JYOTI RAJESH MANE
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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION NO.443 OF 2017

Kumar Urban Development Private Limited,
Office at No.7, Ground Floor, Sarvodaya Estate,
Tardeo, Mumbai-400 034. — Petitioner (Org.Claimant)

versus

The Jal Ratn Deep Co-operative Housing
Society Limited, Plot No.13-B, Survey No.161(Pt),
Bangur Nagar, M.G.Road, Goregaon (West),
Mumbai-400090. — Respondent (Org.Respondent)

Mr.Zal Andhyarujina, Senior Advocate, with Mr.Aditya Shiralkar, Mr.Jahaan Dastur, Mr.Gaurav Gopal, Mr.Mohit Goyal, Ms.Shreshtha Sharma, Mr.Samyak Jain i/by Wadia Ghandy & Co. for Petitioner.

Mr.Rohan Cama with Mr.Aman Sadiwala, Mr.Yash Dhruva, Ms.Siya Ghogare i/by MDP Legal for Respondent.

CORAM : AARTI SATHE, J.

Date of Reserving the Judgment : 17th September 2026
Date of Pronouncing the Judgment : 23nd October 2026

JUDGMENT :-

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the '**Act**') challenges the award dated 3rd March 2017 (hereinafter referred to as the '**impugned award**') passed by the learned Sole Arbitrator, directing the Petitioner to pay a sum of Rs.6,20,00,000/- as liquidated damages under Clause-26 of the Development Agreement dated 12th January 2011 (hereinafter referred to as the '**Original D.A.**') with costs as quantified. The aforesaid liquidated damages of Rs.6,20,00,000/- have been calculated @

Rs.10,00,000/- per week for 62 weeks and after adjusting the security deposit of Rs.1,10,00,000/- and hardship compensation/corpus of Rs.2,42,50,000/-, the impugned award directs payment of a sum of Rs.2,67,50,000/- together with interest.

2. Briefly the facts are as follows:

(i) The Petitioner-Developer is a company incorporated under the Companies Act, 1956, and deemed to be incorporated under the Companies Act, 2013. The Respondent-Society is a Co-operative Housing Society registered under the provisions of Maharashtra Co-operative Societies Act, 1960;

(ii) By an Order dated 22nd October 2018 passed by the National Company Law Tribunal (NCLT) in C.P. (AAA) No. 2715/MB/2018, the Scheme of Merger by Absorption came to be sanctioned, whereby, *inter alia*, Kumar Builders Mumbai Realty Private Limited (the Original Claimant) was merged with the Petitioner-Developer namely Kumar Urban Development Private Limited. Pursuant to the Order passed by NCLT and in accordance with the aforesaid Scheme of Merger by Absorption, the entire business, undertaking, properties, rights, interests, liabilities and obligations of the Transferor Companies, including those of Kumar Builders Mumbai Realty Private Limited, stood transferred to and vested in Kumar Urban Development Private Limited, without any further act, instrument or deed, with effect from the effective date i.e. 1st April 2017;

(iii) The Respondent-Society is the owner of Plot No. 13-B, CTS No. 96, Survey No. 161 (Part), admeasuring 4,619 sq. mtr. as per the Conveyance in its favour and 4,640 sq. mtr. as per the Property Register Card, situated at

Bangur Nagar, Goregaon (West), Mumbai – 400 090 (hereinafter referred to as the '**Land**'). Five buildings comprising 97 flats (hereinafter referred to as the '**Buildings**') have been constructed on the Land and are occupied by 97 members of the Respondent-Society. Of these, 96 flats are identical in size, while one flat is smaller. The Land and the Buildings are collectively referred to as the '**Property**';

(iv) 93 members amongst 97 members of the Respondent-Society requested the Managing Committee of Respondent-Society to convene a Special General Body Meeting (hereinafter referred to as the "**SGM**") to consider redevelopment of the Property. Accordingly on 14th February 2010, the Respondent-Society convened a SGM at which meeting 90 members were present and a Resolution was passed to redevelop the said Property.

(v) On 4th March 2010 and 6th March 2010, the Respondent-Society invited tenders for redevelopment of the said Property by advertisements of even date;

(vi) On 29th April 2010, the Petitioner-Developer submitted their tender along with payment of Rs.10,00,000/- to the Respondent-Society. On 9th May 2010, the Respondent-Society appointed the Petitioner as the Developer for redevelopment of the said Property.

(vii) Pursuant thereto, on 16th May 2010, the Respondent-Society issued a Letter of Intent (hereinafter referred to as the '**LOI**') of even date and thereafter the Petitioner-Developer paid the Respondent-Society a sum of Rs.1,00,00,000/- as security deposit. It is the Petitioner-Developer's contention that till 16th May 2010, the Petitioner-Developer had paid an aggregate amount of

Rs.1,10,00,000/- to the Respondent-Society;

(viii) On 23rd September 2010, the Petitioner-Developer and Respondent-Society exchanged the drafts of the Original D.A and at the request of the Respondent-Society, the Petitioner-Developer submitted an application to the Municipal Corporation of Greater Mumbai (`MCGM') seeking permission to develop the said Property bearing Application No.CHE/A-0108/BP(WS)/AP. The MCGM called upon the Petitioner-Developer to comply with various requirements.

(ix) On 9th January 2011, the Respondent-Society approved the Original D.A and Power of Attorney at its SGM held on the said date. It is the Petitioner-Developer's contention that the Respondent-Society has claimed to have approved the draft consent to be executed by its members in favour of the Petitioner-Developer, however, no such consent was ever furnished by the Respondent-Society;

(x) On 10th November 2010, MCGM issued a letter stating that, as the conditions stipulated in its letter dated 10th November 2010 had not been complied with, the proposal dated 23rd September 2010 stood closed. It is the Petitioner-Developer's contention that such letter was also issued to Mr.Rituraj Gupta, the then Secretary of the Respondent-Society. It is also the Petitioner-Developer's contention that the Respondent-Society was aware of the proposal dated 23rd September 2010 having been rejected and the Respondent-Society had appointed an Architect as the Project Management Consultant (PMC) and also an Advocate, and hence the Respondent-Society was in a position to ascertain the

status of application dated 23rd September 2010 submitted by the Petitioner-Developer to the MCGM;

(xi) On 12th January 2011, the Petitioner-Developer and the Respondent-Society executed Original D.A along with Power of Attorney and further it is the Petitioner-Developer's contention that around the same time, the Petitioner-Developer paid Rs.1,25,000/- to each member of the Respondent-Society aggregating to Rs.1,21,25,000/-.

(xii) It is the Petitioner-Developer's contention that on 3rd May 2011, the Respondent-Society purported to seek information regarding the outcome of the application made by the Petitioner-Developer to MCGM dated 23rd September 2010. In response to the aforesaid letter, the Petitioner-Developer by its letter dated 20th May 2011, forwarded to the Respondent-Society, the information provided by its Architect and sought an extension of time to obtain the requisite approvals from the MCGM.

(xiii) It is further the Petitioner-Developer's contention that at a meeting of the Respondent-Society held on 12th June 2011, one of its member specifically pointed out the fact relating to the application made by the Petitioner-Developer to the MCGM, which had been rejected, and therefore, by a SGM of the same date, the Respondent-Society granted extension of time to the Petitioner-Developer to make an application before the MCGM;

(xiv) On 12th September 2011, the Petitioner-Developer forwarded the requisite documents to the Petitioner-Developer's Architect and issued a letter of appointment to the Architect. The extension granted by the Respondent-Society

to the Petitioner-Developer to make an application to the MCGM, expired some time on 12th September 2011 and thereafter the Petitioner-Developer did not submit any application for development permission within the extended time. In the meantime, the MCGM issued various circulars concerning elevation features of buildings to be constructed and the Chief Fire Officer's Department issued revised guidelines;

(xv) On 6th January 2012, the State of Maharashtra issued a Notification proposing to amend Development Control Regulations for Greater Mumbai, 1991 (hereinafter referred to as the '**DCR, 1991**') including the introduction of Compensatory Fungible Floor Space Index (`**Fungible FSI**'). Until then, the Petitioner-Developer did not submit any application to the MCGM for approval;

(xvi) Between 21st January 2012 and 23rd January 2012, the Petitioner-Developer paid a sum of Rs2,55,48,000/- to MCGM towards various approvals, permissions and various deposits. It is the Petitioner-Developer's contention that under the Original D. A., 96 members of the Respondent-Society whose original flats each admeasured 480 sq.ft. carpet area, were entitled to new premises admeasuring 480 sq.ft. carpet area together with an additional 150 sq.ft. aggregating to 630 sq.ft. carpet area. The 97th member whose original flat admeasured 360 sq.ft. carpet area, was entitled to new flat admeasuring 360 sq. ft carpet area together with an additional 113 sq.ft., aggregating to 473 sq.ft. carpet area. The Original D.A. further contemplated that each flat would be provided with 162 sq.ft. of flower beds and drying balconies (elevation features). At the

relevant time, the elevation features were permitted without being counted towards Floor Space Index (`FSI') and could not be merged with the flats;

(xvii) Following the introduction of Fungible FSI by the State of Maharashtra in 2012, the Petitioner-Developer offered to provide 96 members with flats admeasuring 773 sq.ft. carpet area each as against 630 sq.ft. and the 97th member with a flat admeasuring 580 sq.ft. carpet area as against 473 sq.ft. carper area, as contemplated under the Original D.A. Thus, the Petitioner-Developer offered additional 143 sq.ft. of carpet area to each of the 96 members and an additional 107 sq.ft. of carpet area to the 97th member. It is the Petitioner-Developer's contention that the Fungible FSI contemplated payment of premium for availing such additional FSI. Accordingly, the Petitioner-Developer submitted revised plans to the Respondent-Society for approval incorporating the additional carpet area.

