M/S R B Enterprises vs Union Of India And Others on 18 December, 2023

Author: Jyoti Singh

Bench: Jyoti Singh

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
% Date of Decision: 18th Dece
+ O.M.P. (COMM) 115/2022
M/S R B ENTERPRISES ..... Petitione
Through: Mr. Jai Sahai Endlaw, Mr. Gaurav Aggarwal, Mr. Ashish Kumar and Ms. Mahima Misra, Advocates.

versus

UNION OF INDIA ..... Respondent
Through: Ms. Monika Arora, Centr Government Standing Counsel wi Mr. Subhrodeep Saha and Mr. Yash Tyagi, Advocates.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J.

1. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as '1996 Act') assailing the arbitral award dated 14.12.2021 passed by the learned sole Arbitrator.

2. Facts to the extent necessary and relevant are that Petitioner is a proprietorship firm carrying on business of sale and purchase of rice/cereals/ food grains etc. and supplies are made to various Public Sector Undertakings. In the month of May, 2017, Petitioner along with other whole-sellers who were rice vendors, was invited by the Respondent to attend a meeting in relation to supply of different qualities of rice, particularly, Sharbati rice for the consumption of the Army. Tender dated 13.06.2017 was floated by the Respondent for procurement of 16900 MT rice (Sharbati or equivalent) on NeML portal through reverse auctioning. Corrigendum-I was issued on 10.07.2017 in respect of Request for Proposal ('RFP') dated 13.06.2017. Finally, the contract for supply of 2000 MT rice (Sharbati or equivalent) @ Rs.44,625/- per MT was executed with the Petitioner on 04.08.2017. Pursuant to the award of contract, Petitioner furnished an unconditional Bank Guarantee of Rs.89,25,000/- which, as per Clause 1 of Part-IV (A) of RFP, was to be forfeited if

there was a breach of contract. Stipulated Delivery Period ('DP') was 05.08.2017 to 03.09.2017 and auto-extended DP was 04.09.2017 to 03.10.2017.

3. As the record goes, Petitioner vide letter dated 22.09.2017 requested for additional extension of time due to flood situation in Assam. By a letter dated 08.09.2017, Respondent asked the Petitioner to submit a certificate from the Civil District Administration in support of the claim that rice could not be transported on account of floods. According to the Respondent, there was no response from the Petitioner on this aspect.

4. Petitioner states that vide letter dated 22.09.2017, another extension was sought in the DP after the date of expiry of auto-extended DP, as Petitioner was unable to transport the rice due to conditions beyond its control. Respondent, however, took a decision not to extend the DP and the decision was communicated to the Petitioner vide letter dated 31.10.2017. Due to the alleged breach of contract by the Petitioner by not supplying the contracted quantity of 2000 MT rice, the contract was cancelled on 24.10.2018 and action was initiated for forfeiture of the PBG. However, Petitioner filed a petition under Section 9 of the 1996 Act seeking a stay of invocation and encashment of PBG as well as for appointment of Arbitrator under Section 11(5) and (6) of the 1996 Act. Court vide order dated 13.11.2017 restrained the Respondent from invoking the PBG, subject to the condition that the same shall be kept alive by the Petitioner. Subsequent thereto, Petitioner filed a petition under Section 11 of the 1996 Act being Arb. P. No.98/2018 for appointment of an independent sole Arbitrator. Petition was disposed of on 22.03.2018 recording the statement of the Respondent that a sole Arbitrator had already been appointed. After some litigation pertaining to the appointment of the Arbitrator, the present Arbitrator was appointed and Petitioner consented to the said appointment.

5. On 30.06.2020, an application was filed by the Petitioner under Section 17 of the 1996 Act for interim relief and vide order dated 09.07.2020, the Arbitrator permitted the Respondent to encash the PBG. Petitioner filed its Statement of Claim seeking direction to the Respondent to return the PBG along with payment of renewal charges @ 1% of total amount of Bank Guarantee with permission to the Petitioner to encash the same along with interest @ 18% per annum for loss of interest suffered by the Petitioner on the amount of Bank Guarantee from the date of furnishing the same till realisation. Rs.2,00,000/- was claimed towards cost of litigation. Counter Claims were filed by the Respondent seeking Rs.89,25,000/- as damages suffered @ 0.5% per week or part thereof not exceeding undelivered goods. Counter Claim No.2 was for grant of interest @ 18% per annum on Counter Claim No.1 from the last original delivery date i.e. 31.08.2017 till the date of realisation on 23.07.2020. Cost of arbitration and litigation expenses of Rs.1,00,000/- were sought as Counter Claim No.3. Rejoinder to the Statement of Claim and written statement to the Counter Claims were filed by the Petitioner. On basis of the pleadings of the parties, following issues were settled on 29.12.2020:-

> "1. Whether any breach of contract was committed and if so, then whether the breach of contract was committed by claimant or respondent. OPC and OPR
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> 2. Whether Respondent was justified in terminating the contract. OPR

3. Whether the claimant is entitled for the claims made in their statement of claim and if so, then to what extent. OPC

4. Whether the Respondent is entitled for the claim in their counter claims as claimed by them and if so, then to what extent. OPR

5. Whether forfeiture of bank guarantee by the Respondent was justified in terms of the contract. OPR

6. Whether respondent is entitled to recover damages from forfeited bank guarantee deposited by the claimant. OPR

7. Whether the claimant is entitled to recover damages as claimed by them in their statement of claim. OPC

8. Whether the Respondent is liable to refund the amount of Performance Bank Guarantee deposited by the claimant. OPC

9. If the Respondent is liable to refund the amount of Performance Bank Guarantee, then, whether the Respondent is also liable to pay interest on it? OPC

10. Relief."

6. It is recorded in the Award that during the course of oral arguments Petitioner had confined the submissions to issues No. 6 and 7 only. Both parties did not lead evidence in support of their respective claims, which is recorded in the Award and is thus an undisputed fact. Written submissions were filed by the parties along with judgments and by the impugned Award passed on 14.12.2021, the learned Arbitrator rejected the claims of the Petitioner after rendering a finding that Petitioner was responsible for breach of contract for not supplying 2000 MT of rice in terms of the contract and thus the termination of the contract by the Respondent was justified. Counter Claim No.1 was decided in favour of the Respondent awarding damages envisaged in the clause pertaining to liquidated damages. Counter claim No.2 was allowed to the extent of 9% interest from the date of contract till realization. Litigation expenses and cost of arbitration were not awarded to either party. The reason for awarding the damages in favour of the Respondent was that Petitioner had committed breach of the contract and the contract provided liquidated damages in case of breach and that there was nothing on record to show that pre-estimated liquidated damages were unreasonable or a penalty. Reliance was placed on the judgment of the Supreme Court in Kailash Nath Associates v. Delhi Development Authority and Another, 2015 (4) SCC 136.

7. Assailing the impugned Award, learned counsel for the Petitioner contended that the award suffers from 'patent illegality', which goes to the root of the matter inasmuch as the Respondent failed to prove the damages claimed, since no evidence was admittedly led by the Respondent. In the order dated 18.01.2021, learned Arbitrator had recorded that "Both the parties did not lead any evidence." In the absence of any evidence, it was not open to the Arbitrator to award damages in

favour of the Respondent, who failed to discharge the onus on this aspect. Learned Arbitrator has completely ignored the well settled law that damages must be proved and proof thereof cannot be dispensed with. A party claiming compensation/ damages must prove the loss suffered by it as held by the Supreme Court in Maula Bux v. Union of India, (1969) 2 SCC 554. The pre-estimated liquidated damages can only be granted in cases where it is impossible to assess the compensation, however, where the losses can be ascertained in terms of money, the party claiming compensation must prove the losses suffered.

8. It was further contended that the learned Arbitrator has committed patent illegality in not considering the ratio decidendi of the judgment of the Supreme Court in Kailash Nath (supra), where the Supreme Court interpreted the expression "whether or not actual damage or loss is proved to have been caused thereby" to mean that where it is possible to prove actual damage or loss, such proof is not dispensed with and only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, as a genuine pre-estimate of damage or loss, can be awarded. The Arbitrator only picked certain portions from the judgment and relied on them in ignorance of the other paragraphs in the judgment, which were relevant for adjudicating the issue as a whole. In Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI), 2019 (15) SCC 131, the Supreme Court held that a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.

