Claim for ‘Loss of profit’ and its adjudication – An analysis

By

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Types of damages:

Loss - Income Tax Act, 1961, Section 115 J, Expl (iv); Companies Act, 1956, Section 205(1), First Proviso, Clause (b).

In A. Ramaiya’s Companies Act (14th Edn., 1988, at p. 1498), the learned author has referred to the established corporate practice and opined that the word ‘loss’ in proviso (b) to Section 205(1) would include ‘depreciation’. In accounting parlance and in a commercial sense, the word ‘loss’ is always taken as including ‘depreciation’. If depreciation were to be excluded the legislature would have used the term ‘cash loss’. A comparison may be made with the language employed in Section 3(o) of the Sick Industrial Companies (Special Provisions) Act, 1985 wherein a distinction is made between ‘accumulated loss’ and ‘cash loss’. The learned Senior Counsel also referred to Garden Silk Weaving Factory v. CIT [91991) 2 SCC 684: (1991) 189 ITR 512] wherein this court has held that unabsorbed depreciation was part of loss. The learned counsel also referred to Section 349(4)(1) of the Companies Act which uses the expression ‘excess of expenditure over income’ which is narrower in scope and excludes depreciation. We find substance in the submission. There is no reason to assign to the term ‘loss’ as occurring in Section 205 proviso clause (b) of the Companies Act a meaning different from the one in which it is understood thereat solely because it is being read along with Section 115-J of the Income tax Act.

Section 205(1) First proviso clause (b), of the Companies act brings out the unabsorbed portion of the amount of depreciation already provided for computing the loss for the year. The words ‘the amount provided for depreciation’ and ‘arrived at in both cases after providing for depreciation’ make it abundantly clear that in this clause ‘loss’ refers to the amount of loss arrived at after taking into account the amount of depreciation provided in the profit and loss account. The term ‘loss’ as occurring in clause (b) of the proviso to Section 205(1) of the Companies Act has to be understood and read as the amount arrived at after taking into account the depreciation. [Surana Steels Pvt. Ltd. v. Dy. C.I.T., (1999) 4 SCC 306 (313, 314)]

What is loss of profit - Circulating Capital?
Adam Smith in his ‘Wealth of Nations’ describes ‘fixed capital’ as what the owner turns to profit by keeping it in his own possession and ‘circulating capital’ as what he makes profit of by parting with it and letting it change masters. ‘Circulating capital’ means capital employed in the trading operations of the business and the dealings with it comprise trading receipts and trading disbursements, while ‘fixed capital’ means capital not so employed in the business though, it may be used for the purposes of a manufacturing business, but does not constitute capital employed in the trading operations of the business. Vide Goden Horse Shoe (New) Ltd. v. Thurgood, (18 TC 280), if there is any loss resulting from depreciation of the foreign currency which is embarked or adventured in the business and is part of the circulating capital, it would be a trading loss, but depreciation of fixed capital on account of alteration in exchange rate would be a capital loss. Putting it differently, if the amount in foreign currency is utilized or intended to be utilized in the course of business or for a trading purpose or for effecting a transaction on revenue account, loss arising from depreciation in its value on account of alteration in the rate of exchange would be a trading loss, but if the amount is held as a capital asset, loss arising from depreciation would be a capital loss. (Sutlej Cotton Mills Ltd v. C.I.T., (1978) 4 SCC 358)

**Fixed capital**

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**Income Tax and Super tax under Income Tax Act, 1922, Sections 3 and 55**

To appreciate the distinction between the concepts of income-tax and super-tax, a brief history of their incidents will not be inappropriate. Under the Income-tax Act of 1886 the total...
income from various sources was not the criterion for assessment but the different sources alone were the basis for it. For the first time 1918 Act introduced the scheme of total income for the purpose of determining the rate of tax. Under that Act several heads were enumerated, under which the income of an assessee fell to be charged. The 1922 Act went further and enacted that loss under one head of "income" can be set off against the profit under another head. Till the 1922 Act super-tax was separately levied. It was first introduced by the Super-tax Act of 1917 and then it was replaced by the 1920 Act. Only in 1922, for the first time, it was incorporated in the Income-tax Act. Though both the taxes are dealt with by the same Act, their distinctive features are maintained. As regards income-tax, in the words of a learned author, "S. 3 charges the total income, S. 4 defines its range, S. 6 qualifies it and Ss. 7 to 12 quantify it." There are various other sections which provide the machinery for the ascertainment of the total income for assessment and recovery of tax. As regards super-tax, a separate chapter viz., Ch. IX, deals with it; it comprises Ss. 55 to 58. Section 55 is the charging section for the purpose of super-tax under that section. "In addition to the income tax charged for any year, there shall be charged, levied and paid for that year in respect of the total income of the previous year “an additional duty of income-tax (in this Act referred to as super-tax) at the rate of rates laid down for that year by a Central Act". Section 56 says that for the purpose of super-tax, except in specified cases, the total income shall be the total income as assessed for the purpose of income-tax, Section 56A exempts from super-tax certain dividends. Section 58(1) applies by reference to super-tax certain provisions of the Act relating to the charge, assessment, collection and recovery of income-tax. It would be seen from this Chapter that though super-tax is described as an additional duty of income tax it is not incorporated in the income-tax; its identity is maintained. A self-contained Chapter deals with the charge, assessment, collection and recovery of super-tax. There are essential differences between the two taxes emanating not only from the express provisions contained in Ch. IX but also from the omission to apply the specified sections of the Act to the said tax. Successive Finance Acts also made a distinction between the two taxes. This is not the occasion to notice in detail the differences between the two taxes. It is enough to state that there are pronounced differences between the incidents of the two taxes. But two relevant differences may be noticed, namely: (i) though both the taxes are assessed on the total income of a person, the total income for the purpose of income-tax is computed on the basis of income classified under the different heads mentioned in S. 6 of the Act, whereas super-tax is not concerned with the different heads, but is payable on the total income so ascertained; and (ii) while super-tax, except in a few cases, is payable by the assessee direct, the income-tax is payable by him direct as well as by deduction. While in the case of income-tax by reversing the process the tax attributable to a particular source can be ascertained. The only possible method by which the said tax may be split up is by working out the proportion of the tax payable by the assessee in respect of an income from a particular source on the basis of the ratio the said income bears to the total income. But this method is
not sanctioned by the Act. It is not legally possible to predicate what particular part of the super-tax is attributable to an income from a particular source, for unlike in the case of income-tax, total income alone is the criterion and the income from different sources is not relevant. To illustrate: super-tax is now levied an income over certain level at present Rs.25,000/-. If As total income is Rs. 35,000/- made up of Rs.20,000/- from big forest and Rs.15,000/- from other sources, what is the super-tax attributable to the income from the big forest? The answer is, it is not possible to do so. *(State of Madhya Pradesh v. Sirajuddin Khan, AIR 1965 SC 198)*

**Reserve and provision**

The distinction between the two concepts of ‘reserve’ and ‘provision’ is fairly well-known in commercial accountancy and the same has been explained by this Court in Metal Box Company of India Ltd v. Workmen, (1969) 73 ITR 67 : (1969) 1 SCR 750 : AIR 1969 SC 612 thus :

*The distinction between a provision and a reserve is in commercial accountancy fairly well known. Provisions made against anticipated losses and contingencies are charges against profits and therefore, to be taken into account against gross receipts in the P&L account and the balance-sheet. On the other hand, reserves are appropriations of profits, the assets by which they are represented being retained to form part of the capital employed in the business. Provisions are usually shown in the balance-sheet by way of deductions from the assets in respect of which they are made whereas general reserves and reserve funds are shown as part of the proprietor’s interest. (See Spicer and Pegler: Book-keeping and Accounts, 15th edition, page 42.) In the other words the broad distinction between the two is that whereas a provision is a charge against the profits to be taken into account against gross receipts in the profit and loss account, a reserve is an appropriation of profits, the asset or assets by which it is represented being retained to form part of the capital employed in the business. *(Vazir Sultan Tobacco Co. Ltd v. C.I.T., (1981) 4 SCC 435)**

**Sticky advances**

*Those advances are called ‘sticky’ in commercial parlance whose recovery becomes highly improbable or doubtful. The interest accruing on such advances are debited to the parties concerned by those institutions which maintain their accounts on mercantile system, and at the same time instead of carrying such an interest to the profit and loss account, the same is credited to a separate account styled as suspense account or interest suspense account. *(Kerala Financial Corporation. v. C.I.T., (1994) 4 SCC 376)**

**What Contract Act 1872 says?**

**Section 73 of 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.

Illustrations

(a) A contracts to sell and deliver 50 maunds of saltpetre to B, at a certain price to be paid on delivery. A breaks his promise. B is entitled to receive from A, by way of compensation, the sum, if any, by which the contract price falls short of the price for which B might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered.

(b) A hires B's ship to go to Bombay, and there take on board, on the first of January, a cargo which A is to provide and to bring it to Calcutta, the freight to be paid when earned. B's ship does not go to Bombay, but A has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. A avails himself of those opportunities, but is put to trouble and expense in doing so. A is entitled to receive compensation from B in respect of such trouble and expense.

(c) A contracts to buy of B, at a stated price, 50 maunds of rice, no time being fixed for delivery. A afterwards informs B that he will not accept the rice if tendered to him. B is entitled to receive from A, by way of compensation, the amount, if any, by which the contract price exceeds that which B can obtain for the rice at the time when A informs B that he will not accept it.
(d) A contracts to buy B's ship for 60,000 rupees, but breaks his promise. A must pay to B, by way of compensation, the excess, if any, of the contract price over the price which B can obtain for the ship at the time of the breach of promise.

(e) A, the owner of a boat, contracts with B to take a cargo of jute to Mirzapur, for sale at that place, starting on a specified day. The boat, owing to some avoidable cause, does not start at the time appointed, whereby the arrival of the cargo at Mirzapur is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls. The measure of the compensation payable to B by A is the difference between the price which B could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived.

(f) A contracts to repair B's house in a certain manner, and receives payment in advance. A repairs the house, but not according to contract. B is entitled to recover from A the cost of making the repairs conform to the contract.

(g) A contracts to let his ship to B for a year, from the first of January, for a certain price. Freights rise, and, on the first of January, the hire obtainable for the ship is higher than the contract price. A breaks his promise. He must pay to B, by way of compensation, a sum equal to the difference between the contract price and the price for which B could hire a similar ship for a year on and from the first of January.

(h) A contracts to supply B with a certain quantity of iron at a fixed price, being a higher price than that for which A could procure and deliver the iron. B wrongfully refuses to receive the iron. B must pay to A, by way of compensation, the difference between the contract price of the iron and the sum for which A could have obtained and delivered it.

(i) A delivers to B, a common carrier, a machine, to be conveyed, without delay, to A's mill, informing B that his mill is stopped for want of the machine. B unreasonably delays the delivery of the machine, and A, in consequence, loses a profitable contract with the Government. A is entitled to receive from B, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

(j) A, having contracted with B to supply B with 1,000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with C for the purchase of 1,000 tons of iron at 80 rupees a ton, telling C that he does so for the purpose of performing his contract with B. C fails to perform his contract with A, who cannot procure other iron, and B, in consequence, rescinds the contract. C must pay to A 20,000 rupees, being the profit which A would have made by the performance of his contract with B.
(k) A contracts with B to make and deliver to B, by a fixed day, for a specified price, a certain piece of machinery. A does not deliver the piece of machinery at the time specified, and in consequence of this, B is obliged to procure another at a higher price than that which he was to have paid to A, and is prevented from performing a contract which B had made with a third person at the time of his contract with A (but which had not been then communicated to A), and is compelled to make compensation for breach of that contract. A must pay to B, by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by B for another, but not the sum paid by B to the third person by way of compensation.

(l) A, a builder, contracts to erect and finish a house by the first of January, in order that B may give possession of it at that time to C, to whom B has contracted to let it. A is informed of the contract between B and C. A builds the house so badly that, before the first of January, it falls down and has to be re-built by B, who, in consequence, loses the rent which he was to have received from C, and is obliged to make compensation to C for the breach of his contract. A must make compensation to B for the cost of rebuilding the house for the rent lost, and for the compensation made to C.

(m) A sells certain merchandise to B, warranting it to be of a particular quality, and B, in reliance upon this warranty, sells it to C with a similar warranty. The goods prove to be not according to the warranty, and B becomes liable to pay C a sum of money by way of compensation. B is entitled to be reimbursed this sum by A.

(n) A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day. B, in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment.

(o) A contracts to deliver 50 maunds of saltpetre to B on the first of January, at a certain price. B afterwards, before the first of January, contracts to sell the saltpetre to C at a price higher than the market price of the first of January. A breaks his promise. In estimating the compensation payable by A to B, the market price of the first of January, and not the profit which would have arisen to B from the sale to C, is to be taken into account.

(p) A contracts to sell and deliver 500 bales of cotton to B on a fixed day. A knows nothing of B's mode of conducting his business. A breaks his promise, and B, having no cotton, is obliged to close his mill. A is not responsible to B for the loss caused to B by the closing of the mill.

(q) A contracts to sell and deliver to B, on the first of January, certain cloth which B intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in
making caps. B is entitled to receive from A, by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

(r) A, a ship-owner, contracts with B to convey him from Calcutta to Sydney in A's ship, sailing on the first of January, and B pays to A, by way of deposit, one-half of his passage-money. The ship does not sail on the first of January, and B, after being in consequence detained in Calcutta for some time and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, arriving too late in Sydney, loses a sum of money. A is liable to repay to B his deposit, with interest, and the expense to which he is put by his detention in Calcutta, and the excess, if any, of the passage-money paid for the second ship over that agreed upon for the first, but not the sum of money which B lost by arriving in Sydney too late.

Section 211 of INDIAN CONTRACT ACT, 1872 [S.211]

Agent's duty in conducting principals business:

An agent is bound to conduct the business of his principal according to the directions given by the principal, or in the absence of any such directions according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

Illustration

(a) A, an agent engaged in carrying on for B a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, on its to make such investment. A must make good to B the interest usually obtained by such investments.

(b) B, a broker, in whose business it is not the custom to sell on credit, sells goods of A on credit to C, whose credit at the time was very high. C, before payment, becomes insolvent. B must make good the loss to A.

Section 212 of INDIAN CONTRACT ACT, 1872 [S.212]

Skill and diligence required from agent:

An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct
consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

Illustration

(a) A, a merchant in Calcutta, has an agent, B, in London, to whom a sum of money is paid on A's account, with orders to remit. B retains the money for a considerable time. A, in consequence of not receiving the money, becomes insolvent. B is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss-as, e.g., by variation of rate of exchange-but not further.

(b) A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit, without making the proper and usual enquiries as to the solvency of B. B, at the time of such sale, is insolvent. A must make compensation to his principal in respect of any loss thereby sustained.

(c) A, an insurance-broker employed by B to effect an insurance on a ship omits to see that the unusual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. A is bound to make good the loss to B.

