2023:DHC:7053-DB

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 27.09.2023

\+ **FAO(OS) 132/2019 & CM No.32795/2019**

SUDERSHAN KUMAR BHAYANA (DECEASED) THR LRS ..... Appellant

versus

VINOD SETH (DECEASED) THR LRS ..... Respondents

AND

\+ **FAO(OS) 204/2019**

VINOD SETH (DECEASED) THR LRS. ..... Appellant

versus

SUDERSHAN KUMAR BHAYANA (DECEASED) THR LRS. ..... Respondent

Advocates who appeared in this case:

For the Appellants : Mr. Gurmehar S. Sistani, Adv. in FAO(OS) No.132/2019 & for respondent in FAO(OS) No.204/2019.

For the Respondents : Mr. Kunal Seth, Adv. in FAO(OS) No.132/2019 & for appellant in FAO(OS) No.204/2019.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

VIBHU BAKHRU, J

1. The present cross appeals have been filed under Section 37(1)(c) of the Arbitration & Conciliation Act, 1996 (hereafter **'the A&C Act'**)

impugning an order dated 15.04.2019 (hereafter **'the impugned order'**) passed by the learned Single Judge of this Court in OMP No.1125/2014 captioned ***Vinod Seth (deceased) through Kunal Seth & Anr. v. Sudershan Kumar Bhayana & Anr.*** The legal heirs of Sh. Vinod Seth [appellants in FAO(OS) No.204 of 2019 / respondents in FAO(OS) No.132 of 2019] had filed the aforesaid application under Section 34 of the A&C Act impugning an arbitral award dated 21.10.2013 (hereafter **'the impugned award'**) delivered by an Arbitral Tribunal comprising of a sole arbitrator. They took exception to the impugned award to the limited extent that the claims made by the respondents (their predecessor) were allowed, and to the extent that the counterclaims were not awarded in full.

Factual Context

2. The impugned award was rendered in the context of the disputes that had arisen in connection with the agreement dated 09.04.2010 (hereafter **'the Collaboration Agreement'**) in respect of a property described as "*three storied Built-up Property Bearing No. 40, in Block F-1U, Built on Land Measuring 242 Sq. Yds., Situated at Pitampura, Delhi, with the freehold rights of the land under the said property, with all facilities & easement therein*" (hereafter **'the subject property'**) The Collaboration Agreement was entered into between Sh. Sudershan Kumar Bhayana and his wife Smt. Kiran Bhayana (hereafter '**the Owners**') on one part, and Sh. Vinod Seth (hereafter **'the builder'**) on the second part.

3. In terms of the Collaboration Agreement, the builder had agreed to construct "*1/3rd parking + 2/3 basement with guiniting work (water proofing), Upper ground floor, first floor, second floor and third floor with all fittings fixtures and finishing work as per A class construction*." after demolishing the extant building on the subject property. In addition, the builder also agreed to pay a sum of ₹64,00,000/- and bear the cost of construction. In consideration for the same, the Owners had agreed that the builder would retain the second floor without roof rights, in the building as reconstructed, and they would execute a registered sale deed in respect of the said floor, in his favour.

4. The builder was required to construct the building within a period of twelve months or earlier with a further grace period of two months. However, if there was any delay thereafter, the builder would be liable to pay a penalty of ₹10,000/- per day, for the delay in completing the construction.

5. The building plans were sanctioned on 31.12.2010 and the Owners also granted an extension of time to complete the construction. The disputes between the parties arose sometime in August, 2011 and the Owners terminated the Collaboration Agreement on 11.11.2011. Subsequently, by a letter dated 13.01.2012, the Owners forfeited the money deposited by the builder and also called upon him to pay a further sum of ₹55,00,000/-.

Arbitral Proceedings

6. In the aforesaid context, the builder filed a petition under Section 9 of the A&C Act, *inter alia,* seeking an order restraining the Owners from alienating, disposing of, dealing with or creating any third party right in respect of the second floor of the subject property. In the said proceedings, the parties agreed that they be referred to arbitration. With the consent of the parties, the learned Arbitrator was appointed. The court also directed that the arbitration be conducted under the *aegis* of the Delhi International Arbitration Centre (then known as Delhi High Court Arbitration Centre) and in accordance with its Rules.

