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

Date of decision: 27th FEBRUARY, 2025

IN THE MATTER OF:

\+ **O.M.P. (COMM) 170/2024 & I.A. 8480/2024**

BAJAJ FINANCE LIMITED .....Petitioner

Through: Ms. Surabhi Lal, Mr. Rachit Bansal, Advocates

versus

SEETHA KUMARI .....Respondent

Through: Mr. Pawan Upadhyay, Mr. Rishab Khare, Mr. Varun Sharma, Advs.

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The challenge in the present petition under Section 34 of the Arbitration & Conciliation Act, 1996 (*"Arbitration Act"*) is to an Award dated 20.02.2024 (hereinafter referred to as the impugned award) passed in favour of the Respondent, whereby the Respondent was awarded a sum of Rs.28 crores along with interest of Rs.5,34,83,836/- and legal expenses of Rs.30,00,000/-.

2. The Petitioner, Bajaj Finance Ltd., is a Non-Banking Financial Company (NBFC) registered with the Reserve Bank of India (RBI). The Petitioner is engaged in the business of lending and financing, including offering Loan Against Securities (LAS) to individuals and entities.

3. The Respondent, Seetha Kumari, is an Indian citizen and stock trader who availed a loan facility from the Petitioner under a Loan Against Securities Agreement (LAS Agreement).

4. The dispute in the present proceedings arises out of the recall of the LAS facility and the subsequent sale of pledged securities by the Petitioner to recover outstanding dues, which the Respondent contends was unlawful and in breach of contractual obligations.

5. The facts, shorn of unnecessary details, are as follows:

a. The Petitioner (Bajaj Finance) and Respondent (Seetha Kumari) were engaged in a relationship as borrower and lender respectively since the year 2015. On 18.07.2015, Petitioner granted a loan facility of ₹10 Crores to the Respondent against Securities vide sanction letter dated 18.07.2015. A Loan-cum-Pledge-cum-Guarantee Agreement was entered into between the parties on 21.07.2015. The Respondent was granted additional loan of 10 Crores for a period of 24 months vide sanction letter 02.05.2019 and Loan-cum-Pledge-cum-Guarantee Agreement dated 04.05.2019 was entered into. Accordingly, the total sanctioned loan was 20 crores, which was secured against securities in the form of 6,00,000 shares in two listed companies namely 2,00,000 shares of Hinduja Global Solutions Ltd. (hereinafter referred to as Hinduja) and 4,00,000 shares of Jindal Poly Films Ltd(hereinafter referred to as Jindal) with a margin of 100% to the satisfaction of the Respondent.

b. In accordance with the contractual covenants contained in the agreement executed between the Parties, the Respondent was required to maintain a margin of 100% throughout the tenure of the loans.

c. As per Clause 4 under Article II of the Agreement, the Petitioner had the discretion to recall the loan and liquidate pledged

securities in the event of:

i. Borrower's failure to comply with any of the requirements under the agreement or breach of any of its provisions.

ii. Failure in payment of any interest when due to the lender.

iii. Fail to pay any amount when due to (a) the lender under any other agreement; (b)any other person

iv. Failure to maintain or provide margin when called upon the lender.

v. An event of occurrence of default as specified in Article V of the Agreement

(emphasis supplied)

d. On 02.03.2020, the value of Hinduja shares declined significantly, and the stock was been placed under the Additional Surveillance Measure (hereinafter referred to as ASM) category by the National Stock Exchange (hereinafter referred to as NSE). On 18.03.2020, the Respondent provided additional securities to compensate for the alleged shortfall in pledged shares.

e. On 19.03.2020, the Petitioner issued a shortfall notice to the Respondent for ₹74,95,671, requiring either margin replenishment or partial repayment within three working days. On 20.03.2020, the Respondent transferred ₹20 lakhs to the Petitioner towards margin replenishment.

f. On 25.03.2020, the Petitioner notified the Respondent via email that the LAS account was overdrawn by ₹27,15,671 and required

immediate rectification. The Respondent made the necessary payment on the same day. However, on 26.03.2020, the Petitioner proceeded with the sale of 3,213 Hinduja shares, valued at approximately ₹14 lakhs, despite the prior payment made towards margin replenishment.

g. On 27.03.2020, the Petitioner issued a loan recall notice at 12:07 PM, citing margin shortfall and alleged default under the LAS Agreement. On the same day, the Reserve Bank of India (hereinafter referred to as RBI) announced a moratorium on term loans due to the COVID-19 pandemic. The Petitioner granted the Respondent a 10-day extension on 30.03.2020.

h. The Respondent subsequently sought reconsideration vide her email dated 01.04.2020. She offered additional collateral to address any shortfall and requested the Petitioner not to recall the outstanding loan and further not to sell the shares by stating that there was no default on her part. On 03.04.2020, she cited the RBI circular, contending that the LAS facility qualified as a "term loan" and hence, she was eligible for the moratorium.

i. The Petitioner vide its email dated 03.04.2020 informed the Respondent that she had obtained a Loan against Securities and not a Term Loan or a Working Capital Loan and therefore the Advisory issued by the RBI vide its Press Release dated 27.03.2020 shall have no application to the claimant’s loan.

j. On 05.04.2020, the Respondent obtained a verbal 30-day extension from the CEO of the Petitioner to resolve outstanding issues. Between 06.04.2020 and 21.05.2020, the Respondent made

multiple payments to the Petitioner to reduce the outstanding loan amount. The details of the payments are as follows:

Date	Amount Paid (₹)
07.04.2020	₹1 crore
08.04.2020	₹1 crore
12.05.2020	₹20 lakhs
13.05.2020	₹2.30 crores
19.05.2020	₹11.59 lakhs
20.05.2020	₹18 lakhs
21.05.2020	₹14.40 lakhs

k. By 22.05.2020, the outstanding loan had been reduced to ₹13.17 crores, while the pledged securities were valued at ₹56.61 crores, providing a 450% margin coverage. It is stated that despite this, on 12.06.2020, the Petitioner issued a notice requiring the Respondent to maintain a 100% margin, followed by a final email on 08.07.2020 referring to the recall notice dated 27.03.2020 and demanded full repayment. In its notice Petitioner reiterated that the case of the Petitioner was not covered in the RBI Press Release and hence she could not claim any protection under it. The Petitioner also informed the Respondent that in the event she failed to repay the balance loan amount immediately, the Petitioner shall be constrained to sell the Securities offered as collateral in order to recover its dues.

l. Subsequently, between 09.07.2020 and 10.07.2020, the Petitioner sold pledged securities worth ₹5.34 crores, despite the Respondent's objections and request for time to arrange alternative

financing. On 11.07.2020 the Respondent received a sanction letter from Aditya Birla Group to clear off the dues of the Petitioner and on 13.07.2020, the Respondent cleared the entire outstanding amount by making several RTGS payments, thereby clearing and closing the loan account.

m. The Respondent herein filed a Petition, being ARB. P. 1253/2021, before this Court under Section 11 of the Arbitration and Conciliation Act, 1996, for appointment of an Arbitrator and this Court vide Order dated 02.02.2022 constituted an Arbitral Tribunal consisting of a Sole Arbitrator.

