REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No.1168 OF 2007

KANCHAN UDYOG LIMITED ....APPELLANT(s)

VERSUS

UNITED SPIRITS LIMITED ......RESPONDENT(s)

JUDGMENT

NAVIN SINHA, J.

The appellant's suit, C.S. No.839 of 1990, for damages and wrongful termination of contract, was decreed by the learned Single Judge on 02.12.1999. It has been reversed in appeal preferred by the respondent, on 14.01.2005 in APD No.14 of 2000, and the suit dismissed.

2. The appellant entered into an agreement with the respondent for establishment of a non-alcoholic beverages bottling plant at Dankuni, West Bengal, and sale under the respondent's trade mark, 'Thrill', 'Rush', 'Sprint', and 'McDowell's Sparkling Soda.' The respondent

provided technical consultancy for establishment of the plant, incorporated in the Project Engineering Services Agreement dated 11.09.1985. A Bottler's agreement dated 26.10.1985 was separately executed, valid for ten years with a renewal option, containing the respective rights and obligations of the parties, along with a Marketing agreement. The concentrate (Essence), for preparation of the non-alcoholic beverage, was to be supplied by the respondent. The beverage was to be sold in specified districts of West Bengal, as provided for in the marketing agreement.

3. The appellant, on 15.12.1985 applied for loan, Exhibit 'C', to the West Bengal Industrial Development Corporation (hereinafter referred to as 'the WBIDC') for establishment of the bottling plant at an estimated cost of Rs.226.80 lakhs. In accordance with procedures, it was processed by the West Bengal Consultancy Organisation Ltd. (hereinafter referred to as 'WEBCON'), which independently prepared a techno-economic feasibility report, 'Exhibit F1'. Loan was then advanced to the appellant by the WBIDC, and the West Bengal State Financial Corporation. Commercial production commenced on 01.01.1987. The bottler's agreement was terminated by the respondent on 16.03.1988. Commercial production at the plant ceased in May, 1989, and the suit was instituted by the appellant in 1990.

The learned Single Judge decreed the Suit, awarding damages for Rs.2,73,38,000/- towards loss of anticipated profits, and a sum of Rs.1,60,00,000/- towards costs for installation of the plant, after deducting Rs.9.05 lakhs payable by the appellant to the respondent as consultancy charges. The respondent was held liable to pay to the appellant a sum of Rs.4,24,33,000/- with interest @ 10% from the date of suit till payment. The Division Bench in appeal reversed the decree, and dismissed the Suit.

4. Sri Paras Kuhad, learned senior counsel appearing for the appellant, submitted that the bottler’s agreement valid for ten years, was terminated unilaterally and prematurely by the respondent on 16.03.1988, contrary to clause 26 of the agreement. The appellant had never denied performance of its obligations under the agreement. The appellant had not signed and returned the termination letter, in acceptance, as reiterated by the respondent on 25.07.1988. The appellant did not sign any fresh agreement with M/s. Venkateswara Essence & Chemicals Pvt. Ltd. (hereinafter referred to as ‘VEC’) for supply of concentrates by it, in lieu of the respondent. The acceptance of concentrates by the appellant directly from M/s. VEC for a short time span, under clause 5 of the agreement, cannot be construed either as novation of the original contract under Section 62 of the

Indian Contract Act (hereinafter referred to as ‘the Act’), or acquiescence to any new arrangement by substitution of a new contract. It was an act done under compulsion, and not voluntarily. A novation of contract, can take place only by mutual consent in a tripartite arrangement. In absence of any fresh tripartite agreement executed between the parties, it is futile to contend novation. The respondent also continued to deal with the appellant under the original agreement, even while it sought to persuade the appellant to sign the fresh agreement.

