M/S Green Vistas Property Development ... vs M/S Leatherex Tanning Company

Author: M.M.Sundresh

Bench: M.M.Sundresh

IN THE HIGH COURT OF JUDICATURE AT MADRAS
Reserved on : 17.01.2018
Delivered on: 29.01.2018
CORAM
THE HONOURABLE MR.JUSTICE M.M.SUNDRESH
O.P.No.591 of 2014 and A.No.1812 of 2016

M/s Green Vistas Property Development (Private) Ltd.,
F3, First Floor, K.Geyes Pavithram Building,
No.34 & 36, 7th Avenue, Besant Nagar,
Chennai-600 090.
Represented herein by its Director
MrVaibhav Gulechha ..Petitioner

Vs.

1.M/s Leatherex Tanning Company,
Old No.6 (New No.13),
Kattur Sadayappan Street,
Chennai-600 003, Tamil Nadu .
represented by its Managing Parnter
Mr.M.K.M. Kader Meera Sahib

2.Hon'ble Mr.Justice Doraiswamy Raju,
'Kanaka Durga'; No.20, Old No.39,
Puram Prakash Rao Road,
Balaji Nagar, Royapettah,
Chennai-600 014. .. Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996,
For Petitioner : Mr.R.Thiagarajan
For Respondent : Mr.R.Murari, S.C., for
Ms.Hema Srinivasan

ORDER

The petitioner is the private limited Company dealing in construction and infrastructural projects. A Memorandum of Understanding was entered into on 26.11.2004 between the petitioner and the first respondent, which is a partnership firm, to construct and develop an IT software park in the property belonging to the latter. The Memorandum of Understanding was followed by a Joint

Development Agreement dated 25.02.2005.

2. As per the agreement, the property belonged to the first respondent was to be developed jointly by the petitioner along with that of a third party. The time for completion of the contract was 15 months from the date of obtaining plan approval from CMDA. Time was specifically made as an essence of the contract. This Clause -4 was followed by Clause 12, which deals with the liability to pay a sum of Rs.2,50,000/- per month for the delayed period. If the petitioner fails to deliver the portion earmarked to the first respondent within 24 months from the date of the approval, then it has to pay a sum of Rs.5,00,000/- per month from the date of CMDA approval till the date of handing over the possession.

3. Except the preliminary work, nothing more thereon was done. The petitioner did not even make an application presumably on the ground of the difficulties with the planning authorities. In tune with Clause-4 and 12 of the Joint Development Agreement, the petitioner started paying a sum of Rs.5,00,000/- per month from 15.01.2007 onwards. It was stopped from 15.11.2008. In the meanwhile, the first respondent demolished the building put up in the property belonged to it and handed over the same to the petitioner. After exchange of notices, the first respondent invoked the arbitration clause. The petitioner has also made a counter claim.

4.The claims made by the first respondent were for a total sum of Rs.104,76,71,414/- on different heads, which are as under.

As per Claim No.1 : Loss of rental on account of eviction of tenants including interest:

> Since the developer/promoter had not made any progress in the JVD and the owners had vacated the tenants and demolished the existing structures loss of rent from 1.3.2005 till 1.2.2012 for 84 months at Rs.1,15,530/- per month.
>
> 1,14,51,334.00 As per Claim No.2 Liquidated Damages- Past damages & Future damages including interest:
>
> Since the JDV had become non-starter, the promoter/developer had been paying compensation as per the clause of JDV. But the promoter/developer had stopped paying the compensation on 15.11.2008 onwards, compensation amount due from 15.11.2008 to 15.2.2012 i.e., 40 months at Rs.5,00,000/-.
>
> 2,69,70,000.00 As per Claim No.3: Removal of Piles/Plinth beams and claim on account of refilling: removal of the piles including column rods may cost Rs.25 to Rs.30 lakhs.
>
> The developer/promoter raised some column rods and excavated earth which has to be cut and filling cost of 40000 cft. of refilling with earth at Rs.30/- CFT.
>
> 20,00,000.00 As per Claim No.4: Loss of rental income- as on October 2006:

From 1.10.2006 (the date in which the developer/promoter supposed to have handed over the completed structure till Feb. 2012.

9,65,16,000.00 As per Claim No.5: Loss sustained on account of failure to deliver the constructed area:

Had the promoter handed over the constructed portion on 1.10.2006 and the owners had sold them on that date, when the market was in peak, the owners would have on sale of such portion -38300 sft., of constructed area plus the undivided share of land at the rate of Rs.8000/- sft.