n. After the completion of pleadings, the Arbitrator has framed the following issues:

> *"(i) Whether the claims filed by the Claimant are barred by the principles of res judicata?*
>
> *(ii) Whether the recall of the loan and the sale of securities by the Respondent is contractually and legally valid?*
>
> *(iii) Whether the Claimant is entitled to the claims made in its Statement of Claim?*
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> *(iv) Whether the Claimant 1s entitled to any concessions/relaxations granted by the Reserve Bank of India (RBI) during the COVID - 19 Pandemic?*
>
> *(v) Whether the Claimant is entitled to the interest on the amount claimed and, if yes, at what rate?*
>
> *(vi) What relief and costs?"*

o. Proceedings were conducted before the learned Sole Arbitrator. An Award dated 20.02.2024 was passed by the learned Sole

Arbitrator in favour of the Respondent herein awarding Rs.28 crores to the Respondent as compensation towards the value of shares pledged by the Respondent herein and sold by the Petitioner herein in breach of the Loan Agreement. The learned Sole Arbitrator also awarded Rs.5,34,83,836/- to the Respondent herein as pre-award interest and Rs.30,00,000/- as legal expenses incurred by the Respondent. While passing the award, the learned Sole Arbitrator further held that the Petitioner herein has violated the contractual terms agreed upon between the parties under the Loan-cum-Pledge-cum-Guarantee Agreement by hurriedly selling the shares pledged by the Respondent herein.

p. The Arbitrator after hearing both sides came to a conclusion that the recall of loan and the sale of securities of the Respondents was bad in law inasmuch as the contract did not give any unbridled right to the Petitioner to recall the loan and sell the shares as the right to recall the loan and selling shares would arise only in the event of a default. The Arbitrator held that shares could have been sold only if the margin fell below 85% and, on the date, when the shares were sold, the loan was secured at 450% of the outstanding loan. The Arbitrator also held that it was mandatory for the bank to give three days' notice to the Respondent which was not given to the Respondent on the date of selling of securities i.e., on 09.07.2020 and 10.07.2020. The Arbitrator, thereafter, determined the compensation and assessed the damages to tune of Rs.28,00,00,000/. The Arbitrator also assessed the pre-award interest to the tune of Rs.5,34,83,836/- crores and also awarded the Respondent a sum of

Rs.30,00,000/- as legal expenses. The Ld. Tribunal was of the opinion that in view of the price fluctuation in the shares value, a rigid formula cannot be applied and, therefore, concluded that a sum of Rs.28,00,00,000/- is a reasonable compensation. The relevant paras of the award reads as under:

> *"152. Evidence of the precise amount of loss may not be possible but in the absence of any evidence by the party committing breach to the effect that no loss was caused to the aggrieved party, the Tribunal has to proceed on some guesswork with regard to the quantum of compensation to be allowed in the given circumstances, as ruled by the Supreme Court in Construction and Design Services (supra). Since the Claimant also could have led such evidence to show the extent of actual loss suffered but has failed to do so, the Tribunal opines that it shall be fair to award Rs.28,00,00,000/- (approximately 62% of Rs.45 Crores as claimed by the Claimant) as reasonable compensation on account of the Respondent's breach of the Loan-cum-Pledge-cum-Guarantee Agreement.*
>
> *153. The above conclusion also draws strength from the age-old principle of "reasonable compensation" , which is innate in Section 74 of the Contract Act. An award of compensation , in the absence of clear convincing proof of actual loss or damage, ought to be compensatory in nature and not penal, particularly when the amount claimed by the Claimant to the tune of Rs.45,00,00,000/- does not appear to be a genuine pre-estimate of loss especially when neither the Respondent, that is, the party in breach, nor the Claimant, that is, the party aggrieved by the breach, has been able to prove the actual loss or damage.*
>
> *154. Such an approach is in accord with the real purpose and object of the concept of "reasonable compensation", which is an olive branch of the*

principle of equity, justice and good conscience. Resultantly, when the said principle is adhered to, with all the regard it deserves, any unauthorized or unjust gain for one party at the expense of the other party gets nipped in the bud. Contractual Law cannot be martyred for the inequitable notion of unjust enrichment, for if actual loss or damage remains unproven due to lack of some cogent evidence, the law does not provide for a windfall in favour of the aggrieved party at the detriment of the breaching party. This is what been held by the Supreme Court in Kailash Nath Associates (supra).

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157. That being the case, the Tribunal is of the view that allowing a claim to the tune of Rs.28,00,00,000/- against the Respondent and in favour of the Claimant as reasonable compensation on account of the Respondent's breach of the subject Loan agreement, shall, as far as money can do it, put the Claimant in such a financial position as if the said Loan Agreement had been fully performed by both the parties.

158. In view of the above discussion, the Tribunal, with regard to the third Issue/Point of Determination, holds that owing t o the Respondent's breach of the subject Loan Agreement, the Claimant be allowed against the Respondent, a claim of Rs.28,00,00,000/- as reasonable compensation. It is because had the shares been kept alive, as the Claimant puts it, she would have fetched Rs.45 Crores. Thus, the Tribunal has arrived at the figure regard being had to the amount at which the shares have been sold and the amount that is claimed and further keeping in view the fluctuating nature of the market."

q. The Award dated 20.02.2024 is under challenge in the present

petition.

6. The Learned Counsel for the Petitioner assails the impugned Award on multiple grounds. The main limb of his argument is that the Ld. Tribunal has erroneously applied Section 74 of the Indian Contract Act while awarding damages to the Respondent and the computation of award thereunder is fundamentally flawed. It has been vehemently contended by the Learned Counsel for Petitioner that the Respondent could not establish that any actual loss was attributable to the Petitioner's alleged breach of contract. Thus, while awarding 62 % of the claim amount to the Respondent, the Arbitrator relied on guesswork rather than deploying a logical, standardised or rational methodology. Therefore, the compensation in the Award was nothing but a conjectural determination and lacked logical rigour and thoughtful analysis.

7. Extending this argument, it is further contended by the learned Counsel for the Petitioner that this misapplication of Section 74 to award "reasonable compensation" under Section 73 of the Indian Contract Act sans any coherent basis would contravene and violate Section 28(2) of the Arbitration Act. Though the Arbitrator proceeded to adjudicate the dispute on the basis of equity, justice and good conscience and this was done in the non-existence any express agreement or understanding granting the Ld. Tribunal such an authority. Therefore, the Ld. Tribunal cannot draw strength from or determine compensation on an *ex aequo et bono* basis as it would directly be in the teeth of Section 28(2) of the Arbitration Act.