(d) A, a merchant in England, directs B, his agent at Bombay, who accepts the agency, to send him 100 bales of cotton by a certain ship. B, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. B is bound to make good to A the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

Decisions of Supreme Court

This was an appeal from the Supreme Court of Calcutta. The Respondents were the Plaintiffs in that Court, and their plaint recited that they, before the committing of the grievances complained of, had been, and then were, he owners of a steam-tug called The "Underwriter" employed for hire in towing ships to and from the port of Calcutta, and in the receipt of large profits from such employment; and that the Defendant was an officer in the public service of the East India Company, having the name and style of the Superintendent of marine, and that, as such, he was invested with the chief authority and control over all the officers of the Bengal pilot service employed by the Company on the Hooghly river for the purpose of piloting vessels thereon to and from the said port; and that the said officers of the Bengal pilot service were the only pilots who, upon the said river, exercise the calling of pilots, and take pilotage charge of inward and outward bound ships; and that in consequence of the perils of the navigation, no ship can with safety proceed inwards or outwards, or be duly
navigated, except in charge of a competent pilot. After these recitals, the plaint charged that the Defendant wrongfully and unjustly contriving and intending to injure the Plaintiffs, and to prevent them from continuing to employ their said steam-tug, wrongfully and injuriously issued and published a certain order addressed to the said officers of the Bengal pilot service, whereby he, as such Superintendent of marine, strictly prohibited them from allowing the said steam-tug to take any ship in tow of which they should have charge. It then stated the period during which the order remained in force; the deprivation of employment during that time; and the consequent loss of profit, laying the damage at Rs. 20,000. To this plaint, the Appellant pleaded three pleas, on the first only of which, being the plea of not guilty, the question before their Lordships arises that the allegations in the inducement by way of recitals must be taken to have been admitted by the Defendant, and supposing the direct allegations which are in issue to have been proved, in such sense as to make the action maintainable, no question was made before us as to the amount of the damages awarded the point for consideration, therefore is whether upon the evidence in the case this action is maintainable. This case was disposed of in the Court below in a very learned and elaborate judgment, to which their Lordships have given the full consideration it deserves, though they cannot accede to all the conclusions of that judgment. The appeal has been very ably argued at the Bar; but their Lordships have not thought it necessary to review and distinguish the many cases cited, in the Court below. It seems to them that when the legal principles to which they have adverted are applied to the facts of this case, its decision turns on a very plain and elementary point it is essential to an action in tort that the act complained of should, under the circumstances, be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will, however, directly, do him harm in his interests, is not enough. Cases are of daily occurrence in which the lawful exercise of a right operates to the detriment of another, necessarily and directly without being actionable. The present case appears to their Lordships to be no more, and they will, therefore, humbly advise Her Majesty that the judgment of the Court below ought to be reversed, and that the costs of the appeal should be borne by the Respondents. [Thomas Eales Rogers –vs- Rajendro Dutt [1859] 8 M.I.A. 103(3 Members of the Judicial Committee)]

The appellants were the owners of a 12-anna undivided share in three plots of land, the pro forma respondents Nos. 2 and 3 being the owners of the remaining 4-anna share. In circumstances which appear from the judgment of the Judicial Committee respondent No. 1 instituted a suit against the appellants and the pro forma respondents claiming an order for the execution of an amalnamah in his favour as to the property in the terms of a kabuliyat which he had executed, possession, Rs.600 as compensation for loss of profits, and further relief. The Subordinate Judge dismissed the suit on the ground that no contract was established. Sect. 15, however, is in these terms "Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the
whole, or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the Court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance, and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant." It is upon this that the Judges of the High Court proceeded. The proviso to the section, however, has been overlooked. The plaintiff has not relinquished all claims to further performance and all right to compensation either for the deficiency or for the loss or damage sustained by him through the default of the defendants. On the contrary, he claimed in his plaint Rs.600 as loss of profit already suffered, and he has obtained a decree for the return of that share of the salami which enured to the 4-anna share. The learned judges who allowed the appeal on the ground that an important question of law was involved stated this as one of the questions which they thought might properly be submitted to this Board, and their Lordships have thought it right, although in the view that they take of the case it is not necessary for their decision, that their opinion should be recorded. On the whole matter their Lordships will humbly advise His Majesty that the appeal should be allowed and the decrees of the High Court and the District Court recalled with costs and the decree of the Subordinate Judge affirmed. The first respondent must pay the appellants costs of the appeal. [Promatha Nath Mittra –vs-Gostha Behari Sen (Defendants) [1931] 59 LawReportsInd.App. 47 Privy Council 3 Lords]

The present suit was brought in the High Court at Calcutta on January 25, 1937. The plaint alleged that the respondents had failed and neglected to perform their part of the contract and to make over positive prints of a number of films therein specified by name. On that basis it claimed Rs.3000 as general damages for loss of profit, refund of the Rs.4000 paid on account, and Rs.913-13-0 expenses incurred. The respondents by their written statement of April 22, 1937, denied that they had committed any breach of contract, and averred that they had all along been ready and willing to perform their obligations under the contract. They alleged that the appellant had broken the contract, and that they had suffered damages, for which they were advised to bring a separate suit. The Judge accepted that contention, and gave the appellant a decree for Rs.4000 and costs. On the respondents appeal to a Division Bench, Lord-Williams J., who dissented from his colleagues, held that the respondents had committed breaches which entitled the appellant to rescind the contract—a view which the appellant abandoned before the Board. He (Lord-Williams J.) appeared to have considered that the course taken by the learned judge in decreeing the suit on a ground not pleaded was justified by consent of the respondents counsel at the trial; and he agreed that if the respondents rightly rescinded the contract under s. 39 by reason of the appellants default, the appellant was entitled under s. 64 to refund of the Rs.4000. Derbyshire C.J. and Nasim Ali J. thought that the trial judge was wrong in giving a decree upon a case which the appellant had not made on the pleadings; but they, too, entertained the new ground of claim without taking steps to have it
pleaded. They decided that it was unsustainable since s. 64 of the Act did not apply to a case of rescission under s. 39, and in the result the appeal was allowed. Their Lordships think that this appeal should be allowed; that the decrees of the High Court dated January 10 and July 14, 1939, should be set aside; that it should be declared that the appellant is entitled to recover from the respondents Rs.4000 paid under the contract of May 8, 1936, subject to the right of the respondents to set off the amount due to them as damages for the appellants repudiation and breaches of the said contract; that the respondents should have leave within two months of the receipt by the High Court of the Order in Council to be made on this appeal, or within such further time as may be allowed by the High Court, to file in the High Court particulars of their claim for damages as aforesaid; and that this case should be remitted to the High Court in its Original Jurisdiction to assess such damages and thereafter to pass a decree for such sum as may be due on balance to either party, and to make such order as to the costs of the proceedings for the assessment of damages as it shall think fit. Their Lordships will humbly advise His Majesty accordingly. The appellant will pay the respondents costs in the High Court both at the trial and on appeal. The respondents will pay the appellant his costs of this appeal.

[Muralidhar Chatterjee –vs- International Film Company Limited. [1942] 70 Law Reports Ind. App. 35 Privy Council 5 Lords]

The short question is whether, and if so, to what extent, respondents Nos. 1-3 are entitled to compensation for loss of profit on coal which they were prevented from working or getting from a portion of their coal mine underlying the station at Jheria by reason of restrictions imposed by a declaration of the Government of Bihar and Orissa made pursuant to the provisions of the Land Acquisition (Mines) Act, 1885. The question here does not turn on the statutory provisions, but on what extent the parties have modified their statutory rights by the siding agreement. After hearing both parties, for the reasons mentioned in the judgment, their Lordships are of opinion that this appeal should be dismissed. [Secretary Of State –vs-Ambalal Khora. [1944] 72 Law Reports Ind. App. 11(Privy Council - 5 Lords)]

Income-Tax Act (1922) S. 4 (3) (vii). Insurance amount received by Mills Company against loss of profits owing to fire-Taxable income. Held that an amount of money paid by an Insurance Company to the assessee Mills Company against loss of profits following a fire is a receipt and in so far as it represents loss of profits, as opposed to loss of capital and so forth, it is an item of income in any normal sense of the term. Such a receipt is inseparably connected with the ownership and conduct of the business and arises from it. Accordingly it being not exempt under S. 4 (3) (vii), the amount is income and as such taxable under Section 4. [Raghuvashti Mills LTD., Bombay –vs- Commissioner of Income-tax, Bombay City. [1953] 0 AIR (SC) 4= 1953 55 BomLR 196, [1952]22 ITR 484 SC, 1953 I MLJ 113 SC, [1953 ]4 SCR 177(SC-4J)]
The various decided cases demarcate the areas on the two sides of the line in which a receipt may lie and in every case it has to be determined as to whether it falls on one side or the other. The simplest case is of income from property or business as distinct from something received in lieu of property or business itself. One illustration of this is insurance against fire, destruction or damage and insurance against loss of profit, the former would bring in compensation in the nature of a capital. Another instance is where the whole business is bought over and the receipt is the price of the business itself as opposed to a lump sum payment for the loss of profit calculated on a proper basis. The test of income i.e. periodicity or recurrence at fixed intervals has been doubted in this Court. Raghuvanshi Mills, 1953 SCR 177. The agreement which is now before us and which was surrendered was terminable at will. The amount of profit which the assessee made from working the agency contract in Hyderabad State alone was much more than the amount which the assessee received for the termination of the whole of their agency outside the State. Thus it is clear that the termination did not affect the trading activities of the assessee and therefore the termination of the contract viewed against the background of the assessee's business organisation and profit-making structure appears to be no more than compensation for the loss of future profit and commission. The true effect of the facts of this case appears to be this that in 1939 the assessee's area of distribution was increased from the State of Hyderabad to the whole of India and in 1950 it was again reduced to the original area of 1931. The assessee never lost their agency. As a result of this contraction of area they at the most have lost some agency commission. The compensation therefore was in the nature of surrogatum and in this view of the matter it is revenue and not capital. The Court would, therefore, allow this appeal with costs throughout.


There is no mention of any loss to goodwill there. It is said on behalf of the respondent that the claim was for "compulsory vacation of the premises and also for "disturbance and loss of business and that the claim for "compulsory vacation of the premises" was for the injury to the goodwill. That indeed would be a strange way of making a claim for loss of goodwill. There is a claim for loss of business in express terms and this was computed at two years loss of profits. Why was loss of business claimed? Clearly, because the business would be stopped or disturbed for some time by the compulsory vacation of the premises. That would make the claim as framed sensible. It would then be a claim for one thing only, namely, for loss of profits. The Department says that that is all that was claimed. It is difficult to hold that the claim so framed was, as the respondent contends, for three things, namely, (a) compulsory vacation of premises, (b) disturbance of business and (c) loss of business. If three things were claimed all could not have been together computed by one measure of two years loss of profit as was done. The claim for loss of business would have been without any particulars as to how the loss was said to have been occasioned and this could thirdly have been intended. It is reasonable to
think that the compulsory vacation of the premises was mentioned as explaining how the disturbance and loss of business had been occasioned for which a claim had admittedly been made. There is no hint whatsoever anywhere in this letter that the respondent intended to make any claim from any loss of goodwill. It is perfectly plain that it was only claiming loss of profit for two years during which it did not except to be able to restart its business. We do not think that the Tribunal came to any contrary finding. It, no doubt, said "Really speaking the payment is on account of the compulsory vacation of the premises". That does not show that the Tribunal thought that the payment was on account of loss of goodwill. This observation was made because the Tribunal found that it had not been proved that the respondent had actually suffered and loss. No question of actual proof of loss arose for making the claim. That is why the Tribunal said that the payment was on account of compulsory vacation of premises; from such vacation a loss of profit might reasonably be presumed. The Tribunal does not mention any loss of goodwill at all and no question of any such loss appears to have been raised either in the Tribunal or the High Court. It is said this shows that the respondent was claiming for loss of goodwill. That seems to us quite untenable a contention. No goodwill is referred to. All that is said here is that competitors would go ahead while the respondent's business remained stopped. Now that has nothing to do with loss of goodwill. It is only concerned with the stoppage of the respondent's business irrespective of its removal from one premise to another. Further, this statement was not in connection with any claim actually made. It could only, if at all, be taken as referring to claim for loss of profits. The Court, therefore, did not think that this portion of the respondent's letter helps it. It seems to us for the reasons aforesaid that the sum of Rs. 57,435/- had not been received by the respondent for any injury to any of its capital assets. In our view, the sum was received as compensation for loss of profits for the period during which, it was imagined, the respondent's business would remain stopped before it could be restarted at a new premises. That being so, it was clearly a revenue receipt, it has not been disputed that if the amount in question was paid as compensation for loss of profit, it would be a revenue receipt and liable to tax. As it was a trading receipt it cannot be held exempt from tax under S. 4(3) (vii) of the Income-tax Act either. In the result we answer both the questions framed in this case in the negative. This appeal is therefore allowed with costs. [Commissioner Of Income Tax, Excess Profits Tax, Bombay City Bombay –vs- Shamsher Printing Press, Bombay [1961] 0 AIR(SC) 98(SC-3J)]

The counsel for the respondent relies on that part of S. 73 which says that damages may be measured by what the parties knew when they made the contract to be likely to result from the breach of it. It is contended that the contract clearly showed that the goods were to be transported to and sold in Calcutta and therefore it was the price in Calcutta which would have to be taken into account in arriving at the measure of damages for the parties knew when they made the contract that the goods were to be sold in Calcutta. Reliance in this connection is placed on two cases, the first of which is Re. R. and H. Hall Ltd. and W. H. Pim (junior) & Co.
Arbitration, (1928) All ER 763. In that case it was held that damages recoverable by the buyers should not be limited merely to the difference between the contract price and the market price on the date of breach but should include both the buyer’s own loss of profit on the re-sale and the damages for which they would be liable for their breach of the contract of resale, because such damages must reasonably be supposed to have been in the contemplation of the parties at the time the contract was made since the contract itself expressly provided for re-sale before delivery, and because the parties knew that it was not unlikely that such re-sale would occur. That was a case where the seller sold unspecified cargo of Australian wheat at a fixed price. The contract provided that notice of appropriation to the contract of a specific cargo in a specific ship should be given within a specified time and also contained express provisions as to what should be done in various circumstances if the cargo should be re-sold one or more times before delivery. That was thus a case of a special type in which both buyers and seller knew at the time the contract was made that there was an even chance that the buyers could re-sell the cargo before delivery and not retain it themselves. The second case on which reliance was placed is Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd., (1949) 1 All ER 997. That was a case of a boiler being sold to a laundry and it was held that damages for loss of profit were recoverable if it was apparent to the defendant as reasonable persons that the delay in delivery was liable to lead to such loss to the plaintiffs. These two cases exemplify that provision of Section 73 of the Contract Act, which provides that the measure of damages in certain circumstances may be what the parties knew when they made the contract to be likely to result from the breach of it. But they are cases of a special type; in one case the parties knew that goods purchased were likely to be re-sold before delivery and therefore any loss by the breach of contract eventually may include loss that may have been suffered by the buyers because of the failure to honour the intermediate contract of re-sale made by them; in the other the goods were purchased by the party for his own business for a particular purpose which the sellers were expected to know and if any loss resulted from the delay in the supply the sellers would be liable for that loss also, if they had knowledge that such loss was likely to result. The question is whether the present is a case like these two cases at all. It is urged on behalf of the respondent that the seller knew that the goods were to be sent to Calcutta; therefore it should be presumed to know that the goods would be sold in Calcutta and any loss of profit to the buyer resulting from the difference between the rate in Calcutta on the date of the breach and the contract rate would be the measure of damages. Now there is no dispute that the buyer had purchased canvas in this case for re-sale; but we cannot infer from the mere fact that the goods were to be booked for Calcutta that the seller knew that the goods were for re-sale in Calcutta only. As a matter of fact it cannot be denied that it was open to the buyer in this case to sell the railway receipt as soon as it was received in Kanpur and there can be no inference from the mere fact that the goods were to be sent to Calcutta that they were meant only for sale in Calcutta, it was open to the buyer to sell them anywhere it liked. Therefore this
is not a case where it can be said that the parties knew when they made the contract that the goods were meant for sale in Calcutta alone and thus the difference between the price in Calcutta at the date of the breach and the contract price would be the measure of damages as the likely result from the breach. The contract was for delivery F.O.R Kanpur and was an ordinary contract in which it was open to the buyer to sell the goods where it liked. [Murlidhar Chiranjilal –vs- Harishchandra Dwarkadas [1962] 1 SCR 653/ [1962] 0 AIR(SC) 366(SC-DB)]

