considered by the Arbitrators hits the nail in the head. No further evidence need be adverted to. This Order is modified/corrected by Speaking to Minutes Order 34. The Learned Arbitrators have considered clause 5 along with clause 12 of the contract in paragrap h 14 of the Award. The intrinsic requireme nt of clause 5 with regard to the commencemen t and completion of the contract which was for improving efficiency of the electricity distributions in the State was seen in terms of the period of time set out therein for commenceme n t as well as completion. Hence, though clause 5.1 provides for commenceme n t upon the events happening, whichever was later, the intrinsic requiremen t of the time period has been seen by the Learned Arbitrators. In the normal course the commenceme n t would be within 4 month s of the execution of the contract itself.

If however, the letter of credit was opened later, natur ally the period of time required for obtaining the letter of credit would have to be allowed to the parties for commencing their respective obligations. Further since as many as 47,987 lists of locations of DTCs were to be provided an allowance for that provision was made by allowing the commenceme nt of the contract after the lists were provided. 35. The clause of commence me nt of the contract has to be reasona bly interpreted. The clause relates to supply and installation as shown in the subtitle. The Arbitrators have considered that clause alongside clause 12 which is in respect of location and installation as reflected in that sub- This Order is modified/corrected by Speaking to Minutes Order title. Hence, whereas clause 5.1 shows the time of performance, clause 12 shows the acts done with regard to the place of performa nce. Whereas clause 5 shows what has to be done for commence me nt of the contract, clause 12 shows how that act would have to be performed and by whom. The lists were to be supplied under clause 5. The Superinte nding Engineers were to issue the instr uction s on the locations under clause 12 . They were to provide supervision thereu n der. The Responde nt was to ultimately install the panels ig at the locations approved by the Superinte nding Engineers. It is in that light that the Arbitrators have considered the time period of 4 mont hs for the commence me nt of the contract and the time period of 20 month s for its completion from the date of the contract, with added time period as would be required upon opening the letter of credit or receiving the list of locations. 36. It may be mentioned that if there had been an essentially manageable or enumer at a ble list of locations to be provided, it would have been annexed to the contract itself. It may have been supplied by a single authority of the Petitioner though after the execution of the contract. But this is a case where several lists of as many as 47,987 locations were to be provided in 3 zones having many districts. Keeping the yardstick of 4 months time for starting This Order is modified/corrected by Speaking to Minutes Order the execution - as no party would be expected to wait for years to collect all the lists - the performa nce of the obligations of the parties must also be viewed keeping in mind the demonstr a ble effect of the execution or non- execution of the contract over a long period of time. Mr. Rai, therefore, incorrectly commented that the interpretation put by the Learned Arbitrators is incorrect. 37. Paragrap h 15 of the Award considers also the field of the activity which would be occupied by the other Lessors with whom the Petitioner entered into similar contracts calling for greater supervision by provision of specific lists to the Lessors who are to specifically install panels at the specific locales provided. This requires appreciation of the fact that no Lessor could tread upon the toes of the others . 38. Paragrap h s 15 & 16 considers the corresponde nce between the parties and its interpretation including the internal comm u nication of the Petitioner showing how the Senior Officers had to reprima n d the relevant Ju nior Officers for not performing as directed. 39. Paragrap h 17 considers the evidence of the only witness of the Responden t. Indeed the essential evidence is contained in the corresponde nce between the parties that This Order is modified/corrected by Speaking to Minutes Order the witness was a party to. The oral evidence being excluded by docume n t a ry evidence, it matters little what

a witness on behalf of the Responde nt would be required to say - the admitted corresponde nce speaks for itself. It shows the accepta nce of the breach of the obligations on the part of some of the officers of the Petitioner by justifiable reprima n d contained in the letters of the Senior Officers to them writ large on its face. 40. Once the breach is shown it has to be seen whether that is a funda me n t al breach as would prevent the party not at fault from performing the contract. This aspect has been considered in paragrap h 18 of the Award. It is clear to see that if the lists of locations were not supplied and the locations were not pinpointed at site, no installation could be made. This is not a requireme nt of the contract which could be waived. The Responden t could never have installed without the list being given and the location being shown. The Respondent may have been reasona ble, but only to the extent of the breaku p of the lists of different locales such that when the list of a particular District is given he would commence work within 4 month s at that place and complete it within 20 mont hs thereat. In fact the aforesaid corresponde nce has shown the exception taken by the Petitioner that at certain locations the Responde nt sought to This Order is modified/corrected by Speaking to Minutes Order install even without the presence of the required Officer. The observation in the Award that provision of the list was the funda me n t al requirement, cannot therefore, be faulted. Once that is seen, the default of the Petitioner's officers and the conseque nt breach of the Petitioner with the conseque nt right of the Responde nt to terminate the contract upon such breach follows as a matter of corollary. 