5. The respondent was the domain expert. Relying on its assurance, the appellant had made a business investment. A reasonable profit was, therefore, naturally expected. The loss of anticipated profits was due to the failure of the respondent to provide adequate aggressive marketing and advertisement support under the bottler’s agreement, in an extremely competitive market. The assumption of the respondents that there existed a market for their brand products 'Thrill', 'Rush', 'Sprint', was totally misconceived, believing in which the appellant had made the investment. A party committing breach of contract, was liable for such damages as are estimated as not unlikely to result from the breach, at the time of making of the contract. The appellate court erred in relying upon

future events, to hold that the appellant could not be foreseen to earn profits. Any temporary difficulties that the appellant may have had in its own operations, were not insurmountable, and could have easily been overcome, if the respondent had facilitated smooth running of the business and earning of profits thereby. The claim for damage was required to be assessed by a broad estimation, taking into consideration all significant factors, evaluating the chances for earning profit, and not determination of actual profitability. Reliance was placed on ***Wellesley Partners LLP v. Withers LLP***, (2015) EWCA Civ 1146.

6. The claim for loss of anticipated profits was not based on the WEBCON report, 'Exhibit F1'. Neither was it based on 'Exhibit W1', the report prepared by Dr. Baisya, the then technical survey manager of the respondent. It was based on Exhibit 'C', the loan application submitted by the appellant to the WBIDC along with enclosures, containing details of profitability, cash flow, cost of production and estimation of sales. It was prepared with the assistance of Dr. Baisya, duly proved by Sri Binod Khaitan of the appellant. The appellate court did not express any reservation about the sufficiency of proof regarding the document. The fact that it may not have been established to the satisfaction of the court, that it was jointly prepared

with Dr. Baisya, does not detract from its contents or admissibility of the same. The agenda notes of the meeting of WBIDC dated 19.02.1986 which considered the profitability projections based on its own market survey report, was also duly proved by the appellant's witness Sri Binod Khaitan. The original minutes, and the application for financial assistance had been summoned by the court from WBIDC by subpoena. These were cumulatively sufficient to assess estimated loss of production and the profitability that would have accrued if the business had remained operational. This loss of profitability was therefore clearly in contemplation of the parties at the time of entering into the contract, and which alone would be the relevant date for assessment of claim for damages. The breach by the respondent of the bottler's agreement was the direct cause for loss of anticipated profits. Alternately, the causation had to be determined in a holistic manner by a cumulative assessment. The claim for loss of profitability is based on gross profits, and not net profits, as in that event several heads of claims regarding expenses would automatically get covered. The Project Services Agreement demonstrates that success of the business was primarily the responsibility of the respondent, dependent on the fulfillment of its obligations.

7. The appellant had taken all reasonable steps for mitigation of damages as available to it, by exploring alternate use of its bottling plant by other bottlers, including sale of the plant, relying on the Explanation to Section 73 of the Act. The appellate court, despite noticing the efforts made by the appellant, erred in applying the test for success of the endeavor, instead of the endeavor made. The appellant was not expected to take such steps involving unreasonable expenses, risk or injury to itself. The respondents were required to affirmatively demonstrate that the appellant had acted unreasonably, despite availability of opportunity, in its duty to mitigate the loss. Reliance was placed on ***M. Lachia Shetty & Sons Ltd. vs. Coffee Board, Bangalore***, (1980) 4 SCC 636. Even if the respondent were to succeed on this aspect, the only consequence would be in the matter for computation of damages only, and not its denial completely.

8. The bottling plant set up by the respondent under the Project Services Agreement was specific to their product and needs. It was not saleable in open market. The investment of Rs.2.52 crores in establishment of the plant, by the appellant, was borne out from its balance sheets. The learned Single Judge erroneously awarded Rs.1.60 crores only. It has been unjustifiably set aside in appeal. The claim for establishment cost of the plant, and loss of anticipated profitability,

do not constitute a double claim for damages. Capital cost was claimed towards cost of the plant, it having become non-operational and stood scrapped. Loss of profitability was confined to loss of net profits that would accrue by operation of the plant. The claim for costing, including the capital cost of the project, and profitability are distinct issues. If the plant had remained operational, the investment cost and profitability both would have accrued.