(xviii) On 19th February 2022, at its SGM held, the Respondent-Society considered the revised proposal, however, no decision was taken. It is the Petitioner-Developer's contention that on or about February-March 2012, the Petitioner-Developer paid additional amount of Rs.1,25,000/- to each of the members of the Respondent-Society aggregating to Rs.1,21,25,000/

(xix) Sometime in March-2012 again, the Respondent-Society in its SGM approved the revised proposal submitted by the Petitioner-Developer and further revision in carpet area of each of the flats was also incorporated in the Original D.A (**first modification to D.A**) and the members of the Respondent-Society gave consent to the Petitioner-Developer to avail of the Fungible FSI. The

Respondent-Society in its SGM held on 25th March 2012, gave consent to the Petitioner-Developer to apply for and avail Fungible FSI (**second modification to D.A**);

(xx) Pursuant to the first modification to D.A, the Petitioner-Developer submitted fresh plans to the Respondent-Society for approval and the plans were approved by the Respondent-Society in its SGM held on 29th April 2012. At the said SGM, the Respondent-Society also approved modification of Clause-17, fixing 31st July 2012 as the deadline for obtaining approval of the plans from MCGM, the IOD, together with full TDR, FSI and payment of entire premium for the Fungible FSI (**third modification to D.A**). Pursuant thereto, the Petitioner-Developer submitted new plans to MCGM for approval and paid requisite fees and obtained various approvals

(xxi) The aforesaid plans were scrutinized sometime in October-2012, and the scrutiny report approved the Basic Floor Space Index (**Basic FSI**), the additional 0.33 FSI permissible under DCR, 1991, the entire admissible TDR and the Fungible FSI applicable thereto. The approved plans provided for 15% deductible Recreation Ground (hereinafter referred to as the "**RG"**) and 5% physical RG on the podium. Accordingly, the concessions required for the entire building were approved by the MCGM and the only remaining step was the purchase and loading of the TDR FSI;

(xxii) On 8th November 2012, the Petitioner-Developer requested MCGM to issue IOD for the basic FSI, additional 0.33 FSI and the Fungible FSI applicable thereto. The Petitioner-Developer also paid additional amount of

Rs.90,76,500/- towards the premium for additional 0.33 FSI in addition to various other amounts payable to the MCGM. It is the Petitioner-Developer's contention that the Petitioner-Developer had forwarded to the Respondent-Society copies of the concession plan, the plan approved by the CFO and the plan approved for parking;

(xxiii) Further, in March 2013, the Petitioner-Developer paid further amounts to MCGM aggregating to Rs1,74,49,800/- towards issuance of approval of plans i.e. IOD. The MCGM issued IOD on or about 28th March 2013 approving basic FSI, additional 0.33 FSI and Fungible FSI applicable thereto aggregating to 6,641.59 sq.mtrs. of FSI. It is the Petitioner-Developer's contention that thereafter the Petitioner-Developer required only a few hundred square meters of TDR FSI to achieve sufficient FSI for constructing 97 flats for the Respondent-Society members;

(xxiv) Thereafter by letter dated 29th March 2013 and 30th March 2013, the Petitioner-Developer forwarded the IOD, plans, brochures, MCGM payment receipts to the Respondent-Society and commenced compliance with the conditions stipulated in the IOD. It is the Petitioner's contention that after all these formalities, certain members of the Respondent-Society raised objections to the redevelopment proposal including three members who did not consent to the proposal. Some members also demanded enhanced compensation resulting in further negotiations between the Petitioner-Developer and the Respondent-Society;

(xxv) On 25th July 2013, pursuant to the negotiations, the

Petitioner-Developer submitted a fresh offer letter (`**first modified proposal**') increasing the hardship compensation and also the Petitioner-Developer sought flexibility in loading the full TDR, which was approximately 67% due to the loading of 0.33 additional FSI. The Petitioner-Developer requested a schedule specifying the commencement and completion periods for members to vacate their respective flats, to facilitate financial planning and arrangements for payment of corpus and allied amounts. It is Petitioner-Developer's contention that this was necessary as certain members had not provided their consent, which could have necessitated proceedings against them;

(xxvi) On 28th July 2013, in view of the negotiations, proposals and counterproposals, the Respondent-Society convened its AGM to consider the Petitioner-Developer's proposal dated 25th July 2013. At the meeting, the Respondent-Society formulated a further proposal and accordingly submitted the same to the Petitioner-Developer (`**second modified proposal**'). Thereafter, in response to the second modified proposal, the Petitioner-Developer submitted its proposal by letter dated 1st August 2013 (`**third modified proposal**'). At the Respondent-Society's request, on 5th August 2013, the Petitioner-Developer submitted a revised proposal by letter dated 5th August 2013 (`**fourth modified proposal**').

(xxvii) By its letter dated 5th August 2013, the Respondent-Society informed the Petitioner-Developer that the proposed modifications would be considered at its general meeting scheduled for 10th August 2013;

(xxviii) On 10th August 2013, the Respondent-Society convened its

SGM at which the aforesaid modifications were accepted. Consequently, the Original D.A stood novated, and the parties entered into a fresh Development Agreement (`**second D.A.**') on 10th August 2013. Under the second D.A., it was agreed that the Petitioner-Developer would initially load only such TDR FSI as was necessary to construct the rehabilitation premises (`**Rehab TDR**') for the Respondent-Society's members and that the balance 0.67 TDR would be loaded within six months from the date on which the members vacated their respective premises (`**balance TDR**'). It is Petitioner-Developer's contention that the Statement of Claim sought specific performance of the modified D.A. In view of the modifications and novation, the events preceding 10th August 2013 ceased to have material relevance;

(xxix) By letter dated 20th September 2013, the Petitioner-Developer sought schedule from the members of Respondent-Society to vacate their respective premises, to enable it to perform its obligations under the second D.A, to plan the loading of balance TDR of 0.67 and arrange the bank guarantee contemplated thereunder. The aforesaid schedule was essential for the Petitioner-Developer to plan payment of the corpus, compensation, brokerage and shifting charges payable to the members of Respondent-Society as well as its overall financial outlay. The schedule for vacating the premises was necessary for the Petitioner-Developer to plan and perform its reciprocal obligations under the second D.A;

(xxx) By its letter dated 20th September 2013, the Respondent-Society, instead of providing the requested schedule for vacating, contended that

the notice to vacate would be issued only upon payment of corpus, loading of the TDR FSI and submission of the bank guarantee. The Respondent-Society further stated that it would survey the individual flats and intimate the tentative dates for vacating only after issuance of Notice to Vacate. Since the letter dated 20th September 2013 of the Respondent-Society was not in accordance with the second D.A, the Petitioner-Developer by its letter dated 21st September 2013 informed the Respondent-Society that it would revert with its plan of action;

(xxxi) On 30th September 2013, the Petitioner-Developer by its letter called upon the Respondent-Society to commence co-ordination with its members for taking possession from them and hand over the same to the Petitioner-Developer in batches. The Petitioner-Developer stated that payments payable to the members would be handed over to the Managing Committee of Respondent-Society within four working days. The Petitioner-Developer also assured the Respondent-Society that the formalities relating to loading of Rehab TDR FSI and issuance of bank guarantee would be completed before the Respondent-Society hands over possession of all vacant buildings to the Petitioner-Developer for demolition. It is the Petitioner-Developer's contention that the Respondent-Society has incorrectly described the letter dated 30th September 2013 addressed by the Petitioner-Developer as notice to vacate, and in fact the said letter merely sought schedule to enable the Respondent-Society to provide 60 days schedule commencing from 1st November 2013 and ending with 31st December 2013 in accordance with the second D.A which contemplated a 60 days' notice to vacate;

(xxxiv) Various letters were exchanged between the Petitioner-

Developer and the Respondent-Society and it is the Petitioner-Developer's contention that various false and baseless allegations were made by the Respondent-Society against the Petitioner-Developer and that the Petitioner-Developer had in fact agreed to issue a notice to vacate by 1st October 2013, although not provided in the second D.A., upon loading of the Rehab TDR and requested the Respondent-Society to confirm the same. Instead of confirming the same, the Respondent-Society issued a without prejudice letter dated 7th October 2013. Several meetings and negotiations were held between the Petitioner-Developer and the Respondent-Society after 7th October 2013, and several alternatives were suggested to clear the impasse. However, that did not yield any result;

(xxxv) In the meantime, several material developments took place and State of Maharashtra introduced various modifications to the DCR 1991. The Supreme Court in the matter referred to as **Municipal Corporation of Greater Mumbai vs. Kohinoor CTNL Infrastructure Company Pvt. Ltd.**[1], (hereinafter referred to as "**Kohinoor Mills case**") directed a 6-meter open space be maintained on two sides of the building and that R.G. be provided at the ground level. The Supreme Court further clarified that its decision in **Kohinoor Mills case** (supra) would apply even where an IOD had already been issued. Thereupon several other amendments to the DCR, 1991 were made from time to time;

(xxxvi) On 2nd July 2014, in view of the change which were necessitated on account of change in law, the Petitioner-Developer proposed

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1 (2014) 4 SCC 538

revised plans which the Respondent-Society did not accept, in spite of being fully aware of the modifications caused due to the decision in Kohinoor Mills case and the Respondent-Society insisted to proceed with the development in accordance with IOD dated 29th March 2013;

(xxxvii) On 16th November 2014, the Respondent-Society by letter of even date marked as without prejudice and without making any reference to the second D.A., sought to invoke Clause-26 of the Original D.A and demanded a sum of Rs.18,80,00,000/- from the Petitioner-Developer. The Petitioner-Developer responded to the aforesaid letter by its letter dated 29th November 2014 and sought to invoke arbitration clause.

(xxxviii) It is the Petitioner-Developer's contention that on 15th December 2014, the Respondent-Society through their advocate's letter of even date, made various false, baseless allegations ignoring the second D.A and purported to invoke Clause-45 of the Original D.A;

(xxxix) Thereafter Petitioner-Developer filed an application under Section 9 of the Act being Commercial Arbitration Petition (L) No.1892 of 2014, on which this Court by its order dated 23rd December 2014 constituted the Arbitral Tribunal. However, effective interim relief was not granted to the Petitioner.

(xl) Being aggrieved by the aforesaid order of this Court, the Petitioner-Developer preferred Appeal (L) No.540 of 2015. By an order dated 20th July 2015, the Petitioner-Developer was granted interim relief. The Respondent-Society thereafter filed an application under Section 9 of the Act being Commercial

Arbitration Petition (L) No.219 of 2015;

(xli) Thereafter pleadings, documents and evidence were filed by both the parties before the learned Sole Arbitrator and the impugned award dated 3rd March 2017 was passed by the learned Sole Arbitrator directing the Petitioner-Developer to pay a sum of Rs.2,67,50,000/- as and by way of damages with costs as quantified within two months from the date of receipt of the award being the compounded effect of adjudication of claim and counter claim.

(xlii) It is being aggrieved by the impugned award that the present petition under Section 34 of the Act has been filed.

3. Learned senior counsel Mr. Zal Andhyarujina along with Mr. Aditya Shiralkar along with Mr. Jahaan Dastur along with Mr. Gaurav Gopal along with Mr. Mohit Goyal along with Ms. Shreshtha Sharma along with Mr. Samyak Jain instructed by Wadia Ghandy & Company appeared on behalf of the Petitioner. Learned counsel Mr. Rohan Cama along with Mr. Aman Sadiwala along with Mr. Yash Dhruva along with Ms. Siya Ghogare instructed by MDP Legal appeared on behalf of the Respondent-Society.