41. The aspect of waiver has been considered in paragraph 18 of the Award. The unreason a ble contention that the claima nt s were entitled (or were they bound ?) to wait till all the lists were supplied was rightly repelled. The very purpose of the contract would be frustrated, if that was done by the Responde nt. In fact in that case the Petitioner would have been well within its rights and entitlement s to enforce performance of that part of the contract requiring installation upon that particular list being furnished. The further contention that the Responde nt never complained about the failure to supply the list brings out the character of the Petitioner as being highly ingrate aside from it being self - frustrating. It is rightly seen by the Learned Arbitrators as being devoid of merits. 42. The insistence of the Petitioner that though lists were given the panels were not installed by the Responden t has This Order is modified/corrected by Speaking to Minutes Order also been falsified in the evidence and considered in the Award. Paragrap h 19 of the Award shows various admissions of the Petitioner's star witness in paragrap h 119 of his evidence during his cross examination. The admissions inter alia show that what were stated to be ready lists or complete lists was neither ready, nor complete. The evidence shows the assertions upon the assur a n ce s of the relevant Superinten di ng Engineer who did not attend the relevant meeting. The Head Office did not make the necess ary inquiries culminating in the admission of fact that the number of locations given was only 14,5 9 1 . The Learned Arbitrators have rejected the credibility of the evidence of the witness who had so prevaricated. Conseque n tly they have concluded that those lists could not have been given to the Respondent's officer Mr. Mathew and it mattered not that Mr. Mathew was

not examined. 43. Much has been said about the Superintendi ng Engineers and their total lack of performa nce of duty from the admitted corresponde nce. None of them was examined. Only the irrelevant Superintendi ng Engineer of Sangli where no installations were to be made by the Responde nt was examined. The refrain of Mr. Rai that though as many as 26 witnesses were examined by the Petitioner no part of their evidence was heeded by the Arbitrators has to be considered This Order is modified/corrected by Speaking to Minutes Order in the light of the evidence of their star witness rejected upon appreciation. 44. Paragrap h 20 of the Award shows the novation between the parties purs u a n t to the meeting dated 24 th Ju ne 1998 requiring the Respondent to install panels not insisting upon strict compliance of clause 5.2 of the contract. The letter which followed the said meeting dated 2nd September 1998 required the execution of that intent of the parties. 45. Paragrap h 21 of the Award considers the aspect of the assertion of the provision of the lists with the failure to collect the same on the part of the Petitioner's witness and the correspon dence reflecting that the Respondent repeatedly asked for the lists which were not being supplied. 46. The conclusion by the Learned Arbitrators that it was impossible for the Respondent to install the panels in the scenario provided by the Petitioner is, therefore, not only justified but could be the only conclusion. In that scenario the allowance for simulta neo u s installations being withdrawn and the insistence upon the strict performa nce of the contract being made has been held not to be "rational" in paragrap h 22 of the Award. The Learned Arbitrators have considered how the Respondent could be expected to have This Order is modified/corrected by Speaking to Minutes Order installed panels as per the annex ures B-I, B-II and B-III when the B-I list was for locations hitherto unk nown to the Responde nt and which had to be specifically provided and pinpointed was itself not provided. The proof of the pudding has been seen by the Arbitrators in paragrap h 23 , in which they have concluded that the list for Kolhapur zone which was to be shown to have been furnished to the Respondent. The Petitioner " had not done so " and conseque n tly the Petitioner could not complain that there were enough lists of locations where the panels remained un- installed. 47. This, it is argued, is a funda me n t al breach of the contract entitling the Respondent to rescind the contract and claim damages. 48. It would do well to underst a n d the concept of what is " funda me n t al " . 49. The Thesa u r u s would show the following synonymo u s: basic, key, crucial, primary, vital, central, major, principal, main, chief, central, integral, indispens a ble. 50. Hence a " fundame n t al breach " , as the term itself suggests is a breach of a basic, main term of the contract, so This Order is modified/corrected by Speaking to Minutes Order primary that upon such a breach the other reciprocal promises cannot be performed by the other party to the contract. Lord Reid has enunciated the ambit of this term in the case of Suiss e Atlantique Societ e d' armam e n t Maritim e S.A. Vs. N.V. Rotterdam s c h e Kolen Centrele 19 6 6 AC 36 1 @ 397 (H.L) to which my attention was drawn by Mr. Dada. In that case the charterer as the contracting party committed willful and deliberate (though not fraud ulen t or malafide) breaches by delaying loading and discharging the cargo even upon the pain and result of paying demur