9. Sri Jaideep Gupta, learned senior counsel appearing for the respondent, referring to clause 7 of the bottler's agreement, submitted that it was not a business partnership agreement. The appellant was unable to run its business for more than one reason, attributable to it alone. The change in excise regime dated 22.09.1987, made it an economic compulsion to route concentrates through M/s. VEC to avoid higher excise duty, which in turn would affect the price and saleability of the product, ultimately to the detriment of the appellant itself. At the Bangalore meeting, twelve out of fourteen bottlers, agreed for the new arrangement. The appellant also started to place orders and received concentrates directly from M/s. VEC from April 1988 but abruptly stopped doing so in May, 1989. The claim for damages was raised belatedly only thereafter by filing the suit in 1990, and after the appellant had shut down the plant because of its own inability to run

the business. There had been no breach by the respondent. The original agreement underwent a novation *sub silentio*, in the facts of the case, under Sections 8 and 62 of the Act, even if it had not been formally reduced to writing. Reliance was placed on ***McDermott International Inc vs. Burn Standard Co. Ltd. & Ors.***, (2006) 11 SCC 181. Alternately, if the supply of concentrates was accepted by the appellant from M/s. VEC in view of clause 5 of the bottler's agreement, there had not been any termination of the contract by the respondent. The appellant had further acquiesced to the new arrangement for supply of concentrates, and by its conduct had waived the claimed legal rights under the bottler's agreement.

10. The termination of the contract was not the causation or dominant cause for loss of anticipated profits. Reliance was placed on ***Galoo Ltd. & Ors. vs. Bright Grahame Murray & Anr.***, (1994) 1 WLR 1360. The appellant rested its claim for loss of expected profitability before the High Court on Exhibit 'F1' and 'W1', but failed to prove both the documents in accordance with law. In the present appeal, for the first time, it was now being claimed on the basis of Exhibit 'C'. Annexure 'M' to the plaint, the claimed loss of profitability is only a reproduction of Exhibit 'C'. The latter has already been the subject of independent consideration in Exhibit 'F1' the WEBCON

report. The appellant failed to prove that Exhibit 'C' was prepared jointly with Mr. Baisya. There was absolutely no material to demonstrate any real or substantial chance for earning profit by the appellant. Profit projections made in a loan application for viability of a project to avail finance, are mere speculative assumptions and cannot be a yardstick to claim loss of anticipated profits. The appellant also failed to take steps to mitigate its losses under Section 73 of the Act for 'remedying the inconvenience caused' by the breach either by utilisation of the plant for bottling by others, availing concentrates from M/s. VEC or selling the plant immediately after closure in May, 1989 to fetch a higher rate, but did so belatedly in 1996. Reliance was placed on ***M/s. Murlidhar Chiranjilal vs. M/s. Harishchandra Dwarkadas & Anr.***, (1962) 1 SCR 653 and ***Payzu v. Saunders***, (1919) 2 KB 581.

11. The appellant cannot claim both reliance loss with regard to the investment in establishment of the plant, and expectation loss with regard to anticipated profitability from the plant, simultaneously. If no profit was likely to accrue from the plant, award of reliance loss would confer a windfall on the appellant and would increase the damages in proportion to the appellant's own inefficiency rather than in gravity of the breach and offend the principles of causation. Reliance was placed

on Pollock and Mulla, 14th edition, ***Cullinane vs. British Rema Manufacturing Co. Ltd***., (1954) 1 QB 292 and ***C&P Haulage vs. Middleton***, (1983) 3 All ER 94. The respondent cannot be made the undertaker for the inability of the appellant to run its business profitably for lack of sufficient business acumen. The award of Rs.1.60 crores towards establishment cost of the plant is also erroneous. It does not take into consideration the depreciation of the plant, and assigns no reason for fixation of the quantum.

