

IN-DEPTH

Global Damages

EDITION 6

Contributing editor
A Scott Davison
Kroll

 LEXOLOGY



Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK
© 2023 Law Business Research Ltd
www.thelawreviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at September 2023, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to info@thelawreviews.co.uk.
Enquiries concerning editorial content should be directed to the Content Director,
Clare Bolton – clare.bolton@lbresearch.com.

ISBN 978-1-80449-216-1

Acknowledgements

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

DECHERT LLP

HERBERT SMITH FREEHILLS

INDUSLAW

KROLL

LAWSON LUNDELL LLP

PINHEIRO NETO ADVOGADOS

RAJAH & TANN SINGAPORE LLP

URÍA MENÉNDEZ

WHITE & CASE LLP

INDIA

*Padmaja Kaul, Palecanda M Chinnappa, Yugank Goel, Sahana Devanathan and Vansh Bhutani*¹

I OVERVIEW

In India, the award of damages for non-performance or breach of contract is governed by the Contract Act, 1872 (Indian Contract Act). There are various other statutes that also provide for payment of damages or compensation in appropriate situations. Damages are also frequently granted in tort cases.

The concept of damages in Indian law has been defined by the Supreme Court of India (Supreme Court) as ‘the pecuniary compensation, obtainable by success in an action, for a wrong which is either a tort or a breach of contract, the compensation being in the form of a lump sum which is awarded unconditionally’.² The Indian law of damages largely aims to place the claimant in the same situation as if the breach had not occurred.

While the general law on damages is meant to be compensatory in nature, Indian jurisprudence on grant of exemplary and punitive damages is evolving and gaining popularity, especially in cases involving repeat offenders in intellectual property matters, as well as environmental law.

Indian law provides for broadly two categories of damages: liquidated and unliquidated damages. Some of the other recognised categories include:

- a* general and special damages;
- b* consequential damages;
- c* pecuniary and non-pecuniary damages;
- d* aggravated damages;
- e* exemplary damages;
- f* nominal damages; and
- g* damages for loss of profit or opportunity.

This chapter primarily focuses on the provisions of the Indian Contract Act on the award of damages, the guiding principles of which are often followed by courts in awarding damages as well as under other statutes, with punitive damages being seldom awarded.

1 Padmaja Kaul and Palecanda M Chinnappa are partners, Yugank Goel and Sahana Devanathan are principal associates and Vansh Bhutani is an associate at IndusLaw.

2 *Common Cause, a registered Society v. Union of India*, 1999 (6) SCC 667.

II QUANTIFICATION OF FINANCIAL LOSS

i Introduction

In Indian contract law, the function of damages for breach of contract is compensatory and not punitive.³ The object is to put the person, whose right has been breached, in the same position, so far as money can do, as if there was no breach.⁴

Quantification of damages plays a crucial role in compensating parties for losses suffered due to a breach of contract. Sections 73⁵ and 74⁶ of the Indian Contract Act provide the framework for assessing and awarding damages in such cases. Section 73 deals with the compensation for loss or damage caused by a breach of contract, stating that the injured party is entitled to receive compensation for any loss or damage that naturally arises from the breach in the ordinary course of events (i.e., unliquidated damages). Section 73 borrows from the principles laid down in *Hadley v. Baxendale*⁷ and also allows for the recovery of both pecuniary and non-pecuniary losses that are a direct consequence of the breach. Conversely, Section 74 provides for the payment of liquidated damages; that is, when a contract specifies a predetermined amount to be paid in the case of a breach. However, the court has the power to

3 R Yashod Vardhan and Chitra Narayan (eds), *Pollock and Mulla: The Indian Contract Act and Specific Reliefs Act* (15th ed, LexisNexis 2017) citing *Dhullipadi Namayya v. Union of India*, AIR 1958 AP 533.

4 *Murlidhar Chiranjilal v. Harishchandra Dwarkadas*, (1962) 1 SCR 653.

5 Section 73, Indian Contract Act, 1872:

Compensation for loss or damage caused by breach of contract. When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. Compensation for failure to discharge obligation resembling those created by contract. When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract. Explanation - In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

6 Section 74, Indian Contract Act, 1872:

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.

7 *Hadley & Anor v. Baxendale & Ors*, [1854] EWHC J70.

reduce or waive such liquidated damages if they are found to be excessive or unconscionable. These provisions in Indian contract law ensure that parties are adequately compensated for the harm caused by a breach of contract, while striking a balance between compensation and unjust enrichment.

ii Evidence

Damages are only awarded in the case of a breach of contract, which has to be adjudicated upon by the courts.⁸ In cases where a party is seeking damages as compensation for the loss or damage, the party has to prove that the breach naturally arose in the course of things and that both parties knew at the time of entering into the contract that the loss would be a likely result of the breach. The existence of loss or injury is indispensable and must be established both in the case of liquidated and unliquidated damages.⁹ However, in the case of unliquidated damages, the court must ensure that such a pre-estimate of damages is not in the nature of a penalty.¹⁰

The claimant also faces the burden of proving two other essential elements to successfully claim damages: reasonable foreseeability and mitigation. First, the claimant must demonstrate that the loss suffered was reasonably foreseeable at the time of entering into the contract. This means that the consequences of the breach should have been within the contemplation of the parties or such consequences could have been anticipated by a reasonable person in a similar situation.¹¹ The courts typically apply the test of remoteness to ascertain whether the loss was in the contemplation of the parties when entering into the contract. Regarding remoteness, it has been held to be sufficient that the event of the breach of contract would have appeared as not unlikely to occur by the parties.¹² Second, the claimant is also required to demonstrate that it took reasonable steps to mitigate or minimise the loss resulting from the breach.¹³ This implies that the claimant ought to have made reasonable efforts to reduce the extent of its losses by taking appropriate actions.¹⁴ By establishing both reasonable foreseeability and mitigation, the claimant strengthens their case for an award of damages under Indian contract law.