53,26,00,000.00 As per Claim No.6: Damages- Additional cost of construction to be incurred if the project to be completed as originally envisaged.

If the promoter had handed over the vacant land back to owners and they in turn constructed same area during 2006-07 and sold them net loss the owners would have incurred.

11,49,00,000.00 As per claim No.7 Damages- Loss of rental revenue due to abandonment of the project:

If the owner had to construct now during 2011-12 due to the difference of cost of construction the net loss due to the delay would be as per the above claim.

4,66,98,400.00 As per Claim No.8 Loss of rental receivable by the claimant:

If the owner had constructed during 2006- 2007 of their own with additional built up area as stated and rent it out, the net rental income till Feb, 2012 from March 2008 would be as per the above claim.

18,40,85,680.00 As per Claim No.9: Compensation for the structures existed prior to joint venture agreement which were demolished as per the clause contained therein:

The claimant is entitled to compensation 3,24,50,000.00 TOTAL CLAIM 104,76,71,414.00

5.The Tribunal, ultimately, on a consideration of the entire materials available on record, was pleased to award certain amount as against claim Nos.1 to 3 and 9 while permitting set off of Rs.4,00,000/- being the security deposit. Incidentally, 9% interest was awarded on the award amount from the date of the claim statement i.e. 01.03.2012. Thus, the claim Nos.4 to 8 and counter claim were rejected. Challenging the same, the petitioner has come forward to file the present original petition.

6. The Tribunal gave factual findings that there is absolutely no justification for the petitioner in not starting the work and complete it. It did not even apply for the planning permission. There is no material to bring the case of the petitioner under Section 56 of the Indian Contract Act, 1872. It is only on the premise and in pursuant to the agreement, the first respondent demolished the existing construction. The first respondent was receiving the rent. It is entitled for the liquidated damages in the same terms as paid before the interregnum by the petitioner. This has been paid till 15.12.2012. Since the termination of contract is valid, the petitioner will have to make good the damages caused by removing the unauthorised columns and refilling of the earth. It is also entitled for the rent. The costs of the building demolished will have to be paid by the petitioner. The Tribunal having found the issues substantially in favour of the first respondent, as the consequence rejected the counter claim.

7. The learned counsel appearing for the petitioner would contend that there cannot be any liquidated damages. Even assuming that there can be any such damage, it can only be for the breach and not for the period status quo ante. In other words, it is submitted that a liquidated damage can only be ordered for the loss caused by the breach. The first respondent could have put up construction by engaging a third party. The approach of the Tribunal in appreciating Sections 73 and 74 of the Indian Contract Act, 1872, is not correct. It is a case of impossibility of performing the contract. To buttress his submissions, the learned Counsel has made reliance upon the following decisions:

1.SIR CHUNILAL V. MEHTA & SONS lTD V. THE CENTURY SPINNING AND MANUFACTURING COMPANY LIMITED (AIR 1962 Supreme Court, 1314);

2. FATEH CHAND VS. BALKISHAN DASS(AIR 1963 Supreme Court 1405);

3. M.LACHIA SETTY AND SONS LIMITED V. COFFEE BOARD, BANGALORE AND GIRI COFFEE WORKS V. COFFEE BOARD, BANGALORE ((1980) 4 Supreme Court Cases 636); and

4.MURLIDHAR CHIRANJILAL V. HARISHCHANDRA DWARKADAS AND ANOTHER (AIR 1962 Supreme Court 366)

8. The learned Senior Counsel appearing for the first respondent would submit that the Tribunal has given its findings based upon facts. The evidence of the petitioner was taken into consideration at length and recorded. Admittedly, the petitioner did not even make an application seeking for planning permission. There is no material to hold that the petitioner was prevented from making an application. The petitioner made the first respondent to demolish the building. Therefore, the rent which the first respondent was collecting earlier and the costs of the building was rightly awarded by the Tribunal. Though higher amount has been sought for towards liquidated damages by way of an addition of interest, it was rejected. There is nothing wrong in the Tribunal taking into consideration of the amount paid already by the petitioner for the delay caused by it. The payment made by the petitioner itself would show that the delay was on account of its failure. The other claims awarded are not required to be interfered with being based upon factual adjudication. The following

judgments have been relied upon by the learned Senior counsel appearing for the first respondent:

1. OIL AND NATURAL GAS CORPORATION LIMITED V. WESTERN GECO INTERNATIONAL LIMITED ((2014) 9 Supreme Court Cases 263);

2.ASSOCIATE BUILDERS V. DELHI DEVELOPMENT AUTHORITY ((2015) 3 Supreme Court Cases 49);