The claim to set off is only allowable in respect of loss of profits or gains incurred by the non-residents under any of the heads mentioned in Section 6, and Section 24 is applicable only to such loss of profits and gains which if they had been profits and gains would have been assessable in British India or the taxable territories. It is contended that in the case of non-residents, income accruing or arising without British India or without taxable territories is not liable to be assessed and the loss of such profits and gains is not contemplated to be set off within the provisions of sub-sections (1) and (2) of Section 24 of the Indian Income-tax Act. The Court considered these contentions it is necessary to set out the material provisions of the Indian Income-tax Act as they stood at the relevant time in his case it is unnecessary to go to the provisos, but s. 24 itself has no application because sub-section (1) of Section 24 when it refers to loss of profits or gains, has reference to taxable profits or taxable gains and sub-section (2) of Section 24 can only be applied in a case where the loss cannot be set off under sub-section (1) because of the absence of inadequacy of profits etc. In other words, the argument is that Section 24 is applicable only to such loss of profits and gains which if they had been profits and gains would have been assessable in British India or the taxable territories; but in the case of non-residents, income accruing or arising without British India or without the taxable territories not being liable to be assessed, the loss of such profits and gains is not contemplated to be set off within the provisions of Section 24, sub-sections (1) and (2). The Court, therefore, came to the conclusion that the High Court correctly answered the question which was referred to it. Accordingly, the appeals fail and are dismissed. [Indore Malwa United Mills –vs- Commissioner of Income-tax (Central) Bombay. [1962] Supp3 SCR 310(SC-3J)]

The several heads of claim which went to make up the total of the damages for which a decree was prayed were set out in paragraphs 3 to 20. The first head of claim was in relation to loss of profits stated to have arisen on account of inadequate supply of liquor. There were two items of loss claimed in the plaint which had and could have absolutely no place (iii) the loss because they arose only after the Government suspended the licence and later cancelled it and took over the vend-shops under Government s own management. One of these items was: (1) xxxx (2) the loss of profit for the unworked period. i.e., from July 1, l952 onwards which was worked out to Rs. 45,471/6/- If these two items are deducted from the total Rs. 1,09,653/11/- there would be a balance of only Rs. 37,782/5/- . Whereas with reference to the same items of complaint a sum of Rs. 74,935/8/3 was claimed in the notice. The result therefore is that the
entire claim in the suit must fail for the reasons we have indicated earlier. The appeal, therefore, fails and is dismissed. [Amar Nath Dogra –vs- Union of India. [1963] 1 SCR 657/ [1963] 0 AIR(SC) 424(SC-5J)]

The appellant was conducting business as selling or distributing agent of numerous principals. The agency which was terminated was one of many such agencies in which the appellant functioned as distributing agent of a foreign principal. There is not even a suggestion that by the termination of the agency held by the appellant in explosives from the principal company, the trading structure of the assessee’s business was impaired. It is manifest that the agencies of the companies conducted by the appellant must have been obtained at different times. There is no evidence that these agencies were of any fixed duration. It would be reasonable to infer that some of the agencies may be cancelled and fresh agencies obtained. The list furnished by the appellant before the Tribunal analysing the different classes of business carded on by it disclosed that the business was done in many lines. The appellant acted as managing agent of some concerns, as distributing agent of others, and as secretary of still other class of concerns. Again it dealt as an exporter and importer, shipping agent, and as a buyer and dealer in diverse commodities. A large amount of business was done by the appellant as an agent of foreign companies. The appellant had obtained agencies for paints, varnishes, petroleum, kerosene oil, medicines and toilet preparations, cement, timber, stationery, metals, tea engineering goods, air-conditioning equipment and a large number of other commodities. It may reasonably be held, having regard to the vast array of business done by the appellant as agents, that the acquisition of agencies was in the normal course of business and determination of individual agencies, a normal incident, not affecting or impairing the trading structure of the appellant. The appellant was compensated by payment to it the loss of profit it suffered by the cancellation of its agency, leaving it free to conduct its remaining business. On a careful consideration of all the circumstances we agree with the High Court that cancellation of the contract of agency did not affect the profit-making structure of the appellant, nor did it involve a loss of an enduring trading asset: it merely deprived the appellant of a trading avenue, leaving him free to devote his energies after the cancellation to carry on the rest of the business, and to replace the contract lost by a similar contract. The compensation paid, therefore, did not represent the price paid for loss of a capital asset. We therefore dismiss the appeals with costs. [Gilhnders Arbuthnot And Company LTD. –vs- Commissioner of Income-tax, Calcutta. [1964] 8 SCR 121/ [1965] 0 AIR(SC) 452(SC-3J)]

There is no ground for holding that because of the change which took place in the management after July 1958 it was likely that the affairs of the Company would be conducted in a manner prejudicial to its interests. The change that took place after July 1958 was that the appellant no longer remained the chairman of the Company and the Patnaik and Loganathan groups practically managed the Company without the appellant. But as the High Court has
pointed out there were no facts before the Court to come to the conclusion that the change in management was likely to result in the affairs of the Company being conducted in a manner prejudicial to its interests. In this connection, reliance is placed on certain matters which transpired after the application was filed in September 14, 1960. These matters however cannot be taken into account for the application as to be decided on the basis of the facts as they were when the application was made. Besides as the High Court has pointed out, it has not been shown that in view of certain actions taken by the new management without consulting the appellant, the Company was landed in any difficulty and loss of profit which would show mismanagement of its affairs. Lastly it was stated in the application that accounts had not been shown to the appellant and his group and in consequence of this the appellant was not able to give full particulars of the several acts of fraud, misfeasance and other irregularities committed by the new management. But as the High Court has pointed out, the appellant asked for production of certain documents in April 1961 and those documents were made available for inspection by the appellant and were produced in Court. It was for the appellant to take inspection of those documents if he so desired and the appeal Court was right in pointing out that the learned Single Judge was not correct in drawing an adverse inference against the Company that it had disobeyed the orders of the Court and had not produced the documents called for and had given no opportunity to the appellant for their inspection. It seems to us that the appeal Court was right in the view and no case has been made out even prima facie for action under this part of S. 398 of the Act. The appeals, therefore, fail and are hereby dismissed.

[Shanti Prasad Jain –vs- Kalinga Tubes Ltd. [1965] 2 SCR 720/ [1965] 0 AIR (SC) 1535(SC-3J)]

The Second question presents little difficulty. In making his order of assessment for the year 1950-51 the Income-tax Officer declared that the loss computed in that year could not be carried forward to the next year under Section 24 (2) of the Income-tax Act, as it was not a business loss. The Income-tax Officer has under Section 24 (3) to notify to the assessee the amount of loss as computed by him, if it is established in the course of assessment of the total income that the assessee has suffered loss of profits. Section 24 (2) confers a statutory right (subject to certain conditions which are not material) upon the assessee who sustains a loss of profits in any year in any business, profession or vocation to carry forward the loss as is not set off under sub-section (1) to the following year, and to set it off against his profits and gains, if any, from the same business, profession or vocation for that year. Whether the loss of profits or gains in any year may be carried forward to the following year and set off against the profits and gains of the same business, profession or vocation under Section 24 (2) has to be determined by the Income-tax Officer who computes the loss in the previous year under Section 24 (3) that the loss cannot be set off against the income of the subsequent year is not binding
on the assessee. On a careful consideration of the covenants, the Court is of the view that the Treasurer was not a servant of the Allahabad Bank under the terms of the agreement, dated January 2, 1931, and the remuneration received by him was not "salaries" within the meaning of Section 7 of the Income-tax Act. But that is not sufficient to conclude the matter in favour of the assessee. The benefit of Section 24 (2) of the Indian Income-tax Act may be availed of by the assessee only if the loss sought to be set off was suffered under the head "Profits and gains in any business, profession or vocation". It is difficult to regard the occupation of the Treasurer under the agreement as a profession, for a profession involves occupation requiring purely intellectual or manual skill, and the work of the Treasurer under the contract cannot be so regarded. Occupation of a Treasurer is not one of the recognized professions, nor can it be said that it partakes of the character of a business or trade. In performing his duties under the agreement the assessee exercised his skill and judgment in making proper appointments and made arrangements for supervising the work done by the staff in the Cash Department of the Bank’s Branches. The remuneration received by him was for due performance of the duties and also for the guarantee against loss arising to the Bank out of the acts or omissions of the Cash and other staff of the Bank. Taking into consideration the nature of the duties performed, and the obligations undertaken, together with the right to remuneration subject to compensation for loss arising to the Bank from his own acts and omissions or of the servants introduced by him into the business of the Bank, the assessee may be regarded as following a vocation. The remuneration must therefore, be computed under Section 10 of the Income-tax Act and loss of profit suffered in that vocation in any year may be carried forward to the next year and be set off against the profit of the succeeding year. The appeal, therefore, fails and is dismissed with costs. [Commissioner of Income Tax, U.P. –vs- Manmohan Das. [1966] 2 SCR 531/ [1966] 0 AIR(SC) 798(SC-3J)]

In proceedings for assessment for the year 1954-55 of the assesses the Income-tax Officer disallowed, out of the amounts claimed for "shortage", Rs. 3,64,000.00 in the Gwalior factory, and Rs. 35,000.00 in the Hyderabad factory. Again the Income-tax Officer held that K.L. in its transactions had incurred a loss of Rs. 1,35,566.00 and since it had invested Rs. 20,88,077.00 in the Gwalior factory, income from which was exempt from payment of tax. loss amounting to Rs. 59,000.00 being the amount proportionately attributable to the investments of K.L. in the Gwalior factory of the assesses was liable to be allocated in computing the .income of the Gwalior factory, and the balance only in computing the loss of profit of K.L. the Court sets aside the order of the High court and direct that the Tribunal do submit a statement of case on the following question to the High court of Madhya Pradesh: Whether, on the facts and in the circumstances of the case, any part of the loss suffered by Khanchand Lachmandas was liable to be allocated between the Gwalior factory and the other ventures of the assesses in determining their taxable income for the assessment year 1954-55. [J.B. Mangharam and Company –vs- Commissioner of Income-tax, Nagpur [1971] 3 SCC 954/ [1970] 0 UJ 743(SC-DB)]
The Civil Judge Poona was appointed arbitrator to determine the amount of compensation. In the course of proceedings before the arbitrator, the respondent filed written statement claiming compensation inter alia, for loss of profits. The arbitrator by his award dated April 15, 1948 awarded a sum of Rs. 1,25,500 for loss of earnings to the respondent. In addition to that we have the finding of the Tribunal that the respondent firm during the period for which the claim for compensation was made had been carrying on business in its usual name and style in the same office premises in which it used to carry on business prior to the requisition of the godowns by the Government. The effect of the requisition of the godowns, according to the Tribunal, was not to stop the business of the respondent. On the contrary, the respondent continued to carry on the business though at a reduced scale. A case somewhat similar to the present case is Commissioner of Income Tax/Excess. Profits Tax, Bombay City v. Shamsher Printing Press, 39 ITR 90. The respondent firm in that case had for the purpose of its business a printing press. The premises in which the press was housed were requisitioned by the Government and the respondent had to shift its business to another place. Of the various sums paid as compensation for the requisition, the Government paid Rupees 57,435 towards the claim of the respondent "on account of the compulsory vocation of the premises, disturbance and loss of business". It was held by this Court that the sum of Rs. 57,434 had not been received by the respondent for any injury to its capital assets, including goodwill. The above sum, it was further held, had been received as compensation for loss of profit and was a revenue receipt liable to tax. As a result of the above, the Court accepted the appeal, set aside the judgment of the High Court and answered the question referred by the Tribunal in favour of the department. In the Court’s opinion, the sum of Rupees 1,05,074 received by the respondent as compensation from the Government was taxable as income of the respondent and was not a capital receipt. In the circumstances of the case, the Court left the parties to bear their own costs of this Court as well as in the High Court. [Commissioner of Income Tax, Poona –vs-Manna Ramji And Company. [1973] 3 SCC 43/ [1973] 1 SCR 1068/ [1973] 0 AIR (SC) 515(SC-3J)]

The petitioner challenged the canalisation of export scheme on the following grounds. First it is not a canalisation scheme. It is in fact a scheme to transfer the business of the petitioner and goodwill in favour of the corporation which is outside the purview of the Act. Second, the scheme is an unreasonable restriction in so far as it results in loss of foreign exchange loss of profit and enables contracting foreign buyers to avoid the contract and sue the petitioner for breach of the contract. The contention with regard to contracts entered into before 24 January, 1972 but where letters of credit have not been opened before that date is that the traders are exposed to loss of business and loss of profits and thereby unreasonable restrictions stave been put on the traders right to carry on business in violation of Article l9 (1) (g). This contention is unacceptable. It cannot be said that the Government authorities acted mala fide in extending the date of the opening of the letter of credit from 24 January, 1972 to
31 March, 1972. The relaxation was to minimise hardships to the traders. The relaxation was to prevent dislocation of trade on a large scale. The Association gave instances of traders who could not succeed in opening letters of credit for reasons beyond their control. For these reasons, the contentions of the petitioner fail. The petition is dismissed. [Daruka and Company –vs- Union of India. [1973] 2 SCC 617/ [1974] 1 SCR 570/ [1973] 0 AIR(SC) 2711(SC-5J)]

The appeal raises important and interesting questions of law relating to the interpretation of some of the provisions of the Indian Railways Act pertaining to the liability of the railways for breach of contract. The plaintiff/respondent brought a suit for recovery of an amount of Rs. 2,378.00 65 np. being: the damages for breach of contract resulting from delayed delivery of the goods consigned by the plaintiff through the defendant railways to be delivered at Poona. The plaintiff, which is a firm carrying on its business dealing in iron goods, booked a consignment with the defendant on 15/12/1961 at Bhilai to be carried to Poona and to be delivered therein to the consignee safely and in good condition. The defendant railways accepted the offer under a railway receipt dated 1/12/1961. It appears that there was some delay in the delivery of the goods at Poona and on enquiries made by the plaintiff it appeared that till 9/05/1962 the goods had not been delivered at all. Thereafter the plaintiff served a notice of claim and of suit dated 9/05/1962 on the railway administration. Soon after the service of the notice the consignment was delivered on 21/07/1962. According to the plaintiff under the contract or the usage of the railways the normal period of delivery was ten days and as the defendant had committed an inordinate delay in delivering the goods it was liable to pay damages to the plaintiff. The plaintiff, however, calculated the damages by way of interest at the rate of 12 per annum on the locked up capital of Rs. 27,332.44 which due to rise in prices has swelled to Rs. 35,476.27 np. The plaintiff further alleged that the delay in the delivery was due to gross negligence of the defendant railways which instead of sending the goods direct from Bhilai to Poona diverted them to Aurangabad where the consignment had to be loaded. In the metre gauge train and then to a broad gauge line and it was only after the defendant received the notice from the plaintiff that it expedited the delivery of the goods. The defendant railways contested the suit on the ground that there was no inordinate delay, nor there was any contract that the goods were to be delivered within ten days. It is also averred that the plaintiff had led no evidence to show that there was any loss of profits or rise in the market price. The defendant further alleged that the plaintiff was not entitled to claim interest as damages. In support of the appeal the learned Solicitor-General submitted three points before us: One of them is that That this plaintiff could not claim for loss of profit or loss of market as the same is expressly barred by Section 78(d) of the new Railways Act. As an alternative argument it was also pleaded that the plaintiff has not averred in his plaint that there was any rise in the prices because the goods belonging to the plaintiff were a controlled commodity and could not be sold without a permit. Before claiming loss of profits it was the bounden duty of the plaintiff to allege that he had been granted the permit to sell the goods. The history and the object with
which the radical provisions of the new Act were introduced bear testimony to change of the nature of the liability of the railway administration. But in order to avoid the payment of double damages, Sections 76 and 78 have been inserted. In other words, where due to delay on the part of the railway there is physical deterioration or diminishing of the value of the goods, the plaintiff cannot claim damages by way of loss of profits or loss of market plus damages sustained by the actual loss or deterioration of the goods. In such a case the plaintiff can claim only the actual loss in the value of the goods caused by destruction, damage or deterioration and not loss of profit. Section 78(d) which flows out of Section 6 clearly provides that the railway administration shall not be responsible for any indirect or consequential damages or for loss of particular market. The Solicitor-General, therefore, rightly contended that in cases falling squarely within the four corrects of Section 76 of the new Act Section 78(d) will apply. In fact Section 78(d) merely incorporates the measure of damages as contemplated by Section 73 itself. It is well settled that the liability of an ordinary carrier even in the English common law does not extend to a damage which is indirect or remote. Loss of profit or loss of a particular market has been held by a number of decisions to be a remote damage and can be awarded only if it is proved that the party which is guilty of committing the breach was aware or had knowledge that such a loss would be caused. Section 78(d), however, seeks to bar the remedy of this kind of damage. In the instant case, however, as the plaintiff itself has not claimed loss of market or remote damages, the question of application of Section 78 (d) does not arise. Moreover, in the instant case, it is conceded that there was no physical deterioration of the goods at all which were delivered to the consignee at Poona in the same condition as they were booked from Bhilai by the plaintiff. In these circumstances, the case of the plaintiff does not fall within the four corners of Section 76, nor does it fulfill any of the categories mentioned therein. If Section 76 does not apply to the facts of the present case, then Section 78 will also have no application, because Section 78 starts with a non obstante clause "notwithstanding anything contained in the foregoing provisions of this Chapter, a railway administration shall not be responsible". Counsel for the respondent submitted that even if Section 76 barred the remedy of the plaintiff, the fact that due to delay in delivery there was loss of profit or loss of market would amount to "deterioration" as contemplated by Section 76 of the new Act. In support of this contention, the learned Counsel relied on a decision of the Allahabad High court in G. I. P. Railway Co. v. Jugal Kishore Mukat Lal. The last question submitted by the learned Solicitor-General was that the plaintiff was not entitled to loss of profit or loss of market, because the plaintiff has not pleaded anywhere that he had obtained any permit for the goods which were a controlled commodity and sustained loss of market. It is true that the plaintiff has not pleaded this fact, but the plaintiff has not at all prayed for any damages on the ground of loss of market or loss of profit. The plaintiff has only claimed nominal damages for the loss which occurred to him because of the amount of money which he had deposited in the bank and was locked up for more than six months due to the delayed delivery. The trial court has already scaled down
the amount from Rs. 2,378.65 to Rs. 1,250.00 and we think the trial court was fully entitled to do so. In these circumstances, therefore, all the contentions raised by the Solicitor-General fail, and the Court found no merit in this appeal which is accordingly dismissed with costs. [Union of India –vs- Steel Stock Holders Syndicate, Poona. [1976] 0 AIR(SC) 879/ [1976] 3 SCC 108/ [1976] 3 SCR 504(SC-DB)]