4. The core challenge to the impugned award as sought to be contended by learned counsel on behalf of the Petitioner-Developer is that the same is patently illegal under Section 34(2A) of the Act on the ground that the impugned award is directly contrary to the substantive law of liquidated damages in India since it substitutes evidence of breach for proof of loss and legal injury and has awarded liquidated damages in absence of any loss or legal injury. It is in this context that the Petitioner-Developer has submitted that the impugned award is liable to be set

aside.

5. The primary contention of Learned Senior Counsel Mr. Zal Andhyarujina appearing on behalf of the Petitioner-Developer is that the claim of liquidated damages by the Respondent-Society is not supported by evidence of loss or legal injury and has only sought to invoke Clause-26 of the Original D.A. without stipulating the loss or legal injury or without identifying the head under which the loss or legal injury has been suffered by the Respondent-Society. It is his contention that the aforesaid Clause-26 of the Original D.A. only contemplates that in the event the Petitioner-Developer fails to complete the works/item of works in all respects and hand over the newly completed building to Respondent-Society within the time stipulated as mentioned in the Original D.A., the Petitioner-Developer in case the default continues for more than 60 days shall be liable to pay the Respondent-Society liquidated damages for such default and not as penalty Rs. 10,00,000/- per week of default or any part thereof. The clause further stipulates that the liquidated damages be payable by the Petitioner-Developer within seven days from the demand of Respondent-Society. It is therefore his submission that the said clause did not set out any factual or commercial basis upon on which the figure of Rs. 10,00,000/- per week was arrived at and further that the clause did not specify that the said sum is a genuine pre-estimate of loss/damages.

6. It is further his contention that the Respondent-Society by their letter dated 16th November 2014, and 15th December 2014 had demanded liquidated damages of Rs. 18,80,00,000/- for 188 weeks on account of the alleged failure on

the part of the Petitioner-Developer to construct the building without identifying any particular expenditure, displacement related hardships or any other loss or legal injury which has been occasioned to the members of the Respondent-Society by the alleged delay of the Respondent-Society.

7. It is his submission that the Petitioner-Developer had paid to the Respondent-Society a sum of Rs. 1,10,00,000/- towards security deposit and a sum of Rs. 2,42,50,000/- towards hardship compensation/corpus, aggregating to Rs. 3,52,50,000/-. The said amounts continue to be enjoyed and retained by the members of the Respondent-Society till date. It was further submitted by him that the Respondent-Society has not undergone redevelopment as on date and, in the meantime, the permissible FSI has increased considerably under the regime prevailing during 2011–2014 under the DCR, 1991. Consequently, the Respondent-Society has not suffered any loss on account of the Petitioner-Developer's inability to proceed with the redevelopment. He has further submitted that in fact on account of publication of the Development, Control, Promotion and Regulation, 2034 (hereinafter referred to as the "DCPR 2034"), the Respondent-Society has stood to gain additional FSI and in fact made a profit.

8. He further submitted that in its counterclaim filed before the learned Sole Arbitrator, the Respondent-Society had quantified a figure of Rs. 19,60,00,000/- as liquidated damages on the basis of alleged breaches at the stipulated weekly rate of Rs. 10,00,000/- per week without identifying any particular expenditure and without pleading/explaining why the particular loss allegedly claimed to have suffered in the redevelopment was difficult or impossible to prove. The pleading in

fact did not explain the factual commercial basis upon which the Rs. 10,00,000/- per week represented the anticipated consequences of delay.

9. It was further submitted that in the counterclaim itself the Respondent-Society has categorized the sum of Rs. 19,60,00,000/- as penalty and in fact in the evidence led before the learned Sole Arbitrator, the witnesses on behalf of the Respondent-Society did not claim that naming the amount of Rs. 19,60,00,000/- as penalty was a mistake. He further submitted that none of the witnesses were in a position to depose that the sum was a genuine pre-estimate of loss/damages agreed by the parties nor could they remotely assert that any compensable loss of legal injury had in fact occurred in the present case that would justify the award of Rs. 10,00,000/- per week.

10. It was further his submission that that the learned Sole Arbitrator by way of the impugned award sought to place reliance on the wordings liquidated damages and "not penalty" to award the liquidated damages to the Respondent-Society and further wrongly concluded that the Original D.A. was a construction contract, and therefore the quantum of loss caused by prolonged delay would be difficult to prove and hence awarded the liquidated damages erroneously to the Respondent-Society. He also sought to vehemently argue that the law on liquidated damages which rests on the interpretation of Section 74 of the Indian Contract Act, 1872 (hereinafter referred to as the "**Contract Act**") has been well settled by the Supreme Court in the Constitutional Bench ruling in **Fateh Chand Vs. Balkishan Das**[2]. He further submitted that the principles as laid down in **Fateh**

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2 1963 AIR 1405

Chand (supra) have been reiterated in the judgment of **M/s. Kailash Nath Associates Vs. Delhi Development Authority & Anr.**[3]

11. He categorically submitted that in the facts of the present case the provisions of Section 74 of the Contract Act could not be automatically pressed into service to award the liquidated damages as done by the learned Sole Arbitrator in the present case, inasmuch as, the requirement of proof of loss or at least the extent that some injury/legal injury or compensable loss had occurred was not proved by the Respondent-Society in the present case. He also submitted that the learned Sole Arbitrator had in fact in the impugned award itself recorded that the hardship compensation was intended for members having already moved out of their existing flats and arranging alternate accommodation but that event had not occurred and hence he submitted that once that event had not occurred, then this finding becomes material in view of the fact that then liquidated damages could not be granted to the Respondent-Society, inasmuch as, there was really no loss or damage which the Respondent-Society had suffered. He further submitted that the learned Sole Arbitrator wrongly concluded that the Original D.A. was a construction contract and that the quantum of loss caused by the prolonged delay would be a loss which would be difficult to prove and, on that basis, the stipulated quantum which was the pre-estimated damage as per Clause 26 of the Original D.A. was a correct figure and hence awarded the said figure to the Respondent-Society. He further submitted that this Court, by its order dated 11th March 2020, while admitting the petition and after considering the impugned award and the

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3 2015 (4) SCC 136

authorities relied upon by the Petitioner-Developer, particularly **Fateh Chand** (supra), **ONGC Ltd. vs. Saw Pipes Ltd.**[4], **Maula Bux vs. Union of India**[5] and **Ultratech Cement Ltd. v. Sunfield Resources Pty. Ltd.**[6], had recorded a *prima facie* case concerning the breach of legal principles governing liquidated damages.

12. He further submitted that the decision in **Fateh Chand** (supra) of the Supreme Court's Constitutional Bench which is the leading authority on Section 74 of the Contract Act has also held that insofar as liquidated damages are concerned the same are to be examined on the facts of the case and also have to be awarded basis whether or not actual damage or loss has been proved to have been caused thereby. He submitted that in the facts of the present case, liquidated damages which have been awarded to the Respondent-Society do not justify an award of compensation where in consequence of the breach, no legal injury at all has resulted. He submitted that in the case of **Fateh Chand** (supra), the Supreme Court explained that compensation is awarded to make good loss or damage naturally arising from the breach or contemplated by the parties as its likely consequence. He submitted that in the facts of the present case, none of these ingredients had been satisfied. He even went on to submit that there was no genuine estimation of loss which had been conducted by the learned Sole Arbitrator and only on the basis of Clause-26 of the Original D.A., the learned Sole Arbitrator had awarded the liquidated damages to the Respondent-Society which was an erroneous interpretation. He further submitted that the Clause-26 of the

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4 (2003) 5 SCC 705

5(1969) 2 SCC 554

6 (2016) SCC OnLine Bom 10023

Original D.A. itself used the words penalty in the clause and even the Respondent-Society in its statement of claim had used the word penalty which they were entitled to get which definitely does not take the colour of liquidated damages. He further submitted that in the case of **Fateh Chand** (supra), the Supreme Court held that Section 74 of the Contract Act did not confer any special benefit on a party and the Court would award only reasonable compensation not exceeding the name, sum or penalty stipulated in the contract. Although, breach had been established on the facts, the Supreme Court in the case of **Fateh Chand** (supra) rejected the award of liquidated damages on the ground that there was no evidence that the Plaintiff had suffered any loss. He further submitted that the modern restatement of law on liquidated damages has been enunciated in the case of **Kailash Nath** (supra) which again reiterates the same requirements highlighted in **Fateh Chand** (supra). In the said case, the Supreme Court re-emphasized that reasonable compensation was the governing principle even for liquidated damages and that damage or loss caused by breach must be proved on evidence. He submitted that the proof of actual loss was a must and in fact a *sine qua non* which had to be established prior to awarding the liquidated damages. He therefore submitted that it is only in those rare cases where loss is difficult or impossible to prove that the stipulated amount may be awarded if it is a genuine pre-estimate, however, even in such cases the proof of *factum* of loss i.e. some compensable loss and legal injury resulted from the breach is not dispensed with. He sought to place reliance on this Court's decision in **Punj Lloyd Ltd v. IOT Infrastructure and Energy Services Ltd**.[7]

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7 (2018) SCC OnLine Bom 19741

where this Court held that the law nevertheless requires the claimant to plead and make out a case of having suffered loss. Thus, the authorities permit reasonable inference and an agreed measure of compensation. However, they do not dispense with the factual foundation for that inference. He further submitted that the judgment in **ONGC Ltd.** (supra) relied by the learned Sole Arbitrator had to be appreciated and applied in the light of its actual contractual and factual setting. He submitted that in the facts of case of **ONGC Ltd.** (supra), the contract was for supply of 26 inch and 30-inch casing pipes required for offshore operations. In that, evidence had been recorded that the rig-redevelopment plan was made having regard to several constraints including shortage of casing pipes, further it had also recorded that the shortage was not only the sole cause and it also rejected ONGC's attempt to prove the asserted production-related loss. The Supreme Court had nevertheless later on held that there had been a delay in deployment of rigs and a consequent change affecting actual gas production at Platform B1-21 and that the exact loss or damage would be difficult to prove in that contractual setting. And in those facts, the Supreme Court had awarded the liquidated damages. The critical distinction in the case of **ONGC Ltd.** (supra) and the present case was that in that case it was actually difficult to prove the actual loss and the Supreme Court on a proven operational disruption which had an adverse effect on the production program had awarded the liquidated damages. He also submitted that in the facts of **ONGC Ltd.** (supra) the clause itself which stipulated recovery was an agreed genuine pre-estimate and not a penalty prescribed at the rate of 1% of the relevant contract price per week subject to a 10% ceiling and provided for recovery from the

supplier's bill. He submitted that in the facts of the present case there was no genuine pre-estimate and in fact Clause-26 of the Original D.A. in the present case specified penalty and not liquidated damages. He also submitted that **ONGC Ltd.** (supra) also relied on **Fateh Chand** (supra) and **Maula Bux** (supra) to make an observation/ hold that there has to be proof of monetary loss and also that actual damage or injury has to be proved before awarding liquidated damages. He therefore submitted that the decision of **ONGC Ltd.** (supra) had to be applied in the correct context insofar as the present case is concerned and the same has not been done by the learned Sole Arbitrator thereby making the impugned award liable to be set aside.