When awarding damages, the courts also assess whether there is a causality that can be established between the breach of contract and the claimant's loss. It must be proved that the breach did not merely provide an occasion for the loss or the opportunity for the claimant to injure himself or herself but was the dominant cause for the loss.¹⁵ There may be cases where there are multiple reasons for the loss caused to the claimant and in such cases, the claimant will have to prove that the dominant or effective cause for the loss was the breach

8 *P Radhakrishna Murthy v. NBCC Limited* 2013 3 SCC 747.

9 *Kailash Nath Associates v. Delhi Development Authority*, (2015) 4 SCC 136.

10 *Maula Bux v. Union of India*, (1969) SCC 2 586.

11 R Yashod Vardhan and Chitra Narayan (eds), *Pollock and Mulla: The Indian Contract Act and Specific Relief Act* (15th ed, LexisNexis 2017) citing *Karsandas H. Thacker v. The Saran Engineering Co Ltd*, AIR 1965 SC 1981.

12 R Yashod Vardhan and Chitra Narayan (eds), *Pollock and Mulla: The Indian Contract Act and Specific Relief Act* (15th ed, LexisNexis 2017).

13 *Murlidhar Chiranjilal v. Harishchandra Dwarkadas*, AIR 1962 SC 366.

14 R Yashod Vardhan and Chitra Narayan (eds), *Pollock and Mulla: The Indian Contract Act and Specific Relief Act* (15th ed, LexisNexis 2017) citing *Chitty on Contracts*, 28th ed, pp. 1316–17, paragraphs 28–05.

15 R Yashod Vardhan and Chitra Narayan (eds), *Pollock and Mulla: The Indian Contract Act and Specific Relief Act* (15th ed, LexisNexis 2017).

of contract to recover damages. Furthermore, in cases where there is an unforeseeable and extraneous event after the breach of contract, such as an act of nature or an act of a third party, then the claimant will only be able to recover damages for the loss that accrued before the extraneous event.¹⁶

iii Date of assessment

The obligation to pay damages arises when a contract is breached, and typically, the assessment of damages is from the day when the breach occurred.¹⁷ If the contract does not specify otherwise, the law in effect at the time of the breach will be used to determine the amount of damages.¹⁸ Furthermore, damages are determined based on the prevailing rate of goods at the time the cause of action arose, which is usually either the specified performance time or a reasonable time for performance.¹⁹ In a contract of sale where no time was fixed for the acceptance of goods, the Supreme Court held that the measure of damages was prima facie the difference between the contract price and the market price of the goods on the date of the refusal of the buyer to accept such goods.²⁰

Courts in India also have the discretion and power to decide a different date than when the contract was breached or the contract was to be performed if it is necessary to compensate the claimant and carry out substantial justice between the parties.²¹ An example of this is when the claimant did not have knowledge of the breach of contract when it occurred or was unable to take immediate action to mitigate the damage or loss.

iv Financial projections

Damages may be claimed for future losses that were not in existence at the time of the trial and such damages are to be quantified separately, wherever possible.²² As mentioned above, since the primary objective of awarding damages is to put the innocent party in the position that it would have occupied had the contract been performed, the law aims to protect and redress the innocent party's defeated financial expectation and compensate it for its loss of bargain or profits.²³ Notably, however, claimants cannot expect to be put in the same physical position in which they would have been had the contract been performed or be

16 R Yashod Vardhan and Chitra Narayan (eds), *Pollock and Mulla: The Indian Contract Act and Specific Reliefs Act* (15th ed, LexisNexis 2017).

17 R Yashod Vardhan and Chitra Narayan (eds), *Pollock and Mulla: The Indian Contract Act and Specific Reliefs Act* (15th ed, LexisNexis 2017) citing *Union of India v. Mouji Lal Shaw*, AIR 1960 Cal 729.

18 R Yashod Vardhan and Chitra Narayan (eds), *Pollock and Mulla: The Indian Contract Act and Specific Reliefs Act* (15th ed, LexisNexis 2017) citing *Padma Srinivasan v. Premier Insurance Co. Limited*, (1982) 1 SCC 613.

19 R Yashod Vardhan and Chitra Narayan (eds), *Pollock and Mulla: The Indian Contract Act and Specific Reliefs Act* (15th ed, LexisNexis 2017) citing *Bolisetti Venkatanarayana v. Vakkalagada Lakshmi Punmayya*, AIR 1928 Mad 1232.

20 Dr Rajesh Gupta and Dr Gunjan Gupta (eds), *Dr Gurbax Singh: Law of Compensation of Damages* (Vinod Publications Pvt Ltd, 2020) citing *Naihati Jute Mills Limited v. Khyalinam Jagannath*, AIR 1968 SC 522.

21 R Yashod Vardhan and Chitra Narayan (eds), *Pollock and Mulla: The Indian Contract Act and Specific Reliefs Act* (15th ed, LexisNexis 2017) citing *Johnson v. Agnew*, (1980) AC 367.

22 Nilima Bhadbhade (ed.), *Pollock & Mulla, The Indian Contract Act and Specific Relief Acts*, vol. 2 (updated 14th ed, LexisNexis Butterworths Wadhwa).

23 R Yashod Vardhan and Chitra Narayan (eds), *Pollock and Mulla: The Indian Contract Act and Specific Reliefs Act* (15th ed, LexisNexis 2017) citing *MSK Projects (I) (JV) v. State of Rajasthan* (2011) 10 SCC 573.

granted compensation for unreasonable and disproportionate expected profits.²⁴ Therefore, for claiming damages on account of expected profits, claimants do not need to prove any actual loss that they had incurred but merely show that the other party to the contract was guilty of breach of contract.²⁵ However, in certain cases, claims for such damages may be expressly barred by the contract itself.