The workmen were deprived of their wages during the period of the strike on the score that it was an illegal strike. Both sides seem to have accepted this finding after an unsuccessful challenge in the High Court and happily industrial peace is said to be prevailing currently. What did hurt the Mazdoor Sangh more and what the management did try to have and to hold as a bonanza was the second finding that the strikers, apart from forfeiting wages, do pay compensation in the huge sum of Rs. 6,90,000/- in one case and Rupees 80,000/- in the other, for the loss of profits suffered by the manufacturing business of the management, a pronouncement unusual even according to counsel for the appellant, although sustainable in law, according to him. For the workers, this unique direction of industrial law is fraught with ominous consternation and dangerous detriment. The Mazdoor Sangh challenged the award as illegal and void by filing two writ petitions but the High Court quashed that part of the award which directed payment of compensation by the workers to the management and, as earlier pointed out, both sides have chosen to abide by the award in relation to the denial of wages during the strike period. The decisive question now comes to the fore. Did the arbitrators commit an error of law on the face of the award in the expanded sense we have explained? The basic facts found by the arbitrators are beyond dispute and admit of a brief statement. The Court summarised the fact situation succinctly and fairly when we state that according to the arbitrators, the strike in question was in violation of Section 24 of the Act and therefore illegal. This illegal strike animated by inter-union power struggle, inflicted losses on the management by forced closure. The loss flowing from the strike was liable to be recompensed by award of damages. In this chain of reasoning is necessarily involved the question of law as to whether an illegal strike causing loss of profit is a delict justifying award of damages. The arbitrators held, yes. The Court held this to be an unhappy error of law - loudly obtrusive on the face of the award. The Court may as well suggest that, to silence possible mischief flowing from the confused state of the law and remembering how dangerous it would be if long, protracted, but technically illegal strikes were to be followed by claims by managements for compensation for loss of profits, a legislative reform and re-statement of the law were undertaken at a time when the State is anxious for industrial harmony consistent with workers welfare. This rather longish discussion has become necessary because the problem is serious and sensitive and the law is somewhat slippery even in England. The Court is convinced that the award is bad because the error of law is patent. The High Court has touched upon another fatal frailty in the tenability of the award of compensation for the loss of profits flowing from the illegal strike. The Court expressed its concurrence with the High Court that the sole and whole foundation of the award
of compensation by the arbitrators ignoring the casual reference to an ulterior motive of inter-
union rivalry, is squarely the illegality of the strike. The workers went on strike claiming
payment of bonus as crystallized by the earlier settlement (D/- 2-10-1957). There thus arose an
industrial dispute within Section 2 (k) of the Act. Since conciliation proceedings were pending
the strike was ipso jure illegal (Sections 23 and 24). The consequence, near or remote, of this
combined cessation of work caused loss to the management. Therefore, the strikers were liable
in damages to make good the loss. Such is the logic of the award. It is common case that the
demands covered by the strike and the wages during the period of the strike constitute an
industrial dispute within the sense of Section 2 (k), of the Act. Section 23, read with Section 24,
it is agreed by both sides, makes the strike in question illegal. An "illegal strike" is a creation of
the Act. As we have pointed out earlier, the compensation claimed and awarded is a direct
reparation for the loss of profits of the employer caused by the illegal strike. If so, it is
contended by the respondents, the remedy for the illegal strike and its fall out has to be sought
within the statute and not de hors it. If this stand of the workers is right, the remedy indicated
in Section 26 of the Act, viz., prosecution for starting and continuing an illegal strike, is the
designated statutory remedy. No other relief outside the Act can be claimed on general
principles of jurisprudence. The result is that the relief of compensation by proceedings in
arbitration is contrary to law and bad. There was argument at the Bar that the High Court was
in error in relying on Section 18 of the Trade Unions Act, 1926 to rebuff the claim for
compensation. The Court listened the arguments of Shri B. C. Ghosh in support of the view of
the High Court, understood on a wider basis. Nevertheless, the Court did not wish to rest its
judgment on that ground. Counsel for the appellants cited some decisions to show that an
award falling outside the orbit of the Indian Arbitration Act can be enforced by action in court.
The Court did not think the problem so posed arises in the instant case. The Court dismissed the
appeal. [Rohtas Industries Ltd. –vs- Rohtas Industries Staff Union. [1976] 2 SCC 82/ [1976] 0

On an invitation to tender sought by the erstwhile State of Saurashtra for providing
cement concrete surface to Rajkot Jamnagar road for miles 18 to 40 measuring from the Rajkot
end, the appellant submitted his tender quoting 712% lower than the estimated cost of the
works in the amount of Rs. 16,59,900/- Only. The tender of the appellant was accepted on July
6, 1954 as per the letter of the Executive Engineer, Road Development Division, Rajkot. As
agreed to between the parties, the appellant furnished security deposit in the amount of Rs.
24,885/- and the contract documents were executed between the parties. The only term of the
contract which at present needs noting is that the work was to be executed within a period of
14 months from the date fixed by the written order to commence the work. Indisputably, the
appellant commenced the work, and completed sub-grading of the road in a distance of 5 miles
and 5 furlongs and furnished cement concrete surface in the length of 21 miles. Certain
disputes arose between the parties as a result of which the respondent rescinded the contract
imputing that as the time was of the essence of the contract and as the appellant failed to execute the work within the stipulated time he was guilty of committing breach of contract. The final bill in respect of the work done by the appellant was prepared but the payment thereunder was accepted by the appellant under protest. The appellant thereafter filed a suit claiming Rs. 7 lakhs by way of damages, goodwill, prestige and loss of expected profit, Rs. 3 lakhs by way of damages on account of loss sustained while executing the work and Rs. 1 lakh as damages for the extra work done by the appellant. The total claim was of Rs. 11 lakhs. The State of Bombay as the defendant resisted the suit on diverse grounds inter alia contending that the rescission of the contract consequent upon the breach of contract committed by the appellant was just, legal and valid. It was contended that as the time was of the essence of the contract and the commencement order was served on the appellant on July 26, 1954 and as the appellant failed to complete the work within the stipulated period of 14 months from the date of the commencement order the defendant was justified in rescinding the contract. All the claims as to damages and damages for extra work and damages by way of loss of profit were denied and the plaintiff was put to strict proof thereof. The Plaintiff preferred Civil Appeal No. 599/64 after paying the court-fees as directed by the Court. In the petition of appeal, the plaintiff reduced his claim from Rs. 11 lakhs in the plaint to Rs. 6,50,000/- comprising of Rs. 4,30,314/- on account of loss of profit, Rs. 1,19,686/- by way of compensation for loss sustained while executing the work and Rs. 1 lakh as compensation for extra items executed by the plaintiff while performing the contract. It was not disputed before us that where in a works contract; the party entrusting the work, commits breach of the contract, the contractor would be entitled to claim damages for loss of profit which he expected to earn by undertaking the works contract. What must be the measure of profit and what proof should be tendered to sustain the claim are different matters. But the claim under this head is certainly admissible. Leaving aside the judgment of the trial Court which rejected the claim for want of proof, the High Court after holding that the respondent was not justified in rescinding the contract proceeded to examine whether the plaintiff-contractor was entitled to damages under the head loss of profit. In this connection, the High Court referred to Hudsons Building and Engineering Contract (1970), tenth edition and observed that in major contracts subject to competitive tender on a national basis, the evidence given in litigation on many occasions suggests that the head-office over heads and profit is between 3 to 7% of the total price of cost which is added to the tender. In other words, the High Court was of the view that the claim under this head was admissible. The High Court, however, addressed itself to the question whether adequate proof is tendered to sustain the claim. In this connection, it was observed that the loss of profit when it is sought to be recovered on the percentage basis has to be proved by proper evidence. Having settled the legal position in this manner, the High Court proceeded to reject the claim observing that the bare statement of the partner of the contractors firm that they are entitled to damages in the nature of loss of profit @ 20% of the
estimated cost is no evidence for the purpose of establishing the claim. The High Court further observed that the appellant has not proved by any primary documents the basis of its pricing for the purpose of quotation in reply to the tender and hence when it has quoted at 71/2% less than the original estimated cost and in this view of the matter the claim for loss of profit is unsustainable. Counsel for the appellant urged that the appellant was placed at a comparative disadvantage on account of his two appeals arising from two identical contracts inter partes being heard on two different occasions by two different Benches even though one learned Judge was common, to both the Benches. It was pointed out that in the appeal from which the cognate Civil Appeal No. 1998/72 arises, the same High Court in terms held that the claim by way of damages for loss of profit on the remaining work at 15% of the price of the work as awarded by the trial Court was not unreasonable. The High Court had observed in the cognate appeal that the basis adopted by the learned civil Judge in computing the loss of profit at 15% on the value of the remaining work contract cannot be said to be unreasonable. In fact, the High Court had noticed that this computation was not seriously challenged by the State, yet in the judgment under appeal the High Court observed that actual loss of profit had to be proved and a mere percentage as deposed to by the partner of the appellant would not furnish adequate evidence to sustain the claim. In this connection the High Court referred to another judgment of the same High Court in First Appeal No. 89 of 1965 but did not refer to its own earlier judgment rendered by one of the Judges composing the Bench in First Appeal No. 384 of 1962 rendered on 3/6 July, 1970 between the same parties. When this was pointed out to Mr. Mehta, his only response was that the Court cannot look into the record of the cognate appeal. We find the response too technical and does not merit acceptance. The Court is not disposed to accept the contention of Mr. Mehta for two reasons: (1) that in an identical contract with regard to another portion of the same. Rajkot-Jamnagar road and for the same type of work, the High Court accepted that loss of profit at 15% of the price of the balance of works contract would provide a reasonable measure of damages if the State is guilty of breach of contract. The present appeal is concerned with the same type of work for a nearby portion of the same road which would permit an inference that the work was entirely identical. And the second reason to reject the contention is that ordinarily a contractor while submitting his tender in response to an invitation to tender for a works contract reasonably expects to make profits. What would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid. In this case we have the additional reason for rejecting the contention that for the same type of work, the work site being in the vicinity of each other and for identical type of work between the same parties, a Division Bench of the same High Court has accepted 15% of the value of the balance of the works contract would not be an unreasonable measure of damages for low of profit. The Court, therefore, is of the opinion that
the High Court was in error in wholly rejecting the claim under this head. Now if it is well-established that the respondent was guilty of breach of contract inasmuch as the rescission of contract by the respondent is held to be unjustified, and the plaintiff-contractor had executed a part of the works contract, the contractor would be entitled to damages by way of loss of profit. Adopting the measure accepted by the High Court in the facts and circumstances of the case between the same parties and for the same type of work at 15% of the value of remaining parts of the works contract, the damages for loss of profit can be measured. It was then attempted to take us through the maze of evidence and requested us that the claim under this head in the amount of Rs. 4,30,314/- is reasonable, fair and just. The value of the works contract was Rs. 16,59,900/- and the appellant had offered the rate at 71/2% less of the estimate made by the State. The appellant had executed some part of the contract. How much work he had completed and what was the balance of the works contract was attempted to be spelt out by a reference to Ext. 77/1 (Line Plan of Road) read with Exts. 77/2 and 77/3 showing the widening of the side strips near Kankawati Bridge as well as Longitudinal Sections of the Roads. In our opinion, while estimating the loss of profit that can be claimed for the breach of contract by the other side, it would be unnecessary to go into the minutest details of the work executed in relation to the value of the work contract. A broad evaluation would be sufficient. The Court, in this connection, invited both counsels for the appellant and respondent to give broad features of the work as well as the portion of the work executed by the appellant. Having heard them, the Court is satisfied that the appellant should be awarded Its. 2 lakhs under the head loss of estimated profit for breach of contract by the respondent. [A.T.Brij Paul Singh –vs-State Of Gujarat [1984] 2 Scale 56/ [1984] 0 AIR(SC) 1703/ [1984] 4 SCC 59/ [1984] 0 UJ 915(SC-3J)]

The Appellant is a contractor, who entered into two agreements with the Government of the State of Andhra Pradesh for providing B.T. Macadam wearing coat and seal coat along two stretches of the Hyderabad-Vijayawada National Highway. While the work was in progress, the contractor made certain claims in respect of the loss suffered on account of delay, escalation of rates and other heads. The claims were referred to arbitration. On Sept. 4, 1979 the Arbitrator held the contractor entitled to a sum of Rs. 99,00,000/- under five heads of claim. The contractor applied to the Civil Court for making the award a rule of the Court while the State Government prayed for setting aside the entire award. The Civil Court set aside the award and refused to pass a decree in terms of the award. The contractor appealed to the High Court, and on April 19, 1982 the High Court allowed the appeal to the extent of one of the claims only, the claim being for loss of profit in the sum of Rs. 16,00,000/- together with interest. The appeal was dismissed in respect of the other heads of claim. In regard to the claim to adjustment on the second count the position is more controversial. The claim is founded in the doctrine of equitable set off, but the Court did not find evidence before us to bring the case within the operation of the doctrine. It is not a case where cross demands rise out of the same
transaction or the demands are so connected in their nature and circumstances that they can be looked upon as part of one transaction. Nor can assistance be derived from Clause 71. The benefit of that provision can be claimed only if the amount sought to be retained is an ascertained sum, an amount which can be readily adjusted against the amount payable under the other contract. Here, the amount sought to be adjusted has yet to be determined as a liability against the contractor. It has been disputed by the appellant. Accordingly, Clause 71 cannot be invoked. In the result, the decision of the High Court in respect of the adjustment of Rs. 12,69,532/- cannot be sustained. In the circumstances, the appeal is allowed in part, the judgment and order of the High Court is modified in so far that while the adjustment claimed by the State Government on the basis of the final bill relating to the contract covered by the award is maintained, the direction in respect of the adjustment of the claim made under the other contract is set aside. The parties will bear their own costs. Appeal partly allowed.