9. The impugned Award also deserves to be set aside being in the teeth of fundamental policy of Indian Law since it is well settled that where there is a clause in a contract for extension of time, in that situation time is no longer the essence of the contract and the vendee has to prove damages suffered due to late delivery but upon failure to do so, no damages can be claimed. In the present case, the contract envisaged extension in the DP and therefore time was no longer the essence of the contract. In Welspun Speciality Solutions Limited v. Oil and Natural Gas Corporation Limited, (2022) 2 SCC 382, the Supreme Court held that in order to examine whether delayed execution of contract entitled the other party to compensation, reliance on contractual conditions and conduct of parties to conclude that existence of extension clause dilutes time being the essence of the contract, was in accordance with the rules of contractual interpretation.

10. The impugned Award suffers from patent illegality in as much as the Arbitrator awarded damages without recording a finding that Respondent had suffered a loss and overlooking that no evidence was led to establish the alleged loss. Supreme Court in I-Pay Clearing Services Private Limited v. ICICI Bank Limited, (2022) 3 SCC 121, held that where there are no findings on contentious issues in the award or if findings are rendered ignoring material evidence on record, the same are acceptable grounds for setting aside the award itself.

11. Learned counsel for the Respondent, per contra, urged that contract dated 04.08.2017 was placed on the Petitioner for supply of 2000 MT of Rice (Sharbati or equivalent) @ Rs.44,625/- per MT. Petitioner furnished an unconditional Bank Guarantee of Rs.89,25,000/- for 2000 MT Rice which was liable to be forfeited in case of breach of contract in terms of Clause 1 of Part-IV (A) of RFP. Stipulated delivery schedule was from 05.08.2017 to 03.09.2017 and auto extended delivery

period was from 04.09.2017 to 03.10.2017. Petitioner vide its letter dated 02.09.2017 requested for additional extension of time due to flood situation in Assam. Respondent vide letter dated 08.09.2017 asked the Petitioner to submit a certificate from Civil District Administration in support of the claim that there was flood in Assam, preventing the supplies. Vide letter dated 22.09.2017, Petitioner sought another extension from the date of expiry of the auto extended delivery period, however, the request was rejected on the ground that stocks from other firms were received during the said period at ABSD, Guwahati and Petitioner was only finding excuses on the ground that Railways had discontinued the loading, whereas the goods were to be transferred by road and grant of extension would set up wrong precedents besides the fact that extension of delivery period was the prerogative of the Respondent and paragraph 5(c) of Part II of RFP entitled the Respondent to unilaterally cancel the contract if goods were not tendered within the original or extended DP. Since there was breach of contract due to non-supply of 2000 MT Rice, the contract was cancelled on 24.10.2018. PBG was sought to be forfeited, however, this Court granted an interim order in favour of the Petitioner staying the invocation of the Bank Guarantee, which was subsequently vacated by the learned Arbitrator. Since Petitioner had committed breach of the contract, no infirmity can be found with the action of terminating the contract and therefore, consequences must follow including forfeiture of PBG and award of damages in favour of the Respondent.

12. Clause 7 of RFP provided liquidated damages as a measure of damages in the event of seller's failure to supply the items during the original Delivery Period or the auto extended period. It was clearly stipulated in the Clause relating to liquidated damages that a sum equivalent to 0.5% of the price of contracted quantity, which the contractor fails to deliver, for each week or part thereof, will be imposed as liquidated damages for the period supplies are delayed after expiry of original Delivery Period upon cancellation of the contract albeit it was also stipulated that damages shall not exceed value of 10% of undelivered goods. Respondent suffered damages on account of breach of the contract by the Petitioner. Original Delivery Period was further auto extended upto 29.09.2017 but Petitioner neither supplied in this period nor invoked the force majeure clause within 10 days from movement of their supplies as per Clause 6(c) of Part IV(A) of RFP. It is wrong for the Petitioner to contend that Respondent did not suffer any damages due to non-supply of rice to the Armed Forces. Lot of time and resources was invested in concluding the contract and due to non-supply, the contracted rice quantity could not reach the actual consumer.

13. Respondent calculated the approximate loss of revenue caused to them. The Supreme Court in Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705, held that Section 74 of the Indian Contract Act, 1872 is to be read along with Section 73 and therefore, in every case of breach of contract, person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. Court is competent to award reasonable compensation even if no actual damage is proved if breach is shown to have suffered. In some contracts, it would be impossible for the Court to assess 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 a genuine pre-estimate by the parties as a measure of reasonable compensation. This principle has been reiterated by the Supreme Court in Construction and Design Services v. Delhi Development Authority, (2015) 14 SCC 263, wherein it was held as follows:-

> "16. ...
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> 67. ....It has been specifically mentioned that it was an agreed genuine pre-estimate of damages duly agreed by the parties. It was also mentioned that the liquidated damages are not by way of penalty. It was also provided in the contract that such damages are to be recovered by the purchaser from the bills for payment of the cost of material submitted by the contractor. No evidence is led by the claimant to establish that the stipulated condition was by way of penalty or the compensation contemplated was, in any way, unreasonable. There was no reason for the Tribunal not to rely upon the clear and unambiguous terms of agreement stipulating pre-estimate damages because of delay in supply of goods. Further, while extending the time for delivery of the goods, the respondent was informed that it would be required to pay stipulated damages."

17. Applying the above principle to the present case, it could certainly be presumed that delay in executing the work resulted in loss for which the respondent was entitled to reasonable compensation. Evidence of precise amount of loss may not be possible but in the absence of any evidence by the party committing breach that no loss was suffered by the party complaining of breach, the court has to proceed on guesswork as to the quantum of compensation to be allowed in the given circumstances. Since the respondent also could have led evidence to show the extent of higher amount paid for the work got done or produce any other specific material but it did not do so, we are of the view that it will be fair to award half of the amount claimed as reasonable compensation."

14. Learned counsel relied on the judgment of this Court in Ministry of Defence, Government of India v. Cenrex Sp. Z.O.O & Ors., 2015 SCC OnLine Del 13944, more particularly the following paragraph:-

> "14. In the present case, surely, the subject contract is of a type where how much loss is caused to the petitioner/Ministry of Defence, Government of India for delay in supply of parachutes cannot be calculated because how the Army of this country would have been affected by non-delivery of the parachutes on time and what would have been the alternative arrangements made due to delayed deliveries and expenses accordingly which had to be incurred on account of non-availability of parachutes on time, is impossible to calculate and hence Articles 2 and 10 of the subject Contract are valid and can be enforced for enforcement of liquidated damages as per Section 74 of the Indian Contract Act. Clearly, therefore, the majority Award has gone against the settled principles of law for holding that a performance bond is a mere security and cannot be used towards enforcement of the Articles 2 & 10 of the Contract of liquidated damages as per Section 74 of the Indian Contract Act. An illegal Award, in view of Section 28(1)(b)(i) of the Act cannot be sustained."

15. I have heard learned counsels for the parties and examined the rival contentions.

16. The heart of the dispute and the pivotal point lies in the question whether the pre-estimate stipulated amount of damages in the aforesaid clause renders the Petitioner liable to pay the damages ipso-facto without any proof of loss and damages and/or quantification thereof.

17. The bone of contention between the parties is Clause 7 of RFP pertaining to liquidated damages, which is extracted hereunder for ready reference:-

> "Liquidated Damages: The Contract can be cancelled unilaterally by the Buyer in case items are not delivered within the actual contracted delivery period or within the Delivery Period (DP) indicated in the AT Notes. In the event of the Seller's failure to supply the items in the original delivery period, an auto extension of delivery period equal to the original delivery period will commence from the very next day of the last date of expiry of original DP. It may be noted that a sum equivalent to 0.5% of the price of contracted quantity which the contractor has failed to deliver, for each week or part thereof will be imposed as liquidated damages for the period the supplies are delayed after the completion of the original DP. The total damages shall not exceed value of 10% of undelivered goods."