rage charges for such cargo which was calculated to be of lower rate than to pay for freight of the coal which they would have had to use as fuel for more voyages that would have resulted. 51. It was observed that in such a case the Charters would have committed a " fundame n t al or repudicatory breach " or a breach " going to the root of the contract " . He further observed: " One wa y of looking at the matter would be to ask whether the party in breach has by his breach produced a situation funda me nt ally different from anything which the parties could as reasonable men have contemplated when the contract was made . . . " (pg.397) This Order is modified/corrected by Speaking to Minutes Order Lord Reid has thereafter held what would be the conseque nce or the aftermat h of such breach at page 398 thus : " If funda m e n t al breach is established the next question is what effect, if any, that has on the applicability of other terms of the contract. This question has often arisen with regard to clauses excluding liability, in whole or in part, of the party in breach. I do not think that there is generally much difficulty where the innocent party has elected to treat the breach as a repudiation, bring the contract to an end and sue for damages ". ig (pg.398) 52. Lord Reid further considered the caselaw dealing with the right of the party guilty of breach to rely upon the exclusion clause in the contract i.e., the clause excluding the liability of the party in breach upon rescission of the contract. Following, amongst others, Lord Denning's opinion in the case of Karsales (Harrow) Ltd. Vs. Wallis 195 6 1 W.L.R. 936 he held that such party cannot use the umbrella of the exclusion clause if the breach" goes to the root of the contract " i.e., if it is a breach " of a funda me nt al term " thus: "It must mean that the law does not permit contracting out of common law liability for a funda me nt al breach" . (pg.401) 2 principles, therefore, follow from the rule of law, (as His Lordship called) from earlier cases cited in that This Order is modified/corrected by Speaking to Minutes Order judgment. a) A fundam e n t al breach is a breach of the most basic and essential term of the contract, which goes to the root of the contract. b) A breach of the funda me n t al term enables the aggrieved party to repudiate the contract and sue for damages. 53. Hence in this case the Learned Arbitrators have accordingly, rightly held that there was funda me n t al breach of the terms of the contract by the Petitioner in paragrap h 23 of the Award. Once that is seen to have been correctly concluded no further consideration arises. It, therefore, must be taken to be the funda me n t al breach that entitled the Respondent to terminate the contract. 54. Mr. Dada's reliance is upon the case of Union of India vs. K.H.Rao (197 7) 1 SCC 583 in which the Plaintiff failed to supply the goods after an initial supply despite deman d s of the Defendant s. They were held to have committed a breach of the contract entitling the Defenda nt s to rescind the contract and claim damages for breach as also to forfeit the security deposit. Going further in the same direction is the case of Prakash Khandre Vs. Vijay Khandre 200 2 5 Scc 56 8 @ 599 in paragrap h 53 wherein the case of S. Munisharnappa Vs. B. Venkatrayappa 198 1 3 SCC 260 @ This Order is modified/corrected by Speaking to Minutes Order 27 0 in paragrap h 17 was referred to. It was held that if a contract is discharged by breach, the entire contract goes - together with the agreement for maintena nce - leaving the party aggrieved to take steps to

recover damages for such breach. 55. Much has been argued upon whether the termination was under the letter dated 11 th February 1999 or 21 st April 1999 and whether the former constit uted partial termination and the latter a final and complete termination. ig These academic differences matter little when the entitlement to terminate is seen and the contract has in any event been fully terminated at least in April 1999. 56. It may be mentioned that the second of the 2 points for consideration being the non- renewal of the letter of credit has been justifiably held against the Responde nt and which it has fairly accepted. Since the contract was terminated by the Responden t the letter of credit could not be renewed as it was not expected to perform any part of the contract itself which would entitle it to receive the rent under the terms of the contract, all that the Respondent could receive was the damages to the extent suffered by it for breach of the contract. This Order is modified/corrected by Speaking to Minutes Order 57. The next contention of the Petitioner is upon the extent of the damages granted by the Learned Arbitrators. Mr. Rai contended that the Arbitrators have chosen a "rough and ready meas ure" to award damages. He would contend that damages can never be so quantified. He takes exception to the said jargon. The contract was for payment of rent for the lease period of 10 years. The rent payable was computed for monthly payment though payable at the end of each quarter. This was upon the correspondi ng obligation to maintain the panels. Had the contract subsisted, the Respondent would have had to satisfy the Petitioner's officers that the panels were functioning and in good working condition. For that purpose certain computer printout s were required to be maintained showing inspection and verification. Alas the contract did not contin ue. The Respondent became entitled to be paid off for the unexpired period of lease upon the breach seen to have been committed by the Petitioner. The compliance of that part of the contract which related to the mainten a n ce of the installed panels, therefore, does not even come up for consideration. It need not be seen whether until the last year of the contract period the panels would have functioned well and would have been kept in a state of good repair. That aspect would come up for consideration after the panels were installed and maintained and if the Petitioner had not committed any breach with regard to the This Order is modified/corrected by Speaking to Minutes Order installation of all of the panels required to be installed under the contract. The breach having been committed and the contract having been terminated, the position as on the date of termination would alone be required to be seen. Since this is a contract requiring payment s to be made in installment s by way of rent or compen s a tion for the panels which would work during the contract period, the meas u re of damages is the payment that is required to be made upon an earlier date, being the date of termination, the maintena nce of the panels notwithsta n di ng. 58. In the case of the Proctor Endowm e n t Loan and Annuity Company Vs. Grice 187 9- 80 5 Q.B.D . 