In Raghuvanshi Mills Ltd. (22 ITR 484 : AIR 1953 SC 4), while dealing with a case of the amounts received under an insurance policy, it was held that it would constitute income. It is sufficient that the headnote is extracted as under: "The assessee company had insured its mills with certain insurance companies and also had taken out certain policies of the type known as "consequential loss policy" which insured against loss of profit, standing charges and agency commission. The mills were completely destroyed as a result of fire and a certain amount was paid to the assessee by the insurance companies. The question was whether this amount which was treated as paid on account of loss of profits was assessable to income-tax: Held that the amount received by the assessee was income and so was taxable. [Padmaraje R.Kadambande – vs- Commissioner of Income-tax, Pune. [1992] 0 AIR(SC) 1495(SC-DB)]

Coming to the issue whether devaluation surplus earned by the assessee consequent on the settlement of the claim by the insurance company could be treated as revenue receipt, it may be stated that taxability on profit or deduction for loss depends on whether profit or loss arises in course of business. The Court has maintained a distinction between insurance against loss of goods and insurance against loss of profits. The latter is undoubtedly taxable as is clear from the decision in Raghuvanshi Mills (AIR 1953 SC 4) (supra) where any amount paid by the insurance company, on account of loss of profit was held taxable. But what happens where the insurance company pays any amount against loss of goods. Does it by virtue of compensation becomes profit and is taxable as such. Taxability of the amount paid on settlement of claim by the insurance company depends both on the nature of payment and purpose of insurance. Raghuvanshi Mills decision is an authority for the proposition where the very purpose of insurance itself is profit or gain. Result may be the same where the payment is made for goods in which the assessee carried on business. Any payment being accretion from business, the
excess or surplus accruing for any reason may be nothing but profit. But where payment is made to compensate for loss of use of any goods in which the assessee does not carry on any business or the payment is a just equivalent of the cost incurred by the assessee, but excess accrues due to fortuitous circumstances or is a windfall, then the accrual may be a receipt, but it would not be income arising from business, and, therefore, not taxable under the Act. In Commissioner of Inland Revenue v. Williams Executors, (1943) 26 Tax Cas 23, the distinction was explained thus, "A manufacturer can, of course, insure his factory against fire. The receipts from that insurance will obviously be capital receipts. But supposing he goes further, as the manufacturer did in that case, and insures himself against the loss of profits which he will suffer while his factory is out of action; it seems to me it is beyond question that sums received in respect of that insurance against loss of profits must be of a revenue nature." The Court is of the view that on the facts of that case, the High Court of Kerala was right in law in upholding the findings of the Tribunal, while on the facts found in the instant case, the High Court of Madras was wrong in law in reversing the well-considered order of the Tribunal. For reasons stated by us this appeal succeeds and is allowed. Both the questions referred by the Tribunal to the High Court are answered in the affirmative, i.e., in favour of assessee and against the department. The assessee shall be entitled to its costs. Reference answered in favour of assessee. [Universal Radiators, Coimbatore –vs- Commissioner Of Income Tax, T.N. [1993] 2 Scale 393/ [1993] 0 AIR(SC) 2254/ [1993] 2 SCC 629/ [1993] 0 AIR(SCW) 2388/ [1993] 3 JT 150(SC-DB)]

Though the contractor was entitled to damages only in respect of one claim, committed manifest error of law in upholding the entire award. The fact that the umpire had committed illegality in awarding damages twice over would indicate his non-application of judicious mind to the claims in an objective manner. In a non-speaking award it is difficult to decide how he adjudged the claims. Thereby he committed misconduct which entails the setting aside of the award as a whole and the doctrine of severability becomes inapplicable to the facts of this case. His next contention was that under clause 62 of the general conditions, certain matters were to be finally determined by the Railways and the arbitrator lacked jurisdiction to decide these claims and thereby the award gets vitiated by manifest illegality on its face. There was sufficient time for the arbitrator, even after the extended time to make the award in respect of the counter-claim. But was not done, which would also prove the non-application of judicious mind in an objective and dispassionate manner and thereby the award gets vitiated by misconduct committed by the umpire. The 3rd contention is that the Court lacked power to award pendente lite interest by operation of Section 29 of the Act. Shri Soli Sorabjee, the Senior Counsel for the respondent-contractor contended inter alia that though the award is a non-speaking award since the umpire granted each claim separately, the claims on items 11 and 12 are severable from the rest of the award. The High court upheld the highest of the two claims granted by the umpire. The claim for loss of profits on item 11 and for damages on item 12 are
distinct and separate concepts. The umpire, therefore, was justified to grant separate amounts on each of the claims which would show active consideration and application of the mind. Hence it is not a misconduct. Even otherwise they are severable from the rest of the award, which could be sustained. The grant of pendente lite interest by arbitrator was not a settled principle till the Constitution bench decision of this court in secretary, Irrigation Department v. G.C. Roy was rendered. Earlier division bench of this court in Executive Engineer (Irrigation) v. Abhaduta Jena where it was held that arbitrator had no power to award interest pendente lite, was overruled. In this twilight zone of law, the arbitrator did not award interest pendente lite. In view of the Constitution bench judgment in G.C. Roy case the grant of pendente lite interest by the court is legal. Even otherwise if this court finds that the High court committed illegality in granting interest pendente lite the matter requires remittance to the umpire, for fresh decision in this behalf. Similarly on the counter-claim, it was contended, that no counter-claim in fact was laid, although belatedly a counter-statement was made, as found by the umpire. This point was not argued before the Single Judge nor seriously disputed before the division bench. Even otherwise, this dispute also could be remitted to the umpire for reconsideration. The crucial question is whether the umpire committed misconduct by non-application of mind to the claims and counter-claims and of its consequences. Claim 11 is founded upon the allegations of delay, laches, negligence and default on the part of the appellant, said to have resulted in loss of profits to the contractor in a sum of Rs. 4,93,696.00 and the umpire awarded Rs. 4,11,400.00. A perusal of both the claims would show that claim 11 is founded on loss of profits and claim 12 is founded for damages, based upon delay, laches and negligence alleged against the appellant, resulting in breach of the contract. It is clear from the above facts and legal position that the arbitrator committed misconduct in non-application of his mind in deciding claims 11 and 12. It being a non-speaking award, it is difficult to find whether he had applied his judicious mind in deciding which of the two claims the respondent would be entitled to, in particular, on the finding of the High court in this behalf. Therefore, the award in respect of claims 11 and 12 is set aside. The order of the High court to award Rs. 6,00,000.00 stands set aside. Since the counter-claim was not considered the matter requires determination. Accordingly the rejection of the counter-claim would be treated as a nil award of the counter-claim and for the above reasons it stands set aside and the matter is remitted to be adjusted afresh. The decree of the High court granting interest pendente is also set aside. The appeals are accordingly allowed to the above extent and the judgment of the division bench of the High court stands modified and the award of the severable part stands confirmed accordingly. In the circumstances parties are directed to bear their own costs. [Union Of India –vs- Jain Associates. [1994] 2 Scale 604/ [1994] 0 AIR(SCW) 2507/ [1994] 3 JT 303/ [1994] 1 ArbLR 494/ [1994] 4 SCC 665(SC-DB)]

The petitioner entered into a contract with the respondent in the year 1976 for construction of a permanent road between Ranichak and the Main Feeder Road at Haldia. The
said contract contained an arbitration clause. The petitioner, invoking the arbitration clause, referred the disputes arising out of the contract to the arbitration of an arbitrator appointed by the Institute of Engineers India. The Statement of Claim filed by the petitioner before the arbitrator covered a number of matters including refund of security deposit amounting to Rs. 60,940/- as well as compound interest @ 18% per annum on the said amount from February 10, 1977 till date of payment. The arbitrator made an award on September 26, 1984 whereby he awarded a sum of Rs. 4,95,000/- to the petitioner. The said award was, however, set aside, in appeal, by a Division Bench of the Calcutta High Court by judgment dated December 11, 1989. Special Leave Petitions (Civil) Nos. 2929-30 of 1990 filed by the petitioner against the said judgment of the Calcutta High Court were disposed of by this Court by order dated July 23, 1990, whereby it was directed that: "............in all these matters a sum of Rs. 7,50,000/- (Rupees Seven Lakhs and Fifty thousand only) should be paid to the petitioner in full and final settlement of these matters within 3 months from today. If the said sum is not paid within the prescribed period the petitioner shall be entitled to interest at the rate of 12% per annum." While the aforementioned proceedings for setting aside the arbitral award were pending the petitioner invoked the arbitration clause for a second time and the same arbitrator was appointed again to arbitrate on the dispute. The Statement of Claim for Rs. 5,85,456.71 in the said reference related to refund of the security deposit of Rs. 60,943/-, The claim for Rupees 2,92,526.40 for loss of profit in business on account of withholding of the sum of Rs. 60,943/- as well as claim for Rupees 1,94,132.31 by way of compound interest @ 18% per annum on the said amount of Rs. 60,943/- from 1978 to October 1986 and certain other incidental claims. The second reference to the arbitration was challenged by the respondent by filing an application under Sections 5, 11 and 33 of the Act which has been allowed by the learned single Judge of the High Court. Having regard to the claim made by the petitioner in the first reference to arbitration which included the claim for refund of security deposit of Rupees 60,943/- as well as the claim for interest on the said amount and the order dated July 23, 1990 passed by this Court on the special leave petitions filed by the petitioner whereby it was directed that a sum of Rs. 7,50,000/- should be paid to the petitioner "in full and final settlement of these matters", we do not find any merit in the case of the petitioner. No ground is made out for interference with the order passed by the learned single Judge of the High Court. Special leave petition is, therefore, dismissed. [Damodar Engineering And Construction And Company –vs- Board of Trustees For Port Of Calcutta. [1993] 4 Scale 414/ [1994] 0 AIR(SC) 1141/ [1994] 1 SCC 370/[1994] 1 ArbLR 133/ [1991] 0 SCC(Cri) 420/ [1994] 1 UJ 165/ [1994] 0 AIR(SCW) 402/ [1993] 6 JT 335(SC-3J)]

The Contingencies Reserve shall not be drawn upon during the currency of the licence except to meet such charges as the State Government may approve as being - (a) expenses or loss of profits arising out of accidents, strikes or circumstances which the management could not have prevented. there was no distribution between the consumers benefit reserve which
had been considered by the Supreme Court in the case of Poona Electric Supply Co. Ltd. [(1965) 57 ITR 521 : AIR 1966 SC 30] and the contingencies reserve. The argument is fallacious. The Court quoted the appropriate passage of this Court earlier judgment. The emphasis is on the fact that the amount paid into the consumers benefit reserve has to be returned to the consumers. Therefore, it is as if the electricity company had not received the amount which it was obliged to return. The amount that it was obliged to return was not a part of its income. This is altogether different from the case of monies standing to the credit of the contingencies reserve which are set apart to be utilised by the electricity for the purposes set out in clause V of the Sixth Schedule. These are to meet expenses or recoup loss of profits arising out of accidents, strikes or other circumstances which the electricity company could not have prevented; to meet expenses on replacement or renewal of plant or works; and for payment of compensation required by law for which no other provision has been made. These are all the expenses which the electricity company has to incur. The reservation is made so that money is always available for meeting these expenses and the supply of electricity is not interrupted. For the same reason, payments out of the contingencies reserve can be made only with the State Governments approval. It is particularly noteworthy that the electricity company can make good from out of the contingencies reserve even a loss of profit arising out of strikes, accidents and other circumstances over which it has no control. There can be no doubt, in the circumstances, that the monies in the contingencies reserve belong to the electricity company. The Court held that the amount credited to the contingencies reserve is not diverted by reason of an overriding obligation or title and, in determining the business profits of the assessee, it must be taken into account. If the amount credited to the contingencies reserve was includible in the computation of the business income of the assessee, the amount so appropriated should be allowed as a business deduction, being expenditure necessary to carry on the assessee's business. As the Calcutta High Court has pointed out, there is no expenditure. The amount appropriated to the contingencies reserve is set apart to meet possible exigencies. It is not a provision for known, existing liabilities. In the result, the identical question referred to us in the three references is answered in the affirmative and in favour of the Revenue. [Associated Power Company LTD. –vs- Commissioner Of Income Tax. [1995] 6 Scale 702/ [1996] 0 AIR(SC) 894/ [1995] 9 JT 146/ [1996] 0 AIR(SCW) 285/ [1996] 7 SCC 221(SC-3J)]

Civil Court determined compensation for loss of profits to Appellant's poultry. In petition, single Judge of High Court held that Appellant at best would be entitled for loss of business for a reasonable period of 5 and 6 months. That was confirmed by Division Bench. Whether, order passed by High Court might be right in granting amount only for a reasonable period of 6 to 7 months. If person was compelled to change his residence or place of business by reason of acquisition, reasonable transit expenses incidental to such change. However, claimant happened to secure alternative land at a far off place and that too said to be an insecure place. Even if it was assumed to be so, could not be a ground to contend that he was
also entitled to compensation under clause fifthly due to change of business and setting up of business in an insecure place. Thus, single Judge might be right in granting amount only for a reasonable period of 6 to 7 months on facts in case. However, it could not be laid as a principle of law that loss of business till claimant was resuscitated in his business in securing a place and expenses incurred in that behalf also should always be a component of determination of compensation under Section 23(1) of Act. Transport charges incurred for displacement and carrying material due to displacement are required to be awarded, in addition to compensation determined. Appeal dismissed. [Jaspal Singh and Anr. vs. Union of India (UOI) and Anr. MANU/SC/1069/1997 = JT 1997 1 SC 401, 1997 115(1) PLR 781, 1997 1 SCALE 210, 1997 2 SCC 640, [1996 ]Supp10 SCR 368(SC)]

Damages can be claimed by a contractor where the government is proved to have committed breach by improperly rescinding the contract and for estimating the amount of damages court should make a broad evaluation instead of going into minute details. Where in the works contract, the party entrusting the work committed breach of contract, the contractor is entitled to claim the damages for loss of profit which he expected to earn by undertaking the works contract. Claim of expected profits is legally admissible on proof of the breach of contract. Exercise of power under Section 152 CPC contemplates the correction of mistakes by the Court of its Ministerial actions and does not contemplate of passing effective judicial order after the judgment, decree or order; the section cannot be pressed into service to correct an omission which is intentional, how erroneous that may be. Where in the works contract, the party entrusting the work committed breach of contract, the contractor is entitled to claim the damages for loss of profit which he expected to earn by undertaking the works contract. Claim of expected profits is legally admissible on proof of the breach of contract. [Dwaraka Das –vs- State Of M.P. [1999] 2 RCR(Civ) 56/ [1999] 1 PLR(SC) 820/ [1999] 1 Scale 376/ [1999] 1 Supreme 429/ [1999] 2 UJ 895/ [1999] 0 AIR(SCW) 663/ [1999] 1 JT 375/ [1999] 3 SCC 500/ [1999] 0 AIR(SC) 1031(SC-DB)]

The ordinary heads of damages allowable in contracts for sale of land are settled. A vendor who breaks the contract by failing to convey the land to the purchaser is liable damages for the purchaser’s loss of bargain by paying the market value of the property at the fixed time of completion less the contract price. The purchaser may claim the loss of profit he intended to make from a particular use of the land if the vendor had actual or imputed knowledge thereof. For delay in performance the normal nature of damages is the value of the use of the land for the period of delay, viz. usually its rental value. [Ghaziabad Development Authority –vs- Union Of India [2000] 5 Scale 59/ [2000] 6 SCC 113/ [2000] 0 AIR(SC) 2003/ [2000] 7 JT 256/ [2000] 0 AIR(SCW) 1861/ [2000] 3 ArbLR 170/ [2000] 4 Supreme 373/ [2000] 2 CLT(SC) 259(SC-DB)]