13. He further submitted that in the facts of the present case the members of the Respondent-Society remained in their existing homes, it was not the case that there was any displacement, relocation and alternate accommodation, hardship, and further there was no factual foundation for the liquidated damages to be awarded. The impugned award granted the claim of liquidated damages in the absence of evidence on loss or legal injury suffered by the Respondent-Society and the impugned award merely referred to prolonged delay and erroneously described the Original D.A. as a construction contract and immediately concluded that the quantum would be difficult to prove. He submitted that there was no finding that the Respondent-Society had actually suffered any loss, leave alone identify the requisite particulars and nature of such loss. In these circumstances, he submitted that the award *ex-facie* demonstrates patent illegality, inasmuch as, the first principle of 'reasonableness of compensation', which equally governs the claims of

liquidated damages under Section 74 of the Contract Act, had been lost sight of. The learned Sole Arbitrator had in complete ignorance and disregard of the settled legal position under Section 74 of the Contract Act and in defiance of a host of judicial pronouncements on the subject had failed to enquire into the reasonableness of the Respondent-Society's claim of Rs 10,00,000/- per week of alleged delay and had determined the issue arbitrarily and mechanically and thereby erroneously granting the claim of Rs 6.20 Crore.

14. He lastly submitted that in the present case, the finding of pre-estimation of the quantum of damages was contrary to the case pleaded before the learned Sole Arbitrator. His primary contention in respect thereof was that the Respondent-Society in its own pleading before the learned Sole Arbitrator had defined the nature of the named sum as penalty and hence there was no question of the Petitioner-Developer denying the same in its pleading. He submitted that the Respondent-Society did not contend before the learned Sole Arbitrator that the said pleading was a mistake or error either during evidence or in its submissions as reflected in the impugned award. He therefore submitted, that being the case, considering that the Respondent-Society did not lead any evidence to prove that the named sum was a genuine pre-estimate of damages leave alone place any material on record to show how the estimate was arrived at between the parties and they themselves had pleaded the same to be in the nature of penalty the learned Sole Arbitrator without investigating into those facts or without even coming to a conclusion that there was any actual loss had erroneously awarded the liquidated damages to the Respondent-Society on the ground that they were genuine pre-

estimated damages. He submitted that there was no proof of actual loss and the same could not have been dispensed with in the present facts of the case. He also submitted that this was basically because the Respondent-Society's members had not vacated their existing flats and they had not shifted to an alternate accommodation and were in fact enjoying the amounts received by them from the Petitioner-Developer as hardship compensation.

15. He also sought to distinguish the judgments relied upon by learned counsel on behalf of the Respondent-Society, i.e. **Ultratech Cement Ltd.** (supra), **Associate Builders Vs. Delhi Development Authority**[8], **Jan De Nul Dredging India Pvt. Ltd. Vs. Tuticorin Port Trust**[9] and **Grace Gharunda Vs. Naina Fernandez & Ors**[10] and **ECGC Ltd. vs. Baco Metallic Industries**[11] to primarily contend that all the aforesaid judgments were rendered in a different fact pattern. He submitted that in the case of **Ultratech Cement Ltd.** (supra), this Court had awarded liquidated damages in the context of demurrage charges and in the facts of that case considering that it was an International Shipping Maritime Contract and in those peculiar facts the Court had specifically recorded that the demurrage amount fixed in respect of vessels had not been disputed and that the figures were supported by the contractual rate and evidence in the nature of contemporaneous commercial correspondence. It is in those facts the Court held that there was a genuine pre-estimation of damages and as a matter of fact it was established on the basis of evidence. He further submitted that the ruling in **Ultratech Cement Ltd.** (supra)

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8 (2015) 3 SCC 49

9 2026 INSC 34

10 Appeal No. 536 of 2019 in Arbitration Petition No. 1022 of 2016 dated 10th August 2022 (Bombay High Court)

11 2025 SCC OnLine Bom 3959

had not dispensed with the requirement of actual loss which needed to be proved, but, however this Court on the basis of the peculiar maritime transaction in the facts of that case, had decided that it was because of those facts that the impossibility of proof was accepted by this Court and hence the liquidated damages were awarded to the concerned party in that case.

16. He also submitted that in the facts of the present case the impugned award was of such a nature that it was not an intelligible award and was not coherent and also was not based on any reasoning and hence it required interference under Section 34 of the Act, inasmuch as, it had failed to appreciate the settled principles of law of liquidated damages. He also submitted that D.As. are primarily different from construction contracts and therefore the finding of the learned Sole Arbitrator that the aforesaid Original D.A. was a construction contract and hence no actual proof of loss is required to be done was an incorrect finding. He further submitted that the decisions of **Associate Builders** (supra), **Jan De Nal Dredging** (supra) and **Grace Gharunda** (supra) would not be applicable to the facts of the present case, inasmuch as, the very tenor of this impugned award was such which required interference under Section 34 of the Act. He therefore submitted that the impugned award was liable to be set aside, and this was a fit case where the Court could exercise its jurisdiction under Section 34 of the Act.

17. *Per contra*, learned counsel on behalf of the Respondent-Society, Mr. Rohan Cama submitted that the impugned award required no interference, inasmuch as, it was an award which was a well-reasoned award passed on appreciation of facts and in consonance with the settled principles of law on liquidated damages under

Section 74 of the Contract Act. The primary thrust of arguments of learned counsel on behalf of the Respondent-Society was that the impugned award has specifically taken into consideration Clause-26 of the Original D.A. which provided for liquidated damages and was the foundation on which the liquidated damages had been awarded by the learned Sole Arbitrator. He took this Court to the relevant clause to impress upon this Court that the clause itself was not in a nature of penalty and in fact was a pre-estimated genuine estimation of loss/damages which had been arrived at by the parties to the commercial contract. He further submitted that in the case of liquidated damages it was the party who was resisting the payment of liquidated damages who had to prove that the amount of liquidated damages was unreasonable. The requirement of proving loss or grave legal injury was not on the party who had been awarded the liquidated damages.

18. He further submitted that in a claim of liquidated damages the only thing which does not require to be proved is the extent of such loss or quantification thereof so long as the learned Sole Arbitrator is satisfied that the liquidated damages amount is a genuine pre-estimate of loss and that it is not possible to prove the actual worth or loss i.e. to quantify the damages. He submitted that in the present case the learned Sole Arbitrator had come to a conclusion that there was a delay and breach on part of the Petitioner-Developer and that the Respondent-Society was entitled to invoke the liquidated damages clause for the purposes of claiming the loss/damage suffered. He also submitted that it was clear from the reading of the findings of the learned Sole Arbitrator that he had arrived at the conclusion that the liquidated damages clause required to be invoked. He further

submitted that in the facts of the present case the impugned award was an award which did not require interference inasmuch as, it was not an award where the reasoning as arrived at by the learned Sole Arbitrator was such which was not discernable or was not something which was not a just and fair outcome, thereby rendering interference under Section 34 of the Act. He then went on to submit that in the facts of the present case, the learned Sole Arbitrator had clearly and categorically held in the impugned award itself, that the amount claimed in the liquidated damages clause was in fact a genuine pre-estimate of loss. He further submitted that the learned Sole Arbitrator had taken note specifically of Clause-26 of the Original D.A. which categorically provided/used the words "not as penalty" and hence the learned Sole Arbitrator on the basis of well settled principles of law arrived at a factual finding that the amount claimed is a genuine pre-estimate of loss as envisaged by the parties. It was further his submission that the interpretation as sought to be made by Learned Counsel on behalf of the Petitioner-Developer on the decision of **Kailash Nath** (supra) that proving of loss or legal injury is a *sine qua non* to award liquidated damages could not be applied in the facts of the present case, considering that this was a case where the learned Sole Arbitrator had come to a conclusion that it was a genuine pre-estimate of loss and further that no actual loss could be proved. He submitted that the learned Sole Arbitrator had rightly placed reliance on the decision of **ONGC Ltd.** (supra) to hold that the facts of that case and the present case were similar and the present contract was in the nature of a construction contract, and in construction contracts if there is delay in completing the construction within the stipulated time, it would be difficult to

prove how much loss was suffered by the Respondent-Society. He therefore submitted that once this factual finding has been recorded by the learned Sole Arbitrator then to apply the principles of **Kailash Nath** (supra) to contend that proof of actual loss is a must cannot be insisted upon by the Petitioner-Developer in the present case. He further submitted that in fact the decision of **Kailash Nath** (supra) was never cited before the learned Sole Arbitrator and hence the heavy reliance by learned counsel on behalf of the Petitioner-Developer on the same could not be accepted. He submitted that **Kailash Nath** (supra) did not lay down any new position in law and infact reaffirmed the principle which has been enunciated in **ONGC Ltd.** (supra), that if there is genuine pre-estimate of loss then a party is not required to prove the loss or prove the actual damages suffered. It is only in cases where either it is a penalty or it is not a genuine pre-estimate of loss then such exercise of proof would perhaps be required. He submitted that once a specific finding was made by the learned Sole Arbitrator that in the facts of the present case actual damages could not be proved, then to contend that the same needs to be proved was a submission which ought to be rejected of the Petitioner-Developer.