592 (C.A.) the Court of Appeal considered a case of moneys lent upon a bond under which the principal was to be paid in 5 years by installment s. Default having been made in the payment of one installment, the Plaintiffs claimed the entire balance of unpaid installment s. It was held that that amou nt could be recovered as it was not a penalty. It

was observed that when the payment is accelerated it would constit ute default and when upon a default a sum otherwise payable at a future period becomes forthwith payable, it is no longer a penalty. 59. In the case of Dunlop Pneumati c Tyre Company Limited Vs. New Garage And Motor Company Limited This Order is modified/corrected by Speaking to Minutes Order 19 1 5 A.C. 79 a fair and reasonable sum was held payable as damages for breach of a contract when the damage likely to accrue to the Appellants was difficult or impossible to prove. In that case the breach of the contract was held proved. An inquiry as to damages was directed by the trial Judge. The inquiry was to be held by the Master. The conseque nce of the breach was such as to make precise pre - estimate of the damages almost an impossibility. The agreement between the parties was " Price Management Agreement " . Damage from a single sale was impossible to forecast. It had to be seen whether the amount payable would be liquidated damages or penalty. It was observed, from the judgment in the case of Kemble Vs. Farren, that though the presu m p tion could be raised in favour of a penalty where a single lump sum is to be paid by way of compens ation in respect of many different events, some serious, some trifling, the presu m p tion could be rebutted even if the damage caused by the events, however varying in importa nce, may be of such an uncertain natu re that it cannot be accurately ascertained. (on page 96). Hence where a party stipulated an amou nt as damages it was held that that amoun t could be paid even if there was practical impossibility of accur ate assess me nt of damages. Such payment was, therefore, held not to be a penalty. This Order is modified/corrected by Speaking to Minutes Order It is based upon such a principle that the case was considered by the Arbitrators. The rents in the entire period of 10 years became due and payable upon the breach committed by the Petitioners. That would not amoun t to penalty if the contract has been correctly terminated. Nevertheless the Arbitrators fairly considered that though entire amoun t became due and payable it would require payment to be made by the Petitioners otherwise in advance of the contract period and hence, though that would not have tenta mo u n t e d to penalty, they allowed only a part of that amoun t to the Responden t. 60. Upon the case of Interoffice Telephon e s Ltd. Vs. Robert Freeman Co. Ltd., 195 8 1QB 190 (C.A.) relied upon by the Responden t it was argued that when the contract of hire over a period of years was repudiated, the meas ure of damages should be the same as in the case where a buyer refuses to accept goods sold to him. Placing reliance upon the case of re Vic Mill Ltd.(19 1 3) 1 Ch. 465 the deman d and supply relations hip was considered. The Defenda nt s argued about how the damages should be computed in case of loss of rent; the starting figure was argued to be the total of the last installment of rent, deducting therefrom an allowance for mainten a nce which the Plaintiffs would have had to carry out if the contract had run on and a further This Order is modified/corrected by Speaking to Minutes Order discoun t for receiving a lumps u m of what would otherwise be receivable over the period of the contract and further deducting the depreciated value of the equipment and adding the cost of reconditioning the equipment so as to make it available for another hirer. It was further argued that rentals payable over a num ber of years was not equivalent

to the price of the goods. Upon considering the principle of mitigation of the damages in the case of hiring out and installation, the loss suffered by the Plaintiffs (apart from incidental expenses) would be the rentals of some reasona ble period to be allowed. Hence, the grant by the trial Judge allowing a period of 6 months with the addition of expenses and considering the cost of reconditioning the plant was upheld. The argume n t of the Plaintiffs in that case which was accepted was that damages suffered was the loss of rentals over the period which the contract had yet to run at the time when the Defenda nt s repudiated the contract less the deductions for mainte na nce as well as discount. That was held to be the appropriate method of comput a tion of damages. The case of re Vic Mill (Supra) was followed and the case of British Stamp and Ticket Automati c Delivery Co. Ltd. Vs. Haynes 192 1 1 K.B. 377 was overruled (on pg.1 9 9) . Hence the comput a tion of damages on a reason able basis for payment of rents for a part of the unexpired period of lease has been upheld. This principle was held to be a This Order is modified/corrected by Speaking to Minutes Order broad general principle applicable to the case of hiring as also sale of goods. 