Courts may also grant compensation for expenses incurred prior to, and in contemplation of, a contract.²⁶ In such cases, the law aims to put the claimant in the position in which it would have been had the contract never been made between the parties. To claim compensation for costs and expenses incurred prior to entering into a contract, the claimant must prove that such costs were directed towards the performance of the contract and would also have to satisfy the test of remoteness.²⁷

v Assumptions

When assessing the losses suffered by the claimant, the court may need to make certain assumptions regarding the extent of the loss suffered or the potential gains that the claimant would have obtained had the contract not been breached. An example of an assumption made by the court is when there is a breach of a works contract, whereby a reasonable expectation of profit would be implicit in the contractor's tender, and therefore such a reasonable profit would be assumed to grant the innocent party damages in order to compensate it for the loss of profits that it expected to earn.²⁸ Furthermore, Indian courts have held that the claimant is entitled to the benefit of every reasonable presumption as to the loss suffered,²⁹ especially in cases where the lack of relevant evidence makes it impossible to assess the damages.

vi Discount rates

The discounted cash flow (DCF) method is a widely used approach to assess the quantum of damages. It involves estimating the market value of an asset by calculating the present value of anticipated future cash flows emanating from such an asset. These cash flows are discounted back to the valuation date using a suitable discount rate that considers the risks associated with the anticipated cash flows. The DCF method relies on the fundamental principle that parties value assets based on the expected future benefits from owning these assets. The DCF is a commonly used method to calculate damages in arbitration by experts.

24 R Yashod Vardhan and Chitra Narayan (eds), *Pollock and Mulla: The Indian Contract Act and Specific Relief Act* (15th ed, LexisNexis 2017) citing *Ruxley Electronics and Construction Limited v. Forsyth*, (1996) AC 344, *AT Brij Paul Singh v. State of Gujarat*, AIR 1984 SC 1703.

25 Dr Rajesh Gupta and Dr Gunjan Gupta (eds), *Dr Gurbax Singh: Law of Compensation of Damages* (Vinod Publications Pvt Ltd, 2020) citing *Dwarka Sas v. State of Madhya Pradesh and Anr*, AIR 1999 SC 1031.

26 R Yashod Vardhan and Chitra Narayan (eds), *Pollock and Mulla: The Indian Contract Act and Specific Relief Act* (15th ed, LexisNexis 2017).

27 R Yashod Vardhan and Chitra Narayan (eds), *Pollock and Mulla: The Indian Contract Act and Specific Relief Act* (15th ed, LexisNexis 2017).

28 Dr Rajesh Gupta and Dr Gunjan Gupta (eds), *Dr Gurbax Singh: Law of Compensation of Damages* (Vinod Publications Pvt Ltd, 2020) citing *AT Brij Paul Singh and Bros v. State of Gujarat*, AIR 1984 SC 1703.

29 R Yashod Vardhan and Chitra Narayan (eds), *Pollock and Mulla: The Indian Contract Act and Specific Relief Act* (15th ed, LexisNexis 2017) citing *Andard Mount (London) Limited v. Curewel (India) Limited*, AIR 1985 Del 45.

vii Currency conversion

According to the UNIDROIT Principles, the assessment of damages should be made in either the currency specified for the monetary obligation or the currency in which the harm was endured, depending on which option is deemed more suitable by the claimant.³⁰ The latter option is given to claimants seeking compensation, as claimants also have to incur expenses to repair the damage that has been caused by the breach of contract, which may not always be in the specified currency.³¹

There may be situations where the payment in a foreign currency from a buyer was delayed, which resulted in a breach of contract, and this delay resulted in the currency's valuation decreasing, thereby causing loss to the seller. Indian courts have allowed parties to claim for damages on account of currency loss when a debt that is due in foreign currency is not paid on time.³² However, losses flowing from the revaluation of currency must have a connection with a breach of contract or must be within the assumed contemplation of parties.³³

viii Interest on damages

Interest, whether statutory or contractual, symbolises the potential profit the claimant could have gained or the loss it endured due to not using the money.³⁴ Regarding interest on damages, these damages aim to compensate the claimant for the period in which it was deprived of the damages until a judgment was made in its favour³⁵ and not solely an adjustment for the increased value of damages to account for inflation. In India, the Interest Act, 1978 allows for interest on damages at a rate not exceeding the current rate of interest,³⁶ for a period prior to the date of quantification, if:

- a the contract specifically provides for such payment from the date provided in the contract; and
- b a written demand has been made for the payment of interest on the amount claimed as damages before initiation of proceedings.

The power of the court to grant interest pendent lite arises from Section 34 of the Code of Civil Procedure, 1908 (CPC).³⁷ The Supreme Court of India has held that granting interest

30 UNIDROIT Principles, Article 7.4.12.

31 R Yashod Vardhan and Chitra Narayan (eds), *Pollock and Mulla: The Indian Contract Act and Specific Reliefs Act* (15th ed, LexisNexis 2017).

32 R Yashod Vardhan and Chitra Narayan (eds), *Pollock and Mulla: The Indian Contract Act and Specific Reliefs Act* (15th ed, LexisNexis 2017) citing *Aruna Mills Limited v. Dhanrajmal Gobindram*, (1968) 1 QB 655.

33 R Yashod Vardhan and Chitra Narayan (eds), *Pollock and Mulla: The Indian Contract Act and Specific Reliefs Act* (15th ed, LexisNexis 2017) citing *Aruna Mills Limited v. Dhanrajmal Gobindram*, (1968) 1 QB 655.

34 *Dr Sham Lal Narula v. Commissioner of Income Tax*, AIR 1964 SC 1878.

35 *CIT v. Dr Shyam Lal Narula*, AIR 1963 (Punjab) 411.

36 Section 2(b), Interest Act, 1978 defines 'current rate of interest' as 'the highest of the maximum rates at which interest may be paid on different classes of deposits (other than those maintained in savings account or those maintained by charitable or religious institutions) by different classes of scheduled banks in accordance with the directions given or issued to banking companies generally by the Reserve Bank of India under the Banking Regulation Act, 1949'.