19. He further submitted that the reliance on the decisions of **Jan De Nul Dredging India Pvt. Ltd.** (supra), **Grace Gharunda** (supra) was correct in the facts of the present case, inasmuch as, having regard to the clear findings on delay and breach by the Petitioner-Developer and as also having regard to the clear application of judgments cited before the learned Sole Arbitrator it could not be termed that the impugned award was so perverse or unreasonable that it required

interference under Section 34 of the Act. He further submitted that in the facts of the present case once the learned Sole Arbitrator had given detailed reasons that there were delay and breaches by the Petitioner-Developer, and that the delay justified the invocation of the liquidated damages clause i.e. Clause-26 that the liquidated damages amount was a genuine pre-estimate of the loss suffered by the Respondent-Society, and it would be difficult to prove that actual loss given the nature of the contract, then to contend that the impugned award was unreasoned award, was a submission of the Petitioner-Developer which deserved to be rejected. He therefore submitted that the reliance placed upon by the learned counsel on behalf of the Petitioner-Developer in the case of **Union of India vs Recon, Mumbai**[12] and **Dyna Technologies Pvt. Ltd. vs. Crompton Greaves Ltd.**[13] to contend that interference under Section 34 of the Act is warranted when an award is not a reasoned award would not be applicable in the facts of the present case. He further submitted that the continuous harping by the Petitioner-Developer that the award did not in any manner show or hold that the Respondent-Society had actually suffered a loss amounted to taking a pedantic view of the matter considering that in the facts of the present case the learned Sole Arbitrator had on an appreciation of the facts and evidence led before him come to a clear conclusion that no loss could be determined in the facts of the present case and hence allowed the invocation of the liquidated damages clause i.e. Clause 26. He submitted that by itself was sufficient to establish that a legal injury had arisen out of the breach committed by the Petitioner-Developer in delaying the construction of the

12 2020 (6) Mh. L.J.

13 (2019) 20 SCC 1

building.

20. He therefore submitted that the impugned award had been rightly passed. He further submitted that the reliance placed by learned counsel on behalf of the Petitioner-Developer on the case of **Rajasthan State Mines & Minerals Ltd. vs Eastern Engineering Enterprises and Anr.**[14] was passed under the old Arbitration Act, 1940 ("Act of 1940") and would not apply to the facts of the present case, inasmuch as, the contention of misapplication of law as opposed to breach of the law is a ground of challenge which is no longer available in light of proviso to Section 34(2A). He further submitted that in the case of **Madgavkar Salvage vs. Norsea Global Offshore PTE. Ltd.**[15] the findings as given in **Ultratech Cement Ltd.** (supra) had not been disturbed and infact in the said decision it has been once again reiterated that a party may be required to prove the loss in a given case only if the loss was capable of being proved, but, not as in the present case where the loss was not capable of being proved. He therefore submitted that the present petition was liable to be dismissed.

ANALYSIS AND FINDINGS

21. I have heard learned counsel on behalf of the parties extensively and have perused the papers and proceedings and the impugned award with their assistance. At the outset I am of the view that the provisions of Section 34 of the Act, which are now well-settled by various decisions of the Supreme Court and this Court, allow interference in an arbitral award only in exceptional circumstances, as set out in Section 34 of the Act. It is in this limited scope of interference as envisaged

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14 (1999) 9 SCC 283

15 2019 SCC Online Bom 79

under Section 34 of the Act that I proceed to consider the competing considerations presented by the Petitioner-Developer and the Respondent-Society.

22. In the present case, the core of the dispute is in respect of the liquidated damages which had been awarded by the learned Sole Arbitrator to the Respondent-Society in respect of delay on the part of the Petitioner-Developer to complete the construction of the building. The entire controversy hinges on the interpretation of Clause 26 of the Original D.A. dated 12th January 2011 and the intent of the parties and the wordings contained therein. This to my mind is the heart of the matter and it is only on an interpretation of the aforesaid Clause 26 of the Original D.A. that the present controversy ought to be decided. It would be therefore beneficial to reproduce the provisions of the aforesaid Clause 26 of the Original D.A. along with Section 74 of the Contract Act:

> "26. Liquidated Damages:
> If the Developer fails to complete the works/item of work in all respect and hand over the duly completed NB to the society within the time stipulated as mentioned herein, the Developer in case, the default continues for more that 60 Days, shall pay to the Society, liquidated damages (LDs) for such default and not as penalty Rs. 10,00,000.00 (Rs. Ten Lakhs Only) per week of default or any part thereof. The Developer shall make payment of such charges to. the Society within 7 Days of the demand being raised by the Society, LDs will be levied in case of delay, in construction completion schedule at every stage of construction defined. In Clause 17 of this agreement. The given stages of completing construction of the NB shall be construed as completed only when certified by the Society in writing based on the recommendation of Society's Architect. Delay in any of the eight stages of construction completion mentioned in Clause 17 herein, shall lead to imposition of LDs. In case, the Developer fails to pay the LDs as agreed Society may without prejudice to any other method of recovery deduct the amount or Liquidated Damages from the initial Security Deposits and/or also recover through the Bank Guarantee and Developer in that case, shall have to restore the Initial Security Deposits and or the Bank Guarantee back to their original amounts.
> The deductions of such Liquidated Damages shall not relieve the Developer. from his obligation to complete the works or from any other of his obligations and liabilities under the contract."

> Section 74 of the Contract Act: **Compensation for breach of contract where penalty stipulated for --**
> "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by

way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation. -- A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception. -- When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation. -- A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

23. On a plain reading of the aforesaid clause i.e. Clause 26 of the Original D.A. it is clear that the liquidated damages of an amount of Rs. 10,00,000/- per week of default was an amount which was agreed between the parties in the event the Petitioner-Developer failed to complete the work/item of work in all respects and hand over the duly completed building to the Respondent-Society as envisaged in the Original D.A. Further, the aforesaid clause also specifically provides that the said liquidated damages would not be in the nature of penalty and once that being so it is my view that the terms of the aforesaid clause would govern the liquidated damages payable by the Petitioner-Developer to the Respondent-Society. I am therefore of the view that nothing more or less could be read into the wordings of the said clause to assail the findings of the learned Sole Arbitrator, that an actual proof of loss or legal injury had to be proved or shown by the Respondent-Society before the learned Sole Arbitrator prior to awarding the liquidated damages. The aforesaid Clause-26 to my mind is unequivocal in its application and once there is a

delay on the part of the Petitioner-Developer to complete the work as envisaged in the Original D.A., then the provisions of liquidated damages would kick in. I am therefore in agreement with the contention as advanced by learned counsel on behalf of the Respondent-Society that in the facts of the present case there was no requirement to prove actual loss or damage before awarding the liquidated damages, inasmuch as, the same was a commercial understanding which was reached at between the parties and was specifically not in the nature of penalty. I am also in agreement with the submission as sought to be made by learned counsel on behalf of the Respondent-Society that the amount of liquidated damages as specified in Clause-26 was infact a genuine pre-estimate of loss or damages which was not controverted by the Petitioner-Developer before the learned Sole Arbitrator and was on the basis of commercial understanding between the parties, and hence could not be held to be arbitrary or unreasonable.

24. I am also of the view that the learned Sole Arbitrator has in the award itself given categorical findings in respect of the delay on the part of the Petitioner-Developer to support the conclusion that liquidated damages were infact payable without proof of loss/legal injury. As a matter of illustration, the delays which were caused by the Petitioner-Developer and are captured by the impugned award are reproduced below:-

i. The learned Sole Arbitrator in paragraph no. 28 has categorically held that the effect of depositions by the Petitioner-Developer failed to deal with the objections raised by the MCGM by terming those objections as routine and there was total inaction on the part of the Petitioner-Developer for about 5 months

in processing the application for IOD. This will again show that the Petitioner-Developer was not ready and willing to perform the terms of the Original D.A.

ii. In paragraph nos. 32 to 34 also the learned Sole Arbitrator has categorically come to the finding that the Petitioner-Developer did nothing for about 11 months to process the IOD and hence the only conclusion which can be drawn from such unexplained inaction of the Petitioner-Developer was that they were not ready and willing to proceed with the project.

iii. Further in paragraph no. 66 it has been categorically held by the learned Sole Arbitrator that the Respondent-Society had to run after the Petitioner-Developer for arranging meeting with the Chairman and Managing Director (CMD) so that the grievances of the Respondent-Society could be explained to the CMD.

iv. Also, paragraph 72 and 79 has recorded that the Respondent-Society was totally frustrated by the delay and had infact asked the Petitioner-Developer to proceed with the work rather than go on submitting new proposals. In paragraph 79 as well after considering the entire correspondence between the Respondent-Society and the Petitioner-Developer the learned Sole Arbitrator has come to a finding that the Respondent-Society had lost trust in the Petitioner-Developer and hence there was consistent delay on the part of Petitioner-Developer.

25. The entire impugned award to my mind therefore on an appreciation of evidence and the facts has come to the conclusion that indeed there was a breach on the part of the Petitioner-Developer, and therefore it could not be contended that the impugned award is on any count perverse or unreasonable requiring

interference under Section 34 of the Act.

26. I am therefore of the view that once the delay on the part of the Petitioner-Developer was established on an appreciation of evidence and facts then the necessity to lead any further evidence to prove such loss or legal injury would not be required in the facts of the present case. Further, my this view is fortified by a clear reading of Clause-26 of the Original D.A. which provides for these liquidated damages in the event of delay on the part of the Petitioner-Developer and the same are not in the nature of penalty. I am therefore of the view that the learned Sole Arbitrator has arrived at a correct conclusion that the liquidated damages were in the nature of pre-estimated damages, and also considering that the learned Sole Arbitrator in paragraph no. 148 of the impugned award held that there was no averment by the Petitioner-Developer contending that the same were in the nature of penalty and not pre-estimated damages followed by proof, the aforesaid finding to my mind would not require any interference.

27. I will now be dealing with the decisions cited at the time of hearing by learned counsel on behalf of Petitioner-Developer to contend that actual loss or injury ought to be proved to award the claim of liquidated damages would not be apposite to the facts of the present case. The rather strong reliance by learned counsel on behalf of the Petitioner-Developer on the cases of **Fateh Chand** (supra), **Kailash Nath** (supra) & **Maula Bux** (supra) to support the aforesaid proposition would not amount to ignoring the settled position of law that when there are pre-estimated and genuine liquidated damages which can be awarded then the proof of actual loss or legal injury could not be insisted upon. In the case of **Fateh Chand**

(supra), the Supreme Court was dealing with Section 74 of the Contract Act, in a case where the contract provided between the Plaintiff and Defendant for forfeiture of Rs. 25,000/- consisting of Rs. 1,039/- paid as earnest money and Rs. 24,000/- paid as the purchase price, the Defendant had conceded that the Plaintiff was entitled to forfeit the amount of Rs. 1,000/- which was paid as earnest money, however since the Plaintiff therein had failed to prove the loss suffered by him in consequence of the breach of the contract committed by the Defendant, the Supreme Court came to the conclusion that the retention of Rs. 24,000/- by the Plaintiff would be sufficient compensation to him and hence the finding of the High Court that 13% of the price be regarded as compensation in relation to contract as a whole was held arbitrary. It is in that fact pattern, that the Supreme Court held that while awarding liquidated damages the compensation has to be reasonable and considering that in the said contract there was a clause of forfeiture of amount in the nature of penalty that the Supreme Court held that compensation for breach of contract might be awarded to make good, loss or damage which naturally arose in the usual course of things and it did not justify the award of compensation when in consequence of the breach no legal injury at all has resulted. Hence, considering that there was already a forfeiture clause by way of penalty, the Supreme Court while awarding the compensation and deciding the reasonableness of that compensation held that evidence of loss or legal injury had to be proved. In the present case, Clause-26 itself is very categorical and clear to provide that the liquidated damages were in the nature of pre-estimated damages and not in the nature of penalty and hence the proof of loss or actual injury was not something

which required to be proved.