61. In the case of Hyundai Heavy Industrie s Co. Ltd. Vs. Papadopoulo s & Ors. 198 0(2) All E.R. 29 (H.L.) a contract of guara ntee for purcha se of a ship payable in 5 installment s was held rescindable, if default of an installment was made upon which the buyer was liable for payment under the tender. The Ship- builder was held entitled to retain the money already paid and sell the ship. ig It was observed that the provision was indicative of the importa nce attached to the payment s of installment s on the due dates. Hudson on Building Contract s (10 th Edition 197 0 page 255) was referred to. Hence, the Contractor was held entitled to sue for damages. 62. In the case of A.V.Josep h Vs. R. Shew Bux A.I.R . 191 8 Privy Council it was held that even when damages with regard to all the items which were required to be deducted from the amou nt claimed were not proved, only nominal damages cannot be granted upon the breach which came to be proved. The Plaintiff auctioned the goods. The Plaintiff himself bought back the goods upon auction as there were no other auction purcha ser s. The Plaintiff had not given sufficient evidence to show the cost. The Plaintiff was to This Order is modified/corrected by Speaking to Minutes Order show the loading charge, custom duty, insura n ce and the freight. Freight was the largest item for deduction. Evidence showed that freight less rebate was rupees 16- 8 anna s per ton. The Plaintiff's notice asserted that freight actually incurred was 28 rupees. It was held by the Privy Council that that amoun t of freight could be deducted from the amou nt claimed as the loss upon breach, though the Plaintiff had failed to prove the exact freight incurred. Their Lordships observed this aspect as follows: "Then that leaves the one large item, the freight. As regards the freight, it is possible that plaintiff will suffer owing to his careless ne s s , but their Lordships think the safe thing to do is to take it at the largest figure which has been suggested here, namely, that figure which he threatened the other side with, in the letter to which their Lordships have referred. That would be at the rate of rupees 28 or, with a deduction of rupee 1 rebate, rupees 27. Making those deductions their Lordships bring out the figure of damage s at rupees 18,502 and that, in

their Lordships' opinion, is the sum for which judgment should be entered". 63. This case was followed in the case of Pani Bai Vs. Smt. Sire Kanwar, AIR 19 8 1 Rajasthan , 184 which was a case for meas u re of damages, in which there was no evidence on record as to the price the goods would have fetched and hence, the damages could be correctly determined. Relying upon the case of A.V.Josep h (supra) the Court considered the fact of the Plaintiff not having led sufficient evidence to This Order is modified/corrected by Speaking to Minutes Order show the details of damages, despite which the Privy Council held that the Plaintiff cannot be granted only nominal damages. Hence, reason able damages came to be granted after considering a num ber of judgment s as well as texts on the law of contracts. Hence, it has been held in paragrap 13 @ page 187 of this judgment thus:- "13 . The fact that damage s are difficult to estimate or could not be asse s s e d with certainty or precision cannot relieve the wrong doer of the necessity of paying the damages for the breach of his duty to abide the instructions of the principal and the lack of evidence in such matters would not be sufficient ground for awarding only nominal damage s. . . . . the other party should be accorded the benefit of every reasonable presum ption for the loss suffered. Thus, when faced with such a situation that a precise quantu m of damages could not be calculated because of insufficiency of material placed on the record, the Court may form its own conclusions on matters in respect of which there is no evidence, on a reasonable basis and the defend a nt s must be paid reasonable compens ation for the loss suffered by them. The Court, in such a situation, should try to place the principal in such a position in which he would have been placed if the agent would not have committed breach of the instructions of his principal". 64. In this case the relevant text from Cheshire, Fifoot & Furmsto n's Law of Contracts came to be considered. In the 15 th Edition of the Law of Contract by Cheshire, Fifoot & Furmsto n's at page 769 is the best enunciation of a fair This Order is modified/corrected by Speaking to Minutes Order meas u re of damages as has been evolved from precedent to precedent: It is left to the good sense of the Court "to establish as best it can what it considers to be an adequate recompen s e for the loss suffered by the Plaintiff" . It also allows for guesswork. Nevertheless a meas ure has to be made . . . . . "the fact that it cannot be made with mathem atical accuracy is no reason for depriving the Plaintiff of compens ation" . In fact in this case the meas u re of damages upon all the rents having been payable upon the breach could have been better ascertained, yet the Respondent was allowed lesser compens ation by way of damages since he would be entitled to recover the rents for the later period. The Learned Arbitrators therefore justly considered the meas ur e of damages only of a reason a ble amou nt from the amoun t which otherwise strictly became due and payable. 65. In the case of State of Kerala V/s. K. Bhaskaran AIR 19 8 5 Kerala 49 in a suit for damages for breach of Works Contract the grant of damages at 10% of the Governme nt's estimate of the work was held to be the correct estimate of damages. It was observed that a 10% profit was taken as an element in the preparation of the estimate of contract and This Order is modified/corrected by Speaking to Minutes Order hence, the loss of Contractor at 10% of Governme nt estimate of contract was