37 Section 34, Code of Civil Procedure, 1908:

Interest.— (1) *Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum*

pendent lite should be within the discretion of the court and should be fixed in accordance with the general practice of the court and not be too high.³⁸ Section 34 of the CPC also empowers courts to grant future or post-judgment interest on the damages awarded, from the date of the decree until the date of the actual payment.

Indian courts award interest to claimants in terms of an agreement, statutory provisions or by reason of usage or trade having the force of law. However, interest cannot be awarded by way of damages, except in situations where the claimant's money due was wrongfully withheld. However, even in such a case, a written demand by the claimant for the withheld amount due is necessary.³⁹

ix Costs

Reasonable damages, fines or costs incurred by a claimant during the prosecution or defence of legal proceedings can be sought for recovery,⁴⁰ regardless of whether the claimant was the defendant or the plaintiff in the prior proceedings and regardless of the outcome (whether won, lost, settled or partially resolved). However, the recovery of these costs is subject to the standard rules of remoteness and causation.

The recovery of costs in the action for seeking damages itself is guided by Section 35 of the CPC,⁴¹ which grants courts wide discretion to determine by whom or to what extent costs are to be paid. Generally, Indian courts apportion costs to the amount actually recovered

adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate not exceeding six per cent. Per annum as the Court deems reasonable on such principal sum], from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit: Provided that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed six per cent. Per annum but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions. Explanation I.—In this sub-section, 'nationalised bank' means a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970). Explanation II.—For the purposes of this section, a transaction is a commercial transaction, if it is connected with the industry, trade or business of the party incurring the liability. (2) Where such a decree is silent with respect to the payment of further interest on such principal sum from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie.

38 *Mahabir Prasad Rungta v. Durga Datta* (1961) 3 SCR 639.

39 Dr Rajesh Gupta and Dr Gunjan Gupta (eds), *Dr Gurbax Singh: Law of Compensation of Damages* (Vinod Publications Pvt Ltd, 2020).

40 *Hales v. London and North-Western Railways Co.*, (1863) 4 B&S 66.

41 Section 35, Code of Civil Procedure, 1908:

Costs.—(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of an incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers. (2) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing.

and granted, and not the damages claimed. However, when the court is of the view that the claimant was placed in a position of great difficulty by the unjust act of the party that breached the contract and presented a meritless defence, the court may grant the full costs incurred by the claimant in pursuing the damages and not only in proportion to the damages awarded by the court.⁴²

x Tax

The position of Indian law regarding tax on compensation received by a party for settlement of a dispute is that such compensation is not income, and therefore no income tax can be imposed on the same.⁴³ It has also been held that liquidated damages received by a claimant are not to be considered as a 'supply under the Goods and Services Tax Act, 2017', and thus no such tax can be imposed on the liquidated damages.⁴⁴

III EXPERT EVIDENCE

i Introduction

The Indian Evidence Act, 1872 (Indian Evidence Act) specifically addresses the use of expert evidence, primarily in Sections 45 to 51. As a general rule, courts in India do not admit opinions or beliefs of witnesses.⁴⁵ Over time, however, the law regarding expert evidence has evolved due to technological advancements and judicial decisions.

Typically, witnesses are expected to provide testimony based on their firsthand knowledge of the facts. It is the responsibility of the court to draw opinions, inferences or conclusions from these testimonies.⁴⁶ Witnesses are not supposed to express personal thoughts or beliefs during a proceeding before the court, as their opinions are deemed irrelevant. Nevertheless, there are certain specialised matters that require expertise in a particular subject. In such cases, the opinions of individuals with specialised education, training or experience are accepted as evidence.⁴⁷

ii Role of expert evidence in calculation of damages

In several cases, expert evidence has been found to be critical for arriving at an informed decision on merits. The determination of liability and allocation of damages in such a case would be impossible without the guidance of experts. Whether it is a civil suit or arbitration, decision-makers often rely substantially on expert evidence for their understanding as

42 C Kameshwar Rao, *Law of Damages and Compensation* (7th ed, Law Publishers (India) Private Limited, 2013).

43 *CIT v. Amar Dye Chem Ltd* (1994) 74 Taxman 254.

44 Circular No. 178/10/2022-GST [F. NO. 190354/176/2022-TRU] dated 3 August 2022 issued by the Central Board of Indirect Taxes and Customs.

45 Ratanlal Ranchhoddas and Dhirajlal keshavlal Thakore (eds), *Ratanlal and Dhirajlal's: The Law of Evidence* (23rd ed, LexisNexis Butterworths Wadhwa, 2010).

46 Ratanlal Ranchhoddas and Dhirajlal keshavlal Thakore (eds), *Ratanlal and Dhirajlal's: The Law of Evidence* (23rd ed, LexisNexis Butterworths Wadhwa, 2010).

47 Ratanlal Ranchhoddas and Dhirajlal keshavlal Thakore (eds), *Ratanlal and Dhirajlal's: The Law of Evidence* (23rd ed, LexisNexis Butterworths Wadhwa, 2010) citing *Taylor*, 12th ed, s. 1418, p.902.

also to justify their verdict.⁴⁸ In cases where the actual loss is to be proved, the evidence provided by experts is crucial in determining what would be awarded to the claimants. Furthermore, experts are also engaged to determine the 'but-for' position; that is, the position in which a party would have been had it not been for the breach of contract, as they analyse the financial projections of the claimant. Specialised industry experts also assist in calculation of damages in specific cases such as engineers in a construction dispute.