7. Before the Arbitral Tribunal, the Owners were arrayed as claimants. They filed their Statement of Claim, *inter alia,* claiming damages amounting to ₹72,00,000/- computed at the rate of ₹10,000/- per day (rounded up for ₹3,00,000/- per month) with effect from 09.04.2011 to 08.04.2013 (period of twenty-four months). They acknowledged that they had received an aggregate sum of ₹40,00,000/- (₹5,00,000/- + ₹35,00,000/-), which included the price of *malba* resulting from the demolition of the built-up property prior to reconstruction. However, they also claimed that they had paid a sum of ₹4,01,700/- to the Municipal Corporation of Delhi (hereafter **'MCD'**) towards the fees for approval of the building plans, which was required to be accounted for.

8. According to the Owners, they had received a net amount of ₹34,98,300/- from the builder after deducting the fees for approval of

the building plans (that is, ₹4,01,700/-). They also asserted that an amount of ₹6,00,000/- was recovered by the builder from sale of *malba*. The Owners stated that they had forfeited the money as provided by the builder.

9. It is the Owners' case that the builder had breached his obligation under the Collaboration Agreement. It was alleged that the builder had stopped construction on or about August, 2011. The construction site was kept in a filthy and a dismal state rendering the same a health hazard. The Owners claimed that water upto three to four feet in depth had collected in the basement. The MCD issued a notice dated 08.09.2011 to the builder to take necessary measures to remove stagnant water as the same would result in breeding of mosquitoes. They claimed that several warrants were sent to the builder during the period 04.05.2011 to 12.12.2011. The Owners also filed a criminal complaint with Station House Officer, Maurya Enclave, Pitampura, Delhi on 11.09.2011 as, according to them, the builder had abandoned the construction site. The Owners claimed that they were compelled to terminate the Collaboration Agreement on 11.11.2011 on account of failure of the builder to perform his obligations.

10. The builder filed a Counterclaim before the Arbitral Tribunal claiming a sum of ₹1,00,00,000/- along with *pendente lite* interest and post award interest till recovery of the said amount at the rate of 12% per annum. In the alternative, the builder sought an award that he be declared the owner of the second floor with a half share in the basement and a proportionate share in the parking of the subject property with a

further direction that the Owners execute a sale deed in respect of the said portion of the subject property. The builder also agreed to pay a remaining amount of ₹19,00,000/- and as well as the cost of completing the construction.

11. The builder claimed that he had paid an aggregate sum of ₹45,00,000/- out of the agreed amount of ₹64,00,000/- to the Owners in terms of the Collaboration Agreement and acknowledged that he was required to pay a further amount of ₹19,00,000/-. He further claimed that he had incurred an aggregate sum of ₹36,92,400/- in reconstruction (₹15,55,200/- for the basement, ₹10,36,800/- for stilt parking and ₹11,00,400/- for ground floor and *chajja*) of the building. It was the builder's case that he was proceeding with the construction and had partly constructed the building, however, the Owners had made several complaints, rendering it difficult for him to continue the construction and had effectively ousted him from the subject property. The builder claimed that the price of immovable properties had increased after the parties had entered into the Collaboration Agreement and alleged that this had motivated the Owners to unjustifiably terminate the Collaboration Agreement. The builder also claimed that the delay was on account of the Owners.

Impugned Award

12. The Arbitral Tribunal accepted that the builder had paid an amount of ₹45,00,000/- to the Owners in part performance of his obligations to pay a sum of ₹64,00,000/- in terms of the Collaboration

Agreement. The Arbitral Tribunal also accepted that the builder had incurred an amount of ₹36,92,400/- for partially reconstructing the subject property. However, the Arbitral Tribunal also found in favour of the Owners that the builder had breached the Collaboration Agreement; thus, the Owners were entitled to damages.

13. The Arbitral Tribunal rejected the builders' Counterclaim for an amount of ₹1,00,00,000/- along with interest at the rate of 12% per annum. Further, the Arbitral Tribunal did not accept that the builder was entitled to the portion of the built-up property (second floor along with a proportionate share of common facilities and land) against payment of the remaining cost of construction and the balance amount of ₹19,00,000/- (₹64,00,000/- minus ₹45,00,000/-). But the Arbitral Tribunal accepted that the builder would be entitled to refund of the money paid to the Owners as well as the cost of ₹36,92,400/- incurred by him for reconstruction of the subject property. Thus, the Arbitral Tribunal awarded an amount of ₹81,92,400/- in favour of the builder.

14. In view of the finding that the builder was in breach of his obligation under the Collaboration Agreement, the Arbitral Tribunal awarded damages at the rate of ₹10,000/- per day for the period 09.04.2011 to 08.04.2013 (that is, a sum of ₹72,00,000/-) as claimed by the Owners. The dispositive portion of the impugned award reads as under:

> "I hereby direct that (i) the claim is allowed to the effect that he is entitled to claim Rs.72 lacs from the Counter-claimant. (ii) The Counter-claim is partly allowed to the extent that the respondent / Counter-claim is entitled to

recover Rs.81,92,400/- from the claimant. (iii) Both the parties shall bear their own arbitration costs."