28. Further, learned counsel on behalf of the Petitioner-Developer has strenuously argued by placing reliance on the decision of **Kailash Nath** (supra) to contend that damages or loss is a *sine qua non* for payment of compensation and in the facts of the present case the same has not been established. He categorically placed reliance on the following paragraphs of the aforesaid decision to contend that the principles enunciated in **Kailash Nath** (supra) has not been followed. The following are the paragraphs on which reliance has sought to be placed: -

> " 43. On a conspectus of the above authorities, the law on compensation or 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."
>
> (emphasis supplied)

29. To my mind on reading the conclusion/ratio in the aforesaid paragraphs rendered in **Kailash Nath** (supra), it is quite clear that even in the said decision it has been held that proof of actual damage or loss is required for liquidated damages to be awarded under Section 74 of the Contract Act, only when it is possible to

prove the actual damages or loss. In cases where damages or loss is difficult to prove, then the liquidated damages amount named in the contract, if is a genuine pre-estimate of damage or loss is agreed between the parties, then in that event the actual damage or loss need not be proved. In the facts of the present case, that being the mandate of **Kailash Nath** (supra), once the learned Sole Arbitrator in the impugned award had come to the conclusion that in the facts of the present case, the loss itself was not possible to prove and that it was a genuine pre-estimated loss then to read the ratio of **Kailash Nath** (supra) differently, into the aforesaid impugned award would to my mind be an incorrect approach. I am further of the view that at the very beginning of my analysis, and as set out by various Courts, considering that limited interference has been called for under Section 34 of the Act, to substitute another view of the High Court by a plausible view reached by the learned Sole Arbitrator on appreciation of the evidence and facts would amount to not following the mandate of Section 34 of the Act. Consequently, I am not in agreement with the submission as sought to be canvassed on behalf of the learned counsel for the Petitioner-Developer, that since in the facts of the present case, there was no actual loss or damage which was proved by Respondent-Society then the liquidated damages could not have been awarded by the learned Sole Arbitrator. The relevant findings of the learned Sole Arbitrator are reproduced below: -

> "143. The claim for LD is based on Clause 26 of the DA. That Clause provides that if the Developer commits default in completing the work as per the schedule and such default continues for more than 60 days, it shall pay to the Society LD (and not as penalty) for such defaults 10 Lacs per week of default or any part thereof. Such LD was to be paid within 7 Days of the demand being raised by the Society and in case it was not so paid, the Society may deduct the amount of LD from the Initial Security Deposits and/or also recover through the Bank Guarantee.

144. The defaults were committed by the Developer, and they had continued for more than 60 days. The demand for LD was made by letter dated the 16h November, 2014 [Ex.103]. The Developer did not pay the demanded amount. So, if the demand for LD was justified, the Society would be entitled to adjust the Security Deposit against the LD. The Society did adjust that amount as recorded in its letter dated 28' November 2018 [Ex.106]. As the Bank Guarantee was not furnished by the Developer, the question of recovering the LD through the same does not arise.

145. Sections 73 and 74 of the Contract Act deal with the issue of damages/compensation. The defaulting party has to pay the same to the other. In the judgment reported in AIR 1959 SC 1357, Shiva Jute Baling Ltd vs Hindley & Co Ltd, it was observed that both these sections provide for reasonable compensation and Section 74 contemplates that the maximum may be the amount named in the contract. In the present case, this maximum is 10 Lacs per week of default or any part thereof being the stipulated LD under Clause 26. As discussed during adjudication SOC, the Developer is the defaulting party and therefore, the Society is entitled to claim damages.

146. As far the Clause 26 is concerned, it provides that it is LD and not penalty. In the judgment reported in (2011) 1 SCC 394, Bharat Sanchar Nigam Ltd vs Reliance Communication Ltd, it was observed in paragraph 49 that a sum of money payable on breach of contract is described by the contract as "penalty" or "liquidated damages" is relevant but not decisive.

147. It was submission of the Developer that Clause 26 is in the nature of penalty and therefore, the Society has to lead evidence of actual loss and then only it can get damages and that too, only the reasonable amount and not the maximum named in the clause. It was. submission of the Developer that since no such evidence was led, the Society is not entitled to any amount as damages.

148. It is be noted that the DA was prepared after exchange of drafts and with assistance of Reg. No legal experts, RW-2 was specifically asked about exchange of drafts as recorded in paragraph NT 84 of his NOE. This clause for LD therefore was inserted after due deliberation and both parties is deemed to be aware of its legal implication and is therefore relevant. Secondly, in the CC of the Society, it was averred in paragraph 7 (c) that "The claim for liquidated damages therefore has prestimate all these damages and has set out an amount of R$:10,00. rupees Ten Lakhs) towards penalty per week". The paragraph 12 of the Statement of Defence to the CC deals with paragraphs 7(a) to (d) of the CC but there no denial that the amount of LD was pre-estimated. The Developer tried to argue that since that paragraph 7(c) uses the term "penalty", there was no need to deny the "pre-estimated". This argument overlooks the meaning of the entire paragraph 7. If the Developer wanted to contend that the Clause 26 was in the nature of penalty and not pre-estimated LD, there should have been specific averment to that effect, followed by proof. This is lacking and it is therefore not open for the Developer to contend that the stipulated around was penalty and not pre-estimate of quantum of damages.

149. In Oil & Natural Gas Corporation Ltd vs SAW Pipes Ltd reported in AIR 2003 SC 2629, it was held in paragraph 45 that:

> "In such a case, there may not be any necessity of leading evidence for proving damages, unless the court arrives at the conclusion that no loss is likely to occur because of such breach In a case where agreement is executed by experts in the field, it would be difficult to hold that the intention of the parties was different from the language used therein. In such a case, it is for the party who contends that stipulated amount is not reasonable compensation, to prove the same." This observation applies to facts of the present case.

150. Then in paragraphs 63 and 66, it was observed that:

"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 construction of a road or a bridge. If there is delay in completing the construction of road or bridge within stipulated time, then it would be difficult to prove how much loss is suffered by the Society/State... 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 party who has committed breach of the contract is not liable to pay compensation....No evidence is led by the Claimant to establish that stipulated condition was by way of penalty or the compensation contemplated was, in any way, unreasonable." A similar observation was* made in paragraph 47 of (2011) I SCC 394, Bharat Sanchar Nigam Lid vs Reliance Communication Ltd, where it was stated that "The fact that damage is difficult to assess with precision strengthens the presumption that a sum agreed between the parties represents a genuine attempt to estimate it and to overcome the difficulties of proof at the trail."
>
> 151. In this view of the legal position, the aforesaid submission of the Developer cannot be accepted. The DA is construction contract and the quantum of loss to the Society and the members of the Society due to prolonged delay on the part of the Developer would be difficult to prove. The quantum of LD stipulated in the DA is therefore proper and is required to be granted."

30. The reliance by learned counsel on behalf of the Petitioner-Developer on the case of **Hindustan Petroleum Corporation Vs. G.R. Engineering Pvt. Ltd.**[16] also would not be apposite to the facts of the present case, inasmuch as, in the said case this Court set aside the portion of the impugned award as being perverse and manifestly arbitrary for want of reasoning in relation to the liquidated damages on the ground that the impugned award had not returned any finding on whether it was difficult to prove the damages, and further the analysis was a rather skimpy analysis, and considering that there was no reasoning which was given by the learned Sole Arbitrator in that case, the impugned award was set aside on the aforesaid ground. In the facts of the present case the same is not the situation inasmuch as, the learned Sole Arbitrator in the facts of present case has copiously

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16 2023 SCC OnLine Bom 3177

recorded findings and come to the conclusion that in the facts of the present case it was indeed difficult to prove the loss and considering that there was a genuine pre-estimated loss/damage which has been incurred by the parties and was agreed upon with due deliberations in Clause-26 of the Original D.A., liquidated damages were awarded.

31. Further the reliance placed by learned counsel for the Petitioner-Developer on the decision of **Madgavkar Salvage** (supra) to contend that the decision of **Ultratech Cement Ltd.** (supra) would not give a blanket presumption that where the contract names the sum of money payable in the case of breach, if the sum is considered by the parties as a genuine pre-estimate of damages, and held by the Court as such, that there is no need for the Court to call for evidence of actual loss or damage, would be an incorrect contention. This in view of the fact, that **Madgavkar Salvage** (supra) has held that only when loss or damage can be proved then the requirement of proving the same cannot be dispensed with. However, it has not diluted the principle that when loss or damage was impossible to be proved then liquidated damages as pre-determined by the parties and as named in the contract have to be payable as per Section 74 of the Contract Act. Therefore, in the facts of the present case as held by me above, since the learned Sole Arbitrator has on thorough examination of facts and evidence come to the conclusion that it was difficult to prove the loss or damages, then in that event the aforesaid decision is irrelevant to the facts of the present case. I am also of the view that considering the aforesaid discussion, the decision of **Punj Lloyd** (supra) would also not be apposite to the facts of the present case, inasmuch as, in the facts of the present case the

learned Sole Arbitrator has in fact returned a finding that it was not possible to prove the actual loss suffered by the Respondent-Society.

32. I am further not in agreement on the reliance placed by learned counsel on behalf of the Petitioner-Developer on the case of **Rajasthan State Mines and Minerals** (supra) to contend that the learned Sole Arbitrator cannot act beyond the terms of the contract, inasmuch as, the said decision has been rendered under the provisions of the Act of 1940 and in paragraph 44(j) of the aforesaid decision it has been held that the Arbitrator is not a conciliator and cannot ignore the law and apply it in order to do what he thinks is just and reasonable and in that context the impugned award was held amenable to challenge. The aforesaid ground of misapplication of law as opposed to breach of the law which was a ground of challenge available in the Act of 1940, would not survive in view of the amended provisions of Section 34(2A) of the Act read along with the proviso. The decision of **Rajasthan State Mines and Minerals** (supra) is therefore not apposite to the facts of the present case.