Expert evidence also helps in establishing whether or not the claimant took steps to mitigate the damage caused by the breach of contract, with experts evaluating the industry practices and customs and determining the commonly accepted practices of companies within a particular industry. It is vital, in certain cases, to have experts determine damages, and thus their role is crucial at times and may not be dispensed with.

iii The courts' role excluding and managing expert evidence

In India, courts have been empowered to derive their own conclusions upon considering the evidence of experts, which may be adduced by both sides, cautiously and upon taking into consideration the authorities on the point on which they depose.⁴⁹ The opinion of these experts could be admitted or denied by the courts. Whether such evidence could be accepted or how much weight should be given, lies within the domain and discretion of the court. The evidence of an expert should, however, be interpreted as any other evidence.⁵⁰

The opinion of an expert must be of a corroborative nature to the facts and circumstances of the given case. If the opinion contradicts an unimpeachable eyewitness or documentary evidence, then it should not be given more weight than the direct evidence. The provisions of the Indian Evidence Act, 1872 mentioned above do not provide for any specific attainment of knowledge, study or experience for being called an expert.

iv Independence of experts

In cases of expert witnesses being engaged by one party, there may arise a situation where such expert may support the view and arguments favourable to the party that engaged them, and in such cases, it may become difficult to get an independent opinion from such an expert. However, the court is not obligated to act upon the opinion of an expert and can refuse to place any reliance on such opinions, especially if they are unsupported by any reasons. Courts in India usually eliminate the possibility of bias by appointing independent experts *suo moto*, whose independence and credibility may be further tested through cross-examination.

48 Ratanlal Ranchhoddas and Dhirajlal keshavlal Thakore (eds), *Ratanlal and Dhirajlal's: The Law of Evidence* (23rd ed, LexisNexis Butterworths Wadhwa, 2010) citing *Powell*, 10th ed, p.39.

49 Ratanlal Ranchhoddas and Dhirajlal keshavlal Thakore (eds), *Ratanlal and Dhirajlal's: The Law of Evidence* (23rd ed, LexisNexis Butterworths Wadhwa, 2010) citing *Sri Sundari Davi v. Gangbram*, 1979 All LJ 38 and *Thyssen Stahlunion Gnuab v. Steel Authority of India*, AIR 2002 Del 255.

50 *IUP Law Review*, April 2022, vol. 12, issue 2, pp. 21–31. 11p.

v Challenging experts' credentials

Experts can be examined by the court and subjected to cross-examination.⁵¹ During cross-examination, the credibility of the experts and their opinion can be challenged as their opinion cannot be relied upon straight away without examining them.⁵² This can be conducted by presenting contrary evidence, demonstrating inconsistencies in the expert's opinions or by other methods provided under the Indian Evidence Act, such as Section 146⁵³ and Section 155,⁵⁴ which deal with impeaching the credibility of witnesses. Cross-examination allows for a thorough examination of the expert's opinions and provides an opportunity for challenging their credibility or demonstrating alternative perspectives. Furthermore, an expert's opinion is not outside the scope of judicial review.⁵⁵

vi Novel science and methods

Sections 73 and 74 of the Indian Contract Act do not lay down the manner or mode in which the computation of damages or compensation has to be made. The Supreme Court of India has held that the method used for computation of damages will depend upon the facts and circumstances of each case.⁵⁶ In the assessment of damages, the court can only award

51 *Onyx Therapeutics Inc v. Union of India*, 2019 SCC OnLine Del 11881.

52 Ratanlal Ranchhoddas and Dhirajlal keshavlal Thakore (eds), *Ratanlal and Dhirajlal's: The Law of Evidence* (23rd ed, LexisNexis Butterworths Wadhwa, 2010) citing *Balakrishna Das Agarwal v. Radhadevi Smt.* AIR 1989 All 133.

53 Section 146, Indian Evidence Act, 1872:

146. Questions lawful in cross-examination. – When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend— (1) to test his veracity, (2) to discover who he is and what is his position in life, or (3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture: Provided that in a prosecution for an offence under section 376, section 376A, section 376AB section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E of the Indian Penal Code (45 of 1860) or for attempt to commit any such offence, where the question of consent is an issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to the general immoral character, or previous sexual experience, of such victim with any person for proving such consent or the quality of consent.

54 Section 155, Indian Evidence Act, 1872:

155. Impeaching credit of witness –The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him:— (1) By the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit; (2) By proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence; (3) By proof of former statements inconsistent with any part of his evidence which is liable to be contradicted; Explanation. — A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

55 Ratanlal Ranchhoddas and Dhirajlal keshavlal Thakore (eds), *Ratanlal and Dhirajlal's: The Law of Evidence* (23rd ed, LexisNexis Butterworths Wadhwa, 2010).

56 *AK Sinha v. MTNL*, OMP No.457/2008 Delhi High Court Decided on 30th October 2009.

damages for breach of legal obligations and not for any breach of any expectation that was reasonably assumed by the claimant, in respect of which there was no legal obligation on the respondent.⁵⁷

Over the years, numerous formulae have been developed to effectively gauge the extent of losses incurred or damages eligible for adjudication by courts or tribunals. Notable examples include the *Hudson* formula, the *Emden* formula and the *Eichleay* formula. The use of such formulae was affirmed by the Supreme Court in *McDermott International Inc v. Burn Standard & Co.*⁵⁸ The Supreme Court held in this case that, subsequent to establishing a breach, the computation of damages can be conducted using internationally recognised formulae, falling under the jurisdiction of the arbitral tribunal. In citing the aforementioned formulae, the Supreme Court determined that the selection of a specific technique rests upon the unique facts and circumstances of each individual case.

vii Oral and written submissions

Indian courts examine the experts as witnesses and only upon such examination can the expert's opinion become admissible. An expert's report may also be admitted as evidence, with reasons for their opinion being tested through cross-examination.

IV RECENT CASE LAW

i **Kanchan Udyog Limited v. United Spirits Limited [(2017) 4 SCC 1]**

The facts of the case

Kanchan Udyog Limited (KUL) entered into contracts with United Spirits Limited (USL) for the establishment of a beverages bottling plant, under a project engineering services agreement dated 11 September 1985, and a bottler's agreement dated 26 October 1985. Owing to various disputes between the parties, USL terminated the contracts, and KUL filed a suit against USL for damages, alleging wrongful termination of contract.

The single judge of the High Court, based on Section 73 of the Indian Contract Act, allowed KUL's claim for loss of anticipated profits and held that USL, which had committed a breach of the contracts, was obliged to put KUL in the same position as it would have been if the contract had been performed. KUL was also found to be entitled to the cost of the plant, which was useless for any other purpose.