3.BHARAT HEAVY ELECTRICALS LIMITED V. TATA PROJECTS LIMITED ((2015) 5 Supreme Court Cases 682);

4.NATIONAL HIGHWAYS AUTHORITY OF INDIA V. ITD CEMENTATION INDIA LIMITED ((2015) 14 Supreme Court Cases 21);

5.ZONAL GENERAL MANAGER, IRCON INTERNATIONAL LIMITED V. VINAY HEAVY EQUIPMENTS((2015) 13 Supreme Court Cases 680); and

6.NAVEEN G. ROLANDS V. CHOLAMANDALAM DBS FINANCE LTD., AND OTHERS((2017) 2 Law Weekly 627).

9. DISCUSSION:- We are dealing with the petition filed under Section 34 of the Arbitration and Conciliation Act, 1996. After considering 57 documents filed on behalf of the first respondent and 51 documents filed on behalf of the petitioner, the Tribunal gave its factual findings. The findings are to the effect that the petitioner was solely responsible for delaying the project. It did not even make an application seeking planning permission. There is no material to hold that the planning permission could not be made for the reasons beyond the control of the petitioner. The fact that the petitioner did make the payment as per the Joint Development Agreement for the delay caused in handing over the building at Rs.5 lakhs per month was taken note of as a factor in support of the first respondent's case. Non furnishing of the original documents was held to be not a necessary one in seeking planning permission. The petitioner also did not make any specific request at the relevant point of time. Therefore, these findings being factual, not only on consideration of the documents filed, but also on the evidence adduced by the parties, do not require any interference under Section 34 of the Arbitration and Conciliation Act, 1996.

10. The law on this subject has already been crystallised in the celebrated judgment of the Apex Court in ASSOCIATE BUILDERS V. DELHI DEVELOPMENT AUTHORITY ((2015) 3 Supreme Court Cases 49).

11. In the case on hand, the first respondent did perform its part in handing over the vacant possession. This was done after demolition of the existing building. The Tribunal was very specific in pointing out that the petitioner was not keen on implementing the project. However, false assurances were given time and again to the first respondent. The reply given on behalf of the petitioner through the communication sent was found to be evasive and incorrect. The evidence of R.W.1 was taken into consideration by the Tribunal for coming to the aforesaid conclusion.

12. Coming to the application of Section 56 of the Indian Contract Act, 1872, this plea was raised by the petitioner after orders were reserved before the Tribunal. The Tribunal rightly held that in the absence of any material to prove the frustration of the contract on facts and the circumstances warranting Section 56 of the Indian Contract Act, 1872, to be attracted not being available, the petitioner is not entitled to any relief on that score. A mere uneconomic result by itself will not be sufficient to attract the rigour of Section 56 of the Indian Contract Act, 1872. It is a positive law. Thus, it does not leave the matter to be determined on the intention of the parties. The change of circumstance must be one, which was not available and contemplated at the time of the execution of the contract. It should strike at the root of the contract. Therefore, the plea made to invoke under Section 56 of the Indian Contract Act, 1872, being vague and not supported by any materials, was rightly rejected by the Tribunal as an after thought. After all, it is for the party, who claimed the frustration, to satisfy the adjudicating authority.

13. On the issue qua Sections 73 and 74 of the Indian Contract Act, 1872, there is no difficulty in holding that the petitioner is liable to make the liquidated damages. Clause 4 of the joint venture agreement speaks about time as the essence of the contract. As per Clause 12, the petitioner is liable to pay a sum of Rs.5 lakhs per month for not delivering the portion earmarked within 24 months. These two clauses are extracted hereunder.

CLAUSE 4 TIME FOR COMPLETION:-

> The party of the second part herein agree that the proposed transaction with respect to the completion of the entire Project shall be completed within 15 months from the date of the Corporation of Chennai/CMDA or their delegated body as the case may be sanctioning their approval with respect to the proposed contemplated development, subject to a grace period of 90 days and also subject to the party of the first part handing over vacant peaceful possession of the Item-I of the Schedule- A property within the time period as contemplated in this Agreement for Joint Development.
>
> Time shall be an essence of this contract. However, in case of natural calamities like floods, famine, earthquake, war, riot, fire etc., suitable extension of time will be permitted. CLAUSE 12 DEFAULT CLAUSE:-
>
> As mentioned in Clause 4 supra, in case the party of the second part commit default or delay in handing over the building or the portion of it earmarked for the party of the first part, over and above the period of 18 months, then they will be liable to pay Rs.2,50,000 (Rupees two lakh fifty thousand only) per month to the Party of the first Part for the delayed period for the Schedule B super built up area of the building earmarked for the party of the first part.
>
> In the event the party of the second part has not delivered the portion earmarked for the party of the first part within 24 months from the date of CMDA/Government approval, the party of the second part shall undertake to pay Rs.5,00,000/- (Rupees five lakhs only), per month, to the party of the first part as compensation till the

possession is handed over to them.