18. Present contract between the parties relates to supply of 2000 MT of Rice (Sharbati or equivalent) for a total sum of Rs.8,92,50,000/-. Petitioner furnished 10% of the contract amount towards PBG in the form of FDR. It is a matter of record that Petitioner did not supply the contracted quantity of rice at Guwahati and the reasons, as per the Petitioner, were force majeure conditions, as the roads were flooded with water on account of rivers overflowing. In some parts, the roads were swept away and the trucks were not plying in Guwahati at the relevant time. The transporter namely Muktsar Bombay Carrier vide its certificate dated 07.09.2017 certified that roads in Assam, Bihar and Bengal were blocked and bridges were damages, owing to which they were not booking any orders for transportation. Petitioner also relied on a certificate dated 07.09.2017 issued by another transporter HPR Himachal Careers, certifying that the roads were flooded and damaged. Petitioner's case was that even the Indian Railways refused to accept the goods for despatch on account of restrictions imposed by the Railway Board. Therefore, the case of the Petitioner before the learned Arbitrator was that the contract could not be executed due to force majeure conditions and became void under Section 56 of the Indian Contract Act. Petitioner, therefore, claimed return of Bank Guarantee along with renewal charges and interest for the loss of interest on the Bank Guarantee along with cost of litigation.

19. Respondent, on the other hand, invoked the liquidated damages' clause and sought pre-estimated damages calculated at the rate of 0.5% per week or part thereof amounting to a total sum of Rs.89,25,000/- along with other counter claims of interest, cost of arbitration and litigation expenses. Respondent's case was that Petitioner failed to supply within the original and/or the auto-extended delivery period and was in the breach of contract and no documents were furnished to establish the defence of force majeure.

20. To appreciate the rival pleas of the parties, it would be appropriate and relevant to first discuss the legal position pertaining to liquidated damages. The starting point in this journey will be

Sections 73 and 74 of the Indian Contract Act, which are reproduced hereunder:-

> "73. Compensation for loss or damage caused by breach of contract.-- When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
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> Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.
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> Compensation for failure to discharge obligation resembling those created by contract.--When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.
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> Explanation.--In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.
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> 74. Compensation for breach of contract where penalty stipulated for.-- When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.
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> Explanation.--A stipulation for increased interest from the date of default may be a stipulation by way of penalty.
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> Exception.--When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the 2 [Central Government] or of any 3 [State Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.
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> Explanation.--A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested."

21. Section 73 envisages award of damages for loss suffered by one party due to breach of contract by the other party to the contract. Section 74 stipulates that in case of a broken contract, if a sum is made in the contract as the amount to be paid in case of breach, whether or not actual damage or loss is proved to have been caused, the aggrieved party is entitled to receive from the opposite party breaking the contract, a reasonable compensation but not exceeding the amount mentioned in the contract. The seminal question is whether by virtue of Section 74, in case of a pre-estimated amount mentioned as liquidated damages, a party in breach would be liable to pay damages, without the other party proving loss/damage. This legal issue is no longer res integra and has been answered in several judgments, which I shall advert to hereinafter.

22. The first judgment that needs a reference in this context is the landmark judgment of the Supreme Court in Fateh Chand v. Balkishan Dass, 1963 SCC OnLine SC 49. The Supreme Court held that Court is empowered to award compensation in case of breach to the maximum amount stipulated, so long as the compensation is reasonable. However, while provisions of Section 74 dispense with the proof of actual loss or damage but they do not justify award of compensation when as a consequence of breach, no legal injury results. It was thus held that Plaintiff has to prove that it has suffered a loss.

23. A Division Bench of this Court in Vishal Engineers & Builders v. Indian Oil Corporation Limited, 2011 SCC OnLine Del 5124, was in seisin of this very issue and held that if there was absence of any loss whatsoever, an aggrieved party cannot claim that it is entitled to liquidated damages without at least proving a semblance of loss. Relevant passages are as follows:-

> "13. The question which, thus, arises is whether in view of such a stipulated amount damages are liable to be paid ipso facto without any further proof qua the issue of sufferance of damages or quantification thereof or something more is required to be done.
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> 14. We would begin with a seminal judgement in Fateh Chand v. Balkishan Das (1964) 1 SCR 515, where it was held that the jurisdiction of the Court to award compensation in case of breach is unqualified except as to the maximum amount stipulated so long as the compensation is reasonable. This imposes a duty upon the court to award compensation according to the settled principles. The phraseology of Section 74 was held to dispense with the proof of actual loss or damages but it did not justify the award of compensation when in consequence of the breach no legal injury at all has resulted. It was, thus, clearly held that a plaintiff has to prove a loss suffered by him in consequence of the breach of contract committed by the defendant. This legal position laid down by the Constitution Bench of the Supreme Court is good law till date and, thus, any judgement of the Supreme Court of a Bench constituted of lesser number of Judges would, thus, have to be read in the context of the seminal pronouncement.
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> 15. The duty of the court not to enforce the penalty clause but only to award reasonable compensation has been held to be statutorily imposed upon courts by

Section 74 of the Contract Act. The court just has to adjudge in every case, reasonable compensation for breach of contract having regard to the conditions which existed on the date of the breach [ref : Fateh Chand case (supra)].

16. In Maula Bux v. Union of India (1969) 2 SCC 554, the forfeiture of security was upheld by the High Court, the amount forfeited being held as not unreasonable under Section 74 of the Contract Act. The Supreme Court set aside the order of the High Court accepting the plea that the loss suffered by the respondent therein was capable of being measured and they could not seek protection under the garb of Section 74 of the Contract Act. Since the respondent had led no evidence that it had suffered loss, it was held that the amount could not be forfeited.

17. The claim for liquidated damages for all practical purposes were held to stand on the same footing as the unliquidated damages in Union of India v. Raman Iron Foundry (1974) 2 SCC 231. The claim of unliquidated damages was, thus, held not to give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a court or other adjudicatory authority. The appellant was held not to have any right or authority to appropriate amounts of other pending bills of the respondent towards satisfaction of claim for damages against the respondent. The breach of contract does not eo instanti incur any pecuniary obligations, nor does the party complaining of the breach become entitled to a debt due from the other party. The only right which accrues at that moment is that the party aggrieved by the breach of contract has a right to sue for damages. Thus, when damages are assessed, the court in the first place must decide that the defendant is liable and then it proceeds to assess as to what is the damage.

18. It is in the aforesaid context that there are observations in State of Karnataka v. Shree Rameshwara Rice Mills (1987) 2 SCC 160, that there has to be an admission of the breach of condition and thereafter only the issue of quantification of damages would arise.

19. Having set out the aforesaid judgements, we consider it appropriate at this stage to refer to the Privy Council pronouncement in Bhai Panna Sing v. Firm Bhai Arjan Singh - Bhajan Singh - Surjan Singh 117 Indian Cases 485 PC, where while dealing with the issue of damages, Atkin, J. observed that the effect of Section 74 of the Contract Act is to disentitle the plaintiffs to recover simpliciter a sum by way of liquidated damages and that the plaintiff must first prove the damages they have suffered.

20. In Indian Oil Corporation v. Lloyds Steel Industries Ltd. 2007 (4) Arb. LR 84 (Delhi), the Indian Oil Corporation (for short 'IOC') invoked a clause in the GCC for liquidated damages and recovered the maximum damages possible even though the work was completed to the satisfaction of the IOC but there was delay in the execution of the work. This recovery was resisted by the contractor on the ground

that there was no damage payable. The dispute was resolved in the arbitration by an award which held that there was absence of justification in invoking the clause of damages. It is at the stage of consideration of objections that the learned single Judge, A.K. Sikri, J. (as he then was) of this Court held that it would be preposterous on the part of the petitioner to submit that it should get the liquidated damages stipulated in the contract even when no loss is suffered. Time was essence of the contract providing for 16 months for completion of the work. This period was fixed keeping in view that the terminal at Jodhpur would be ready by that time and the pipeline would reache the said terminal. Thus, while granting extensions, IOC realized that the terminal was not complete and, thus, it could not be put to any use. The period of six (6) months was, thus, held to have lost its significance inasmuch as setting up of Jodhpur Terminal was part of an integrated project and the Terminal could not be put to commercial use before August, 1996, while the contractor had successfully completed the work well before that date. It would be useful to reproduce the observations made in paragraphs 41 & 42, which read as under:

"41. It is clear from the above that Section 74 does not confer a special benefit upon any party, like the petitioner in this case. In a particular case where there is a clause of liquidated damages the Court will award to the party aggrieved only reasonable compensation which would not exceed an amount of liquidated damages stipulated in the contract. It would not, however, follow there from that even when no loss is suffered, the amount stipulated as liquidated damages is to be awarded. Such a clause would operate when loss is suffered but it may normally be difficult to estimate the damages and, therefore, the genesis of providing such a clause is that the damages are pre-estimated. Thus, discretion of the Court in the matter of reducing the amount of damages agreed upon is left unqualified by any specific limitation. The guiding principle is 'reasonable compensation'. In order to see what would be the reasonable compensation in a given case, the Court can adjudge the said compensation in that case. For this purpose, as held in Fateh Chand (supra) it is the duty of the Court to award compensation according to settled principles. Settled principles warrant not to award a compensation where no loss is suffered, as one cannot compensate a person who has not suffered any loss or damage. There may be cases where the actual loss or damage is incapable of proof; facts may be so complicated that it may be difficult for the party to prove actual extent of the loss or damage. Section 74 exempts him from such responsibility and enables him to claim compensation inspire of his failure to prove the actual extent of the loss or damage, provided the basic requirement for award of 'compensation', viz. the fact that he has suffered some loss or damage is established. The proof of this basic requirement is not dispensed with by Section 74. That the party complaining of breach of contract and claiming compensation is entitled to succeed only on proof of 'legal injury' having been suffered by him in the sense of some loss or damage having been sustained on account of such breach, is clear from Sections 73 and 74. Section 74 is only supplementary to Section 73, and it does not make any departure from the principle behind Section 73 in regard to this matter. Every case of compensation for breach of contract has to be dealt with on the

> basis of Section 73. The words in Section 74 'Whether or not actual damage or loss is proved to have been caused thereby' have been employed to underscore the departure deliberately made by Indian legislature from the complicated principles of English Common Law, and also to emphasize that reasonable compensation can be granted even in a case where extent of actual loss or damage is incapable of proof or not proved. That is why Section 74 deliberately states that what is to be awarded is reasonable compensation. In a case when the party complaining of breach of the contract has not suffered legal injury in the sense of sustaining loss or damage, there is nothing to compensate him for; there is nothing to recompense, satisfy, or make amends. Therefore, he will not be entitled to compensation See State of Kerala v. United Shippers and Dredgers Ltd. AIR 1982 Ker 281. Even in Fateh Chand (supra) the Apex Court observed in no uncertain terms that when the section says that an aggrieved party is entitled to compensation whether actual damage is proved to have been caused by the breach or not, it merely dispenses with the proof of 'actual loss or damage'. It does not justify the award of compensation whether a legal injury has resulted in consequence of the breach, because compensation is awarded to make good the loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach. If liquidated damages are awarded to the petitioner even when the petitioner has not suffered any loss, it would amount to 'unjust enrichment', which cannot be countenanced and has to be eschewed.
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> 42. It is too preposterous on the part of the petitioner to submit that it should get the liquidated damages stipulated in the contract even when no loss is suffered."

(emphasis supplied)

21. The aforesaid judgement, thus, if read in letter and spirit follows the principles laid down in Fateh Chand case (supra).

22. Now turning to some of the latter judgements of the Supreme Court including the judgement in ONGC v. Saw Pipes Ltd. case (supra) relied upon by the learned single Judge. All that was said was that the court was competent to award a reasonable compensation in case of breach even if no actual damage is proved to have suffered in consequence of the breach of contract as in some contracts it would be impossible for the court to assess compensation arising from the breach. If the compensation contemplated is not by way of penalty or unreasonable the court can award the sum if it is a genuine pre-estimate of the loss to be suffered by a party as a measurement of reasonable compensation.

23. In our view these observations have to be read in the context of the pronouncement of the Constitution Bench pronouncement in Fateh Chand case (supra). If it is so, all that it implies is that where it is impossible to assess the compensation arising from breach and that factor is coupled with the parties having agreed to a pre-determined compensation amount not by way of penalty or unreasonable compensation then that amount can be awarded as a genuine pre-estimate of the loss

suffered by a party. It cannot be read to mean that even if no loss whatsoever is caused to party it can still recover amounts merely by reason of the opposite party being in breach.

24. The importance of the aforesaid principles has also been emphasized in BSNL v. Motorola India Pvt. Ltd. (2009) 2 SCC 337, while dealing with the two clauses in the contract - clause 15 which held that the supplier was liable to pay liquidated damages and clause 16 dealing with quantification of damages. The quantification of limited damages came in the category of excepted matters but it was held that for levy of liquidated damages under Clause 16 there has to be a delay in the first place. Once there was a dispute about this fact, the appointment of the arbitrator was held not unwarranted.

25. In the end we may refer to the judgement of the Supreme Court in Bharat Sanchar Nigam Limited v. Reliance Communication Limited (2011) 1 SCC 394. It was held that whether a provision is to be treated as a penalty in matter of construction is to be resolved by asking whether at the time the contract was entered into the predominant contractual function was to deter a party from breaking a contract or to compensate the innocent party for the breach. Thus, the question to be asked is whether the alleged penalty clause can pass muster as a genuine pre- estimate of loss. Liquidated damages were observed to serve the usual purpose of avoiding litigation and permitting commercial certainty. Thus, liquidated damages should not be categorized as penalties.

26. We have, thus, no hesitation in concluding that if there was absence of any loss whatsoever, an aggrieved party cannot claim that it is still entitled to liquidated damages without, at least, proving a semblance of loss."

(emphasis supplied)

24. In Kailash Nath (supra), the Supreme Court elucidated the principles for grant of compensation/damages for breach of contract under Section 74 as follows:-

> "43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:
>
> 43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

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

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

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

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

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

25. In Mahanagar Telephone Nigam Ltd. v. Finolex Cables Limited, 2017 SCC OnLine Del 10497, a Division Bench of this Court following the legal position laid down in Kailash Nath (supra), qua the claim of liquidated damages held as follows:-

"34. It is trite that under Section 74 of the Contract Act, that to claim liquidated damages even where liquidated damages may be specified, the party so claiming, is entitled only to "reasonable compensation" not exceeding the amount specified. Even in a contract, where it is difficult to prove the actual damage or loss, proof thereof is not dispensed with to arrive at "reasonable compensation". It is only in cases where damages or loss was impossible to prove, that the amount named in the contract as liquidated damages, if it is a genuine pre-estimate of damage or loss, can be so awarded.

35. It has been held by the ld. Single Judge therefore, that even assuming that clause 7.4 signifies a genuine pre-estimate of damages, MTNL was not relieved of showing that it had suffered some loss. Both legally and factually, this is the correct position.

36. On application of the above well settled principle, there can be no manner of doubt, that it was incumbent on MTNL to prove before the Arbitrator that it had suffered some loss, even though it may not have to prove the actual loss.

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> 47. It is to be noted that the arbitral tribunal rejected the counter claim of the MTNL, yet proceeded to award liquidated damages. We are unable to agree with Mr. Abhinav Vasisht, ld. Senior Counsel for the appellant - MTNL that the contract was of such nature that it was not possible to evaluate the damages and therefore, that 10% of the amount quantified in the contract between the parties as liquidated damages had to be treated as being reasonable award of damages.
>
> 48. It is clearly stated in para 43.6 of Kailash Nath that in case where damages are difficult or impossible to prove, the claimants would be entitled to the liquidated damages if they were a genuine pre-estimate of the damage. No material at all in this regard was produced before the arbitral award. MTNL has not even asserted that it had suffered loss."

26. The aforesaid judgment is particularly significant, as the Court was dealing with the following clause pertaining to liquidated damages, which is similar to the clause in question in the present case:-

> "9. .....
>
> "17. Liquidated Damages 17.1 The date of delivery of the stores stipulated in the acceptance of Purchase Order should be deemed to be the essence of the contract and delivery must be completed not later than the dates specified therein. Extension will not be given except in exceptional circumstances. Should, however, deliveries be made after expiry of the contract and be accepted by the Consignee, such deliveries will not deprive the Purchaser of his right to recover liquidated damages under Clause 17.2 below, where, however, supplies are made within 21 (twenty one) days of the contracted original delivery period, the consignee may accept the stores and in such cases the provisions of clause 17.2 will not apply. Should the tenderer fail to deliver the stores or any consignment thereof within the period prescribed for delivery, the Chairman Cum Managing Director, MTNL, shall be entitled to recover ½% of the undelivered stores value of the Order placed; for each week of delay or part thereof, subject to a maximum of 10% of the value of the Order placed."