On appeal, the Division Bench of the High Court reversed the findings of the single judge and dismissed KUL's suit. Therefore, KUL filed an appeal before the Supreme Court.

The decision

On appeal, the Supreme Court observed that KUL's business had failed to take off due to its lack of business acumen, failure to manage its finances, failure to deploy manpower in accordance with its projections, lack of effective advertising and failure to mitigate its losses.

While the Supreme Court found that the contracts were terminated prematurely by USL, the Court also found that there was no proof that the breach was the substantial cause

57 Ratanlal Ranchhoddas and Dhirajlal keshavlal Thakore (eds), *Ratanlal and Dhirajlal's: The Law of Evidence* (23rd ed, LexisNexis Butterworths Wadhwa, 2010) citing *Lavarack v. Woods of Colchester Ltd* (1967) 1 QB 278.

58 *McDermott International Inc v. Burn Standard & Co.*, (2006) 11 SCC 181.

for loss of anticipated profits. The Court placed reliance on Section 73 of the Contract Act to observe that there must be a causal connection between the breach of contract and the loss sustained by the party suffering the breach. The Court held that it cannot be concluded that the breach by USL was the cause, much less the dominant cause for KUL's loss of anticipated profits.⁵⁹

On the principle of remoteness of damages, the Court placed reliance on the 'common sense approach' as laid down in *Galoo Limited*,⁶⁰ which held that the breach may have led to the loss being incurred but did not cause the loss. The Court also relied on the following observation in *Chitty on Contracts*:⁶¹

The important issue in remoteness of damage in the law of contract is whether a particular loss was within the reasonable contemplation of the parties, but causation must also be proved: there must be a causal connection between the defendant's breach of contract and the plaintiff's loss. The courts have avoided laying down any formal tests for causation: they have relief on common sense to guide decisions as to whether a breach of contract is a sufficiently substantial cause of the plaintiff's loss.

The Court also delved into the questions of whether reliance loss (i.e., expenses incurred in reliance on the promise) and expectation loss (i.e., loss of profit) could be maintainable simultaneously or are mutually exclusive of each other. The Court observed that the primary object for protection interest has been described as putting the innocent party in the position in which it would have been had the contract been performed. The Court also observed that the purpose of protection of reliance interest is to put the plaintiff in the position in which he or she would have been if the contract had never been made. The loss may include expenses incurred in preparation by the innocent party's own performance, expenses incurred after the breach or even pre-contract expenditure, but subject to remoteness.⁶²

Ultimately, reliance was placed on *Pollock and Mulla*⁶³ to conclude that the rules as to damages seek to protect both the expectation and reliance interests, and the innocent party cannot ordinarily recover both expectation loss and reliance loss, as that would involve double dipping.

Therefore, the Supreme Court concluded that KUL was not entitled to any expectation loss towards anticipated profits, as any grant of reliance loss would be tantamount to giving benefit to it for what were essentially its own lapses, and dismissed KUL's appeal.

The significance of the decision

This decision of the Supreme Court established that the law of contract cannot move from compensating for consequences of breach to compensating for the consequences of entering into the contract. The Supreme Court categorically held that the law of contract compensates a plaintiff for damages resulting from the defendant's breach, but not for damages resulting

59 Paragraph 26.

60 *Galoo Limited v. Bright Grahame Murray*, (1994) 1 WLR 1360 (CA).

61 *Chitty on Contracts*, 26th Ed (1989) vol. 2, pp. 1128–29, paragraph 1785.

62 Paragraph 30.

63 *Pollock and Mulla*, 14th ed, vol. II, p. 1174.

from it making a bad agreement.⁶⁴ Significantly, the Court held that an aggrieved party cannot claim reliance loss to put itself in a better position than if the contract had been fully performed, considering such a claim would confer a windfall on the aggrieved party, and probably be in breach of the principles of causation.

ii McDermott International Inc v. Burn Standard Co Ltd & Ors [(2006) 11 SCC 181]

The judgment in this case is the first Indian judgment that acknowledged and applied various internationally accepted formulae for computation of damages, particularly in engineering, procurement and construction (EPC) contracts.

The facts of the case

The Government of India, through the Oil and Natural Gas Commission (ONGC) entered into a series of contracts with Burn Standard Company Limited (BSCL) to procure structural fabrication and material, for the purpose of offshore oil and gas production. These contracts contained arbitration agreements.

BSCL and McDermott International Inc (MII) entered into a separate contract for transfer of technology to the former, which contained a separate arbitration agreement. The contract stipulated that the deadline for performance was 30 December 1985, but also provided for extension of time and payment of liquidated damages in the case of delay.

Various disputes arose between the parties, and MII invoked the arbitration agreement, and made several claims before the arbitrator. BSCL also made various counterclaims.

The arbitrator, after passing a partial award and additional award, passed the final award awarding damages to MII under various heads, including compensation and damages towards delays and disruptions.

The decision

The Supreme Court held that while claiming damages, the amount is not required to be quantified and that quantification of a claim is merely a matter of proof.⁶⁵

Sections 55⁶⁶ and 73 of the Contract Act do not lay down the mode and manner of computation of damages, and the Supreme Court found that the method used for the computation of damages would depend on the facts and circumstances of each case. Regarding the assessment of damages, it was held that a court can only award damages for breach of legal obligations and not for any breach of expectation that was reasonably assumed by the claimant, in respect of which there was no legal obligation on the part of the respondent.⁶⁷

64 *Kanchan Udyog Ltd v. United Spirits Ltd*, (2017) 8 SCC 237, relying on *C & P Haulage v. Middleton*, (1983) 1 WLR 1461; (1983) 3 All ER 94; See also, *Cullinane v. British Rema Mfg Co Ltd*, (1954) 1 QB 292; (1953) 3 WLR 923.

65 Paragraph 100.

66 Section 55 of the Indian Contract Act, 'Effect of failure to perform at fixed time, in contract in which time is essential.—When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.'