12. We have considered the submissions. The learned Single Judge referring to Section 73 of the Act, on basis of the averments made in the plaint, allowed the claim for loss of anticipated profits relying upon Exhibit 'F1', the WEBCON report, and Exhibit 'W1', the report prepared by Dr. R.K. Baisya, holding that the respondent having committed breach of the agreement, was obliged to put the appellant in the same position by grant of compensation, as the appellant would have been if the contract had been performed. The appellant was also entitled to cost of the plant, as it was useless for any other purpose. The appellant was unable to mitigate its damages as the product did not find acceptability, and the efforts of the parties to persuade Pepsi and Coca Cola to utilise the bottling plant, also came to naught. The appellant was awarded Rs.2,73,38,000/- towards loss of anticipated

profits for ten years and a sum of sum of Rs.1.60 lakhs towards the cost of plant, being the price it fetched in the auction sale to Cadbury-fry by the West Bengal Financial Corporation. A negative finding was returned in one line, on the issue if the suit was barred by waiver and acquiescence, without any discussion.

13. The appellate court examined the copious oral and documentary evidence in detail, and has rendered reasoned findings. It was held that Exhibit 'F1' and Exhibit 'W1' had not been proved in accordance with law, and therefore, were inadmissible in evidence. Serious doubt was expressed, for reasons discussed, if the latter had even ever been tendered in evidence, holding that the two documents could not form the basis for awarding damages for loss of anticipated profits. We need not deliberate on the issue any further, as in appeal before us, the appellant has pressed the claim only on basis of the loan application, Exhibit 'C', submitted by it to the WBIDC. Annexure 'M' to the plaint, the claim for loss of anticipated profits was held to be a reproduction of Exhibit 'C'. The WEBCON report, Exhibit 'F1' was based on independent assessment including consideration of Exhibit 'C'. The primary document, Exhibit 'F1' not having been proved, any assumptions in Exhibit 'C' already considered in the latter, could not be the basis for a profit projection. There was no evidence in support of

the claim that Exhibit 'C' had been prepared in association with Dr. R.K. Baisya. No adverse inference could be drawn against the respondent and it was for the appellant to have summoned Dr. Baisya as a witness to prove its case, since he had since resigned and left the Company.

14. Contrary to the claim of the appellant, that the plant would be a profitable enterprise in the second year of its operation ending March, 1988, the appellant itself acknowledged in its letter dated 09.05.1988, that the appellant would make losses in the next six years upto 1992-93, requesting for supplies of concentrates on credit for five years. The business of the appellant failed to take off due to lack of business acumen, its inability to manage its own finances, and failure to deploy manpower distribution in accordance with its own projections in the loan application submitted by it to the WBIDC. The respondent had provided sufficient advertising and marketing support to the appellant, and its expenditure for the same was far in excess of that made by the appellant, whose bank account reflected severe lack of financial resources, leading to its inability to make payments to its bottle suppliers, for the concentrates, consultancy fees etc.

15. In the bottlers conference on 15.10.1987 at Bangalore, consequent to the new excise regime, twelve out of fourteen bottlers had agreed to the new arrangement for supply of concentrates by M/s VEC, instead of the respondent. The appellant also placed orders on M/s VEC, and received supplies of concentrates directly from March, 1988 till January, 1989 even while it continued to avail marketing services from the respondent also. Thus business relations continued between the parties even after termination of the bottler's agreement.

16. A unilaterally projected profitability in a loan application, which is a mere assumption, cannot be the basis for assessment of damages especially when the appellant conceded that it would not be in a position to earn profit till 1992-93. No evidence had been led with regard to the actual course of the market for cold drinks during 1987-88, and whether other bottlers had made profits. The appellant had failed to demonstrate any real and substantial chance of earning profit, considering that there was no brand acceptance by the consumers also.

17. Considering the principle of causation to award loss of anticipated profits by breach of agreement, it was held in the facts of

the case, that it was not the result of the breach, but was a composition of various factors like lack of brand acceptance, financial crunch of the appellant and lack of adequate infrastructure by it. The claim for damages was therefore, remote as there was not even a speculated chance for making profit by the appellant.