27. In Fiberfill Engineers v. Indian Oil Corporation Limited, 2019 SCC OnLine Del 8255, this Court was examining a contract between the parties where the arrangement was that any delay in execution of the contract would result in price adjustment, which to begin with was to be equal to 1/2% of the contract value for first week subject to maximum of 10% of the total contract value. Argument on behalf of the Petitioner, assailing the arbitral award was that the learned Arbitrator had committed a patent illegality by awarding liquidated damages in favour of IOCL without returning a finding whether any loss or injury had been suffered as a result of purported delay in execution of the call-up orders by the Petitioner. Within the contours of Section 34 of the 1996 Act, the Court framed the questions that were required to be answered and the two questions relevant to the present case are as follows:-

"46. .....

(iv) Was it possible to prove damages in this case?

(v) If it was not possible to prove damages, what was the reasonable compensation that was payable by FFE subject to the upper limit as stipulated in the liquidated damage clause, that is, Clause 4.4.0.0 of GCC?"

28. The contention on behalf of the Respondent was that when parties provide for liquidated damages in the contract, damages need not be proved. This contention was negated by the Court holding that the proposition misses the principle enunciated by the Supreme Court in several decisions including in Kailash Nath (supra). Relevant passages from the judgment in Fiberfill Engineers (supra), are as follows:-

"67. To my mind, the learned Arbitrator has committed a patent illegality in not returning a finding on the issue whether the delay in the execution of the contract by FFE caused loss and injury to IOCL. The learned Arbitrator, to my mind, ought to have also recorded that while there was loss and/or injury, it was n ot possible to prove the same and therefore, the amount deducted towards price adjustment was a reasonable compensation in his view, qua such loss and/or injury. None of these findings are found in the impugned Award. These findings are crucial if IOCL's stand vis-a-vis price adjustment against bills of FFE is to be sustained.....

68. I may also advert to the judgment of a Single Judge of this Court rendered by Hon'ble Mr. Justice A.K. Sikri (as he then was) in India Oil Corporation v. Lloyds Steel Industries Ltd., 2007 SCC OnLine Del 1169, wherein, the Court was required to examine the validity of an award via which IOCL's stand to impose liquidated damage was repelled by the Arbitrator.

69. IOCL had challenged the award by way of a petition filed under Section 34 of the 1996 Act. This Court, inter alia, on the ground that the petitioner had not suffered a loss despite delay on the part of the contractor as found by the learned Arbitrator, sustained the award. In other words, the plea of IOCL that delay simplicitor in the execution of the contract would allow for imposition of damages was repelled both by the Arbitrator and this Court. The liquidated damages clause in that case is similar to the clause found in the instant case. The relevant observations made by the Court in this behalf are extracted hereafter:

"47. Insofar as imposition of liquidated damages is concerned, the discussion is predicated on the issue as to whether any loss is suffered by the petitioner or not. Learned Counsel for the petitioner does not dispute that the construction of terminal at Jodhpur was to be treated as integral part of the entire project, i.e. pipeline project for transferring petroleum products from Kandla to Bhatinda. He also could not dispute that the pipeline had not reached Jodhpur by the original date stipulated for

completion of terminal at Jodhpur or extended date. It also could not be disputed that terminal at Jodhpur had been constructed and commissioned by the respondent much before the pipeline reached Jodhpur. In fact, because of delay in the pipeline reaching Jodhpur terminal, this terminal was put to commercial use in August, 1996, whereas the terminal at Jodhpur was commissioned by 31.3.1996. Therefore, because of delay on the part of the respondent, the petitioner had not suffered any loss.

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49. The learned arbitrator, thus, opined that damages could not be claimed unless the loss was proved and, therefore, the petitioner was not justified in imposing the liquidated damages.

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51. Notwithstanding the above, the petitioner still wants damages to be recovered from the respondent on the specious plea that liquidated damages mentioned in the contract are predetermined damages and, therefore, in view of provisions of Section 74 of the Indian Contract Act, the petitioner was entitled to these damages and it was necessary for the petitioner to prove these damages. The legal position, as explained by the Supreme Court in ONGC v. Saw Pipes (supra), which has already explained above, is not in doubt. However, it is only when there is a loss suffered and once that is proved, it is not for the arbitrator or the Court to examine the actual extent of the loss suffered once there is a pre-estimation thereof. Moreover, the compensation, as stipulated in the contract, has to be reasonable. In a particular case where the defaulting party is able to demonstrate that delay/default has not resulted in any loss being suffered by the other party, then that party cannot claim the damages only because in the contract there is a stipulation regarding liquidated damages. The Supreme Court in ONGC v. Saw Pipes (supra) referred to its earlier judgment in the case of Fateh Chand (supra) and Maula Bux (supra).

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55. It is clear from the above that Section 74 does not confer a special benefit upon any party, like the petitioner in this case. In a particular case where there is a clause of liquidated damages the Court will award to the party aggrieved only reasonable compensation which would not exceed an amount of liquidated damages stipulated in the contract. It would not, however, follow therefrom that even when no loss is suffered, the amount stipulated as liquidated damages is to be awarded. Such a clause would operate when loss is suffered but it may normally be difficult to estimate the damages and, therefore, the genesis of providing such a clause is that the damages are pre- estimated. Thus, discretion of the Court in the matter of reducing the amount of damages agreed upon is left unqualified by any specific limitation. The guiding principle is 'reasonable compensation'. In order to see what would be the

reasonable compensation in a given case, the Court can adjudge the said compensation in that case. For this purpose, as held in Fateh Chand (supra) it is the duty of the Court to award compensation according to settled principles. Settled principles warrant not to award a compensation where no loss is suffered, as one cannot compensate a person who has not suffered any loss or damage. There may be cases where the actual loss or damage is incapable of proof; facts may be so complicated that it may be difficult for the party to prove actual extent of the loss or damage. Section 74 exempts him from such responsibility and enables him to claim compensation in spite of his failure to prove the actual extent of the loss or damage, provided the basic requirement for award of 'compensation', viz. the fact that he has suffered some loss or damage is established. The proof of this basic requirement is not dispensed with by Section 74. That the party complaining of breach of contract and claiming compensation is entitled to succeed only on proof of 'legal injury' having been suffered by him in the sense of some loss or damage having been sustained on account of such breach, is clear from Sections 73 and 74. Section 74 is only supplementary to Section 73, and it does not make any departure from the principle behind Section 73 in regard to this matter. Every case of compensation for breach of contract has to be dealt with on the basis of Section 73. The words in Section 74 'Whether or not actual damage or loss is proved to have been caused thereby' have been employed to underscore the departure deliberately made by Indian Legislature from the complicated principles of English Common Law, and also to emphasize that reasonable compensation can be granted even in a case where extent of actual loss or damage is incapable of proof or not proved. That is why Section 74 deliberately states that what is to be awarded is reasonable compensation. In a case when the party complaining of breach of the contract has not suffered legal injury in the sense of sustaining loss or damage, there is nothing to compensate him for; there is nothing to recompense, satisfy, or make amends. Therefore, he will not be entitled to compensation [see State of Kerala v. United Shippers and Dredgers Ltd., AIR 1982 Ker 281]. Even in Fateh Chand (supra) the Apex Court observed in no uncertain terms that when the section says that an aggrieved party is entitled to compensation whether actual damage is proved to have been caused by the breach or not, it merely dispenses with the proof of 'actual loss or damage'. It does not justify the award of compensation whether a legal injury has resulted in consequence of the breach, because compensation is awarded to make good the loss or damage which naturally arose in the visual course of things, or which the parties knew when they made the contract, to be likely to result from the breach. If liquidated damages are awarded to the petitioner even when the petitioner has not suffered any loss, it would amount to 'unjust enrichment', which cannot be countenanced and has to be eschewed."