Proceedings under Section 34 of the A&C Act

15. The Owners accepted the impugned award and did not challenge the Counterclaim as partly allowed by the Arbitral Tribunal. However, the builder filed an application under Section 34 of the A&C Act (OMP No.1125/2014), *inter alia*, challenging the findings of the Arbitral Tribunal that he was in breach of the Collaboration Agreement and the claim for damages as awarded. The builder also reiterated that he was entitled to the Counterclaim in full.

16. One of the main challenges to the impugned award related to the quantum of damages as awarded. The builder claimed that the Owners had not proved that they had suffered any damages and thus no damages could be awarded without any evidence to establish the same. The builder founded his challenge on the law as laid down by the Supreme Court in ***Fateh Chand v. Balkishan Dass***[1] and ***Kailash Nath Associates v. Delhi Development Authority & Anr.***[2]**.**

17. The learned Single Judge did not accept that the award of damages was liable to be set aside. However, the court faulted the Arbitral Tribunal for calculating the damages at the rate of ₹10,000/- per day from 09.04.2011. The learned Single Judge held that there was no basis for calculating the damages from 09.04.2011. According to the learned Single Judge, the award of compensation was required to be

[1] (1964) 1 SCR 515
[2] (2015) 4 SCC 136

modified by the delay from 09.08.2011 as the construction was continuing till August, 2011. The learned Single Judge found that the Arbitral Tribunal had erred in computing the damages for a period of two years as the Collaboration Agreement contemplated that construction would be completed within a period of fourteen months. Accordingly, the learned Single Judge modified the computation of compensation by accepting that the damages were liable to be computed at the rate of ₹10,000/- per day but restricting the period of damages to fourteen months – from 09.08.2011 to October, 2012.

18. It is material to note that the learned Single Judge also held that since the builder was in breach of the Collaboration Agreement, the earnest money of ₹45,00,000/- was liable to be forfeited in terms of Clause 13 of the Collaboration Agreement.

19. The learned Single Judge observed that the Arbitral Tribunal had accepted the builder's claim that it had incurred ₹36,92,400/- towards construction without any evidence on record to the said effect. However, the court held that the said award was required to be upheld as the Owners had not challenged the impugned award.

Reasons & Conclusion

20. It is clear from the reading of the impugned order that the learned Single Judge has in effect modified the impugned award and has reduced the amount of damages as awarded by the Arbitral Tribunal.

21. Although, the learned Single Judge noticed that the award in relation to Counterclaim was required to be upheld as the Owners had

not challenged the same; nonetheless, also proceeded to observe as under:

> "In so far as the refund of earnest money deposit of Rs.45 lakhs is concerned, the various documents including the notices from the MCD and the Police do show the breach by the Contractor. Thus, Rs.45 lakhs earnest money which has been mentioned in the agreement can be forfeited since the contractor is held to be in breach."

22. It is material to note that the Arbitral Tribunal had held that the amount paid by the builder was required to be refunded and had included the amount of ₹45,00,000/- in the amount of ₹81,92,400/- awarded in favour of the builder against the counterclaim.

23. The Arbitral Tribunal had not referred to Clause 13 of the Collaboration Agreement. However, the learned Single Judge's conclusion that the Owners (Claimants) were entitled to forfeit ₹45,00,000/- earnest money is founded on the said clause, which was also set out in the impugned award.

24. As noted above, the learned Single Judge had upheld that the compensation payable to the Owners, was required to be paid at the rate of ₹10,000/- per day but had modified the period for which the compensation was required to be paid to fourteen months instead of twenty-four months as held by the Arbitral Tribunal.

25. It is apparent from a plain reading of the impugned judgement that the learned Single Judge has modified the impugned award by substituting its decision in place of that of the Arbitral Tribunal. This

approach is fundamentally flawed and is beyond the scope of Section 34 of the A&C Act. Section 34 of the A&C Act contemplates setting aside of the arbitral award only if any of the grounds for setting aside of the same, as set out in Section 34 of the A&C Act, are established. It does not permit the Court to substitute its decision in place of the Arbitral Tribunal.