allowed. 66. So also in the case of Dwarkadas Vs. State of Madhya Pradesh (199 9) 3 SCC 600 relied upon by Mr. Dada, the Supreme Court held that the Appellate Court was not justified in interfering with the finding of fact given by the trial Court (not even an arbitral tribun al) regarding quantification of damages even if it was based upon guesswork. (see also Cheshire supra). ig Hence 10% the contract price granted as damages by the trial Court was held reasonable and permissible though in the other 2 cases cited therein 15% of the contract price was allowed on damages. 67. Furt her in the case of Mc.Dermot t Internation al INC Vs. Burn Standard Co. Ltd. (200 6) 11 SCC 181 @ 224 in para 106 it has been held that damages grantable in constr uction contracts based upon different formulae in different circum st a n ce s, having regard to the facts and circumst a n ce s of a particular case " would eminently fall within the domain of the arbitrator " . Hence the applicability of the 'Emdu n formula' by the Arbitrators was upheld. 68. For some quaint reason, Mr. Rai in the mass of This Order is modified/corrected by Speaking to Minutes Order authorities pushed into his argume nt s also relied upon cases under the Motor Vehicles Act, 1988, Land Acquisition Act 1894 etc. which is best left uncited like several others. 69. What is the meas ure of damages when there is an available market is well known. However, when there is no available market for the goods which in fact happens when goods are manufact u re d to order and are required essentially and only by the buyer, the meas u re of damages depends upon the loss suffered by the aggrieved party upon breach by the defaulting party. 70. In Re Vic Mill Limited 191 3 1 Ch.46 5 the supplier had to supply certain machinery made to particular specification of the buyer. He had to alter the machinery, which was refused to be accepted by the buyer, to sell to another person. He was held entitled not only to nominal damages on the footing that if the buyer had honoured his contract the supplier could have sold machinery to the buyer as also to any other person and hence, the price that he received from that other person was not deductible for computing the damages that he was entitled upon the breach of the buyer. 71. The case of Interoffice Telephon e s Ltd. Vs. Robert This Order is modified/corrected by Speaking to Minutes Order Freeman Co. Ltd., 195 8 1QB 190 (C.A.) has been relied upon by the Responde nt s to show the meas ure of damages. That was the case of a contract of hire when payments were required to be made in installment s and upon the breach of the contract both the parties relied upon different modes of meas u re of damages. 72. The case of Re Vic Mill Limited which was extensively considered and followed in the case of Interoffice Telepho n e s Limited ig was a case where "there was no available market in which the goods could have been promptly sold". The observation in the last paragrap h of the judgment is that the damages will vary according to the state of the market, including the questions of " supply and deman d " . 73. In the case of W.L.Thomp s o n Ltd. Vs. R. Robinson (Gunmakers) 19 5 5 All England Law Reporter 154 it has been observed that there is a comparative absence of authority on the meaning of the phrase "Available market" . The case of Marshall & Co. Vs. Nicoll & Son 191 9 S.C.24 4 (H.L.) was considered (on page 129) for ascertaining the position in law when there was no available market for the goods. It was held

that available market was a situation where particular goods could freely be sold, and that there This Order is modified/corrected by Speaking to Minutes Order was a deman d sufficient to absorb readily all the goods that were thru st on it, so that if a purcha se r defaulted, the goods in question could readily be disposed of. The judgment had considered the situation of the market for motor cars in the recent past. In that case where there was demand for the motor cars, it was observed that whenever a car could be spared by the man ufact u rer it was "snatched" . If any purcha se r fell out, many would take his place. In such cases the award for damages would have been purely nominal. The Court considered that the situation in that case was different and that there was, then no demand for the motor cars such that they could be readily absorbed whenever available for sale. Hence, it was held that if the purcha se r defaulted, the sale was lost and there was no means of readily disposing of the car contracted to be sold, "so that there wa s not, even on the extende d definition, an available market" . It was held that the Plaintiffs were entitled to the compens ation for the loss of their bargain to the extent of the profit. (on page 159 & 160) 74. In the case of G.D.Gear and Company Vs. French Cigarett e s Company Ltd. A.I.R . 193 1 Lahore 742 an order for cigarette papers bearing the specific name of the Plaintiff with 18 carat gold tips was placed. Upon the goods being man ufact u red to that specification the buyer refused and This Order is modified/corrected by Speaking to Minutes Order neglected to take delivery. It was held that the nat ure of the goods ordered was such that they could not be of use to anybody but the Defenda nt s. Papers marked with the name of the Defendan t Firm are of no possible use to any and could not have been sold in the market. The case of Re Vic Mill Limited 19 1 3 1 (Ch.D) 183 holding that a distinction was to be drawn between the goods which are market able and which are not marketa ble was followed. Conseque ntly it was held that the price of the goods was the meas u re of damages when there was no market for the goods. 75. This case has been followed in the case of Punjab State Electrici t y Board, Patiala Vs. M/s. Abnash Textile Trading Agencie s, Ambala City A.I.R . 198 6 Punjab and Haryana 323 for considering the meas ure of damages for cloth. The consideration was the non- marketability of the goods. It was held that the goods in that case was not marketa ble cloth as it was specially made to order. It was, therefore, held that distinction had to be drawn between goods which were marketable and which were not as observed in the case of G.D. Gear (supra) following in Re Vic Mill Limited. 76. It is an admitted position that the panels were man ufact u red and commissioned specifically for the This Order is modified/corrected by Speaking to Minutes Order Petitioner. The panels did not have a ready market in which the Respondent could be expected to sell the panels, if they were not allowed to be installed by the Petitioner at their locations. The market value of the panels, therefore, could not be ascertained as considered in paragrap h 55 of the Award. Mr.Rai's contention that the damages should have been mitigated takes his case no further. Reliance upon Hancha nd & Co. Vs. Gosho Kabushik Kaisha A 192 5 Bom. 28, Murlidhar Chiranjilal Vs. Harischandra Dwarkadas 19 6 2 1 SCR 653 ; is misplaced. ig Mitigation of the loss suffered by the Respondent for not being