In the event of the party of the first part not able to vacate the existing tenant and handover vacant peaceful possession of the item-I of the Schedule-A property within the time period as contemplated in this Agreement, the party of the first part shall be liable to pay interest @ 9% per annum on the amounts paid hereunder by the party of the second part to the party of the first part for such delayed period.

In any case, the party of the first part shall ensure that handing over of vacant peaceful possession of the Item-I of the Schedule-A property is not delayed beyond the stipulated date hereunder as the same would delay the completion of the over all building by the party of the third part on the consolidated extents of the Schedule-A property.

This Agreement shall be in full force until all the transactions contemplated herein are fully and effectively completed.

14. There is no difficulty in holding that both these clauses are to be read together. Once it is done, the liability of the petitioner cannot be avoided especially in the teeth of payment made as per Clause 12 by it though for partial period. When once there is a breach, the consequence will have to flow out by it. Though explanation under Section 73 of the Indian Contract Act, 1872, speaks about inconvenience caused, we do not have such a situation on hand. A liquidated damage would arise when there is a valid agreement, breach and a loss proved. As these factors are very much satisfied, the contentions raised by the petitioner cannot be countenanced. Though there is no mandatory duty imposed on a person claiming liquidated damages, to avoid certain consequence arising for the default, it is a factor to be taken note of in the measurement of damages. What is to be seen is the element of reasonableness . In the action, a party seeking damages. This is for the reason that for such a failure, the non defaulting party cannot be sued. Therefore, at best, it is a question of adjustment in analysing and assessing damages. What constitutes a reasonable action is a question of fact to be seen from case to case.

15. The following paragraph of the Apex Court in M.LACHIA SETTY AND SONS LIMITED V. COFFEE BOARD, BANGALORE AND GIRI COFFEE WORKS V. COFFEE BOARD, BANGALORE ((1980) 4 Supreme Court Cases 636) is apposite.

14.At the outset it must be observed that the principle of mitigation of loss does not give any right to the party who is in breach of the contract but it is a concept that has to be borne in mind by the Court while awarding damages. The correct statement of law in this behalf is to be found in Halsbury's Laws of England (4th Edn.) Vol. 12, para 1193 at page 477 which runs thus:

"1193. Plaintiff's duty to mitigate loss. The plaintiff must take all reasonable steps to mitigate the loss which he has sustained consequent upon the defendant's wrong, and, if he fails to do so, he cannot claim damages for any such loss which he ought reasonably to have avoided."

Again, in para 1194 at page 478 the following statement occurs under the heading 'Standard of conduct required of the plaintiff:

> "The plaintiff is only required to act reasonably, and whether he has done so is a question of fact in the circumstances of each particular case, and not a question of law. He must act not only in his own interests but also in the interests of the defendant and keep down the damages, so far as it is reasonable and proper, by acting reasonably in the matter In cases of breach of contract the plaintiff is under no obligation to do anything other than in the ordinary course of business, and where he has been placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the defendant whose breach of contract has occasioned the difficulty The plaintiff is under no obligation to destroy his own property, or to injure himself or his commercial reputation, to reduce the damages payable by the defendant. Furthermore, the plaintiff need not take steps which would injure innocent persons." (Emphasis supplied).

In Banco De Portugal v. Waterlaw & Sons, Ltd., Lord Shankey, L.C., quoted with approval the statement of law enunciated in James Finlay & Co. v. N. V. Kwik Hoo Tong, Mondel Maatchappij, to the effect "In England the law is that a person is not obliged to minimise damages on behalf of another who has broken a contract if by doing so he would have injured his commercial reputation by getting a bad name in the trade." In American Jurisprudence 2d, Vol. 22 para 33 (at pp. 55-56) contains the following statement of law:

> "33. The general doctrine of avoidable consequences applies to the measure of damages in actions for breach of contract. Thus, the damages awarded to the non-defaulting party to a contract will be determined and measured as though that party had made reasonable efforts to avoid the losses resulting from the default. Some courts have stated this doctrine in terms of a duty owing by the innocent party to the one in default; that is, that the person who is seeking damages for breach of contract has a duty to minimise those damages. However, on analysis, it is clear that in contract cases as well as generally, there is no duty to minimize damages, because no one has a right of action against the non-defaulting party if he does not reasonably avoid certain consequences arising from the default. Such a failure does not make the non- defaulting party liable to suit; it only indicates that the damages actually suffered are greater than the law will compensate. Therefore, in contract actions, the doctrine of avoidable consequences is only a statesment about how damages will be measured." (Emphasis supplied).