26. In ***Project Director, National Highways No. 45 E and 220 National Highways Authority of India v. M. Hakeem & Anr.***[3] the Supreme Court has held as under:

> "16. What is important to note is that, far from Section 34 being in the nature of an appellate provision, it provides only for setting aside awards on very limited grounds, such grounds being contained in sub-sections (2) and (3) of Section 34. Secondly, as the marginal note of Section 34 indicates, "recourse" to a court against an arbitral award may be made *only* by an application for *setting aside* such award in accordance with sub-sections (2) and (3). "Recourse" is defined by P. Ramanatha Aiyar's *Advanced Law Lexicon (3rd Edn.)* as the enforcement or method of enforcing a right. Where the right is itself truncated, enforcement of such truncated right can also be only limited in nature. What is clear from a reading of the said provisions is that, given the limited grounds of challenge under sub-sections (2) and (3), an application can only be made to set aside an award. This becomes even clearer when we see sub-section (4) under which, on receipt of an application under sub-section (1) of Section 34, the court may adjourn the Section 34 proceedings and give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or take such action as will eliminate the grounds for setting aside the arbitral award. Here again, it is important to note that it is the opinion of the Arbitral Tribunal which counts in order to eliminate the grounds for setting aside the award, which may be indicated by the court hearing the Section 34 application.

[3] 2021 SCC OnLine SC 473

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31. Thus, there can be no doubt that given the law laid down by this Court, Section 34 of the Arbitration Act, 1996 cannot be held to include within it a power to modify an award. The sheet anchor of the argument of the respondents is the judgment of the learned Single Judge in *Gayatri Balaswamy* [*Gayatri Balaswamy* v. *ISG Novasoft Technologies Ltd.*, 2014 SCC OnLine Mad 6568 : (2015) 1 Mad LJ 5] . This matter arose out of a claim for damages by an employee on account of sexual harassment at the workplace. The learned Single Judge referred to the power to modify or correct an award under Section 15 of the Arbitration Act, 1940 in para 29 of the judgment. Thereafter, a number of judgments of this Court were referred to in which awards were modified by this Court, presumably under the powers of this Court under Article 142 of the Constitution of India. In para 34, the learned Single Judge referred to para 52 in *McDermott case* [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181] and then concluded that since the observations made in the said para were not given in answer to a pointed question as to whether the court had the power under Section 34 to modify or vary an award, this judgment cannot be said to have settled the answer to the question raised finally.

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42. It can therefore be said that this question has now been settled finally by at least 3 decisions [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181] , [*Kinnari Mullick* v. *Ghanshyam Das Damani*, (2018) 11 SCC 328 : (2018) 5 SCC (Civ) 106] , [*Dakshin Haryana Bijli Vitran Nigam Ltd.* v. *Navigant Technologies (P) Ltd.*, (2021) 7 SCC 657] of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in *Redfern and Hunter on International Arbitration*, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an

> award, the "limited remedy" under Section 34 is coterminous with the "limited right", namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996."

27. In view of the above, the impugned order is liable to be set aside on this ground alone.

28. The impugned order is also flawed on merits. The observation that the Owners were entitled to forfeit earnest money of ₹45,00,000/- is *ex facie* erroneous as the entire amount paid by the builder in terms of the Collaboration Agreement was not as earnest money. It is relevant to refer to Clause 4 of the Collaboration Agreement. The same is set out below:

> "4. That the second party will pay for a total of ₹6400000/- Sixty Four Lac Rupees to the first party apart form the construction finishing and fitting fixture work in the following manner:
>
> i. That the second party will pay ₹5000000/- (Five Lakhs) as earnest money and 3000000/- (Thirty Lakhs) as compensation money in the form of ₹1500000/- as per two cheques in two names & 1500000/- (Fifteen lac Rupees) cash at the time of signing of this agreement.
>
> ii. Rs.1000000/- (Ten Lac) within 30 days of the agreement.
>
> iii. Balance Rs.1900000/- (Nineteen Lac) within 15 days of the forth lanter & the second party will be entitled to get the sell deed registered through by first party, without roof right second floor and without possession, which will be registered separately. After finishing the work of full building from basement to roof of the third floor."

29. It is apparent from the above that the earnest money payable by the builder (which admittedly was paid) was only ₹5,00,000/- and not ₹45,00,000/- as observed by the learned Single Judge.

30. Having stated the above, it is relevant to mention that the controversy in these appeals does not relate to the forfeiture of the earnest money. None of the parties read the impugned order as modifying the impugned award to award ₹45,00,000/- in favour of Owners. It is also material to note that although the Owners had stated in their Statement of Claim that they have forfeited the amount paid by the builder, they had not made any claim for retaining the said amount.