8. The Learned Counsel for the Petitioner further argued that the Ld. Tribunal's decision was in ignorance of and in disregard of the express provisions of contractual terms entered into between the parties. Therefore,

the decision of the Ld. Tribunal that the terms of the contract were ambiguous and the same warranted a purposive and meaningful interpretation given by the Ld. Tribunal was fallacious and resultantly the Ld. Tribunal acted outside its jurisdiction. The learned Counsel for Petitioner has extended this argument further by stating that on account of this erroneous re-interpretation of the explicit and clear terms of the contract the Award is liable to be set aside under Section 34(2)(a)(iii) read with Section 34(2)(b)(ii) and Section 34(2A) of the Arbitration Act, as it is patently illegal, perverse, unreasoned, and contrary to the public policy of India.

9. The learned Counsel for the Petitioner has also assailed the impugned award on the ground that it is against the principles of natural justice and is in contravention of Section 18 of the Arbitration Act. It is contended that the Ld. Tribunal has buttressed the conclusion in its Award by placing reliance upon arguments that were never advanced by either party. Therefore, this reliance on extraneous arguments, that have not been relied upon by either party, deprived the Petitioner of the opportunity to respond effectively to these arguments and amounts to a gross violation of the principles of natural justice and due process.

10. The learned Counsel for the Petitioner has also assailed the finding of the Ld. Tribunal with respect to the loan recall notice dated 08.07.2020 not being in continuation of the Loan Recall Notice dated 27.03.2020. It has been vehemently contended by the learned Counsel for the Petitioner that the findings of the Ld. Tribunal are perverse inasmuch as it ignores crucial material evidence that was on record. Similarly, the explicit and unambiguous terms of the contract were completely ignored by the Ld.

Tribunal when it held that the Respondent fulfilled its margin requirement. Resultantly, the Award was passed on guesswork, conjectures, ignorance of explicit contractual terms and erroneous application of law leads to unjust enrichment of the Respondent.

11. In a similar vein, the Ld. Counsel for the Petitioner argues that the Ld. Tribunal improperly invoked the doctrine of *contra proferentem*, which is applicable only in cases of ambiguity. The contract's terms were clear and unambiguous, leaving no scope for such an interpretation. The unwarranted application of this principle resulted in a distorted construction of the contractual provisions, further exacerbating the arbitrariness of the Award. This Award, therefore stands in clear violation of Section 18 of the Arbitration Act, as it fails to consider the arguments presented by both parties, thereby contravening the fundamental principles of fairness and natural justice.

12. Thus, in sum and substance the argument of the learned Counsel for the Petitioner is that the findings of the Arbitral Tribunal are in the teeth of explicit contractual terms and is based on conjectures, it ignores relevant evidence on record and contravenes Section 28(2) and 18 of the Arbitration Act by re-interpreting the explicit terms which in the face of clear unambiguous terms of Contract was unwarranted and arbitrary and makes the award liable to be set aside under Section 34.

13. Per contra, learned Counsel for the Respondent has submitted a twofold argument. The first limb of his argument is that there were clear ambiguities in the LAS and that the Ld. Tribunal has constructed the provisions in a manner that gave it a commercially sensible construction in order to have it the effect that was intended by the Parties. He points out that

the Arbitrator, while analysing Clauses 4.4 & 4.5 of the LAS Agreement, concluded that the first four conditions of Clause 4.4 did not exist so as to entitle the Petitioner to recall the loan. The Petitioners, therefore, could not have recalled the loan to enforce the securities that were pledged by the Respondent by giving 3 (three) days notice. The second limb of the argument is that the Arbitrator, in a limited manner read down the omnibus and catchall clauses, which had been framed in broad terms granting the Petitioner sweeping rights to designate any event as that of default or recall the loan. It is stated that the Arbitrator has concluded that the ambiguity which arises from the drastic and extreme contractual rights, weighted heavily against the Respondent and was resolved it through a purposive interpretation approach which does not call for any interference. The Respondent's contractual rights to designate an event as that of default and/or terminate the Loan Agreement was construed in a limited manner that the Arbitrator gave a commercially sensible construction of the contract.

14. The sum and substance of the argument of the Respondent is that once the Arbitrator has taken a plausible view with respect to the construction of the terms of the contract this Court, under Section 34, cannot sit in appeal to decide whether the findings of the Arbitral Tribunal with respect to the interpretation of the contract were correct or not.

15. The Learned Counsel for the Respondent also argues that by invoking business common sense and reasonably construing a contract the Arbitrator has highlighted the ambiguity in the LAS Agreement and passed an award that was in consonance with the provisions of Section 28(3) the Arbitration Act. It is stated that the argument of the learned Counsel of the petitioner with respect to violation of principles of natural justice is untenable. He

argues that Arbitral Award was passed by the Arbitrator after giving sufficient opportunities to the parties including granting an opportunity to the parties to furnish their pleadings as well as the written submissions. He also contends that the Arbitrator is the final authority to interpret the terms of the Agreement and is not bound to be restricted only the pleadings on law.

16. The Learned Counsel for the Respondent also argues that the damages of ₹28 crores were fair and based on reasonable estimation of the lost value of shares for the recall of the loan was arbitrary and unlawful. The loaned amount was adequately secured at all times. He points out that the the Petitioner ignored additional securities pledged by the Respondent on 18.03.2020, which covered the margin shortfall. Furthermore, despite Respondent paying ₹28 lakhs on 25.03.2020, the Petitioner still sold 3,213 Hinduja shares on 26.03.2020. The Counsel for the Respondent asserts that the Petitioner could not prove that it had a valid reason for recall of loan when it issued in the notice dated 27.03.2020. It is also contended by the Counsel by the Respondent that the loan against securities should have been treated as a Term Loan, making it eligible for the RBI's Covid-19 moratorium. Thus, taking a sum total of the prevailing circumstances and drawing fair conclusion from material on record and prevailing market prices of the shares as on the date of filing of the Statement of Claim by the Petitioner, the compensation awarded by the Ld. Tribunal to the Respondent was just and fair.

17. The Ld. Counsel for the Respondent argues that the interpretation of the provisions of the LAS agreement, by the Ld. Tribunal, in the face of ambiguity of the terms and conditions therein would not amount to patent

illegality. The Ld. Tribunal has taken a view that is legally tenable and possible. While fleshing out the argument further, he contends that Arbitrator's view interprets the terms and conditions of the contract in a holistic and commercially sensible manner, that is in alignment with the letter and spirit of the contract. The view taken by the Ld. Tribunal gives precedence to a view that is consistent with business common sense. The sum and substance of the reasoning of the arbitrator was that the language of the contractual provisions was laden with omnibus and catchall clauses, framed in broad terms granting the Petitioner sweeping rights to designate any event as an event of default to recall the loan. Therefore, the ambiguity arising from the drastic and extreme contractual rights heavily weighted against the Respondent and the same was sought to be resolved by the Arbitrator through a purposive interpretation of the terms of the contract. The Petitioner's contractual rights to designate an event as an event of default was construed in a limited manner. Therefore, the interpretation of the Ld. Tribunal was to achieve a commercially sensible and pragmatic result preventing arbitrary exercise of such rights.