The plaintiff petitioner, has already observed, wants a decree in the terms of modified Award in the sense that whatever has been awarded to him under doubt retained in addition to
awarding his claim to loss of profit on illegal termination of the contract and has claim to waiver of interest while the Defendant, Respondent wants it to be either set aside or remitted. The discussion in the foregoing and my various findings already recorded lead me to conclude that the award, at this stage, does not deserve either confirmation or modification at my hands. On the other hand, it also does not deserve setting aside once for all. On the other hand, it deserves to be set aside for remittance back to the Arbitrator for going into the entire Arbitration proceedings afresh, on the basis of points of dispute already referred to him by the learned Civil Judge who appointed him under Order dated 25th May, 1993, giving full opportunity to both the parties to lead oral and documentary evidence, if they so desire, and to ensure that all the material documents are brought before him under his instructions. Hence, issue No. 10 is answered accordingly. [State Of Maharashtra –vs- S.D.Shinde And Co. [2003] 4 RCR(Civ) 429/ [2003] 3 RAJ 316/ [2003] 3 ArbLR 314/ [2003] Supp1 JT 353/ [2003] 6 Supreme 828/ [2003] 8 Scale 9/ [2003] 8 SCC 131/ [2003] 0 AIR(SC) 4349(SC-DB)]

In the present suit, the appellants have claimed that the respondent No. 2, despite termination of the manufacturing arrangement with the first appellant, had continued to manufacture Maloxine tables and was exporting the same, inter alia, to M/s Moore Associates Ltd. It was also claimed that the respondents were considering launching the product Maloxine in the Indian market. In the circumstances, the prayers in the suit were, inter alia, for an injunction to restrain the respondents from passing-off the trademark Maloxine or adopting the distinctive get up of the Maloxine carton; restraining the infringement of the copyright of the first appellant in the artistic work comprised in the Maloxine carton; for delivery up of the infringing goods and for accounts on account of the use of the impugned mark. The jurisdiction of the Delhi High Court was sought to be attracted on the base: (a) the copyright of the plaintiffs (appellants) in the Maloxine carton was being infringed by the respondents; (b) the plaintiffs (appellants) carry on business in Delhi and one of them has a registered office in New Delhi. It was also stated that the defendants carry on business for profit in New Delhi within the jurisdiction of the High Court. In order to protect the interests of both the parties, it is felt that the following arrangement may be made in terms of Ciba Geigy Ltd. v. Sun Pharmaceutical Industries, 1997 PTC (17) 364: (1) xxx (2) xxx (3) Defendants shall file an undertaking to the following effects: (a) that they shall keep proper accounts, file quarterly statements of manufacture, sale and stock of the goods in their factory in court every quarter, and (b) that in case the plaintiff succeeds, they shall pay without demur 10% of the sale proceeds by way of estimated loss of profit to the plaintiff, as damages within three months from the date of decision by this court. [Exphar Sa –vs- Eupharma Laboratories LTD. [2004] 3 JT 1/ [2004] 28 PTC 251/ [2004] 2 Supreme 146/ [2004] 1 RAJ 600/ [2004] 2 Scale 589/ [2004] 3 SCC 688/ [2004] 0 AIR(SC) 1682(SC-DB)]
Claim No. 2 is Extra infructuous/Uncompleted expenses, expenses and loss of profit due to enlargement of period of performance Rs. 10,00,000.00. Jurisdiction of Court in interfering with non-speaking award is very limited. In Continental Construction Ltd. vs. State of U.P. [(2003) 8 SCC 4], it was, inter alia, held: "16. The award is a non-speaking one. It is trite that the court while exercising its jurisdiction under Section 30 of the Arbitration Act, 1940 can interfere with the award only in the event the arbitrator has misconducted himself or the proceeding or there exists an error apparent on the face of the award. The learned Civil Judge and the High Court have not found that the umpire acted arbitrarily, irrationally, capriciously or independent of the contract. No finding has been arrived at that the umpire has made conscious disregard of the contract which was manifest on the face of the award." In the result Civil Appeal No. 6678 of 1999 filed by the contractor is, therefore, allowed and Civil Appeal No. 1984 of 2000 filed by the Union of India is dismissed. [D.D.Sharma –vs- Union Of India. [2004] 3 CivCC 137/ [2004] 3 Supreme 92/ [2004] 2 RAJ 193/ [2004] 2 ArbLR 119/ [2007] 6 JT 224/ [2004] 5 Scale 195/ [2004] 5 SCC 325/ [2004] 0 AIR(SC) 2631/ [2004] 3 BBCJ(SC) 48(SC-3J)]

Claim No. 8 has been rejected by the arbitrator. Now we proceed to consider claim No. 9 for loss arising out of turnover due to prolonged of work. The claim made under this head is in a sum of Rs. 10 lakhs. The arbitrator rightly held that on account of escalation in wage and prices of materials compensation was obtained and, therefore, there is not much justification in asking compensation for loss of profits on account of prolongation of works. However, he came to the conclusion that a sum of Rs. 6,00,000/- would be appropriate compensation in a matter of this nature being 15% of the total profit over the amount that has been agreed to be paid. While a sum of Rs. 12,00,000/- would be the appropriate entitlement, he held that a sum of Rs. 6,00,000/- would be appropriate. He also awarded interest on the amounts payable at 15% per annum. Here when claim for escalation of wages bills and price for materials compensation has been paid and compensation for delay in the payment of the amount payable under the contract or for other extra works is to be paid with interest thereon, it is rather difficult for us to accept the proposition that in addition 15% of the total profit should be computed under the heading Loss of Profit. It is not unusual for the contractors to claim loss of profit arising out of diminution in turn over on account of delay in the matter of completion of the work. What he should establish in such a situation is that had he received the amount due under the contract, he could have utilised the same for some other business in which he could have earned profit. Unless such a plea is raised and established, claim for loss of profits could not have been granted. In this case, no such material is available on record. In the absence of any evidence, the arbitrator could not have awarded the same. This aspect was very well settled in Sunleyn (B) & Co. Ltd. vs. Cunard White Star Ltd., [1940] 1 K.B. 740, by the Court of Appeal in England. Therefore, the Court had no hesitation in deleting a sum of Rs. 6,00,000/- awarded to the claimant. The civil appeals stand disposed of in the aforesaid terms. [Bharat Coking Coal –vs-
The arbitrator quantified the claim by taking recourse to the Emden formula. The learned arbitrator also referred to other formulae, but, as noticed hereinbefore, opined that the Emden Formula is a widely accepted one. It is not in dispute that MII had examined one Mr. D.J. Parson to prove the said claim. The said witness calculated the increased overhead and loss of profit on the basis of the formula laid down in a manual published by the Mechanical Contractors Association of America entitled Change Orders, Overtime, Productivity commonly known as the Emden Formula. The said formula is said to be widely accepted in construction contracts for computing increased overhead and loss of profit. Mr. D.J. Parson is said to have brought out the additional project management cost at US$1,109,500. We may at this juncture notice the different formulas applicable in this behalf. [Mcdermott International Inc. –vs- Burn Standard Co.LTD. [2006] 6 Scale 220/ [2006] 11 JT 376/ [2006] 5 Supreme 662/ [2006] 2 ArbLR 498/ [2006] 8 SBR 60/ [2006] 4 SCJ 660/ [2006] 0 AIR(SCW) 3276/ [2006] 11 SCC 181(SC-DB)]

On elaborate discussions of all the contentions raised before the High Court, the Division Bench held that Respondent was not at fault. However, having regard to the fact that the period of licence had expired, the direction to forfeit the security and the license fee was held to be unsustainable and the same was directed to be refunded to the contractor. As regards the claim of the contractor for damages by way of loss of profit, it was held that the same may be the subject-matter of separate suit for damages. [Commissioner Excise –vs-Manoj Ali. [2006] 10 Scale 516/ [2006] 9 Supreme 629/ [2006] 9 JT 391/ [2006] 0 AIR(SCW) 5584(SC-DB)]

In the present case the contractor claimed Rs.30,425/- for abandonment of contract. This was the first claim. The second claim was for Rs.30,213/- for illegal deductions made by ONGC. The third claim was for Rs.2,00,000/- for not supplying the material in time by the ONGC. The fourth claim was loss occasioned by the contractor for keeping his establishment alive and on this head the claim was for Rs.3,50,000/-. The fifth claim was loss of profit at the rate of 20 percent amounting Rs.1,80,000/-. Last claim was interest at the rate of 18% p.a. As already pointed out that the Arbitrator awarded Rs.5,98,438/- as lump sum, we agree with the reasoning of the High Court that the award is unintelligible The Arbitrator has awarded the interest at the rate of 12% on the amount with effect from 09.02.1984 to 03.05.1985 (pendente lite). He has also awarded interest from the date at the rate of 12% on the amount as shown in 1 & 3 above till the date of decree or actual date of payment, whichever is earlier. In view of the aforesaid premises, the Arbitrator has not at all considered clause 14 of the Arbitration Agreement. The interest has been awarded in violation of clause 14 of the Agreement. Apart from others these two legal aspects have not been considered by the Arbitrator. The Court is,
therefore, in full agreement with the reasoning given by the High Court. The Arbitrator may now proceed with the arbitration but in the light of the judgment of the High Court. The Court directed the Arbitrator to consider the matter afresh in the light of the reasoning of the High Court. Subject to the aforesaid, the appeal is dismissed. [M.B.Patel & Co. –vs- Oil & Natural Gas Commission [2008] 2 ArbLR 451/ [2008] 8 SCC 251/ [2008] 8 Scale 598/ [2008] 0 AIR (SCW) 4094(SC-DB)]

**Accident – pecuniary and non-pecuniary damage**

In accidents claim for pecuniary damage which includes expenses incurred by the claimants; comprising of (i) Medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss may arise. In accidents non pecuniary damages may also include damages for mental and physical shock, pain suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e. on account of injury the claimant may not be able to walk, run or sit, (iii) damages for the loss of expectation of life, i.e. on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience hardship, discomfort, disappointment, frustration and mental stress in life. In this case, appellant suffered 55% disability and compensation was assessed @ Rs.2000/- per every 1% disability and interest @ 9% per annum from the date of filing of claim petition awarded. [Ram Kiran Goyal –vs- Sub Divisional Engineer, Mechanical. [2008] 152 PLR 471/ [2008] 2 RCR(Civ) 103/ [2009] 0 ACJ 1070/ [2008] 3 TAC 189/ [2009] 2 AndhWR 639/ [2009] 1 AICJ 691/ [2008] 2 LawHerald 1566(P&H-DB)]

The arbitrator made a reasoned award dated 31.8.1988. He rejected the claim of appellant for damages on account of loss of profit and loss of business as also the interest up to the date of claim statement. The arbitrator awarded a sum of Rs.11,80,132.48 towards the price of material supplied (at 85% of the price) and Rs.25,000/-towards refund of earnest money deposit, in all, Rs.12,05,132.48 with pendente lite interest at the rate of 11% per annum on Rs.11,80,132.48 up to the date of the award. The arbitrator rejected the counter claims of the respondent. [Kwality Manufacturing Corporation –vs- Central Warehousing Corporation [2009] 2 RCR(Civ) 415/ [2009] 5 SCC 142(SC-DB)]

The contractor claimed that the mobilization advance had to be released to it immediately on entrustment of work, to enable it to set up the factory for manufacturing the pipes. It was contended that prompt release of mobilization advance was crucial and fundamental to the contract as manufacture of pipes depended upon setting up a factory for that purpose. Even assuming that the mobilization advance could be released in three instalments, as per modified terms and conditions, the contractor contended that there was inordinate delay on the part of the employer in releasing the instalments, that too, in five instalments. It was further contended that if the mobilization advance had been released
immediately on award of the work, it would have set up a factory and commenced production within three months; that in view of the delay, it lost production for a period of eight months that is nearly one third of the contract period, and that as a consequence they were not able to execute the work of the value of Rs. 5,56,66,086 and the loss of profit and overheads on the said amount at a standard 15% was Rs. 83,49,913 and it was entitled to that amount as compensation for the breach by the employer. The calculation of the said loss of profit and overheads in Claim No. 1 was worked out. The arbitrator held that Clause 8 of the Special Conditions of Contract stood superseded by Clause 3 of the Common Terms of Reference which required the mobilization advance to be released in one instalment and not in three instalments. He held that Clause 5.1(b) inserted by the amendment to the work order dated 08.11.1988 was, an unilateral incorporation by the employer and was not binding on the contractor. He further held that the employer ought to have released the mobilization advance along with the work order dated 23.08.1988, and the employer had abnormally delayed the release of mobilization advance by a total period of 8.5 months by releasing it in instalments. He held that there was a clear delay of about 8 months and during that period the contractor could have executed one third of the work of the value of Rs. 3,30,64,867.50, and as the contractor was prevented from executing the said work on account of the delay, the contractor was entitled to 10% of the said amount, that is Rs. 33,06,500 as loss of profit. The said sum was, therefore, awarded to the contractor under Claim No. 1. There is yet another aspect. The contractor claimed compensation on the basis that he could not do work of the value of Rs. 5,56,66,086 in view of the delay and he was entitled to 15% thereof namely Rs. 83,49,913 as compensation. But the arbitrator made an award in respect of the claim on the ground that there was delay in releasing the mobilization advance and during that period of delay, one third of the contract work could have been done and the value of the work that could have been done was Rs. 3,30,64,867, and 10% thereof was the loss of profit. Firstly, there was no such plea. Secondly, we have already held that the delay relating to mobilization advance, was not on the part of the employer. Thirdly, even if there was delay, it was nobody’s case that no work was done or that the contractor had suffered loss for non-execution of the work during the contract period. Therefore, the Court is of the view that the award of compensation of Rs. 33,06,500 towards Claim No. 1 is liable to be set aside. Claim No. 37A was linked to mobilization advance. The contractor claimed that it had mortgaged its pipe manufacturing unit in favour of the employer by deposit of title deeds, as security for repayment of the mobilization advance; that the machinery installed in the said factory had not been released by the employer in its favour and as a consequence, it could not be shifted to another place to enable it to start the manufacturing process elsewhere; and that on account of the failure on the part of the employer to release the plant, it had to keep the machinery idle and the employer was, therefore, liable to reimburse to the contractor the loss of production from 13.01.1992 at the rate of Rs. 12,072 per day. The contractor contended that if it had been
permitted to shift its plant and machinery, it would have produced 15 pipes per day valued at Rs. 1,20,000, that out of which the overhead and profit element was 15% (that is Rs. 18,000 per day); that as there were 306 working days in a year, the loss of profits/overheads would be 18,000 x 306/365 = Rs. 15,090 per day; and that if 20% thereof (Rs. 3,018) was deducted therefrom towards labour component, the loss of profit per day on account of non-availability of plant and machinery was Rs. 12,072 per day. The employer resisted the claim by contending that there was no obligation to release the plant and its title deeds until the mobilization advance was repaid with interest; that the contract had not repaid the mobilization advance and interest thereon in spite of the award; and, therefore, the question of compensating any 'daily loss' on that account did not arise. The employer also contested the correctness of the assumptions made for calculating the loss. A sum of Rs. 12,072 per day was claimed as damages by the contractor in a two line calculation without any supporting evidence or document. As noticed above, the claim was on the basis that the contractor would have manufactured 15 pipes per day of the value of Rs. 1,20,000 and that the profit and overhead element out of it would have been 15% or Rs. 18,000 per day. By taking the working days as 306 in a year and deducting 20% of labour component, the loss of profit per day was calculated to be Rs. 12,072 per day. There is no evidence to show that the contractor was at any point of time manufacturing 15 pipes a day of the value of Rs. 8,000 each or that he would have made a profit of 15% on the cost thereof. The claim is made on the ground that it is disabled from manufacturing that many number of pipes elsewhere. There is no evidence that it had other contracts where it was required to manufacture that number of pipes or that it could not manufacture the required pipes for want of plant and machinery. Nor is there any evidence as to the value of the plant and machinery that had been mortgaged to the employer and what would be the cost of an alternative plant with a capacity to manufacture 15 pipes per day. If the plant and machinery was of the value of say Rs. 25 lakhs, or if the contractor could install another similar plant at a cost of Rs. 25 lakhs, then the loss at best would be interest on Rs. 25 lakhs and not anything more. In fact even though there is no evidence, while making Claim Nos. 36 and 37 the contractor has given value of the plant and machinery as Rs. 36,84,161. Even assuming the said figure to be true, at best the blocked up investment was only Rs. 36,84,161 and the loss would be around 1% thereon per month by way of interest which would be Rs. 36,841 per month. What is more strange is nowhere in the award the arbitrator considers the validity of the claim of Rs. 12,072 per day nor accepts the said claim as valid or correct. In a reasoned award if the claim of a contractor is equated to proof of the claim, then it is obviously a legal misconduct and an error apparent on the face of the award. While the quantum of evidence required to accept a claim may be a matter within the exclusive jurisdiction of the arbitrator to decide, if there was no evidence at all and if the arbitrator makes an award of the amount claimed in the claim statement, merely on the basis of the claim statement without anything more, it has to be held that the award on that account would be invalid. Suffice it to
say that the entire award under this head is wholly illegal and beyond the jurisdiction of the arbitrator, and wholly unsustainable. [State Of Rajasthan –vs- Ferro Concrete Construction Pvt. Ltd. [2009] 3 ArbLR 140(SC-DB)]