33. I am, therefore, of the view that, in view of the finding returned by the learned Sole Arbitrator and having regard to the nature and purport of Clause-26 of the Original D.A., which cannot be construed as being in the nature of a penalty, proof of actual loss or damage was not required to be established in the facts of the present case. Consequently, no interference under Section 34 of the Act is warranted on this ground. The learned Sole Arbitrator is the master of the facts and of the evidence led before it. In the present case, the findings returned by the learned Sole Arbitrator are based upon an appreciation of the evidence and

material placed on record and constitute, a plausible view of the matter. This Court, while exercising the limited jurisdiction under Section 34 of the Act, cannot re-appreciate the evidence or substitute its own view for that of the learned Sole Arbitrator merely because another view may be possible. The factual findings returned by the learned Sole Arbitrator, having been arrived at upon appreciation of the evidence and material on record, therefore do not warrant interference under Section 34 of the Act.

34. To my mind this impugned award is a well-reasoned order, and the claim of liquidated damages has been awarded after appreciating the relevant clauses of the Original D.A. especially Clause-26. I am therefore not in agreement with the contention made by learned counsel on behalf of the Petitioner-Developer that the Original D.A. was not in the nature of construction contract and hence the finding of the learned Sole Arbitrator that the loss or damage was difficult to prove could not be sustained. I am of the view that once the learned Sole Arbitrator has on the basis of evidence led before it, come to the conclusion that the Original D.A. is indeed in the nature of a construction contract then under the limited jurisdiction of Section 34 of the Act, this Court would not be in a position to substitute its own view on the aforesaid factual finding.

35. Insofar as the reliance placed on **Dyna Technologies** (supra) to contend that impugned award can be set aside under Section 34 of the Act on the ground that there are no reasons/reasoning or if the impugned award suffers from perversity in reasoning and is not proper, intelligible or adequate then in that situation, Section 34 of the Act can be warranted, it would be beneficial to reproduce the relevant

paragraphs of **Dyna technologies** (supra):-

> "34. The mandate under Section 31(3) of the Arbitration Act is to have reasoning, which is intelligible and adequate and, which can in appropriate cases be even implied by the courts from a fair reading of the award and documents referred to thereunder, if the need be. The aforesaid provision does not require an elaborate judgment to be passed by the arbitrators having regard to the speedy resolution of dispute.
> 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.
> 36. At this juncture it must be noted that the legislative intention of providing Section 34(4) in the Arbitration Act was to make the award enforceable, after giving an opportunity to the Tribunal to undo the curable defects. This provision cannot be brushed aside, and the High Court could not have proceeded further to determine the issue on merits.
> 37. In case of absence of reasoning the utility has been provided under Section 34(4) of the Arbitration Act to cure such defects. When there is complete perversity in the reasoning then only it can be challenged under the provisions of Section 34 of the Arbitration Act. The power vested under Section 34(4) of the Arbitration Act to cure defects can be utilised in cases where the arbitral award does not provide any reasoning or if the award has some gap in the reasoning or otherwise and that can be cured so as to avoid a challenge based on the aforesaid curable defects under Section 34 of the Arbitration Act. However, in this case such remand to the Tribunal would not be beneficial as this case has taken more than 25 years for its adjudication. It is in this state of affairs that we lament that the purpose of arbitration as an effective and expeditious forum itself stands effaced."
>
> (emphasis supplied)

36. I am of the view that none of the parameters as laid down in the aforesaid decision can be applied to the facts of the present case, inasmuch as, the award does not suffer from any perversity or arbitrariness and is not an award which is

unintelligible or without any reasoning. As held by me above, the present award has been passed on a complete appreciation of facts and copious findings have been recorded to award the liquidated damages to the Respondent-Society. The findings recorded in the impugned award have been reproduced in paragraph no. 24 above. The principles laid down in **Dyna technologies** (supra) cannot be applied to facts of the present case. The reliance placed by learned counsel on behalf of the Petitioner-Developer on the decisions of **Recon Mumbai** (supra) to submit that the present award suffers from patent illegality and hence is amenable to the challenge of Section 34(2A) of the Act would not apply to facts of the present case, inasmuch as, the said decision lists out as to what amounts to patent illegality. The relevant paragraph is reproduced below:-

> **17.4** This yields the following result:
> (i) A lack of a 'judicial approach', being the Western Geco expansion, is not available per se as a ground of challenge.
> (ii) A violation of the principles of natural justice is a ground for challenge as one under section 18 read with section 34(2)(a)(iii)
> - that is to say, not under the 'fundamental policy' head nor the
> 'patent illegality' head, but distinctly under this sub-section. 30
> (iii) A lack of reasons is a patent illegality under section 34(2-A).
> (iv) In interpreting the contract, the arbitral view must be fair-minded and reasonable. If the view is one that is not even possible, or if the arbitrator wanders beyond the contract, that would amount to a 'patent illegality'.
> (v) 'Perversity' as understood in Associate Builders, is now dishoused from 'fundamental policy' (where Western Geco put it), and now has a home under 'patent illegality'. This includes:
> (A) a finding based on no evidence at all;
> (B) an award that ignores vital evidence; and
> (C) a finding based on documents taken behind the back of the parties.
> I believe this is not an exhaustive listing.
> Combining (iv) and (v) above, therefore, while the explicit recognition or adoption of the Wednesbury unreasonableness standard (introduced in Western Geco) is probably done away with, there is even yet a requirement of reasonableness and plausibility in matters of contractual interpretation. If the interpretation of the contract is utterly unreasonable and totally implausible — the view taken is not even possible - a challenge lies. Therefore: an award that was impossible either in its making (by ignoring vital evidence, or being based on no evidence, etc) or in its result (returning a finding that is not even possible), then a challenge on the ground of 'perversity' lies under section 34(2-A) as a dimension of 'patent illegality'.
> (emphasis supplied)

37. In my view the impugned award does not suffer from any perversity, unreasonableness or which consists of a finding which is based on no evidence at all, or which has ignored vital evidence thereby making it amenable to challenge. It is a settled principle of law that for a patent illegality to be invoked the award must be so unreasonable that it must go to the root of the matter.

38. I am also not in agreement with the contention of learned counsel on behalf of the Petitioner-Developer that the Original D.A. did not contemplate adjustment of corpus/hardship compensation against the amount awarded as liquidated damages, inasmuch as, in my view the Original D.A. in Clauses 10 and 11 provide for hardship allowance and corpus/security deposit which was paid admittedly by the Petitioner to the Respondent. The liquidated damages were over and above the aforesaid hardship compensation, the liquidated damages were quantified at a figure of Rs. 6,20,00,000/- as per Clause-26 of the Original D.A. at the rate of 10,00,000/- per weeks for 62 weeks. Therefore, in fact the learned Sole Arbitrator has only deducted the amount which has been paid to the Respondent-Society and not travelled beyond the scope of the contractual terms as both the liquidated damages and hardship allowances were amount which were provided for under the relevant clauses of the Original D.A.

39. Considering the aforesaid discussion, I am of the clear view that the impugned award does not warrant any interference and does not suffer from any patent illegality as contended by learned counsel on behalf of the Petitioner-Developer. In that context, reliance placed by learned counsel on behalf of the Respondent-Society on the following decisions to elaborate upon the scope of

Section 34 and also on the issue of liquidated damages would be apposite to the facts of the present case. The following are the decisions: -

(1) **Associate Builder Vs. Delhi Development Authority**[17]**:**
(2) **Jan De Nul Dredging India Pvt. Ltd. Vs. Tuticorin Port Trust**
(3) **Grace Gharunda Vs. Naina Fernandez & Ors.**
(4) **ONGC v. Saw Pipes Ltd.**

The aforesaid decisions and their applicability to the present case is discussed below:-

(1) **Associate Builders Vs. Delhi Development Authority**

In **Associate Builders** (supra), which was also considered by the Supreme Court in **Ssangyong Engg. & Construction Co. Ltd. v. NHAI**[18] when dealing with patent illegality under Section 34(2A) of the Act. The Supreme Court in **Ssangyong** (supra) had held that in order to constitute a ground for setting aside an arbitral award, the illegality must *prima fac*ie go to the root of the matter without requiring re-appreciation of evidence by the Court and not amount to a mere erroneous application of the law. The Supreme Court had relied on **Associate Builders** (supra) to hold that an arbitral award can be set aside if the Arbitral Tribunal contravenes Section 31(3) of the Act and provides no reasons for an award, and if the Arbitral Tribunal wanders outside the scope of the contract, committing an error of jurisdiction. The Supreme Court further held that an arbitral award can be set aside on the ground of patent illegality if the findings of the Arbitral Tribunal are based on no evidence, or ignore vital evidence, or is based on documents taken behind the back of the parties. This is however not the case in the facts of the present case,

17 (2015) 3 SCC 49
18 (2019) 15 SCC 131

inasmuch as the learned Sole Arbitrator has relied on cogent evidence and has passed the award within the contours of the Original D.A. entered between the parties. The findings of the learned Sole Arbitrator are sufficiently reasoned, and I fail to see how there is *prima facie* any illegality which goes to the root of the matter. The relevant paragraphs of the decisions in **Ssangyong** (supra) and **Associate Builders** (supra) are reproduced below: -

> Ssangyong Engg. & Construction Co. Ltd. v. NHAI
> 37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.
> **38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.**
> **39. To elucidate, para 42.1 of Associate Builders, namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to-set aside an arbitral award. Para 42.2 of Associate Builders however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.**
> **40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders, namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).**
> **41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders, while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. 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. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.**
>
> (Emphasis supplied)
>
> Associate Builders v. DDA

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

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

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

(iii) ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, it was held : (SCC p. 317, para 7)

> "7.... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

In Kuldeep Singh v. Commr. of Police, it was held : (SCC p. 14, para 10)

> "10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

...

42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality — for example it an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.

42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

> "28. Rules applicable to substance of dispute.—(1)-(2)
>
> (3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

43. In McDermott International Inc. v. Burn Standard Co. Ltd., this Court held as under : (SCC pp. 225-26, paras 112-13)

> "112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract.

> Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission and D.D. Sharma v. Union of India.]
> 113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."
>
> (emphasis supplied)

(2) Jan De Nul Dredging India Pvt. Ltd. Vs. Tuticorin Port Trust

The reliance placed by learned counsel on behalf of the Respondent-Society on the decision of **Jan De Nul Dredging India Pvt. Ltd.** (supra) further fortifies my view. In the said case, the Supreme Court reiterated that interference with an arbitral award is confined to the statutory grounds under Section 34 of the Act, and that the jurisdiction under Section 37 of the Act is narrower still. The Court cannot reappraise evidence, revisit the merits, or substitute its own interpretation for a plausible view of the Arbitral Tribunal. Intervention is virtually impermissible unless the award suffers from such perversity, going to the root of the matter, that no reasonable person could have reached the conclusion arrived at. The mere availability of an alternative view does not warrant interference. Learned counsel for the Petitioner-Developer sought to distinguish this decision as having been rendered on a different fact pattern. I am unable to accept that submission. The decision lays down the limits of a court's jurisdiction over an arbitral award, and those limits bind a Court no less than an appellate Court under Section 37 of the Act, whose power is itself confined within the domain of Section 34 of the Act. Applying these principles, the Petitioner-Developer's challenge is, in substance, that the learned Sole Arbitrator ought to have insisted on proof of actual loss or legal injury. The learned Sole Arbitrator, however, examined Clause-26 of the

Original D.A., which provides for liquidated damages "and not as penalty" and came to the conclusion that the Original D.A. was entered into after an exchange of drafts and with legal assistance and that the Original D.A. is a construction contract in which the loss caused by prolonged delay would be difficult to prove, and applied **ONGC Ltd.** (supra). Consequently, the Petitioner-Developer's contention that this Court ought to arrive at a different conclusion regarding proof of actual loss would, in substance, require this Court to re-appreciate the evidence and substitute its own view for the plausible view taken by the learned Sole Arbitrator. Such an exercise is impermissible within the limited jurisdiction under Section 34. I therefore find no perversity that goes to the root of the matter. The relevant paragraphs of the aforesaid decision are reproduced below: -

> 33. In Punjab State Civil Supplies Corpn. Ltd. v. Sanman Rice Mills, this Hon'ble Court, while examining the scope of Section 34 and Section 37 of the Arbitration Act, has held
> that:
>
> > "20. In view of the above position in law on the subject, the scope of the intervention of the court in arbitral matters is virtually prohibited, if not absolutely barred and that the interference is confined only to the extent envisaged under Section 34 of the Act. The appellate power of Section 37 of the
> > • Act is limited within the domain of Section 34 of the Act. It is exercisable only to find out if the court, exercising power under Section 34 of the Act, has acted within its limits as prescribed thereunder or has exceeded or failed to exercise the power so conferred. The Appellate Court has no authority of law to consider the matter in dispute before the arbitral tribunal on merits so as to find out as to whether the decision of the arbitral tribunal is right or wrong upon reappraisal of evidence as if it is sitting in an ordinary court of appeal. It is
> > only where the court exercising power under Section 34 has failed to exercise its jurisdiction vested in it by Section 34 or has travelled beyond its jurisdiction that the appellate court can step in and set aside the order passed under Section 34 of the Act. Its power is more akin to that superintendence as is vested in civil courts while exercising revisionary powers. The arbitral award is not liable to be interfered unless a case for interference as set out in the earlier part of the decision, is made out. It cannot be disturbed only for the reason that instead of the view taken by the arbitral tribunal, the other view which is also a possible view is a better view according to the appellate court.
> > 21. It must also be remembered that proceedings under Section 34 of the Act

> are summary in nature and are not like a full-fledged regular civil suit. Therefore, the scope of Section 37 of the Act is much more summary in nature and not like an ordinary civil appeal. The award as such cannot be touched unless it is contrary to the substantive provision of law; any provision of the Act or the terms of the agreement."
>
> 37. In other words, the scope of interference of the court with the arbitral matters is virtually prohibited, if not absolutely barred. The powers of the Appellate Court are even more restricted than the powers conferred by Section 34 of the Act. The appellate power under Section 37 of the Act is exercisable only to find out if the court exercising power under Section 34 of the Act, has acted within its limits as prescribed thereunder or has exceeded or failed to exercise the power so conferred. The Appellate Court exercising powers under Section 37 of the Act has no authority of law to consider the matter in dispute before the Arbitral Tribunal on merits so as to hold as to whether the award of the Arbitral Tribunal is right or wrong. The Appellate Court in exercise of such power cannot sit as an ordinary court of appeal and reappraise the evidence to record a contrary. finding. The award of the Arbitral Tribunal cannot be touched by the court unless it is contrary to the substantive provision of law or any provision of the Act or the terms of the agreement."
>
> (emphasis supplied)

(3) Grace Gharunda Vs. Naina Fernandez & Ors.

Further, the Division Bench of this Court in the case of **Grace Gharunda** (supra) held that the interpretation and construction of the contract primarily lie within the scope of the Arbitral Tribunal and warrant interference under Section 34 of the Act only where the interpretation is one that no fair-minded or reasonable person could adopt, or where the Arbitral Tribunal travels beyond the contract. This Court further held that perversity may constitute patent illegality where the award is based on no evidence, ignores vital evidence, or relies on material not disclosed to the affected party, and that mere misapplication of law or a legal principle, or even breach of a substantive provision of law, does not, by itself, furnish a ground for interference with the arbitral award. The learned Sole Arbitrator in the present case did not travel outside the Original D.A. On the contrary, the award was founded upon Clause-26 of the Original D.A., which expressly contemplated payment of liquidated damages for default continuing beyond 60 days. In the present case, the

learned Sole Arbitrator remained within the contractual framework of the Original D.A. and specifically proceeded on Clause-26 while considering the evidence relating to the defaults and the claim for liquidated damages, relied upon cogent evidence, and acted within the contours of the Original D.A. and rendered sufficiently reasoned findings. There is therefore no basis to characterise the impugned award as perverse or as suffering from patent illegality merely because another view on the evidence or on the requirement of proof of loss is sought to be advanced before this Court. The relevant paragraph of the aforesaid decision is reproduced below:-

> 26. As the Section itself shows, the scope for challenge is exceedingly narrow. An erroneous application of law is not a ground to set aside an award. Re-appreciation of evidence by a Section 34 Court is impermissible. The amended provision has been authoritatively appreciated by the Supreme Court in SsangYong Engineering & Construction Co Lid v National Highways Authority of India! The previous law including Associate Builders v Delhi Development Authority, ONG Ltd v Western Geco International Ltd, Renusagar Power Co Ltd General Electric Co* and other decisions were analysed, as was the effect of the statutory amendments. SsangYong Engineering effectively says:
> (a) "Public policy of India", whether in Section 34 or Section 48 means the 'fundamental policy of Indian law' as explained in paragraphs 18 and 27 of Associate Builders. This is a return to the Renusagar position: violation of (i) the fundamental policy of Indian law; (ii) the interest of India; and (iii) justice or morality.
> (b) The Western Geco expansion, i.e. the requirements of a judicial approach (as interpreted in Western Geco) and placing 'unreasonableness' in the 'public policy' head, is now a thing of the past. To do so would be to enter impermissibly into a merit-based review of an arbitral award.
> (c) Violations of principles of natural justice continue to be a ground for interference?
> (d) "The interest of India" does not survive as a ground for challenge.®
> (e) The 'justice or morality' standard is now to be viewed as a test of whether the award violates 'the most basic notions of morality or justice, in accord with paragraphs 36 to 39 of Associate Builders - the award must shock the judicial conscience to admit of interference on this ground.?
> **(f) Domestic awards must now survive an additional test: that set out in Section 34(2A), the 'patent illegality' standard. This must be a facially patent illegality. It cannot be an erroneous application of the law. A backdoor entry is not permitted: a ground not within 'the fundamental policy of Indian law' - the contravention of a statute unlinked to public policy or public interest - cannot slither in under the ground of 'patent illegality.°**
> **(g) There is distinction between an erroneous application of the law' and an incorrect invocation of the law. For instance, ignoring a binding decision of a superior court is not an erroneous application of the law. It is a ground of patent**

illegality, because it does not state the law correctly. But an award that correctly states the law is not vulnerable because its application of that correctly stated law to the contractual dispute is said (or even shown) to be erroneous.
(h) Patent illegality does not extend to a re-appreciation of evidence. Only an appellate court can do that. A Section 34 court cannot. It is not an appellate court."
(i) A mere contravention of substantive Indian law is no longer a ground to set aside an arbitral award.
(j) But an award with no reasons is a violation of Section 31(3) of the Arbitration Act and constitutes a patent illegality. Paragraph 42.2 of Associate Builders stands.'
(k) The interpretation and construction of a contract is primarily for the arbitrator to decide. If the tribunal does so in a way no fair-minded or reasonable person would - that is, the arbitrator's view is not even minimally a possible one — or if he wanders outside the contract and deals with mattes not assigned to him (for instance, in a dispute about a leave and license agreement considering whether a particular communication is defamatory and awarding damages or an injunction), then the award is vulnerable as a jurisdictional error within Section 34(2A).
(l) Perversity', as understood in paragraphs 31 and 32 of Associate Builders, is no longer under the 'public policy of India' head. Yet it continues to exist. It is now repositioned to fall under the 'patent illegality appearing on the face of the award' head. This would include: a finding based on no evidence at all; an award which ignores vital evidence in arriving at its decision; or, say, a finding based on documents taken behind the back of the parties.
(m) The patent illegality standard is unavailable for international commercial arbitrations.
(n) Section 34(2)(a) does not permit a challenge to an arbitral award on merits."
(emphasis supplied)

(4) ONGC v. Saw Pipes Ltd.:

Further, I am in agreement with the contention of Respondent-Society that they are entitled to liquidated damages by relying on the decision of the Supreme Court in ONGC Ltd. (supra), inasmuch as, in the aforesaid case the Court had held 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. The Supreme Court held that if the compensation named in the contract for such breach is a 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, and such party is not required to lead

evidence to prove actual loss suffered by him. In fact, the burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach. In the facts of the present case, Clause-26 of the Original D.A. provides that if the Petitioner-Developer failed to complete the works stipulated therein, the Respondent-Society would be entitled to liquidated damages of an amount of Rs. 10,00,000/- per week of default payable by the Petitioner which would not be penalty. In accordance with the principles enunciated in **ONGC Ltd.**(supra), the Respondent-Society would not have to lead evidence to prove the loss that occurred from such breach and would be entitled to liquidated damages. Relevant paragraphs of the aforesaid decision are reproduced below: -

> 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 case18 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.

…

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 Indian Contract Act. 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.

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)

40. Considering the aforesaid clear position of facts and the detailed findings in the impugned award on the basis of appreciation of facts and

documentary evidence, on which a possible view has been arrived at by the learned Sole Arbitrator, I am not satisfied that a case has been made out for interference with the impugned award. Therefore, the petition is dismissed without any interference. Interim Application(s), if any, shall also be disposed of accordingly. Any amount deposited in Court shall be released within the expiry of **one month** from the date on which this judgment is uploaded on this Court's website. The petition is disposed of in the aforesaid terms. No costs.

(AARTI SATHE, J.)