18. While responding to the arguments advanced by the Ld. Counsel for the Petitioner, the Ld. Counsel for the Respondent contended that the Petitioner deliberately issued the recall notice on 27.03.2020, within hours of the RBI's announcement, and thus this is indicative of the fact that the act of the Petitioner was driven by greed and was done in bad faith rather than being compelled by commercial necessity of securing the loan. Thus, the Ld. Tribunal correctly held that the RBI moratorium should have been honoured.

19. The Counsel for the Respondent further points out that the margin requirement was always complied with by the Complainant/Respondent. She

always met margin calls, and at no point did the margin fall below 85% (that being the contractual trigger for loan recall). Even after receiving payments from the Respondent, the Petitioner proceeded to sell shares in an unjust manner. By 22.05.2020, the Respondent's loan was secured at 450% of the outstanding loan value, proving that the recall was unnecessary.

20. Heard learned Counsel for the parties and perused the material on record.

21. Issues No.2 and 3 are the heart of the entire case. The contention of the learned Counsel for the Petitioner is that the loan recall notice was first given on 27.03.2020 followed by a second notice dated 12.06.2020 which was further followed by an email dated 08.07.2020 and, thereafter, the shares were sold on 09.07.2020 and 10.07.2020. It is stated that it was not necessary for the Petitioner to wait for three more days after 08.07.2020 in view of the fact that the first notice was sent on 27.03.2020 and the Respondent did not take steps to fill in the shortfall in terms of the LAS Agreement. It was open for the Petitioner to sell the shares on 30.03.2020 itself. It, however, did not do so because of the request of the Respondent and in view of the ongoing correspondence between the parties. The argument put forth by counsel for the Petitioner cannot be accepted.

22. The finding of the Arbitrator that there was no unbridled right with the Petitioner to sell shares and that Clause 4.4 of the Loan Agreement gives the events of default which alone gives a right to the Petitioner to sell shares does not require any interference. The fact that Clause 4.5 of the Loan Agreement does stipulate that the loan is repayable unconditionally at the lender's discretion without any reason has to be read in the spirit of the Loan Agreement. The finding of the Arbitrator that unless the conditions

stipulated in Clause 4.4 does not exist, the loan cannot be recalled and the borrower cannot be made to pay the loan at the discretion of the lender is based on commercially sensible construction of the contact which is consistent with business common sense.

23. In order to arrive at its decision, the Ld. Tribunal undertook a meticulous analysis of the individual clauses of LAS Agreement that deal with the powers of the Petitioner, to recall the loan as well as the conditions which would be considered as an event of default and would trigger the recall of the loan. Thereafter, the Ld. Tribunal proceeded to ascertain whether any such event of default occurred in the first place.

24. Article I of Clause 1.28 of the LAS Agreement which defines Securities reads as under:-

> *"**1.28** "Securities" means such marketable shares I debentures I bonds I units of Mutual Funds and other securities as defined in the Securities Contracts (Regulation) Act, 1956, acceptable to the Lender and shall include (wherever the context of this agreement so requires) Mutual Funds of funds registered with Securities Exchange Board of India, and such other securities of a nature and description acceptable to the Lender, which are deposited by the Security Provider with the lender as Security for the repayment of the Loan."*

25. Clause 4 under Article II of the Agreement which deals with "Repayment and Recall" of Loan in particular Clause 4.4 and 4.5 elaborate the circumstances and conditions when the loan extended by the Petitioner to the Respondent became repayable in full by the Respondent. Clause 4 under Article II of the Agreement reads as under:-

> *"**4.4** without limitation or prejudice to the rights of the Lender under this Agreement, the loan shall be*

repayable in full forthwith by the Borrower in the event of Borrower's failure to:

i. comply with any of the requirements under this Agreement or breach of any provisions hereof;

ii. pay any Interest when due to the Lender; or

iii. pay any amount when due to (a) the Lender under any other agreement; or (b) any other person

iv. Failure to maintain or provide Margin, when called upon by the Lender

v. ***An Event of default, as specified in Article V has occurred.***

4.5 ***The Borrower also agrees that the loan is repayable unconditionally on demand made by the Lender at the Lender's absolute discretion and without giving any reasons whatsoever, The Lender would give Three (3) Working Day(s) notice to the Borrower to repay the loan together with all amounts due including interest accrued, charges, dues, levies, expenses, claims, costs and fees thereon of otherwise in relation to this Agreement till the date of actual realisation. Upon receipt of such notice the Borrower shall forthwith repay the Loan."***

[Emphasis supplied]"

26. Clause 1.1 under Article V stipulates the events which constitute default for the purpose of LAS Agreement, which reads as under:-

"ARTICLE V
EVENTS OF DEFAULT TERMINATION
/SUSPENSION OF LOAN

1. Events of Default

1.1 Each of the following events is, and shall be deemed to constitute, an "Event of Default";

i. if the Borrower defaults in the re-payment of the loan or payment of any interest due or any expense or charges as and when they become payable;

ii. if the Borrower is called upon to make good the Margin as specified in the schedule of Terms and it fails to do so within the period of notice specified in the said article;

iii. if the Borrower/Security Provider has made any material misrepresentation of facts, including (without limitation) in relation to the Security;

iv. if the Borrower I Security provider has voluntarily or compulsorily become the subject of proceedings under any bankruptcy or insolvency law or being a company, goes into liquidation or has a receiver appointed in respect of its assets or refers itself to the Board for Industrial and Financial Reconstruction or under any other law providing protection as relief undertaking;

v. if the Borrower/Security Provider being a partnership firm, has steps taken by the Borrower/Security Provider and/or its partners for dissolution of the partnership;

vi. on the death/lunacy or other disability of the Borrower/Security Provider;

*vii. **if there is reasonable apprehension that the Borrower/Security Provider has admitted in writing its inability to pay its debts, as they become payable**;*

viii. if the Borrower/Security Provider suffers any adverse material change in his /her /its financial position or defaults in any other agreement with the Lender;

ix. if there is any commencement of a legal process against the Borrower I Security Provider under any criminal law in force;

x. if the Borrower and I or the Security Provider have taken or suffered to be taken any action for its reorganization, liquidation or dissolution;

xi. if a receiver, administrator or liquidator has been appointed or allowed to be appointed of all or any part of the undertaking of the Borrower I Security Provider;

xii. if the Borrower is in breach of any term or condition of this Agreement (including in respect of payment of the loan balance/ or any Agreements in relation to the Security or the Loan Documents;

xii. if any covenant or warranty of the Borrower is incorrect or untrue in any material respect;

xiv. if the Security Provider creates any encumbrance over the Security, or otherwise takes any action towards creation of such encumbrance over the Security;

xv. if the title of the Security Provider to the Security is in jeopardy or if there is an attachment or lien against the Security;

xvi. if the Borrower I Security Provider acts /or desists from acting in any manner which will jeopardize the security or the powers vested in the lender under the Power(s) of Attorney from being exercised solely by the Lender (acting through its Authorized representatives);

xvii. there exists any other circumstances, which in the sole opinion of the Lender is prejudicial to the interest of the Lender; and

xviii. if any Event of Default has occurred under any other agreement entered into by the Borrower or any associate/ affiliate of the Borrower or a person or entity related to the Borrower."