From the above statement of law it will appear clear that the non-defaulting party is not expected to take steps which would injure innocent persons. If so, then steps taken by him in performance or discharge of his statutory duty also cannot be weighed against him. In substance the question in each case would be one of the

reasonableness of action taken by the non-defaulting party.

16. A damage can be claimed on different grounds. It need not be only for the period of breach. In other words, it cannot be stated that damages can only be asked for a period after the breach and not before it. If non defaulting party suffered a damage in performing its part of the contract, then it is entitled for the relief.

17. Section 74 of the Indian Contract Act, 1872, declares the law as to liability upon breach of contract, when compensation is pre-determined. But it will not prevent an authority from awarding damages occurred due to the conduct of a defaulting party. A liquidated damage is liable to be paid on the inability of a party to perform its role, whereas, the other party is entitled for damages for the loss caused by the unlawful action. Therefore, there is a difference between the liquidated damages and the damages caused by the wrongful act of the party to the contract. To put it differently, a liquidated damage would arise by way of penalty, whereas a damage otherwise would emanate on the action and inaction leading to it. Thus, a liquidated damage normally concerns itself with a non performance of a party. Here, the damage is quantified on an evaluation of the non-performance in terms of money. Therefore, such a damage is very restrictive in nature. The consequence that would emanate from it would form the other damage. The action and inaction on the part of the party, who commits breach has to be seen along with the performance of the contract by the other resulting in the loss. This has to be borne in mind in dealing with a case of damages other than the liquidated one. The intention of the parties, who entered into an agreement will have to be seen ultimately. If the intention is to make good the loss for their breach alone and where an amount is quantified as liquidated damage, it would not take away the right of the other party to claim damages caused otherwise, which is inclusive of the role played by it. For example, A enters into a construction contract with B . A being the owner, demolishes the old building. B commits delay in performing its part. The agreement stipulates liquidated damages for the delay. This will not take away the right of the A from claiming damages or otherwise for its positive act in demolishing the building and thus, incurring loss. Thus, the loss being the one not foreseen intended and envisaged under the contract, the restrictive clause providing for liquidated damages would not bad a relief. After all a tort- feasor has to make good the loss suffered by the others. The position of law has been dealt with in extenso in STEEL AUTHORITY OF INDIA LTD., V. GUPTA BROTHER STEEL TUBES LTD., ((2009) 10 Supreme Court Cases 63), wherein the Apex Court has held as follows:

8. The question that needs to be determined by us is whether the breaches alleged by the respondent are covered by the stipulations contained in Clause 7.2. If the answer is in affirmative, obviously compensation cannot be awarded beyond what is provided therein. On the other hand, if breaches are not covered by clause 7.2, cap provided therein with regard to liquidated damages will not be applicable at all.

30. Although it has been strenuously urged on behalf of the appellant that stipulations contained in Clause 7.2 are comprehensive enough to include all types of breaches, on a careful consideration thereof, we are unable to accept the submission made on behalf of the appellant. Can it be said that SAIL intended to provide for liquidated damages in the contract even in a situation where they were unable to make supply of materials for the reasons beyond control or they declined to supply the materials on one ground or the other. The answer has to be plainly in the negative. It is well known that intention of the parties to an instrument has to be gathered from the terms thereof and that the contract must be construed having regard to the terms and conditions as well as nature thereof. Clause 7.2 that provides for compensation to the respondent for failure to supply or delayed supply of the materials by SAIL was never intended to cover refusal to deliver the materials of the supplies on the part of the SAIL. Refusal to supply materials by SAIL resulting in breach is neither contemplated nor covered in Clause 7.2. There is no impediment nor we know of any obstacle for the parties to a contract to make provision of liquidated damages for specific breaches only leaving other types of breaches to be dealt with as unliquidated damages. We are not aware of any principle that once the provision of liquidated damages has been made in the contract, in the event of breach by one of the parties, such clause has to be read covering all types of breaches although parties may not have intended and provided for compensation in express terms for all types of breaches. It is not a question of giving restrictive or wider meaning to clause 7.2 but the question is what is intended by the parties by making a provision such as this and does such clause cover all situations of breaches by SAIL. However, it is to be noted that liquidated damages cannot be asked after the termination is made and thereafter.