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72. In Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49 : AIR 2015 SC 620, the Supreme Court has held that an award can be interfered with when such a patent illegality is committed by an Arbitrator. The relevant observations

made in this behalf are extracted hereafter:

"31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(i) a finding is based on no evidence, or

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

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42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:

42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:

"28. Rules applicable to substance of dispute.--(1) Where the place of arbitration is situated in India--

(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"

(emphasis is mine)

73. Before I conclude, I must briefly touch upon the judgments cited by Ms. Narayan in support of IOCL's case. First in line is the judgment rendered in Construction and Design Services (in short "CDS") case. Ms. Narayan had laid great emphasis on this judgment to support her contention that when parties provide for liquidated damages in the contract obtaining between them, then, damages need not be proved. To my mind, this proposition is not completely correct as it misses the principles enunciated by the Supreme Court in several decisions, including in the matter of Kailash Nath Associates."

29. It would be relevant to allude to the judgment of the Division Bench of Kerala High Court in State of Kerala v. United Shippers and Dredgers, AIR 1982 Kerala 281 wherein it was held as under:-

> "7. ..... "Compensation" is "something that constitutes an equivalent or recompense; making things equivalent; satisfying or making amends".

This is how the word "compensation" has been explained in Biswas's Encyclopaedic Law Dictionary and in Jowitt's Dictionary of English Law. Black's Law Dictionary explains compensation as "indemnification; payment of damages; making amends; making whole; giving an equivalent or substitute of equal value; that which is necessary to restore an injured party to his former position;" "Compensation" signifies restoration of position or making things equivalent or recompense. Necessarily, something must have happened as a result of the breach of contract which requires an act of recompense or restoration. If the breach has not resulted in any harm, loss or damage to the other party, the question of recompensing him or restoring him to something which he has lost would not arise. That is the reason why Section 73 of the Act states "compensation for any loss or damage caused to him thereby". However grievous or serious an act of breach may be, if it does not lead to any loss or damage caused to the other party Section 73 will not give rise to right of compensation."

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14. .....The interpretation canvassed by the appellant would go against the legislative purpose in using the word compensation in all the three Sections viz.; Ss. 73, 74 & 75 of Chapter VI of the Act. One cannot compensate a person who has not suffered any loss or damage. There may be cases where the actual loss or damage is incapable of proof. Facts may be so complicated that it may be difficult for the party to prove actual extent of the loss or damages. Section 74 of the Act exempts him from such responsibility and enables him to claim compensation inspite of his failure to prove the actual extent of the loss or damage, provided of course he establishes the basic requirement for award of compensation viz the fact that he had suffered some loss or damage. The proof of this basic requirement is not dispensed with by Section 74 of the Act."

18. That the party complaining of breach of contract and claiming compensation is entitled to succeed only on proof of "legal injury" having been suffered by him in the sense of some loss or damage having been sustained on account of such breach, is clear from Sections 73 & 75 of the Act. Section 74 is only supplementary to Section 73 of the act and it does not make any departure from the principle behind Section 73 in regard to this matter. Every case of compensation for breach of contract has to be dealt with on the basis of Section 73 of the Act. In a particular case where the contract itself stipulates for payment of sum of money on the breach of contract or contains any other stipulation for penalty, the principle additionally propounded by Section 74 also will have to be applied and that is why irrespective of the amount stipulated in the contract, the party suffering from the breach is entitled only to reasonable compensation, which, shall not exceed the amount so stipulated in the contract. Whether it be a contract which stipulate sum of money as being payable on breach of contract or whether it contains any other penal clause, or whether it is a contract which does not contain any such clause, the party complaining of breach of contract cannot successfully claim compensation unless he makes out loss or damage referable to such breach. The best measure of reasonable compensation would of course be the extent of actual loss or damage sustained.

.....If quantification of loss or damage not possible, the party who has suffered on account of the breach is not without remedy. He can still request the court to assess reasonable compensation on the materials available and award the same to him..... in a case where a party complaining of breach of contract has not suffered any legal injury in the sense of sustaining loss or damage. There is nothing to compensate him for; there is nothing to recompense, satisfy or make amends. Therefore, he will not be entitled to compensation".

30. This Court was again confronted with the same controversy in TEMA India Ltd. v. Engineers India Ltd., 2015 SCC OnLine Del 10221. Relevant observations of the Court, while dealing with Clause 12 of the contract, which provided for liquidated damages, referring to and relying on the aforementioned judgments, are as follows:-

> "29. In Vishal Engineers & Builders v. Indian Oil Corporation 2012 (1) Arb LR 253 (Del), a Division Bench of this Court summarised the law explained by the Supreme Court as regards Section 73 and 74 ICA including Fateh Chand v. Balkishan Das, (1964) 1 SCR 515; Maula Bux v. Union of India, (1969) 2 SCC 554; Union of India v. Raman Iron Foundry (1974) 2 SCC 231; State of Karnataka v. Shree Rameshwara Rice Mills, (1987) 2 SCC 160. The Court also referred to the decision of the Privy Council in Bhai Panna Sing v. Firm Bhai Arjan Singh-Bhajan Singh- Surjan Singh 117 Ind Cas. 485 PC wherein it was held that under Section 74 ICA, a plaintiff must first prove the damages suffered before seeking to recover the same by way of LD.
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> 32. In the present case, there was no averment by EIL that it had, in fact, suffered any loss on account of the delayed delivery of the equipment. What EIL sought to do was to place on record the letter dated 20th September, 2012 written to it by CPCL stating that the latter was invoking the LD clause in the contract between the parties. However, it is seen that the learned Arbitrator refused to take the said letter on record since it was enclosed with the additional written submissions received on 16th October, 2012 without seeking leave of the Tribunal. Upholding the objections raised by TEMA, the learned Arbitrator by an e-mail communication dated 20th October, 2012 made it clear that "said letter is not taken on record, shall not form part of the record and is not being taken into consideration by me". As a result, there was, in fact, nothing on record before the learned Arbitrator to show that there was any loss suffered by EIL.
>
> 33. Clause 12 of the GPC is not in the nature of a no fault liability clause. It is a clause which reflects an agreement between the parties as to the consequence of a delayed delivery in monetary terms. It gives an outer limit of 10% of the total value of the contract which can be sought to be recovered. However, it does not dispense with the need for the party complaining of the breach i.e. EIL to at least aver that it has suffered some loss on account of such breach. This legal position has been explained in Indian Oil Corporation v. Lloyds Steel Industries Ltd. (supra), wherein in para 51 it

was observed that in the context of Section 74 ICA, the guiding principle was "reasonable compensation" to be awarded by the Court in its discretion. The Court went on to observe as under:

"In order to see what would be the reasonable compensation in a given case, the Court can adjudge the said compensation in that case. For this purpose, as held in Fateh Chand (supra) it is the duty of the Court to award compensation where no loss is suffered, as one cannot compensate a person who has not suffered any loss or damage. There may be cases where the actual loss or damage is incapable of proof; facts may be so complicated that it may be difficult for the party to prove actual extent of the loss or compensation in spite of his failure to prove the actual extent of the loss or damage provided the basic requirement for award of 'compensation', viz. the fact that he has suffered some loss or damage is established. The proof of this basic requirement is not dispensed with by Section 74. That the party complaining of breach of contract and claiming compensation is entitled to succeed only on proof of 'legal injury' having been suffered by him in the sense of some loss or damage having been sustained on account of such breach, is clear from Sections 73 and 74. .....Even in Fateh Chand (supra) the Apex Court observed in no uncertain terms that when the section says that an aggrieved party is entitled to compensation whether actual damage is proved to have been caused by the breach or not, it merely dispenses with the proof of 'actual loss or damage'. It does not justify the award of compensation whether a legal injury has resulted in consequence of the breach, because compensation is awarded to make good the loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach. If liquidated damages are awarded to the Petitioner even when the Petitioner has not suffered any loss, it would amount to 'unjust enrichment', which cannot be countenanced and has to be eschewed."

34. In the instant case, the burden of proof would shift to TEMA to prove that no loss would have been suffered by EIL only if EIL had in the first place pleaded that it had suffered some loss or damage as a result of the delayed delivery. Therefore, the reliance placed by Mr. Dewan on the decision of Phulchand Exports Ltd., to urge that the burden was on TEMA to prove that no loss would have been suffered by EIL is misplaced."