[Emphasis supplied]

27. Clause 2.1 of Article V which deals state that in case of event of default mention in Clause 1, the Petitioner was required to give a notice of one working day. Clause 2.1 and 2.4 falling within Article V of LAS Agreement have been reproduced hereunder:-

*"**2. Notice of Event of Default***

***2.1** If any Event of Default or any event which after a lapse of time is capable of becoming an Event of Default takes place, the Lender shall give notice of one (1) working Day or any reasonable notice as the Lender may deem fit, to the Borrower specifying the nature of such Event of Default or of such event. If the Event of Default is capable of being cured or remedied, the Borrower shall cure or remedy the default or such event before the expiry of the notice.*

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***2.4** Upon the expiry of the period of notice or if no notice is required to be given, unless the Lender gives further time or other accommodation in writing, the Loan Balance shall immediately stand repayable by the Borrower to the Lender and the Security shall immediately become enforceable and the provisions of Article VI shall be applicable. The Lender may also terminate this Agreement at any time after the expiry of*

the period of notice."

28. Clause 4.1 under Article V that deals with the power of the Petitioner to terminate the Agreement is reproduced hereunder: -

> *"**4. Termination /Suspension of Loan***
>
> ***4.1** The Lender may in sole discretion and without assigning any reason terminate this Agreement. On the termination of this Agreement the Lender shall entitled to recall the entire Loan Balance including the balance under each Loan, after issuing a Three (3) Working Days notice."*

29. Apropos of the analysis of the relevant clauses of the LAS, the Ld. Tribunal looked at the contextual setting in which the agreement between the parties had been entered into. The Ld. Tribunal concluded that the contractual entitlement of the Petitioner to the recall the loan needed to be rooted in a tangible base incident or occurrence which would have satisfied the trigger for recalling the loan. The Ld. Tribunal further held that it would be incorrect to say that any random event or occurrence across the vast expanse of the world could grant such expansive and crucial rights in favour of the Respondent. The ambiguity in the provisions of the LAS agreement emanates from this all-inclusive and unbridled right of the Respondent to terminate the agreement and this ambiguity was read and interpreted by the Arbitrator in a commercially sensible manner. The Arbitrator was of the view that a mechanical and literal interpretation would lead to a situation where the Petitioner could designate any event or occurrence as an event of default. Therefore, the Arbitrator's decision to purposively interpret the terms of the LAS Agreement stems from the reasoning that such a drastic power cannot be left to the caprices of the Petitioner and should necessarily

read in a manner that is in furtherance of the interests, objectives, values, policy that the contract is meant to actualise. For this he lays particular emphasis to the joint intention of the parties by looking at the contract, its terms and circumstances surrounding its formation as a whole.

> *"**105**. The main thrust of the arguments put forth by the learned Senior Counsel for the Respondent 1s that any circumstance, which, in the sole opinion of the Respondent, is prejudicial to the Respondent's interest shall constitute an event of default for the purposes of the Loan-cum-Pledge-cum-Guarantee agreement. In this regard, learned Senior Counsel for the Respondent has placed reliance on Clause 4.4(v) under Article II read with Clauses 1.l(vii) and Clause (xvii) under Article V.*
>
> ***106**.Additionally, citing Clause 4.5 under Article II, Clause 4.1 under Article V and Clause 5.1 under Article VII, the Mr. Sakhardande, learned Senior Counsel, has contended that the Agreement allows the Respondent to terminate the Agreement, without assigning any reasons, and the Claimant has agreed that the loan 1s repayable unconditionally on demand by the Respondent, at the Respondent's absolute sole discretion, without giving any reasons whatsoever.*
>
> ***107**. However, the Tribunal is afraid that the aforesaid contentions cannot be accepted. Rather, an event of default and the consequent contractual entitlement of the Respondent to recall the loan, extended to the Claimant, has to have a real tangible base incident and occurrence, which could be said to have enlivened or triggered the Respondent's contractual entitlement to recall the loan. It cannot be that any event or occurrence in the wide world, at the Respondent's sole discretion, could give rise to such a crucial contractual right in favour of the Respondent to recall the loan and, thereafter, enforce the securities that were*

pledged by the Claimant by giving a 3 (three) days' notice.

***108**. Clearly, the language of the said contractual provisions is ambiguous. Such omnibus and catchall Clauses, which have been couched in such wide terms and accord the Respondent such all-inclusive sweeping rights either to designate any event as an event of default and/or to recall the loan, have given rise to an element of ambiguity in the Loan-cum-Pledge-cum-Guarantee Agreement and, thus , it becomes requisite to look at the contextual setting in which the said Clauses of the Loan-cum-Pledge-cum-Guarantee Agreement have been agreed between the Claimant and the Respondent.*

***109**. This ambiguity, which has crept in due to such drastic and extreme contractual rights pitted heavily against the Claimant, has to be resolved by the purposive interpretation approach and an event of default for the purposes of the Loan-cum-Pledge-cum-Guarantee Agreement as well as the Respondent's right to terminate the said Agreement has to be read in a limited way.*

***110**.It needs to be stated that the Respondent's said contractual rights to designate an event as an event of default and/or to terminate the Loan Agreement must have a rational and acceptable understanding and the exercise of such rights cannot be at the sole unbridled discretion of the Respondent. For this reason the manner in which such contractual rights accrue in favour of the Respondent needs to be understood. To aid the construction of such blanket and omnibus clauses of the agreement, a business common sense approach has to be adopted so that a commercially sensible and pragmatic result 1s attained, which resultantly shall keep the arbitrary exercise of such contractual rights by the lender-Respondent at bay."*

30. This Court is of the view that the view taken by the Ld. Tribunal with respect to the interpretation of the terms of the contract was a plausible one and based on sound reasoning. The view of the Ld. Tribunal that at the time of the sale of securities by the Petitioner the loan recall was invalid, meaning thereby that the subsequent sale of securities was also illegal does not require interference. The Petitioner did not provide the mandatory three-day notice before selling the securities on 09.07.2020 and 10.07.2020. The Petitioner could not have sold the shares without ascertaining, on the date of the sale, whether the shortfall in margin continued or not since the sale of the shares by the Petitioner was not in spirit of the contract. The Ld. Tribunal was justified in calculating the compensation and awarding the same to the Respondent.

31. With respect to the second issue, this Court is of the view that the reasoning given by the Ld. Tribunal is a tenable one. It is trite in law that Section 73 of the Indian Contract Act allows for reasonable compensation in the event of loss or damage that is caused by breach of a contract. Therefore, a corollary would be that it was well within the discretion of the Ld. Tribunal, after having perused the materials, evidence and arguments placed on record, to arrive at a reasonable compensation. The Ld. Tribunal has carefully considered the difficulty of arriving at the exact price of market-based asset such as shares as it is constantly fluctuating based on the market conditions. The decision of the Ld. Tribunal emanates for the understanding that the Petitioner had recalled the loan in contravention of the provisions of the contract and the fact that the claimant had not failed to mitigate her loss in any manner whatsoever.