18.Considering the scope of Sections 73 and 74 of the Indian Contract Act, 1872, it has been held by the Apex Court in the following manner.

(1) In OIL AND NATURAL GAS CORPORATION LIMITED V. SAW PIPES LTD., ((2003) 5 Supreme Court Cases 705), it has been held as follows:

68. From the aforesaid discussions, it can be held that:-

(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same;

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequences of the breach of a contract.

(4) In some contracts, it would be impossible for the Court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, Court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.

(2)In FATEH CHAND V. BALKISHAN DASS (AIR (1963) Supreme Court 1405), it has been observed as follows:

Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the 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 predetermining 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. The jurisdiction of the court, is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. Use of the expression "to receive from the party who has broken the contract" does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach.

This landmark declaration of law still holds the field. When the parties have agreed as in this case for payment of damages as stipulated by them the same becomes payable. This principle laid down in this case has been applied in several subsequent cases before the Supreme Court, including the one reported in PHULCHAND EXPORTS LTD., V. OOO PATRIOT (2011 (10) Supreme Court Cases 300). Section 74 of the Indian Contract Act has been held to enable the party aggrieved to claim that much and does not entitle such person to straight away get the stipulated amount and what is rally guaranteed is only a reasonable sum not exceeding the stipulated sum. The Court has been held to have the power and even obligated to adjudge the reasonable compensation in each case on the merits of the claim made.

19. In the case on hand, the Tribunal awarded liquidated damages even after the period of termination. There is nothing wrong in the Tribunal taking into consideration the amount mentioned in Clause 12 of the Joint Development Agreement. After all this was the amount paid by the petitioner for not completing the project within the time. However, this Court finds considerable force in the submission made by the learned counsel appearing for the petitioner that the Tribunal was wrong in extending it till 15.02.2012, though the termination was on 09.05.2009. On the date of termination, the contract came to an end. Therefore, nothing prevented the first respondent from proceeding further in dealing with this property which he did not do so. Inasmuch as contract itself was terminated, there is no continuing duty on the part of the petitioner thereafter. To that extent, this Court finds that the award of the Tribunal insofar as the Claim No.2 is required to be modified by restricting the payment of Rs.5,00,000/- per month from 15.11.2008 to 09.05.2009.

20. Regarding claim Nos.1, 3 and 9, the submissions made by the learned counsel appearing for the petitioner deserves to be rejected. A simple claim for damages is different one from that of a liquidated damages. The first respondent was admittedly receiving the rents. It did loose the rent and suffered loss by the unauthorised construction and demolition of the existing structure without applying and obtaining planning permission. These damages would be equated with the liquidated damages. Therefore, the Tribunal was right in awarding amounts for claim Nos.1, 3 and 9 respectively. These damages admittedly occurred due to the breach committed by the petitioner. To put it differently, for the breach committed by the petitioner, the first respondent cannot be made to suffer. But for the breach, the petitioner would have received rent, kept the building intact and there would not have been any unauthorised construction. When once a breach is made out, the affected party is entitled to restore the property to the original position. In such view of the matter, the award passed by the Tribunal is quite reasonable and fair.

21. After all the Tribunal has awarded only a small part of the claim made by the first respondent. Similarly, the rejection of the counter claim is also perfectly justified in the light of the factual findings rendered. Accordingly, the award passed by the Tribunal stands confirmed except claim No.3.

22. Insofar as claim No.3 is concerned, it is hereby ordered that the first respondent is entitled for liquidated damages at Rs.5,00,000/- per month from 15.11.2008 to 09.05.2009- date of termination. The bank guarantee furnished by the petitioner in favour of the Registrar General, High Court, Madras, can be encashed and the proceeds are to be paid to the first respondent. The aforesaid exercise will have to be done within a period of eight weeks from the date of receipt of a copy of this order.

23. Accordingly, the original petition stands allowed in part. Consequently, Application No.1812 of 2016, seeking furnishing security to the extent of the award

passed by the Tribunal, stands disposed of. No costs.

.01.2018 Index:Yes/No raa M.M.SUNDRESH,J.

raa Pre-delivery order in .01.2018