67 Paragraph 109.

The Supreme Court looked into various methods for the computation of damages, particularly the *Hudson* formula, *Emden* formula and *Eichleay* formula, and concluded that the question of choice of formula, having regard to the facts and circumstances of a particular case, would fall within the domain of the arbitrator.⁶⁸

The Court also found that a court of law or an arbitrator may insist on proof of actual damages and may not allow the parties to take recourse to one specific formula or to prefer one formula over another. This approach, by itself, would not amount to a breach of Section 55 or 73 of the Indian Contract Act.⁶⁹

The significance of the decision

The judgment in *McDermott v. Burn Standard* is the first Indian judgment containing a comprehensive deliberation of various formulae that parties can rely upon for the calculation of damages. The Supreme Court's observation that the use of these formulae falls within the domain of the arbitrators and reliance upon specific formulae does not warrant interference by the Court is in line with the judicial trend in India to minimise interference with arbitral awards. Various courts across the country have subsequently relied on the ruling in *McDermott v. Burn Standard* and have declined to interfere with decisions of the arbitrators relying upon formulae to compute damages, even in the absence of specific evidence being led by the parties.

iii Mahanagar Telephone Nigam Limited v. Tata Communications Limited [(2019) 5 SCC 341

The facts of the case

Mahanagar Telephone Nigam Limited (MTNL) and Tata Communications Limited (TCL) had entered into a contract, in the form of a purchase order, which provided, inter alia, for liquidated damages of a maximum of 12 per cent of the purchase value in the case of a breach.

Subsequently, disputes arose between the parties, and MTNL deducted certain sums from invoices raised by TCL, causing TCL to initiate proceedings before the Telecom Disputes Settlement and Appellate Tribunal (TDSAT).

TCL argued that the amounts deducted by MTNL were not in consonance with the terms of the contract, and MTNL argued that such sums were due towards *quantum meruit* (i.e., an equitable remedy that provides restitution for unjust enrichment).

The TDSAT found that MTNL was not entitled to its claim for *quantum meruit*, since it was beyond the contractually stipulated liquidated damages and was separately charged by MTNL without it establishing that it had suffered any loss. MTNL appealed this TDSAT order before the Supreme Court.

The decision

Upon analysis of the provisions of the Contract Act, the Supreme Court observed that Chapter V, and in particular Section 70, applies to cases where there is no contractual relationship between the parties.⁷⁰

68 Paragraph 106.

69 Paragraph 115.

70 Paragraph 4.

The Court also analysed Section 73 and concluded that it is clear that damages arising out of a breach of contract are to be treated separately from damages resulting from obligations resembling those created by contract. The Supreme Court observed that when a contract has been broken, damages are recoverable under Paragraph 1 of Section 73, but when a claim for damages arises from obligations resembling those created by contract, this would be covered by Paragraph 3 of Section 73.⁷¹

Ultimately, on facts, the Court held that the present case would be squarely covered under Section 74 of the Contract Act, which states that where a sum is given in a contract as a liquidated amount payable by way of damages, only a reasonable amount can be granted, not exceeding the amount stated. The Court thus found that contractually, a maximum of 12 per cent could be levied as liquidated damages under the contract, and since this clause governs the relationship between the parties, a higher amount cannot be awarded as liquidated damages. The Court also found that MTNL could claim only the maximum amount of liquidated damages, and any amounts deducted beyond this would have to be refunded to TCL.⁷²

The significance of the decision

In this case, the Supreme Court had the occasion to analyse if commitments resembling contractual commitments may be construed as part of a contract that already contains remedies for the breach of its terms. The Supreme Court also examined if *quantum meruit* could be granted where parties have entered into a concluded, valid and binding contract.

The Court also considered the applicability of Section 70 of the Contract Act in a contractual claim and made reference to the split verdict in *Moselle Solomon v. Martin & Co*⁷³ on the specific question of whether Section 70 would apply and held that a person relying on an express contract cannot avail of the remedies under Section 70.

With this judgment, the Supreme Court conclusively closed the door to claims of *quantum meruit* where parties have entered into a concluded contract, thus resolving decades of judicial uncertainty on the subject.

iv Welspun Specialty Solutions Limited v. Oil and Natural Gas Corporation Limited [(2022) 2 SCC 382]

The facts of the case

Oil and Natural Gas Corporation Limited (ONGC) had issued a global tender for the purchase of seamless steel casing, with Remi Metals Gujarat Limited (RMGL) emerging as the successful bidder. Subsequently, ONGC issued purchase orders (POs) that stated that the time and date of delivery were the essence of the supply and if any goods were accepted after the delivery or the time for delivery was extended, it would not constitute a waiver of ONGC's right to impose liquidated damages on RMGL under the POs, unless expressly stated.

During the performance of the contract, ONGC granted various extensions to RMGL on account of the delay in meeting the obligations under the contract. When RMGL performed the contract and subsequently raised invoices for the same, ONGC deducted

71 Paragraph 9.

72 Paragraph 13.

73 *Moselle Solomon v. Martin & Co*, (1935) 62 Cal 612.

certain amounts towards liquidated damages. RMGL disputed the levy of liquidated damages by ONGC, among other claims, and the disputes between the parties were referred to arbitration.

The arbitral tribunal held that time was not the essence of the contract since the POs provided for an extension of time for delivery, and therefore the delay in delivery did not constitute a breach of contract and liquidated damages for the same could not be levied by ONGC. ONGC challenged the award before the District Court, which upheld the award of the arbitral tribunal. ONGC further appealed before the High Court, which modified the order of the District Court with respect to the claims of liquidated damages imposed by ONGC but upheld the award as well as the order of the District Court concerning the other claims of RMGL. Thus, both parties filed appeals before the Supreme Court.