31. In Union of India v. Kendriya Bhandar, 2023 SCC OnLine Del 4005, the contention raised by the Respondent was that proof of actual damage or loss caused was a sine qua non and since the Appellant could not show that it had suffered any loss due to alleged breach, the forfeiture of Bank Guarantee was without any authority of law. The Arbitral Tribunal returned a finding that since time was essence of the contract and there was breach by the Respondent, Appellant was entitled to refund of the entire amount of Bank Guarantee, however, no further relief was granted holding that Appellant had failed to prove loss caused to it or suffered by it, as a consequence of breach. The award was upheld by the Division Bench holding that the learned Arbitrator had rightly held in accordance with the contractual terms and judicial pronouncements that since no evidence was led by the Appellant to suggest any loss or damage, Appellant was not entitled to the damages claimed.

This position of law obtains till date and in order to avoid prolixity, I may only refer to two recent judgments of this Court, one of the Division Bench in Union of India and Another v. Indian Agro Marketing Co-operative Ltd., 2023 SCC OnLine Del 891 and the other of the Co-ordinate Bench in Union of India and Another v. Indian Agro Marketing Co-operative Ltd., 2023 SCC OnLine Del 4621. In both the judgments, it is reiterated that even under Section 74 of the Indian Contract Act, proof of actual damage or loss is a sine qua non for grant of damages and once the party claiming breach of contract does not lead evidence to show any loss suffered, mere breach by the opposite party is not enough to award damages even though there may be a stipulation in the contract for a pre-estimated amount as liquidated damage.

32. Before proceeding further to examine the facts of the present case, it is imperative to examine the scope and ambit of the power of this Court to interfere in an arbitral award under Section 34 of the 1996 Act. The extent of jurisdiction of the Court while dealing with the challenge to an arbitral award stands authoritatively examined by a plethora of judgments of the Supreme Court starting from Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644 to Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49. Recently the Supreme Court in Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation Limited, (2022) 1 SCC 131, delineated the limited or narrow window within which judicial interference is warranted as there can be no doubt that parameters for examining an award under Section 34 do not permit this Court to sit as an Appellate Court over an arbitral award by re-assessing or re-appreciating the evidence. Patent illegality has been recognized statutorily as a ground, within which an examination of the arbitral award is permissible. Relevant para of the judgment is as follows:-

> "29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality"."

33. Seen in the backdrop of the settled position of law that proof of loss is a sine qua non for award of damages, even under a clause pertaining to stipulated liquidated damages and examining the

impugned Award within the contours and confines of the scope of Section 34 of the 1996 Act, in my view, the impugned Award warrants an interference. A bare perusal of the award shows that substantial part of the award contains extracts of the claims and counter claims and records the respective contentions of the parties. This is followed by the issues that were settled and quotes of Section 73 of the Indian Contract Act. Reference is then made to the judgment of the Supreme Court in Kailash Nath (supra) but only selective paras are quoted and relevant paras have not been taken note of. The significant point that needs to be noted is that while the learned Arbitrator has come to a finding that Petitioner was in breach of the contract for non-supply of 2000 MT of rice, the learned Arbitrator has recorded at two places that no document has been placed or evidence led to prove the damages suffered by either party. Relevant paras of the award are as under:-

> "In such circumstances as discussed above, and in the absence of any plausible reasons or any documentary proof the claim of the Claimant that they could not supply the 2000MT Sharbati or Equivalent Rice due to Flood situation is not sustainable. Hence, it is found that the Claimant committed breach of contract by not supplying the 2000MT Sharbati or Equivalent Rice at Guwahati as per the terms of the contract. There is no document/ evidence to prove the damages suffered by both the parties.
>
> As per terms of clause No 1.4 of Part IV (A) of RFP, the Performance Bank Guarantee can be forfeited by the buyer if there is any breach of contract. Further, para 1.7 of Part IV (A) of RFP, the buyer has right to forfeit, the PBG in full in case of any breach of contractual obligation by the seller. Respondent was to forfeit the PBG to recover the damages for non supply of contracted quantity of Rice.
>
> The Claimants were fully aware of the date of delivery and specifications of the quality of rice to be supplied by entering into the contract deemed to have accepted the same.
>
> The Claimant moved the Delhi High Court for stay on forfeiture of performance bank guarantee in terms of Section 9 of Arbitration and Conciliation Act and appointment of Arbitrator under Section 11 of Arbitration and Conciliation Act 1996. The claimant in their application filed under section 17 of arbitration and conciliation act had express their in ability to keep the bank guarantee alive. Vide other dated 09 July 2020 the Arbitrator directed the respondent to encash the BG. Accordingly the respondent encashed the bank guarantee.
>
> In view of the above discussion I conclude that the Claimant failed to supply any quantity out of 2000 MT of Rice (Sharbati or Equivalent) hence, committed breach of contract.
>
> There is no document/ evidence to prove the damages suffered by both the parties."

(emphasis supplied)

34. Thereafter, the learned Arbitrator has analysed the provisions of Sections 73 and 74 of the Indian Contract Act and after recording that Petitioner committed breach of the contract held the Respondent entitled to recover liquidated damages. The reasoning given by the learned Arbitrator is as follows:-

> "Liquidated Damages. The Contract can be cancelled unilaterally by the Buyer in case items are not delivered within the actual contracted delivery period or within the Delivery Period (DP) indicated in the AT Notes. In the event of the Seller's failure to supply the items in the original delivery period, an auto extension of delivery period commence from the very next day of the last date of expiry of original DP. It may be noted that a sum equivalent to 0.5% of the price of contracted quantity which the contractor has failed to deliver, for each week or part thereof will be imposed as liquidated damages for the period the supplies are delayed after the completion of the original DP. The total damages shall not exceed value of 10% of undelivered goods".

In case of failure to deliver the goods within the stipulated period the Respondent was entitled to recover liquidated damages from the Claimant as agreed upon. The said pre-estimation was agreed to by the Claimant as they have signed the said RFP.

Section 73 of Indian Contract Act stipulates compensation for loss or damage caused by breach of contract when a contract has been broken, the party who suffers by such breach is entitled to the compensation. The compensation to which the party is entitled is either naturally arose in the usual course of things from such breach, or which the parties knew. In the present case there is liquidated damage clause 7 in the RFP which stipulates liquidated damages and thus it shows that parties knew about the damages to be paid in case of breach of contract.

Section 74 of the Indian Contract Act is thus not applicable because it deals with the Compensation for breach of contract where penalty is stipulated. In the present matter there is nothing on record to show that said stipulation for recovery of liquidated damages was by way of penalty or in any way unreasonable.

Breach of Contract The Claimant failed to supply 2000 MT of Rice (Sharbati or equivalent) thus, committed breach of contract within the stipulated period. Hence, the Respondent is entitled to recover liquidated damages as agreed upon."

35. It is thus apparent that no finding has been rendered by the learned Arbitrator that the Respondent suffered loss or damage on account of breach, which is a sine qua non of a claim of liquidated damage and instead has categorically noted that parties have not filed any document/evidence to prove the damage suffered. Very recently, a Division Bench of this Court in Sudershan Kumar Bhayana (Deceased) Thr Lrs. v. Vinod Seth (Deceased) Thr Lrs., 2023 SCC OnLine Del 6097, was dealing with an arbitral award in the context of the dispute arising out a collaboration agreement. The owners were the claimants who filed their Statement of Claim inter alia claiming damages computed @ Rs.10,000/- per day on the ground that builder had breached his obligations under the agreement and had stopped construction on the site. There were some

counter claims by the builder also. The part of the award that concerns the present matter is the finding of the Arbitral Tribunal that the builder was in breach of his obligation and in view of this finding, the Arbitral Tribunal awarded damages @ Rs.10,000/- per day for the period mentioned therein. The award was challenged by the builder on various grounds and one of the main challenges was related to the quantum of damages awarded. Challenge was predicated on the ground that owners had not proved that they had suffered any damage and thus no damages could be awarded without any evidence. Reliance was placed on the judgments in Fateh Chand (supra) and Kailash Nath (supra). Being unsuccessful before the learned Single Judge in the objections filed under Section 34 of the 1996 Act, appeal was filed before the Division Bench. The Division Bench observed that it is well settled that there are three essential ingredients that are required to be pleaded and established by a party claiming damages. First, there is a breach of contract by the counter party. Second, that the party complaining of breach has suffered an injury as a result of breach of contract and third that the injury suffered is proximate and a direct result of the breach committed. Absent any pleadings that owners had suffered any damages or incurred loss on account of the delay in construction, a claim of damages would not be sustainable. Additionally, no evidence was led on record to show and establish the loss allegedly suffered or in support of the quantum of damages claimed and the owners had simply relied on Clause 7 of the collaboration agreement. Relevant passages from the judgment are as follows:-

> "37. Although, we concur with Mr. Sistani that the impugned order is liable to be set aside but we are unable to concur with the second limb of his argument that the impugned award is liable to be upheld. Admittedly, the Owners had not led any evidence or produced any material to establish the loss suffered by them. They relied solely on Clause 7 of the Collaboration Agreement which is set out below:
>
> "7. That the time period fixed from starting to end i.e. upto finishing upto third floor, with all easement is 12 month or earlier providing the vacant land and a further grace period of two months can be given. Afterwards second party will pay Rs. 10,000/- per day as penalty to the first party apart from whatsoever the reason may be for the delayed period. In case of any calamity, any specific reason beyond the control of human being and/or non-availability of building materials etc. the above clause will be applicable only after the time period further extended which has been delayed."

