

# Dispute Resolution Hotline

October 27, 2016

## A LIQUIDATED DAMAGES CLAUSE DOES NOT OUST THE NEED TO PROVE THE LOSS: BOMBAY HC

- In a claim for liquidated damages, evidence has to be led in support of the same, and such a claim shall be granted on consideration of the basic principles for grant of liquidated damages.
- Relying on precedents, the High Court has reaffirmed that (a) the amount stipulated as liquidated damages has to be a reasonable compensation and a genuine pre-estimate of damages; (b) should not exceed the amount so stated, or the penalty so prescribed;
- The actual loss or injury has to be proved for claiming liquidated damages, and such burden may be dispensed with only when actual damage from breach of contract cannot be proved or calculated.

### INTRODUCTION

Recently in *Raheja Universal Pvt. Ltd. (“Appellant”) v. B.E. Bilimoria & Co. Ltd.<sup>1</sup> (“Respondent”)*, the Bombay High Court (“**High Court**”) elaborated on the scope and implications of liquidated damages under Section 74 of the Indian Contract Act 1872 (“**Contract Act**”) and concluded that the actual loss or injury has to be proved for claiming liquidated damages, and such proof may be exempted when it is not possible to do so, provided that such liquidated damages are a genuine pre-estimate of loss.

### FACTS AND BACKGROUND

The Appellant issued a work order on 13 March 2012 but terminated the contract on 27 December 2012, the point at which, the work was 120 days behind schedule. The reasons attributed to the termination were delayed work, non-compliances and defective work. The Appellant claimed liquidated damages as stipulated in the contract. Subsequently, the Respondent filed an arbitration petition to resolve the dispute and the arbitrator was appointed on 4 January 2013. Importantly, the Respondent did not question the termination but challenged the claim awarded to the Appellant at a later point in time.

The arbitrator accepted the entire claim of the Appellant, and accordingly awarded liquidated damages to the Appellant, which subsequently became the subject matter of the challenge before the High Court. The Single Judge set aside the arbitral award on the ground that the arbitrator had not considered the provisions of the contract before awarding liquidated damages. The Single Judge observed that (a) the contract had been terminated in the interim stage before completion of the tenure; (b) as per the contract the claim for liquidated damages could be sought only after giving an extension on the time period for completion of the project @ 0.5% of the contract value per week to a maximum of 5%. Against the judgment of the Single Judge, the Appellant filed an appeal to the Division Bench of the High Court (“**Division Bench**”).

### JUDGMENT

The Division Bench approved the findings of the Single Judge. The Division Bench observed that the Appellant had not led any evidence to support its claim for liquidated damages, and in absence of any evidence, the grant of liquidated damages by the Tribunal was unacceptable and thus the award was rightly set aside by the Single Judge.

The Division Bench agreed with the findings of the Single Judge as stipulated in the contract, that are: (a) liquidated damages could be claimed only for the period of delay beyond the original date of completion stipulated in the contract; (b) liquidated damages could not be claimed in a phased manner (at the interim stage of the work) during the extended timeline and before termination of contract. Therefore, the stage for claim of liquidated damages as stipulated in the contract had not arisen.

The Division Bench placed reliance on *Kailash Nath v. Delhi Development Authority<sup>2</sup>*, wherein the Supreme Court had held that (a) the amount stipulated as liquidated damages has to be a reasonable compensation and a genuine pre-estimate of damages fixed by both parties and found to be such by the court; (b) the damages awarded should not exceed the amount so stated, or the penalty so prescribed.

The Division Bench further relied on *Kailash Nath*, where the Supreme Court had interpreted the expression “*whether or not actual damage or loss is proved to have been caused thereby*” arising out of Section 74 of the Contract Act concluded that, only in cases where actual damage from the breach of contract cannot be proved or calculated, the court will take the liquidated amount as pre-determined estimate of the loss caused. If the damages can be calculated the same needs to be alleged and quantified as part of the pleadings.

### ANALYSIS

The case provides guidance on a party's obligation to plead and prove actual loss even in a scenario where the

## Research Papers

### FAQs on Setting Up of Offices in India

December 13, 2024

### FAQs on Downstream Investment

December 13, 2024

### Gaming Law 2024

December 12, 2024

## Research Articles

### The Revolution Realized: Bitcoin's Triumph

December 05, 2024

### The Bitcoin Effect

November 14, 2024

### Acquirers Beware: Indian Merger Control Regime Revamped!

September 15, 2024

## Audio

### Securities Market Regulator's Continued Quest Against “Unfiltered” Financial Advice

December 18, 2024

### Digital Lending - Part 1 - What's New with NBFC P2Ps

November 19, 2024

### Renewable Roadmap: Budget 2024 and Beyond - Part I

August 26, 2024

## NDA Connect

Connect with us at events, conferences and seminars.

## NDA Hotline

Click here to view Hotline archives.

## Video

### “Investment return is not enough” Nishith Desai with Nikunj Dalmia (ET Now) at FI8 event in Riyadh

October 31, 2024

### Analysing SEBI's Consultation Paper on Simplification of registration for FPIs

contract stipulates grant of liquidated damages. The only exception being where damage or loss is difficult, or impossible to prove, then the liquidated amount named in the contract, if it is a genuine pre-estimate of damage or loss, can be awarded. The case also provides a summary and discusses earlier precedents on principles governing grant of liquidated damages.

– **Shweta Sahu, Alipak Banerjee & Moazzam Khan**

You can direct your queries or comments to the authors

---

<sup>1</sup> (2016) 3 AIR Bom R 637

<sup>2</sup> (2015) 4 SCC 136

---

## DISCLAIMER

The contents of this hotline should not be construed as legal opinion. View detailed disclaimer.

This Hotline provides general information existing at the time of preparation. The Hotline is intended as a news update and Nishith Desai Associates neither assumes nor accepts any responsibility for any loss arising to any person acting or refraining from acting as a result of any material contained in this Hotline. It is recommended that professional advice be taken based on the specific facts and circumstances. This Hotline does not substitute the need to refer to the original pronouncements.

This is not a Spam mail. You have received this mail because you have either requested for it or someone must have suggested your name. Since India has no anti-spamming law, we refer to the US directive, which states that a mail cannot be considered Spam if it contains the sender's contact information, which this mail does. In case this mail doesn't concern you, please unsubscribe from mailing list.

September 26, 2024

**Scope of judicial interference and inquiry in an application for appointment of arbitrator under the (Indian) Arbitration and Conciliation Act, 1996**

September 22, 2024

---