32. The Ld. Tribunal also takes cognizance of the fact that the

Respondent had acted in good faith taken earnest steps to maintain the margin requirement such as providing additional securities and payments. Thus, the Respondent had fulfilled their obligations with respect to the contract at all times. The Ld. Tribunal's decision of awarding compensation to the Respondent was aimed at compensating the damage that had been caused by the breach of contract and wrongful sale of shares by the Petitioner. The moot question therefore remains is whether the reliance of the Ld. Tribunal on guesswork was permissible by the Ld. Tribunal or not.

33. This Court agrees with the finding of the Ld. Tribunal while considering the fluctuating nature of share values, the Ld. Tribunal placed reliance on approximate figures based on cogent evidence laid before it thus taking a reasonable and plausible view. The Ld. Tribunal's methodology of estimating compensation may be critiqued for not adhering to any strict formula, however, that would not render the findings of the Ld. Tribunal untenable and the Ld. Tribunal is well within its discretion to come up with an approximate figure of compensation. The relevant portion of the impugned award reads as under:-

> *"**152**. Evidence of the precise amount of loss may not be possible but in the absence of any evidence by the party committing breach to the effect that no loss was caused to the aggrieved party, the Tribunal has to proceed on some guesswork with regard to the quantum of compensation to be allowed in the given circumstances, as ruled by the Supreme Court in Construction and Design Services (supra). Since the Claimant also could have led such evidence to show the extent of actual loss suffered but has failed to do so, the Tribunal opines that it shall be fair to award Rs.28,00,00,000/- (approximately 62% of Rs.45 Crores as claimed by the Claimant) as reasonable compensation on account of the Respondent's breach*

of the Loan-cum-Pledge-cum-Guarantee Agreement.

***153**. The above conclusion also draws strength from the age-old principle of "reasonable compensation" , which is innate in Section 74 of the Contract Act. An award of compensation , in the absence of clear convincing proof of actual loss or damage, ought to be compensatory in nature and not penal, particularly when the amount claimed by the Claimant to the tune of Rs.45,00,00,000/- does not appear to be a genuine pre-estimate of loss especially when neither the Respondent, that is, the party in breach, nor the Claimant, that is, the party aggrieved by the breach, has been able to prove the actual loss or damage.*

***154**. Such an approach is in accord with the real purpose and object of the concept of "reasonable compensation", which is an olive branch of the principle of equity, justice and good conscience. Resultantly, when the said principle is adhered to, with all the regard it deserves, any unauthorized or unjust gain for one party at the expense of the other party gets nipped in the bud. Contractual Law cannot be martyred for the inequitable notion of unjust enrichment, for if actual loss or damage remains unproven due to lack of some cogent evidence, the law does not provide for a windfall in favour of the aggrieved party at the detriment of the breaching party. This is what been held by the Supreme Court in Kailash Nath Associates (supra). "*

34. The thrust of the argument of the Petitioner seems to be that the Ld. Tribunal's action of awarding compensation under Section 74 was erroneous. This argument cannot be sustained for the simple reason that the Ld. Tribunal has taken a plausible view which is grounded in the principle of "reasonable compensation" under Section 73 of the Indian Contract Act. In this context it would be apposite to refer to the case of ONGC Ltd. v. Saw

Pipes Ltd., **(2003) 5 SCC 705**, wherein the Supreme Court has held as under:-

> *"**64**. It is apparent from the aforesaid reasoning recorded by the Arbitral Tribunal that it failed to consider Sections 73 and 74 of the Indian Contract Act and the ratio laid down in Fateh Chand case [AIR 1963 SC 1405 : (1964) 1 SCR 515 at p. 526] wherein it is specifically held that jurisdiction of the court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; and compensation has to be reasonable. Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides that 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, the party complaining of breach is entitled, whether or not actual 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. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not*

required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach. Take for illustration: if the parties have agreed to purchase cotton bales and the same were only to be kept as a stock-in-trade. Such bales are not delivered on the due date and thereafter the bales are delivered beyond the stipulated time, hence there is breach of the contract. The question which would arise for consideration is — whether by such breach the party has suffered any loss. If the price of cotton bales fluctuated during that time, loss or gain could easily be proved. But if cotton bales are to be purchased for manufacturing yarn, consideration would be different.

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

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

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

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach

even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

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

(emphasis supplied)

35. Further, the Apex Court in OPG Power Generation (P) Ltd. v. Enexio Power Cooling Solutions India (P) Ltd., **2024 SCC OnLine SC 2600,** has observed as under:-

68. The aforesaid judicial precedents make it clear that ***while exercising power under Section 34 of the 1996 Act the Court does not sit in appeal over the arbitral award. Interference with an arbitral award is only on limited grounds as set out in Section 34 of the 1996 Act. A possible view by the arbitrator on facts is to be respected as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. It is only when an arbitral award could be categorized as perverse, that on an error of fact an arbitral award may be set aside. Further, a mere erroneous application of the law or wrong appreciation of evidence by itself is not a ground to set aside an award as is clear from the provisions of subsection (2-A) of Section 34 of the 1996 Act.***

69. In Dyna Technologies (supra), a three-Judge Bench of this Court held that Courts need to be cognizant of the fact that arbitral awards are not to be interfered with in a casual and cavalier manner, ***unless the court concludes that the perversity of the award goes to the root of the matter and there is no***

possibility of an alternative interpretation that may sustain the arbitral award. It was observed that jurisdiction under Section 34 cannot be equated with the normal appellate jurisdiction. Rather, the approach ought to be to respect the finality of the arbitral award as well as party's autonomy to get their dispute adjudicated by an alternative forum as provided under the law*.*

xxx

72. *An arbitral tribunal must decide in accordance with the terms of the contract. In a case where an arbitral tribunal passes an award against the terms of the contract, the award would be patently illegal. However,* ***an arbitral tribunal has jurisdiction to interpret a contract having regard to terms and conditions of the contract, conduct of the parties including correspondences exchanged, circumstances of the case and pleadings of the parties. If the conclusion of the arbitrator is based on a possible view of the matter, the Court should not interfere****. But where, on a full reading of the contract, the view of the arbitral tribunal on the terms of a contract is not a possible view, the award would be considered perverse and as such amenable to interference*[59]*.*

73. Ordinarily, terms of the contract are to be understood in the way the parties wanted and intended them to be. In agreements of arbitration, where party autonomy is the grund norm, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions used*.*

74. *However,* ***reading an unexpressed term in an agreement would be justified on the basis that such a term was always and obviously intended by the parties thereto. An unexpressed term can be implied if, and only if, the court finds that the parties must have***

intended that term to form part of their contract. It is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them. Rather, it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, forms part of the contract.