31. The Owners (their legal heirs) have appealed the impugned order to the extent that the compensation awarded has been reduced. The grounds of appeal indicate that the Owners support the impugned award and have confined their challenge to reduction of the amount of compensation awarded. This is apparent from the following grounds as set out in the Memorandum of Appeal [FAO(OS) No.132/2019]:

> "A. Because the Ld. Single Judge failed to appreciate that the Ld. Arbitrator has correctly passed the award dated 21.10.2013 allowing the claim of the appellant/owner as well as counter claim of the respondent/builder having gone through all the documents on record.
>
> B. xxx xxx xxx
>
> C. Because the Hon'ble Single judge erred in not appreciating that the start date of compensation as 09.4.2011 is absolutely correct as the agreement dated 09.04.2010 entered into specifically provide for completing the construction within 12 months.

D. Because the Hon'ble Single judge came to the conclusion at her own that the start date should be 9th August 2012 without giving any reasoning about this imaginary start date of the construction.

E. Because the Hon'ble Single judge was herself confusing while giving an imaginary start date of compensation as at one hand she is finding error in the arbitrator's award which is taking full period of two years for compensation and on the other hand in the same sentence she ordering that the same is liable to be granted.

F. Because the Hon'ble Single judge has passed the impugned order in a very cryptic manner without assigning any reasoning while ordering that the period for which compensation is payable is restricted from 09.08.2011 till October 2012."

32. The builder (his legal heirs) have also challenged the impugned order to the extent of the award of damages of ₹42,00,000/- computed at the rate of ₹10,000/- per day from 9th August 2011 to October 2012.

33. The appellants have proceeded on the premise that the sum of ₹45,00,000/- is in any event payable to the builder. Thus, although the learned Single Judge observed that ₹45,00,000/- could be forfeited, the parties understand that there is no effective order modifying the impugned order to the said effect. It is common ground that by virtue of the impugned order, the impugned award has been modified to the extent of reducing the award of damages in favour of the Owners from ₹72,00,000/- to ₹42,00,000/-.

34. Admittedly, the Owners had not produced any evidence in support of their claim for damages. It is also not the Owner's case that it is difficult or impossible for them to quantify and prove the damages

suffered by them. We are unable to concur with the view of the learned Single Judge that an award of damages based on no material at all could be sustained on the basis of a penalty clause in the Collaboration Agreement.

35. Having held that the impugned order passed by the learned single judge cannot be sustained; the question that follows is whether the impugned award is liable to be set aside partially to the extent as assailed by the builder. As noted above, the builder assails the impugned award, *inter alia*, on the ground that the award of damages is without any evidence or material to establish that the Owners had suffered any damages.

36. Mr. Gurmehar S. Sistani, learned counsel appearing on behalf of the Owners [appellant in FAO(OS) No.132/2019] submitted that the impugned order is liable to be set aside and the impugned award is liable to be upheld.

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 ₹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 & Anr.***[2], 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***[4], the Bombay High Court following the decision of the Supreme Court in ***Kailash Nath Associates v. Delhi Development Authority & Anr.***[2] 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. M/s Dhampur Sugar Mills***[5] 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

[4] 2015 SCC OnLine Bom 4146
[5] Neutral Citation: 2022:DHC:2258-DB

> 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)***[6] 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

[6] (2019) 15 SCC 131

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.

52. Insofar as the award against Counter Claim is concerned the learned Single Judge had rightly noted that the same was accepted by the Owners and therefore requires to be upheld. It is well settled that a counterclaim is of the same effect as the cross suit as held in ***Jag Mohan Chawla & Anr. v. Dera Radha Swami Satsang & Ors.***[7]. The relevant extract of the said decision reads as under:

> "5.… The counter-claim expressly is treated as a cross-suit with all the indicia of pleadings as a plaint including the duty to aver his cause of action and also payment of the requisite court fee thereon. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceeding and needless protection (sic protraction), the legislature intended to try both the suit and the counter-claim in the same suit as

[7] (1996) 4 SCC 699

> suit and cross-suit and have them disposed of in the same trial….."

53. In terms of the impugned award, the Arbitral Tribunal had partly allowed the Counterclaim, which was not challenged by the Owners. Thus, the impugned award in respect of the Counterclaim cannot be set aside as none of the parties had applied under Section 34 of the A&C Act to set aside the same.

54. The award of damages in favour of the Owners, which was the subject matter of challenge under Section 34 of the A&C Act is clearly vitiated by patent illegality for the reasons as noted above.

55. In view of the above, the impugned order is set aside. The impugned award, to the extent of claims awarded in favour of the Owners is set aside.

56. The appeals are disposed of the in the aforesaid terms.

57. The parties are left to bear their own costs.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

SEPTEMBER 27, 2023
'gsr'