Claims and counter claims were raised before the arbitrator. After examining the rival contentions, the arbitrator gave an award dated 16/03/1990 for an amount of Rs.19,51,334.25 with interest at the rate of 10% on Rs.18,86,700.23, the principal amount, from the date of award to the date of decree. The claimant then applied for making the award into rule of the Court and vide order dated 1/1/1991, the III Additional Sub-Judge, Ernakulam passed an order making the award rule of the Court. Challenging the same, an appeal was filed before the High Court by the respondent herein. In the said appeal, Division Bench of the High Court was pleased, inter alia, to hold that the claimant-appellant is not entitled to receive from the respondent an amount of Rs.3,63,344/- as compensation for the loss caused to the appellant by way of gains prevented or loss of profit. In other words it is a loss of profit of 15% of the cost of work. Hon’ble Judges held that it is difficult to accept the reasoning of the arbitrator in granting the aforesaid part of the award of the arbitrator and, therefore, the Hon’ble Judges were pleased to set aside the award with regard to claim No.II. [K.V.Mohammed Zakir –vs- Regional Sports Centre. [2009] 4 RCR(Civ) 558/ [2009] 9 SCC 357/ [2009] 12 Scale 567/ [2009] 4 KLT(SC) 755/ [2009] 77 AllLR(SC) 488/ [2009] 4 ILR(Ker) 317(SC-DB)]

The fourth claim which was allowed related to loss of profit allegedly suffered by the petitioner for illegal termination of the contract. The Division Bench, however, set aside in part the award in respect of the aforementioned claims stating as under: "However, we find some substance with regard to the Claim No. 4, loss of profit, there was an admitted delay in handing over the site and supply of materials. We confirm both the award of the arbitrator and the order of the learned Single Judge with regard to Claim No. 4, loss of profit." The award of the arbitrator in respect of Claim No. 4 has been accepted by the Division Bench. Mr. B. B. Singh has drawn our attention to Clause 11(c) of the General Conditions of Contract to contend that in terms thereof, no damages were payable. The question as to whether damages were payable for illegal termination of contract cannot be a subject-matter of contract. The arbitrator has categorically held that not only the termination of contract was illegal, the same was mala fide. Furthermore, the contention raised before us by Mr. Singh has not been raised before the High Court. [G. Ramachandra Reddy –vs- Union Of India. [2009] 2 ArbLR 475(SC)]

Loss of profitability due to late 83,49,913 33,06,500 release of mobilization advance. The contractor claimed that the mobilization advance had to be released to it immediately on entrustment of work, to enable it to set up the factory for manufacturing the pipes. It was contended that prompt release of mobilization advance was crucial and fundamental to the contract as manufacture of pipes depended upon setting up a factory for that purpose. Even
assuming that the mobilization advance could be released in three instalments, as per modified
terms and conditions, the contractor contended that there was inordinate delay on the part of
the employer in releasing the instalments, that too, in five instalments. It was further
contended that if the mobilization advance had been released immediately on award of the
work, it would have set up a factory and commenced production within three months; that in
view of the delay, it lost production for a period of eight months that is nearly one third of the
contract period, and that as a consequence they were not able to execute the work of the value
of Rs. 5,56,66,086/- and the loss of profits and overheads on the said amount at a standard 15%
was Rs. 83,49,913/- and it was entitled to that amount as compensation for the breach by the
employer. The calculation of the said loss of profit and overheads in claim No. (1) was worked
out. The arbitrator held that Clause 8 of the special conditions of contract stood superseded by
Clause 3 of the Common Terms of Reference which required the mobilization advance to be
released in one instalment and not in three instalments. He held that Clause 5(1)(b) inserted by
the amendment to the work order dated 8.11.1988 was an unilateral incorporation by the
employer and was not binding on the contractor. He further held that the employer ought to
have released the mobilization advance along with the work order dated 23.8.1988, and the
employer had abnormally delayed the release of mobilization advance by a total period of 8.5
months by releasing it in instalments. He held that there was a clear delay of about 8 months
and during that period the contractor could have executed one third of the work of the value of
Rs. 330,64,867.50, and as the contractor was prevented from executing the said work on
account of the delay, the contractor was entitled to 10% of the said amount, that is Rs.
33,06,500/- as loss of profit. The said sum was therefore awarded to the contractor under claim
(1). There is yet another aspect. The contractor claimed compensation on the basis that he
could not do work of the value of Rs. 5,56,66,086/- in view of the delay and he was entitled to
15% thereof namely Rs. 83,49,913/- as compensation. But the arbitrator made an award in
respect of the claim on the ground that there was delay in releasing the mobilization advance
and during that period of delay, one third of the contract work could have been done and the
value of the work that could have been done was Rs. 3,30,64,867, and 10% thereof was the loss
of profit. Firstly, there was no such plea. Secondly, the Court has already held that the delay
relating to mobilisation advance, was not on the part of the employer. Thirdly, even if there was
delay, it was nobody's case that no work was done or that the contractor had suffered loss for
non-execution of the work during the contract period. Therefore the Court is of the view that
the award of compensation of Rs. 33,03,500/- towards claim No. (1) is liable to be set aside.
Claim No. 37A was linked to mobilization advance. The contractor claimed that it had
mortgaged its pipe manufacturing unit in favour of the employer by deposit of title deeds, as
security for repayment of the mobilization advance; that the machinery installed in the said
factory had not been released by the employer in its favour and as a consequence, it could not
be shifted to another place to enable it to start the manufacturing process elsewhere; and that
on account of the failure on the part of the employer to release the plant, it had to keep the machinery idle and the employer was therefore liable to reimburse to the contractor the loss of production from 13.1.1992 at the rate of Rs. 12,072/- per day. The contractor contended that if it had been permitted to shift its plant and machinery, it would have produced 15 pipes per day valued at Rs. 1,20,000/-, that out of which the overhead and profit element was 15% (that is Rs. 18,000/- per day); that as there were 306 working days in a year, the loss of profits/overheads would be 18,000 x 306/365 = Rs. 15,090/- per day; and that if 20% thereof (Rs. 3,018/-) was deducted therefrom towards labour component, the loss of profit per day on account of non-availability of plant and machinery was Rs. 12,072 per day. The employer resisted the claim by contending that there was no obligation to release the plant and its title deeds until the mobilization advance was repaid with interest; that the contractor had not repaid the mobilization advance and interest thereon in spite of the award; and therefore the question of compensating any 'daily loss' on that account did not arise. The employer also contested the correctness of the assumptions made for calculating the loss. We may also refer to another aspect. A sum of Rs. 12,072/- per day was claimed as damages by the contractor in a two line calculation without any supporting evidence or document. As noticed above, the claim was on the basis that the contractor would have manufactured 15 pipes per day of the value of Rs. 1,20,000/- and that the profit and overhead element out of it would have been 15% or Rs. 18,000/- per day. By taking the working days as 306 in a year and deducting 20% of labour component, the loss of profit per day was calculated to be Rs. 12,072/- per day. There is no evidence to show that the contractor was at any point of time manufacturing 15 pipes a day of the value of Rs. 8000/- each or that he would have made a profit of 15% on the cost thereof. The claim is made on the ground that it is disabled from manufacturing that many number of pipes elsewhere. There is no evidence that it had other contracts where it was required to manufacture that number of pipes or that it could not manufacture the required pipes for want of plant and machinery. Nor is there any evidence as to the value of the plant and machinery that had been mortgaged to the employer and what would be the cost of an alternative plant with a capacity to manufacture 15 pipes per day. If the plant and machinery was of the value of say Rs. 25 lakhs, or if the contractor could install another similar plant at a cost of Rs. 25 lakhs, then the loss at best would be interest on Rs. 25 lakhs and not anything more. In fact even though there is no evidence, while making claim Nos. 36 and 37 the contractor has given value of the plant and machinery as Rs. 36,84,161/-. Even assuming the said figure to be true, at best the blocked up investment was only Rs. 36,84,161/- and the loss would be around 1% thereon per month by way of interest which would be Rs. 36,841/- per month. What is more strange is nowhere in the award the arbitrator considers the validity of the claim of Rs. 12072 per day nor accepts the said claim as valid or correct. In a reasoned award if the claim of a contractor is equated to proof of the claim, then it is obviously a legal misconduct and an error apparent on the face of the award. While the quantum of evidence required to accept a claim, may be a
matter within the exclusive jurisdiction of the arbitrator to decide, if there was no evidence at all and if the arbitrator makes an award of the amount claimed in the claim statement, merely on the basis of the claim statement without anything more, it has to be held that the award on that account would be invalid. Suffice it to say that the entire award under this head is wholly illegal and beyond the jurisdiction of the arbitrator, and wholly unsustainable. Counsel for the contractor submitted that though there was an award in favour of the employer for refund of mobilization advance of Rs. 59,42,275/- with interest, there was a larger award in its favour aggregating to about Rs. 1.67 crores and interest and it was legitimately entitled to adjust the sum of Rs. 59,42,275/- with interest towards the amount due by the employer under the award namely Rs. 1.67 crores with interest and therefore as on the date of the award the liability towards mobilization advance stood wiped out on account of the same being adjusted towards the amount claimed by him and therefore as on the date of the award, the liability to refund the mobilization advance ceased. This contention is not sound. The mobilization advance amount was an ascertained sum due to the employer from the contractor, with a specific provision for interest. There was a specific contract for continuation of the mortgage until the said amount was paid. On the other hand the amounts that allegedly became due to the contractor under the award were mostly towards damages and escalation in prices validity of which were under challenge and there was no provision in the contract for payment of interest thereon. As noticed above at best the arbitrator could have directed return of the documents of title to the contractor and could not have directed payment of damages at the rate of Rs. 12072/- per day. We therefore hold that viewed from any angle, awarding Rs. 12,072/- per day as damages, from the date of award under Claim 37A cannot be sustained and the same is liable to be set aside. [State of Rajasthan –vs- Ferro Concrete Construction Pvt. Ltd. [2009] 12 SCC 1(SC-DB)]

Before the Arbitrator, appellant put forth eight claims. Respondent repudiated the said claims of the appellant. Respondent No.2 made and published an award on 17.9.1996. While claims Nos.1 and 5 were allowed in part, claims No.2 and 4 were allowed in toto. Claim No.3 was allowed for the amount to which the appellant itself had restricted its claim to. Counter claim of the first respondent was rejected. First respondent filed an application under Section 30 of the Arbitration Act, 1940. Single Judge of the High Court rejected the said objection, opining that the award did not warrant any interference. The Single Judge noticed that claim Nos. 5 and 6 had not been disputed by the first respondent and counter claim No.4 was not pressed. It was, therefore, directed payment of a sum of Rs.2,78,17,530.01 p. with further interest @ 6% per annum from the date of decree till the date of realization. The counter claim was also dismissed. First respondent preferred an intra-court appeal there against in terms of clause 15 of the Letters Patent of the High Court read with Section 39 of the Act. The Division Bench of the High Court allowed the said appeal in part in respect of three items of claim. The objection in relation to fourth item was also dismissed. Both parties are here before the Court
agrieved by and dissatisfied with the said judgment. The fourth claim which was allowed related to loss of profit allegedly suffered by the petitioner for illegal termination of the contract. The Division Bench, however, set aside in part the award in respect of the aforementioned claims stating as under: "However, we find some substance with regard to the claim No.4, loss of profit, there was an admitted delay in handling over the site and supply of materials. The Court confirmed both the award of the Arbitrator and the order of the Single Judge with regard to Claim No.4, loss of profit." The award of the Arbitrator in respect of claim No.4 has been accepted by the Division Bench. Mr. B.B. Singh has drawn our attention to clause 11(c) of the general conditions of contract to contend that in terms thereof, no damages were payable. The question as to whether damages were payable for illegal termination of contract cannot be a subject matter of contract. The Arbitrator has categorically held that not only the termination of contract was illegal, the same was mala fide. Furthermore, the contention raised before us by Mr. Singh has not been raised before the High Court. For the reasons aforementioned, the appeal filed by Union of India is dismissed and that of the appellant is allowed. [G.Ramachandra Reddy & Co.-vs- Union of India. [2009] 6 SCC 414/ [2009] 7 Scale 234/ [2009] 0 AIR(SC) 2629/ [2009] 2 ArbLR 475/ [2009] 7 JT 655/ [2009] 5 SCJ 403(SC-DB)]

The claimant-respondent made two claims (i) Rs.1,35,17,709/- for material loss due to the damage to the boiler and other equipments and (ii) Rs.19,11,10,000/- in respect of loss of profit for the period the plant remained closed. The main question before the Court now is whether the flashover and fire was the proximate cause of the damage in question. In the present case, it is evident from the chain of events that the fire was the efficient and active cause of the damage. Had the fire not occurred, the damage was also would not have occurred and there was no intervening agency which was an independent source of the damage. Hence the Court did not agree with the conclusion of the surveyors that the fire was not the cause of the damage to the machinery of the claimant. Moreover in General Assurance Society Ltd. vs. Chandmull Jain & Anr. AIR 1966 SC 1644 it was observed by a Constitution Bench of this Court that in case of ambiguity in a contract of insurance the ambiguity should be resolved in favour of the claimant and against the insurance company. Counsel for the appellant relied on the decision of the British High Court in Everett & Anr. vs. The London Assurance S.C. 34 L.J.C.P. 299; 11 Jur. N.S. 546; 13 W.R. 862. By the terms of the policy the premises in question was insured against “such loss or damage by fire to the property.” It was held by the High Court that this did not cover damage resulting from the disturbance of the atmosphere by the explosion of a gunpowder magazine a mile distant from the premises insured. The Court is in respectful disagreement with the said judgment as the predominant view of most Court is to the contrary. For the reasons given above the Court sees no merit in this appeal and it is dismissed. [New India Assurance Company Ltd. –vs- Zuari Industries Ltd. [2009] 6 Supreme 290/ [2009] 7 SCJ 755/ [2009] 4 CPJ(SC) 19/ [2009] 7 MLJ(SC) 1093/ [2009] 77 AllLR(SC) 167/ [2009] 4 CCC(SC)
By the time the said decision was rendered on 29.4.2004, BSNL, as per its policy, had already carried forward the balance quantity of the Tender dated 27.3.2001 to the next tender issued in 2002 and had even placed the purchase orders on the successful bidders against the said tender issued in 2002. (BSNL claimed that its counsel had erroneously submitted to the court during hearing of the first writ petition that some quantity still remained to be ordered. Be that as it may). Therefore, according to BSNL, no balance quantity was available and no order for any further quantity could be placed with the respondent, even if the respondent was to be given V-1 rating on a reevaluation. The respondent was aggrieved that the BSNL did not adjudge it as V-1 and did not place orders for further quantities, as per the direction of the High Court. According to the respondent, on account of the failure on the part of BSNL to adjudge it with v-1 rating, and consequential failure to place a purchase order for 30% tendered quantity, it was denied the opportunity to manufacture and supply a quantity of 5.306 LCKM of cables, resulting in a loss of profit at the rate of Rs. 200/- per CKM (or Rs. 2 crores per LCKM) on the quantities for which it did not get an order; and therefore it was entitled to Rs. 10,61,20,000/- as damage from BSNL. Therefore, only when a purchase order was placed, a 'contract' would be entered; and only when a contract was entered, the General Conditions of Contract including the arbitration clause would become a part of the contract. If a purchase order was not placed, and consequently the general conditions of contract (Section III) did not become a part of the contract, the conditions in Section III which included the arbitration agreement, would not at all come into existence or operation. In other words, the arbitration clause in Section III was not an arbitration agreement in praesenti, during the bidding process, but a provision that was to come into existence in future, if a purchase order was placed. In this case, the dispute raised is in regard to a claim for Rs. 10,61,28,000/- as damages on account of BSNL not placing a purchase order, that is loss of profit @ Rs. 200/- per CKM for a quantity of 5.306 LCKM. Obviously the respondent cannot invoke the arbitration clause in regard to that dispute as the arbitration agreement was non-existent in the absence of a purchase order. [Bharat Sanchar Nigam Ltd. –vs- Telephone Cables Ltd. [2010] 0 AIR(SC) 2671(SC-DB)]