75. *But before an implied condition, not expressly found in the contract, is read into a contract, by invoking the business efficacy doctrine, it* ***must satisfy following five conditions:***

a. it must be reasonable and equitable;

b. it must be necessary to give business efficacy to the contract, that is, a term will not be implied if the contract is effective without it;

c. it must be obvious that "it goes without saying";

d. it must be capable of clear expression;

e. it must not contradict any terms of the contract"

(emphasis supplied)

36. After careful perusal of the Award it is apparent that the use of guesswork is not improper for balancing equity and fairness while respecting and acknowledging commercial realities of the share market. The relevant portion of the impugned award reads as under:-

*"**157**. That being the case, the Tribunal is of the view that allowing a claim to the tune of Rs.28,00,00,000/- against the Respondent and in favour of the Claimant as reasonable compensation on account of the Respondent's breach of the subject Loan agreement, shall, as far as money can do it, put the Claimant in such a financial position as if the said Loan Agreement had been fully performed by both the parties."*

37. In this regard it would be relevant to refer to observations made by the Apex Court in McDermott International Inc. v. Burn Standard Co. Ltd., **(2006) 11 SCC 181,** wherein the Apex Court has held as under:-

> *"**110**. As computation depends on circumstances and methods to compute damages, how the quantum thereof should be determined is a matter which would fall for the decision of the arbitrator. We, however, see no reason to interfere with that part of the award in view of the fact that the aforementioned formula evolved over the years, is accepted internationally and, therefore, cannot be said to be wholly contrary to the provisions of the Indian law. "*

38. In the instant case, the Ld. Tribunal while deliberating on the reasonable compensation for the breach, cited Section 74 of the Indian Contract Act and the need for compensation to align with equity and justice. The Ld. Tribunal held that while exact loss was difficult to quantify, it must be compensated reasonably, particularly in the absence of clear figures.

39. Further, the Apex Court in Gemini Bay Transcription Private Limited v. Integrated Sales Service Private Limited & Anr., **(2022) 1 SCC 753**, has observed as under:-

> *"**78**. That such "guesstimates" are not a stranger to the law of damages in the US and other common law tradition nations has been established very early on in a judgment of Asutosh Mookerjee, J. reported as Frederick Thomas Kingsley v. Secy. of State for India [Frederick Thomas Kingsley v. Secy. of State for India, AIR 1923 Cal 49] . In this judgment, a learned Division Bench of the Calcutta High Court put it thus:*
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> > *"It may be conceded that though every breach of duty arising out of a contract gives rise to an action*

for damages, without proof of actual damage, Marzetti v. Williams [Marzetti v. Williams, (1830) 1 B & Ad 415 : 109 ER 842 : 35 RR 329] , Embrey v. Owen [Embrey v. Owen, (1851) 6 Ex 353 : 155 ER 579 : 86 RR 331] , the amount of damages recoverable is, as general rule, governed by the extent of the actual damage sustained in the consequence of the defendant's act, Hiort v. London & North West Railway Co. [Hiort v. London & North West Railway Co., (1879) 4 Exch Div 188] In cases admitting proof of such damage, the amount must be established with reasonable certainty, Commerce, In re [Commerce, In re, (1850) 3 W Rob 286 : 166 ER 969] . ***But this does not mean that absolute certainty is required, nor in all cases, is there a necessity for direct evidence as to the amount. Damages are not uncertain for the reason that the loss sustained is incapable of proof with the certainty of mathematical demonstration or is to some extent contingent and incapable of precise measurement.*** *As Harlan, J. observed in delivering the judgment of the Supreme Court of the United States in Hetzel v. Baltimore & O.P. Co. [Hetzel v. Baltimore & O.P. Co., 1898 SCC OnLine US SC 12 : 42 L Ed 648 : 169 US 26 (1898)] , US at p. 38 certainty to reasonable extent is necessary, and the meaning of that language is that the loss of damage must be so far removed from speculation or doubt as to create in the minds of intelligent and reasonable men the belief that it is most likely to follow from the breach of the contract and was a probable and direct result thereof. To the same effect is the decision in Morris v. United States [Morris v. United States, 1899 SCC OnLine US SC 105 : 43 L Ed 946 : 174 US 196 (1899)] that where absolute certainty is impossible, judgment of fair men as to damages directly resulting governs."*

(at pp. 50, 51)"

(emphasis supplied)

40. The Apex Court in Trishala Jain v. State of Uttaranchal, **(2011) 6 SCC 47**, has observed as under:-

> *"**56.** More often than not, it is not possible to fix the compensation with exactitude or arithmetic accuracy. Depending on the facts and circumstances of the case, the court may have to take recourse to some guesswork while determining the fair market value of the land and the consequential amount of compensation that is required to be paid to the persons interested in the acquired land.*
>
> ***57. "Guess" as understood in its common parlance is an estimate without any specific information while "calculations" are always made with reference to specific data. "Guesstimate" is an estimate based on a mixture of guesswork and calculations and it is a process in itself. At the same time "guess" cannot be treated synonymous to "conjecture". "Guess" by itself may be a statement or result based on unknown factors while "conjecture" is made with a very slight amount of knowledge, which is just sufficient to incline the scale of probability. "Guesstimate" is with higher certainty than mere "guess" or a "conjecture" per se."***
>
> (emphasis supplied)

41. The Apex Court in Construction & Design Services v. Delhi Development Authority, **(2015) 14 SCC 263**, has observed as under:-

> *"**15**. Once it is held that even in the absence of specific evidence, the respondent could be held to have suffered loss on account of breach of contract, and it is entitled to compensation to the extent of loss suffered, it is for the appellant to show that stipulated damages are by way of penalty. In a given case, when the highest limit is stipulated instead of a fixed sum, in the absence of*

evidence of loss, part of it can be held to be reasonable compensation and the remaining by way of penalty. The party complaining of breach can certainly be allowed reasonable compensation out of the said amount if not the entire amount. If the entire amount stipulated is genuine pre-estimate of loss, the actual loss need not be proved. Burden to prove that no loss was likely to be suffered is on the party committing breach, as already observed.

***16**. It is not necessary to refer to all the judgments on the point in view of categorical pronouncement of this Court in Saw Pipes [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] , laying down as follows: (SCC pp. 740-42, paras 64 & 67)*

> *"64. It is apparent from the aforesaid reasoning recorded by the Arbitral Tribunal that it failed to consider Sections 73 and 74 of the Indian Contract Act and the ratio laid down in Fateh Chand case [Fateh Chand v. Balkishan Dass, AIR 1963 SC 1405 : (1964) 1 SCR 515] wherein it is specifically held that jurisdiction of the court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; and compensation has to be reasonable. Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides that 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, the party complaining of breach is entitled, whether or not actual 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. Section 74 emphasises that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach. Take for illustration: if the parties have agreed to purchase cotton bales and the same were only to be kept as a stock-in-trade. Such bales are not delivered on the due date and thereafter the bales are delivered beyond the stipulated time, hence there is breach of the contract. The question which would arise for consideration is — whether by such breach the party has suffered any loss. If the price of cotton bales fluctuated during that time, loss or gain could easily be proved. But if cotton bales are to be purchased for manufacturing yarn, consideration would be different.