The decision

The arbitral tribunal, in this case, held that a mere clause in a contract that stipulates that ‘time is of the essence’ would not at all be determinative to safely conclude that the performance of the obligations is strictly time conditioned in view of Section 55 of the Contract Act. It held that, in order to conclusively determine whether time is of the essence, an inquiry must be made into the overall nature of the contract by examining the contract as a whole.

Upon an analysis of the terms of the contract, the arbitral tribunal held that since the contract contained provisions for extension of time, payment of penalty for delay and levy of liquidated damages, these clauses diluted time being of the essence and rendered the time-conditioned stipulation as nugatory. Consequently, the arbitral tribunal held that, concerning the issue of lawful imposition of liquidated damages, since liquidated damages are in the nature of pre-quantified damages, they could not be granted.

On appeal, the Supreme Court concluded that the findings of the arbitral tribunal regarding the time not being of the essence of the contract were beyond reproach, and the Court concurred with its findings that the very existence of the extension of time provisions together with the stipulation of liquidated damages and the subsequent conduct of ONGC (granting extension of time on earlier occasions) rendered the stipulation of time-conditioned performance diluted.

The Supreme Court affirmed the general principle of common law, as envisaged by the English courts in *Percy Bilton Ltd v. Greater London Council*,⁷⁴ that the general rule is that the promisor is bound to complete the obligation by the date of completion stated in the contract. In addition, it highlighted an exception to the rule of levy of liquidated damages as laid down in *Holme v. Guppy*,⁷⁵ where it was laid down that the promisee is not entitled to liquidated damages if, by its act or omission, it has prevented the promisor from completing the work by the completion date.

The Supreme Court observed that it was undisputed that ONGC had waived liquidated damages on numerous occasions, while granting time extensions for completion of the obligations. The Court concurred with the finding of the arbitral tribunal that as liquidated damages were waived on earlier occasions, it could not be subsequently imposed unless agreed upon by the parties. This finding of the tribunal was upheld and recognised as

74 *Percy Bilton Ltd v. Greater London Council*, (1982) 1 WLR 794 (HL).

75 *Holme v. Guppy*, (1838) 3 M & W 387;150 ER 1195.

the autonomy of a party to engage in contract terms and one that requires a clear intention. Ultimately, the Supreme Court declined to interfere with any of the findings of the arbitral tribunal and upheld its award.

The significance of the decision

The Supreme Court, in this case, conclusively clarified the position as regards the interplay of Sections 55, 73 and 74 of the Indian Contract Act, in the context of time-conditioned obligations and assessment of quantum of damages for delay. This decision of the Supreme Court has significantly impacted the drafting of commercial contracts, since it has been conclusively laid down that it is not sufficient to stipulate that time is the essence of the contract. Parties also need to keep in mind that clauses that provide extension of time or penalties for breach of time, along with the delay in performance of the contract by parties, are all taken into consideration in determining whether time is of the essence of the contract.

v *Kailash Nath Associates v. Delhi Development Authority & Another [(2015) 2 SCC (Civ) 502]*

The facts of the case

Kailash Nath Associates (KNA) submitted the highest bid for a plot at a public auction conducted by the Delhi Development Authority (DDA). As the highest bidder, KNA deposited 25 per cent of the bid amount with DDA, towards an earnest money deposit. DDA acknowledged receipt of KNA's deposit, accepted its bid and directed it to deposit the remaining amount. However, on account of a general recession, KNA requested an extension of time, which was approved by a high-powered committee and granted with varying rates of interest from 18 to 36 per cent.

Another high-powered committee was set up by DDA in order to assess whether additional time was to be granted to KNA, and persons situated similarly. The second high-powered committee also recommended granting an extension of time to make balance payments and specifically named KNA as a party that ought to be granted additional time to make balance payments. However, DDA did not collect the balance payments from KNA and its deposit towards the earnest money was forfeited.

KNA thus filed a suit for specific performance, and in the alternative, for recovery of damages and the earnest amount. Shortly thereafter, DDA re-auctioned the premises.

The decision

The single judge of the Delhi High Court dismissed KNA's suit for specific performance and recovery of damages, but ordered a refund of the earnest money forfeited, together with interest at 9 per cent per annum. On appeal, the Division Bench set aside the judgment of the single judge, holding that the forfeiture was in order.

KNA appealed the order of the Division Bench before the Supreme Court of India, which reversed the judgment of the Division Bench and restored the order of the single judge.

The Supreme Court observed that it would be arbitrary for DDA to forfeit the earnest money on two fundamental grounds:

- a there is no breach of contract on KNA's part; and
- b since DDA did not incur any loss, even if it could insist on a contractual stipulation in its favour, it would be arbitrary to allow DDA as a public authority to appropriate significant sums of money without any loss being caused.⁷⁶

The Supreme Court found that given that two high-powered committees had recommended granting an extension of time to KNA, it could not be said that time was the essence of the contract or that KNA had committed a breach of the contract.

The Supreme Court then went on to summarise the law⁷⁷ on compensation for breach of contract under Section 74 of the Indian Contract Act. It was held that where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of 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 stated. Similarly, in cases where the amount fixed is in the nature of a penalty, only reasonable compensation can be awarded not exceeding the penalty stated. In both cases, the liquidated amount or penalty is the upper limit beyond that the court cannot grant reasonable compensation.

The Supreme Court also held that the expression 'whether or not actual damage or loss is proved to have been caused thereby' used in Section 74 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.

The significance of the decision

This decision of the Supreme Court is a significant exposition of the law on liquidated damages, and interestingly, the Supreme Court concluded that where it is proved that actual damages can be proved, such proof cannot be dispensed with. This position is a noteworthy departure from the position laid down in *Fateh Chand v. Balkishan Das*⁷⁸ and *Maula Bux v. Union of India*,⁷⁹ where the Supreme Court had ruled that an aggrieved party is not required to prove actual damages to claim a decree of compensation. This decision has thus significantly impacted the assessment and award of liquidated damages in India.

76 Paragraph 29.

77 Paragraph 43.

78 AIR 1963 SC 1405.

79 AIR 1970 SC 1955.