On 15.10.2007, the petitioner submitted a commercial offer through e-mail for the supply of Bauxite to the respondent. After several exchanges of e-mails and after agreeing on the material terms of the contract, the respondent conveyed their acceptance of the offer through e-mail on 16.10.2007 confirming the supply of 5 shipments of Bauxite to be supplied from Australia to Vizag/Kakinada. On the basis of the acceptance by the respondent, the petitioner concluded the deal with the Bauxite supplier in Australia on the same day and entered into a binding Charter Party Agreement with the ship owner in Oslo on 17.10.2007. A meeting was held between the representatives of the respondent and the petitioner at
Lanjigarh, Orissa on 26.10.2007 and the minutes of this meeting were signed by them. The acceptance of the offer is acknowledged by the respondent in these minutes. A formal contract containing a detailed arbitration clause was also sent by the respondent to the petitioner on 08.11.2007 which was accepted by the petitioner with some changes and returned the same to the respondent the same evening. On 09.11.2007, the petitioner entered into a formal Bauxite sales Agreement with Rio Tinto of Australia for the supply of 225000 tonnes of Bauxite. On 12.11.2007, the respondent requested the petitioner to hold the next consignment until further notice. On 13.11.2007, the petitioner informed the respondent that it was not possible to postpone the cargo and requested them to sign the Purchase Agreement. On 13.11.2007 itself, the ship owners nominated the ship for loading the material on 28.11.2007. The petitioner terminated the contract on 16.11.2007 reserving the right to claim for damages. On 18.11.2007, the petitioner formally informed the ship owners about the cancellation of the carriage. On 19.11.2007, the ship owners made a claim of 1 million US $ towards commercial settlement and on 30.11.2007, the petitioner informed the respondent to pay a sum of 1 million US $ towards compensation for loss on account of the estimated loss for five shipments and 0.8 million towards compensation for loss of profit and other costs and expenses for cancellation of the order. The respondent rejected the claim of the petitioner on damages. On compensation not being paid, the ship owners served a notice on the petitioner. After negotiations, a settlement was arrived at between the ship owners and the petitioner to pay a lump sum of 6,00,000 US $ to be paid in two installments. The petitioner paid the amount in two installments on 27.02.2008 and 31.03.2008. On 01.09.2008, the petitioner served a notice of claim-cum-arbitration on the respondent to make the payment immediately otherwise treat the notice for referring the dispute to arbitration as per Clause 29 of the Purchase Order and informed about nominating Mr. Shiv Shankar Bhatt, a retired Judge of the Karnataka High Court as the arbitrator from their side and requested the respondent to nominate their own arbitrator within 30 days. On 14.11.2008, the respondent rejected the arbitration notice stating that there was no concluded contract between the parties. Hence, the petitioner filed the present petition for appointment of an Arbitrator. Accordingly, Hon'ble Mr. Justice B. N. Srikrishna, former Judge of this Court is appointed as an Arbitrator to resolve the dispute between the parties. It is made clear that this Court has not expressed anything on the merits of the claim made by both parties and whatever conclusion arrived at is confined to appointment of an Arbitrator. It is further made clear that it is for the Arbitrator to decide the issue on merits after affording adequate opportunity to both parties. In terms of the Arbitration clause, the place of Arbitration is fixed at Mumbai. The Arbitrator is at liberty to fix his remuneration and other expenses which shall be borne equally by both the parties. Arbitration petition is allowed on the above terms. [Trimex International Fze Ltd. –vs- Vedanta Aluminium Ltd. [2010] 1 ArbLR 286(SC)]
Although the said amount of damages had been received by the assessee under clause 6 of the agreement for breach of contract, yet the said amount had been received as compensation for the loss of profit, and therefore, it is in the nature of a revenue receipt. According to the learned counsel, it was on account of late commissioning of the plant that the assessee could not commence production as per its schedule and thereby suffered loss in its profits, which was compensated by the supplier and, therefore, the said amount should have been considered as revenue receipt. [Commissioner of Income Tax, Gujarat –vs- Saurashtra Cement Limited. [2010] 11 SCC 84/ [2010] 325 ITR(SC) 422/ [2010] 6 SCJ 21/ [2010] 233 CTR 209/ [2010] 7 JT 69/ [2010] 5 Supreme 251/ [2010] 192 TAXMAN 300(SC-DB)]

Claim awarded. Award under challenge. Respondent No. 3 was not entitled to any charges towards watch and ward etc. as Respondent No. 3 should not have retained damaged monoblock pumps having received full price of pumps. Case sent back with direction to issue notice to parties and after taking evidence, if necessary, order return of 198 damaged monoblock pumps by Respondent No. 3 to Appellant and if 198 damaged monoblock pumps were not available with Respondent No. 3 to find out value of 198 damaged monoblock pumps realised by Respondent No. 3 and direct Respondent No. 3 to pay said value to Appellant. Appeal allowed. [Nagpur Golden Transport Company (Regd.) vs. Nath Traders and Ors. MANU/SC/1475/2011= 2012 91 ALR 459 = AIR 2012 SC 357 = 2012 1 AWC 577 SC = 2012 1 BomCr 806 = SCSuppl 2012 1 CHN 19 = 1 2012 CPJ 30 SC = 2012 2 CTC 441 = [2012 1 JCR 124 SC ] = JT 2011 14 SC 27 = 2012 3 MhLJ 191 SC = 2012 167 PLR 100 = 2012 1 RCRCivil 382 = 2011 13 SCALE 356 = 2012 1 SCC 555 (SC)]

The respondents No.1 and 2 then filed Complaint No.101 of 1998 before the Consumer Disputes Redressal Forum, Gwalior, and their case in the complaint was that they had paid the price of the consignment to respondent No.3 and were entitled to Rs.3,61,131/- towards the price of the monoblock pumps and damages of Rs.70,000/-, loss of profit Rs.14,000/- as well as cost of Rs.5,000/- and interest @ 18% per annum on the amount claimed by them. The appellant resisted the claim contending that the claim was not maintainable under the Consumer Protection Act, 1986. The District Consumer Disputes Redressal Forum, in its order dated 27.01.1999, held that the appellant as a common carrier was the insurer of the goods in transit and if the goods have been damaged, the appellant was liable to respondents No.1 and 2 for negligence. The District Consumer Disputes Forum, therefore, awarded a sum of Rs.3,60,131/- along with interest @ 18% per annum from 01.04.1997 till the date of payment and Rs.500/- as counsel fee and further sum of Rs.500/- as cost of the case. [Nagpur Golden Transport Company-vs- Nath Traders. [2012] 1 RCR(Civ) 382/ [2012] 1 Supreme 317/ [2012] 0 AIR(SC) 357/ [2012] 1 SCC 555/ [2012] 91 AllLR(SC) 459/ [2012] 2 LW(SC) 289/ [2012] 2 SCJ 158/ [2012] 3 WLR(SC) 109/ [2011] 14 JT 27/ [2012] 1 CHN(SC) 19(SC-DB)]
In the present case, the Respondent No. 1 itself had claimed in the plaint the alternative relief of damages to the tune of Rs. 20,12,44,398/- if the relief for specific performance was to be refused by the Court and break-up of the damages of Rs. 20,12,44,398/- claimed in the plaint which contains an element of loss of profit on sales, for the balance 7 year term of the Agency Agreement amounts to a sum of Rs. 10,31,00,000/-. Counsel appearing for the Respondent No. 1, however, submitted that future profits and loss of goodwill of the Respondent No. 1 cannot be calculated in terms of the money, but the aforesaid statement of damages claimed by the Respondent No. 1 in the plaint would show that the Respondent No. 1 has itself calculated a projected loss of profit for the balance seven year term of the agreement as Rs. 10,31,00,000/- and has also assessed loss of goodwill at Rs. 2,00,00,000/- besides the loss of Rs. 6,00,00,000/- in relocating the store to another place in Brigade Road, Bangalore. The Court took the meaning of irreparable injury to be that which, if not prevented by injunction, cannot be afterwards compensated by any decree which the Court can pronounce in the result of the cause. For the aforesaid reasons, we set aside the order of temporary injunction passed by the trial court as well as the impugned judgment and the order dated 16.07.2010 of the High Court. The appeals are allowed. [Best Sellers Retail (India) Pvt. Ltd. –vs- Aditya Birla Nuvo Ltd. [2012] 4 RCR(Civ) 857/ [2012] 6 SCC 792/ [2012] 3 BBCI(SC) 264/ [2012] 2 UAD(SC) 210/ [2012] 0 AIR(SC) 2448/ [2012] 114 CLT(SC) 1113/ [2012] 5 JT 357/ [2012] 5 MLJ(SC) 435/ [2012] 5 Scale 437/ [2012] 5 SCJ 413(SC-DB)]

The High Court with reference to the item wise claim nos.1 (a),(b),(c) and 2 (a),(b),(e),(f) & (g) examined the claims at threadbare in the backdrop of the legal position laid down by this Court in the cases referred to supra with a view to find out whether the award passed by the Arbitrator in allowing certain claims was required to be interfered with on the ground that the Arbitrator has committed misconduct in passing the award. The High Court has examined the correctness of the above claims awarded at Rs.8,16,412.00 as loss of profits at 10% of the contract value against claim Nos.1 (a),(b),(c) and 2 (a),(b),(e),(f) & (g) by assigning the reasons. With regard to the finding recorded by the High Court as to whether the contractor had engaged skilled and unskilled labour and that they were idle, that the contractor had collected large quantity of material at original work site and had transported them to new site incurring a huge expenditure by him and that the contractor had borrowed amounts from Banks and private financiers and had paid interest on such borrowed amount to them, that the contractor had engaged staff (establishment) and was spending Rs.22,566/- per month for additional period of 18 months, that the contractor traveled to Delhi and other places incurring Rs.77,000/- for obtaining release of Bill amounts from NBCC, that the contractor had organized men, machinery and material for carrying work of the value of Rs.10 lakhs per month, that he suffered a loss of profit of 5% of the deficit turnover, that the contractor would have made a profit of Rs.9 lakhs to 10 lakhs and as the data furnished by the NBCC showed that the net payment made to the contractor was Rs.89,80,540.91, the contractor should be awarded
Rs.8,16,412 as 10% profits on the overheads, the High Court has rightly recorded a finding holding that the claim due to delaying the amount of 10% upon the overheads on the payment made by the NBCC to the Contractor is illogical. The said reasoning of the High Court on the above aspect of claims is perfectly legal and valid as it has assigned valid and cogent reasons in support of the said conclusions arrived at and rightly disallowed the claims. The High Court has rightly held that the award of any sum in addition to the contract amount does not arise as has been awarded by the Arbitrator and made the rule of the court, more particularly when the contractor did not claim 10% of loss of profits under specific claims. In that view of the matter, the claim of the contractor on the loss of profit of 10% of the total amount paid to him is rightly found fault with by the court. The same is rightly set aside by the High Court by recording reasons stating that the NBCC has claimed that the contractor has committed breach in performing his obligations by delaying the completion of the work awarded to him. We do not find any good reason whatsoever to interfere with the same in exercise of this Court’s jurisdiction in these appeals. Consequently, for the reasons stated above the appeals are dismissed. [P. Radhakrishna Murthy –vs- N.B.C.C. LTD. [2013] 3 JT 600/ [2013] 2 RCR(Civ) 355/ [2013] 3 SCC 747/ [2013] 0 AIR(SC) 1904(SC-DB)]

The two communications make it clear that the respondent had crystallized the claims on various heads by letter dated 17.4.2006 and the appellant had agreed to appoint an arbitrator within thirty days. The heads that have been mentioned in the letter dated 17.4.2006 pertained to liquidated damages for delay in performance, cost of repairs and rework which had to be done by the respondent, differential cost of the works left over by the appellant and was completed by the respondent through other agencies, cost of direct consequential damages to the respondent due to defect in the work done by the appellant, cost of consultancy fees and other expenses, loss of profit for four years based on revenue generated per employee, etc. and outstanding mobilization advance remaining with the appellant. The total sum as mentioned in the letter was Rs.74,78,34,921.54. From the said amount monies retained by the respondent and monies received by the respondent as per the contract, i.e., Rs.6,14,62,178.46 were reduced. Needless to emphasize, the validity of the claims had to be addressed by the learned Arbitrator but the fact remains that the respondent had raised the claims by giving heads. Thus, there can be no scintilla of doubt that the respondent had particularized or specified its claims and sought arbitration for the same. In the present case, when it is absolutely clear that the counter claim in respect of the enhanced sum is totally barred by limitation and is not saved by exception carved out by the principle stated in Praveen Enterprises (supra), the Court is unable to agree with the view of the Division Bench of the High Court that the counter claim, as a whole, is not barred by limitation. Thus analysed, the counter claim relating to the appeal which deals with civil contracts shall be restricted to the amount stated in the letter dated 17.4.2006, i.e., Rs.68,63,72,178.08, and as far as the other appeal which pertains to air-conditioning contract, the quantum shall stand restricted to as specified in
the letter dated 21.3.2006, i.e., Rs.19,99,728.58. At this juncture, the Court may, for the sake of completeness, deal with the justifiability of the interference by the Division Bench in the award passed by the learned Arbitrator. It has been urged by senior counsel for the appellant, that the view expressed by the learned Arbitrator being a plausible interpretation of the contract the same did not warrant interference. The Court has already analyzed at length how the interim award is indefensible as there has been incorrect and inapposite appreciation of the proposition of law set out in Praveen Enterprises’s case. In Rashtriya Ispat Nigam Limited, this Court has opined that the learned Arbitrator had placed a possible interpretation on clause 9.3 of the contract involved therein and hence, the interference was exceptionable. In the present case, the factual matrix and the controversy that have emanated are absolutely different and hence, the principle stated in the said authority is not applicable. Thus, we unhesitatingly repel the submission of the learned senior counsel for the appellant that the award passed by the learned Arbitrator did not call for any interference. Consequently, both the appeals are allowed in part, the judgment of the Division Bench in Appeals Nos. 7 of 2013 and 8 of 2013 is modified and the interim award passed by learned Arbitrator as regards rejection of the counter claims in toto stands nullified. The learned Arbitrator shall now proceed to deal with the counter claims, as has been indicated hereinabove by us. Needless to say, the Court has not expressed any opinion on the merits of the claims or the counter claims put forth by the parties before the learned Arbitrator. The parties shall bear their respective costs. [Voltas Limited –vs- Rolta India Limited. [2014] 3 JT 197/ [2014] 1 Supreme 514(SC-DB)]

Conclusion

This kind of damage can be claimed subject to the conditions mentioned in the contract are fulfilled and are all admitted the legitimacy of claiming damages to profit. Although, in accepting the loss of profit as damage, it can be interpreted that the loss of profit as a probable profit and it can also be said that the profit that may happen and there is no certainty for happening cannot be claimed. But, if with fulfilling the contract, for sure a profit will happen for one of the parties, in this case the party in breach should be liable for compensating that loss. Even if one looks at this issue rationally, it can be found that it is completely wise that when somebody destroys other person’s property or prevent him from gaining profit which has been expected to gain by that person, he should be liable for recovering the damage.

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