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67. Take for illustration construction of a road or a bridge. If there is delay in completing the construction of road or bridge within the stipulated time, then it would be difficult to prove how much loss is suffered by the society/State. Similarly, in the

present case, delay took place in deployment of rigs and on that basis actual production of gas from platform B-121 had to be changed. It is undoubtedly true that the witness has stated that redeployment plan was made keeping in mind several constraints including shortage of casing pipes. The Arbitral Tribunal, therefore, took into consideration the aforesaid statement volunteered by the witness that shortage of casing pipes was only one of the several reasons and not the only reason which led to change in deployment of plan or redeployment of rigs Trident II platform B-121. In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that the party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provisions of Sections 73 and 74 of the Contract Act, 1872. There was nothing on record that compensation contemplated by the parties was in any way unreasonable. 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."*

42. Moreover, the scope of Section 34 of the Arbitration and Conciliation Act has been analysed by the Apex Court in number of times. In Dyna Technologies Private Limited Vs. Cromption Greaves Limited, **(2019) 20 SCC 1**, the Apex Court has held as under:-

*"**24**. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an*

alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.

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***35**. When we consider the requirement of a reasoned order, three characteristics of a reasoned order can be fathomed. They are: proper, intelligible and adequate. If the reasonings in the order are improper, they reveal a flaw in the decision-making process. If the challenge to an award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under Section 34 of the Arbitration Act. If the challenge to an award is based on the ground that the same is unintelligible, the same would be equivalent of providing no reasons at all. Coming to the last aspect concerning the challenge on adequacy of reasons, the Court while exercising jurisdiction under Section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. The degree of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue. Even if the Court comes to a conclusion that there were gaps in the reasoning for the conclusions reached by the Tribunal, the Court needs to have regard to the documents submitted by the parties and the contentions raised before the Tribunal so that awards with inadequate reasons are not set aside in casual and cavalier manner. On the other hand, ordinarily unintelligible awards are to be set aside, subject to party autonomy to do away with the reasoned award. Therefore, the courts are required to be careful while distinguishing between inadequacy of reasons in an award and unintelligible awards.*

43. Similarly, the Apex Court in Batliboi Environmental Engineers Limited v. Hindustan Petroleum Corporation Limited and Another, **(2024) 2 SCC 375** has observed as under:-

> *"**35**. Sub-section (1) to Section 34 of the A&C Act requires that the recourse to a court against an arbitral award is to be made by a party filing an application for setting aside of an award in accordance with sub-sections (2) and (3) of Section 34. Sub-section (2) to Section 34 of the A&C Act stipulates seven grounds on which a court may set aside an arbitral award. Sub-section (2) consists of two clauses, (a) and (b). Clause (b) consists of two sub-clauses, namely, sub-clause (i) which states that when the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, and sub-clause (ii), which states that the court can set aside an arbitral award when the award is "in conflict with public policy of India". We shall subsequently examine the decisions of this Court interpreting "in conflict with public policy of India" and the explanation.*
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> ****
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> ***37**. Explanation to sub-clause (ii) to clause (b) to Section 34(2) of the A&C Act, as quoted above and before its substitution by Act 3 of 2016, had postulated and declared for avoidance of doubt that an award is "in conflict with the public policy of India", if the making of the award is induced or affected by fraud or corruption, or was in violation of Sections 75 or 81 of the A&C Act. Both Sections 75 and 81 of the A&C Act fall under Part III of the A&C Act, which deal with conciliation proceedings. Section 75 of the A&C Act relates to confidentiality of the settlement proceedings and Section 81 deals with admissibility of evidence in conciliation proceedings. Suffice it is to note at this*

stage that while "fraud" and "corruption" are two specific grounds under "public policy", these are not the sole and only grounds on which an award can be set aside on the ground of "public policy".

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***45**. Referring to the third principle in Western Geco [ONGC Ltd. v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , it was explained that the decision would be irrational and perverse if (a) it is based on no evidence; (b) if the Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or (c) ignores vital evidence in arriving at its decision. The standards prescribed in State of Haryana v. Gopi Nath & Sons [State of Haryana v. Gopi Nath & Sons, 1992 Supp (2) SCC 312] (for short Gopi Nath & Sons) and Kuldeep Singh v. Delhi Police [Kuldeep Singh v. Delhi Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429] should be applied and relied upon, as good working tests of perversity. In Gopi Nath & Sons [State of Haryana v. Gopi Nath & Sons, 1992 Supp (2) SCC 312] it has been held that apart from the cases where a finding of fact is arrived at by ignoring or excluding relevant materials or taking into consideration irrelevant material, the finding is perverse and infirm in law when it outrageously defies logic as to suffer from vice of irrationality. Kuldeep Singh [Kuldeep Singh v. Delhi Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429] clarifies that a finding is perverse when it is based on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it. If there is some evidence which can be acted and can be relied upon, however compendious it may be, the conclusion should not be treated as perverse. This Court in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] emphasised that the public policy test to an*

arbitral award does not give jurisdiction to the court to act as a court of appeal and consequently errors of fact cannot be corrected. Arbitral Tribunal is the ultimate master of quality and quantity of evidence. An award based on little evidence or no evidence, which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Every arbitrator need not necessarily be a person trained in law as a Judge. At times, decisions are taken acting on equity and such decisions can be just and fair should not be overturned under Section 34 of the A&C Act on the ground that the arbitrator's approach was arbitrary or capricious. Referring to the third ground of public policy, justice or morality, it is observed that these are two different concepts. An award is against justice when it shocks the conscience of the court, as in an example where the claimant has restricted his claim but the Arbitral Tribunal has awarded a higher amount without any reasonable ground of justification. Morality would necessarily cover agreements that are illegal and also those which cannot be enforced given the prevailing mores of the day. Here again interference would be only if something shocks the court's conscience. Further, "patent illegality" refers to three sub-heads : (a) contravention of substantive law of India, which must be restricted and limited such that the illegality must go to the root of the matter and should not be of a trivial nature. Reference in this regard was made to clause (a) to Section 28(1) of the A&C Act, which states that the dispute submitted to arbitration under Part I shall be in accordance with the substantive law for the time being in force. The second sub-head would be when the arbitrator gives no reasons in the award in contravention with Section 31(3) of the A&C Act. The third sub-head deals with contravention of Section 28(3) of the A&C Act which states that the Arbitral Tribunal shall decide all cases in accordance with the terms of the contract and shall take into account the usage of the trade applicable to

> *the transaction. This last sub-head should be understood with a caveat that the arbitrator has the right to construe and interpret the terms of the contract in a reasonable manner. Such interpretation should not be a ground to set aside the award, as the construction of the terms of the contract is finally for the arbitrator to decide. The award can be only set aside under this sub-head if the arbitrator construes the award in a way that no fair-minded or reasonable person would do."*

44. In light of facts and circumstances surrounding instant case as well as settled law this Court is of the opinion that the view taken by the Ld. Tribunal is not only plausible but is based on cogent evidence placed before it. Therefore, this Court is precluded from substituting its own conclusion in place of that arrived at by the Ld. Tribunal.

45. In view of the above, the petition is dismissed along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

FEBRUARY 27, 2025
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