38. A plain reading of the aforesaid clause indicates that the amount of Rs. 10,000/- per day is stipulated as penalty. Even if, it is assumed that the said clause provides for liquidated damages; nonetheless the Owners were required to prove the same. Damages could not be awarded on the ground that the Collaboration Agreement had stipulated the same unless it was established that the same are reasonable damages and the same were suffered by the Owners. Admittedly, the Owners had not led any evidence to establish the damages suffered by them. It is also not their case that the damages suffered by them were incapable of being proved.

39. In Kailash Nath Associates v. Delhi Development Authority, (2015) 4 SCC 136, the Supreme Court had referred to Section 74 of the Indian Contract Act, 1872 and has held as under:

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

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

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

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

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

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

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

40. The aforesaid principles have been reiterated and followed in several decisions of this Court.

41. It is well settled that there are three essential ingredients that are required to be pleaded and established by a party claiming damages. First, that there is a breach of the Contract by the counterparty. Second, that the party complaining of such breach has suffered an injury as a result of the breach of the contract by the counterparty. And third, that the injury suffered is proximate and a direct result of the breach committed.

42. In the present case, the Owners had in their Statement of Claims pleaded as under:

> "11. That when the builder failed to complete the building within the stipulated period and even after the expiry of about 18 months the owner had no alternative but to invoke the clauses 7 and 12 of the Agreement and forfeited the Earnest Money as well as the Compensation Money as stated in the foregoing paras."

43. It is material to note that the Owners had not made any categorical averments that the delay had resulted in them suffering any damages. There is no averment that the Owner's incurred costs, which were higher than the value of the second floor of the reconstructed building.

44. Absent any pleadings that the owners had suffered damages or incurred loss on account of the delay in construction of the work, a claim of damages would not be sustainable. In addition, as noted above, admittedly there is no evidence or material on record to establish that the owners had suffered any loss or the quantum of such loss. The owners have simply relied on Clause 7 of the Collaboration Agreement.

45. It is material to note that there is also no averment that the penalty as contemplated under Clause 7 of the Collaboration Agreement is a genuine pre-estimate of damages.

46. In Hindustan Petroleum Corporation Ltd., Mumbai v. Offshore Infrastructure Ltd., Mumbai, 2015 SCC OnLine Bom 4146, the Bombay High Court following the decision of the Supreme Court in Kailash Nath Associates v. Delhi Development Authority, (2015) 4 SCC 136, had observed that "Unless loss is pleaded and proved, where it capable of being proved, it cannot be recovered. There cannot be any windfall in favour of the respondent to recover liquidated damages even if no loss is suffered or proved."

47. The Division Bench of this Court in Hindustan Petroleum Corporation Ltd. v. Dhampur Sugar Mills, 2022: DHC: 2258-DB, had upheld the decision of the learned Single Judge setting aside an arbitral award awarding damages on the basis of a penalty clause. In the aforesaid context, the Division Bench of this Court had observed as under:

> "11.2. A careful perusal of the same would show that the appellant claimed "penalty". Penalty is generally construed as a sum stipulated in terrorem. On the other hand, damages, liquidated or unliquidated, when awarded, have a compensatory flavour to it. Liquidated damages are awarded by a court only if it construed as a genuine pre-estimate of the loss that is caused in the event of breach. It is no different from unliquidated damages i.e., it cannot be granted if there is no loss or injury. Where parties have agreed to incorporation of a liquidated damages clause in the contract, the Court will grant only reasonable compensation, not exceeding the sum stipulated. Liquidated damages does away with proof where loss or damage cannot be proved, but not otherwise. Thus, the party suffering damages can be awarded only a reasonable compensation, which would put such party in the same position, in which the party would have been had the breach not been committed. The appellant's pleadings are woefully deficient in this regard. Unless loss is pleaded and proved, where it capable of being proved, it cannot be recovered."

48. In Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI), (2019) 15 SCC 131, the Supreme Court had observed that, "Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality."

49. Even if it is accepted - which we do not - that Clause 7 of the Collaboration Agreement could form the measure of damages to be awarded; the said damages could only be for the period of delay in completing the construction. According to the Owners a total of fourteen months (including the grace period of two months) was available to complete the construction. The Collaboration Agreement was terminated on 11.11.2011 and therefore no further construction could be carried on after the termination. Undisputedly, the maximum period of delay thereafter could not exceed fourteen months - which is the total period for completion of the construction. It is also not disputed that the builder had reconstructed a portion of the building. It is obvious that some allowance for such construction was required to be made in computing the period for which damages for delay could be claimed after termination of the Collaboration Agreement.

50. More importantly, Clause 7 of the Collaboration Agreement would not be operative after the Collaboration Agreement was terminated. The builder was not required to complete the building thereafter and therefore the mechanism as contemplated under Clause 7 of the Collaboration Agreement, assuming that the same was required to be enforced, would not survive the termination of the Collaboration Agreement.

51. Thus, the impugned award to the extent the claim made by the Owners is liable to be set aside."

36. Applying the principles elucidated in the aforementioned judgements, the impugned award cannot be sustained in law. There is no finding by the Arbitrator that the Respondent suffered any loss/damage and none was established by leading evidence. In fact, the admitted position is that parties led no evidence and thus a mere reliance on the stipulation for pre-estimated damages and a finding of breach of contract cannot suffice in a claim of damages in light of the wealth of judicial precedents. Counsel for the Respondent had strenuously urged that in the present case, it was impossible to calculate the actual loss incurred on account of non-supply of 2000 MT Rice which was meant for consumption of the army personnel and in this context, heavy reliance was placed on the judgment of this Court in Ministry of Defence (supra), where in turn reliance was placed by the Court on the judgment in Oil & Natural Gas Corporation Ltd. (supra). In my view, the judgment is wholly inapplicable to the facts of the present case. In the said case, on a factual note, the contract was for supply of parachutes to the army and the Court held that it was impossible to calculate the loss that was caused to the army on account of non-supply of parachutes and in this backdrop held that the clauses pertaining to liquidated damages were enforceable in accordance with Section 74 of the Indian Contract Act. In contrast with the said facts, in the present case, it is not the case of the Respondent that the nature of contract was such that losses could not be easily calculated and therefore, they had no alternative but to rely on the clause for liquidated damages. It is also not their case that efforts were made to procure the said quantity of rice from alternate sources and at the risk and cost of the Petitioner. Judgment in Ministry of Defence (supra) could only be relied on, once the Respondent are able to establish that damages could not be easily calculated. This very issue came

up before the Division Bench of this Court in Union of India v. Indian Agro Marketing Co-operative Ltd., 2023 SCC OnLine Del 4002, where the contract was for procurement of 'gram whole' and the Court distinguished the judgment in Ministry of Defence (supra) on the ground that it was not the case of the Appellant that the damages could not be calculated. In view of the judgments of the Supreme Court in Ssangyong Engineering and Construction Company Limited (supra), Delhi Airport Metro Express Private Limited (supra) and I-Pay Clearing Services Private Limited (supra), the impugned award cannot be sustained and warrants interference.

37. In view of the foregoing discussion and the judgments cited above, this Court is of the view that the impugned award dated 14.12.2021 suffers from patent illegality and the same is accordingly set aside.

38. Petition is allowed and disposed of in the aforesaid terms.

JYOTI SINGH, J DECEMBER 18 , 2023/kks/KA