able to install the panels which were ready for installation and even inspected by the Petitioner's officers, cannot be made upon an arithmetical formula which would be applicable to goods which are saleable on the date of the termination of the contract. A reference to the various aspects of the Rule of Mitigation of Damages in Mc Gregor on Damages 17 th Editio n, 200 3 @ 22 3 in paragrap h (e) relating to the onus of proof on the issue of mitigation shows that such onus is on the Defenda nt thus : "If he fails to sho w that the claimant ought reasonably to have taken certain mitigating steps, then the normal meas ure will apply". 77. It is in this purview with the meas u re of damages adopted by the Learned Arbitrators is required to be This Order is modified/corrected by Speaking to Minutes Order appreciated. 78. Out of the 8 separate claims made by the Respondent, 3 of which were not pressed, and 1 was to be in another forum, the Learned Arbitrators granted only the claim for agglomerated rent. The claim for fair price of the installed panels as also the loss of depreciation under the Income Tax Act were rejected as remote loss and damage. The claim of costs being only discretionary was granted in part. The Responde nt has not challenged the rejected claims. ig Hence only the claim for meas ur e of damages by way the rents lost to the Responden t is to be seen. 79. Between the claim of the Respondent for payment of agglomerated rent to call the 47,9 8 7 panels to be installed for the entire period of 10 years and the contention of the Petitioner that the Responde nt would be entitled only to the cost of the 172 9 4 installed panels, the Learned Arbitrators have drawn a balance such as to put the Responden t, who was the aggrieved party in as near a portion as would be had the contract not been breached by the Petitioner. 80. It may atonce be mentioned that if the contention of the Petitioner that the Responde nt is entitled to only the cost of the installed objects is at all heeded, it would mean that This Order is modified/corrected by Speaking to Minutes Order entire Law of Damages is given a go-by. The conseque nce of the very breach proved to have been committed by the Petitioner would be nullified. Yet if the entire agglomerated rent for the contract period of 10 years was granted, it may have been justified as the amoun t which become forthwith payable as damages and not as penalty upon the breach of the Petitioner as held in various cases since Proctor Endown m e n t and Dunlop Pneu mati c Tyre (supra) . Yet the Learned Arbitrators followed the mean course. The result was expected to be challenged by the Respondent, which is not done. The challenge to the meas ure of damages by the Petitioner is essentially on the term " rough and ready meas u re " used by the Learned Arbitrators at 3 places. However this meas u re is on sound reasons culled from the various cases including the case of Interoffice Telephon e s (supra) which is largely followed. Hence, the meas ure of damages ascertained and awarded is neither arbitrary, not capricious. 81. Upon the correct premise that the lease rent is one of the meas ure s for ascertaining the damages in paragrap h 51, the Learned Arbitrators have rejected that it could be for the entire period of the unexpired lease or for the entire of the 47298 panels to be fitted. They accepted the meas ure of damages to be only the loss of rentals for the unexpired This Order is modified/corrected by Speaking to Minutes Order period of lease less the appropriate deductions as held in Interoffice Telepho n e s (supra). 82. Furt

her they distinguis hed between the 172 9 4 panels installed, the 14 2 0 6 panels made ready and inspected but not installed upon the breach of the Petitioner and 164 8 7 panels not man ufact u red until the date of termination of contract. They considered the expenses for installation already meas ur ed for the 172 9 4 panels installed as also the cost of mainten a n ce of those panels. They considered the expenses for installation and mainte na nce not meas u red for the 14 2 0 6 panels readied but left stranded, thank s to the breach of the Petitioner. 83. They considered the oral evidence of the cost of installation by the Responde nt and left unled by the Petitioner. Yet instead of accepting the figure deposed by the Responde nt in its entirety (though no evidence was led by the Petitioner on that score), they have taken only a fair figure as the cost of installation. 84. The deposition of the Responde nt about the mainten a n ce cost @ 1% of the lease rent, not having been challenged in cross- examination is also not accepted at face value. The Learned Arbitrators have considered the cost of This Order is modified/corrected by Speaking to Minutes Order taking printout s, salary, wages, overhead costs and the costs of space parts to repair the panels also. 85. Furt her they have heeded the further deductions required to be made to be discoun ted from the accelerated payment s. Hence to determine the then value of lease rent its discoun ting by determination of the rate of interest is made. 86. Conseque ntly the ig Learned Arbitrators, following Interoffice Telepho n e s (supra) and yet exercising restraint upon the damages to be awarded, have determined as damages payable by the Petitioner the lease rent for a duration of 7 less 1 = 6 years only for the installed 172 9 4 panels. 87. Since the cost of installation of the readied but stranded panels were not incurred by the Responde nt, a further leevay in terms of lease rent of 1 extra year to the end came to be granted for those 14 2 0 6 panels. Conseque ntly, the Learned Arbitrators awarded damages to the extent of the lease rent for 5 years for the readied, inspected, stranded uninst alled 14 2 0 6 panels. 88. The Learned Arbitrators further considered the claim in This Order is modified/corrected by Speaking to Minutes Order respect of the remaining 164 8 7 unma n ufact u r ed panels differently and separately. They rejected the Responde nt's claim for damages for those objects entirely. They however granted only a reasonable value of the raw material for acquiring those panels. Considering the deposition of the Responde nt with regard to the import of the material contained in the purcha se order and the Letters of Credit with regard thereto, being Exhibit- C-4 , they further deducted import of material used for the installed and readied panels and granted only the net cost of the raw materials for the imported material for manufact u re of further panels, hitherto unm a n uf act u re d. 89. The contention of Mr. Rai on behalf of the Petitioner that the entire effort is worth little and is vitiated by " the law of the land " with regard to the meas ure of damages is not only unsou n d but egregiously unjust. His reliance upon a host of judgment s with regard to a number of unrelated aspects of waiver, meas ur e of damages etc. has not succeeded in a better analogy or arithmetical calculation which could have been adopted in the place and stead of the Learned Arbitrators ' sound reasoning and exercise of conservativeness, balance and caution. Indeed, " there is a mighty big difference between good sound reasons and

reasons that sound good " ! This Order is modified/corrected by Speaking to Minutes Order 90. The exercise by the Learned Arbitrators in following the law of damages contained in Section 73 of the Indian Contract Act in a case of such funda me n t al breach of a contract as would prevent a party from performing his part claiming to be damnified under Section 53 of the said Act as enumera ted in the aforesaid cases was both worthy and correct. Further, the contract being for panels commissioned specially for the Petitioner which had no market and hence igthe damages suffered could not be mitigated by sale in open market to a third party. The consideration of both the aspects does not call for interference under Section 34 (2)(iv) of the Arbitration and Conciliation Act, 1996. 91. Mr. Rai contended that the Learned Arbitrators erred from the inception in not appreciating that the Respondent had waived the requirement of lists and hence should have proceeded without such lists, (was he expected to go to the spot when the spot was not spotted ?), and conseque ntly there was no breach which would allow repudiation of the contract or claim of damages and further the very meas ur e of damages was seminally faulty being rough and ready and not precise and proper. Hence, relying upon the case of Delhi Develop m e n t Authority Vs. M/s. R.S. Sharma & This Order is modified/corrected by Speaking to Minutes Order Co., New Delhi 20 0 8 11 Scale 663 @ 672 in paragrap h 12 he contended that under Section 34 of the Act, the Award was liable to be set aside. He contended that such an award was contrary to the subst a n tive provisions of law (in this case the Indian Contract Act Sections 53 and 73) and patently illegal (being against those provisions of law). Though the principles would certainly govern the considerations of Arbitral Awards, this case does not lend itself to any illegality which would vitiate the award. Further cases referred by him, ONGC Vs. Saw Pipes Ltd. (200 3) 5 SCC 70 5 , Mc. Dermott International INC Vs. Burn Standard Co. Ltd. (200 6) 11 SCC 181 go the same way. 92. Only one contention of Mr. Rai may deserve accepta nce. As the consolidated figure of the award, conservative though it really is, runs into several crores of rupees, Mr. Rai contended that that would be the account payable by a public body and indirectly would be payable by the public, which according to him would be rather a strain on public funding. It is seen that the breach has been committed by the Officers of the Petitioner. The evidence led before the Learned Arbitrators as well as the reference in the Award point to the dirty malaise of corruption which has permeated into every fibre of our country and corroded its character to the core. Indeed the letters of the Chief Engineer to the This Order is modified/corrected by Speaking to Minutes Order Superinte nding Engineers as also the letter of the independen t Technical Expert of the Petitioner referred to above reflects a state of affairs that can point to nothing other than corruption at the relevant levels. It would do well for the Petitioner to recover the amou nt lost to the Petitioner by way of damages by the maleficent act of its officers from their earnings and benefits. Indeed the public need not pay for the actions of the officers of the Petitioner who may be found to be breach for reasons not within the course of their duty and for omissions despite specific directions. ig That, ofcourse, is not the reason not to grant damages to the Responde nt who has been victimised precisely

for that reason. 93. Despite the strain on public resources which is pleaded, the Petitioners are seen to have challenged the Award without any justifiable ground and only to delay the inevitable payment under the Award. 94. Under the circum st a n ce s the Petition is dismissed with costs fixed at Rs.1 lakh. (SMT. ROSHAN DALVI, J.)