18. The appellant had failed to take steps for mitigation of damages. It was the respondent which had pursued matters with Pepsi for utilisation of the appellant's plant. The appellant had failed to satisfy that the proposal could not go through for reasons not attributable to it. Likewise, the further details desired by Coca Cola do not appear to have been furnished by the appellant. Even though the plant stopped operation in May, 1989 when it was relatively new, no effort was made for sale and/or utilisation of plant till its auction sale in 1996.

19. Relevant to the discussion, is the bottler's agreement. Clause 7 of the same stipulated that the Company and the bottler were not partners or agents of each other. The bottler was required to make sufficient investment to meet the best quality standards, and satisfy every demand of beverages, within the specified territory by promoting and developing the merchandise in a proper and vigorous

manner so as to compete effectively with other competing brands. The availability of trained personnel for the purpose was the responsibility of the appellant. It was required to prepare a marketing programme before October of the current year, for the next year. The expenses for advertising and promotional activities would attract the Company's participation and be normally not less than 50% of the agreed quantum. The appellant was also at liberty to develop its own promotional campaigns locally. The agreement thus contained the mutual rights and obligations. Though the appellant contends lack of adequate advertising and market support by the respondent, nothing has been demonstrated with regard to the steps taken by it to fulfill its obligations under the agreement. This assumes relevance in view of findings of the appellate court, regarding the financial crunch faced by the appellant, its failure to pay suppliers of concentrates and bottles, requesting for deferred payment of the same, the request not to insist on payment of consultancy fees, and inability to deploy sufficient manpower as per its own projection contained in the loan application on which it seeks to rely.

20. Clause 5 of the bottler's agreement provided for supply of concentrates by the respondent, or from such suppliers as shall be nominated by it. Twelve out of fourteen bottlers had agreed at the

Bangalore convention on 15.10.1987 to the new arrangement for supply of concentrates through M/s. VEC. The appellant also commenced placement of orders directly and received concentrates from M/s. VEC since 22.04.1988 and continued to do so even after its letter dated 11.01.1989, by placing orders on 08.03.1989 till it finally discontinued after closure of the plant in May, 1989. It is not the case of the appellant, based on evidence, that M/s. VEC failed to supply concentrates, or that it did not meet standards, or was insufficient to meet its marketing obligations, much less that any other of the twelve bottlers had complained in this regard. The bottling of McDowells Sparkling Soda was an entirely different issue and could have been continued by the appellant notwithstanding the controversy regarding the concentrates. The plea of the respondents for novation of the contract referring to Section 8 and 62 of the Act, *sub silentio* finds support from the observations in ***McDermott International Inc.*** (supra) as follows:

> "151. Clause 5 of the contract categorically states that MII was to procure the material which was to be reimbursed by BSCL. The extra amount incurred by MII for procuring materials having extra thickness, therefore, was not payable. To the aforementioned extent, there has been a novation of contract. MII had never asserted, despite forwarding of the contention of ONGC, that it would not comply therewith. It, thus, accepted in sub silentio."

21. The novation of a contract could take place *sub silentio* was also noticed in ***BSNL vs. BPL Mobile Cellular Ltd.,*** (2008) 13 SCC 597 as follows**:**

> "45….. They might have also been held bound if they accepted the new rates or the periods either expressly or *sub silentio*….."

22. The learned Single Judge framed an issue also with regard to waiver, estoppel and acquiescence, then answered it in the negative in a singular line, without any discussion. Waiver and acquiescence may be express or implied. Much will again depend on the nature of the contract, and the facts of each case. Waiver involves voluntary relinquishment of a known legal right, evincing awareness of the existence of the right and to waive the same. The principle is to be found in Section 63 of the Act. If a party entitled to a benefit under a contract, is denied the same, resulting in violation of a legal right, and does not protest, foregoing its legal right, and accepts compliance in another form and manner, issues will arise with regard to waiver or acquiescence by conduct. In the facts of the present case, the conduct of the appellant in placing orders and receiving supply of concentrates directly from M/s. VEC, for a period of nearly one year, and continuing to do so even after it wrote to the respondent in this regard, without recourse to any legal remedies for denial of its legal right to receive

concentrates from the respondent, undoubtedly amounts to waiver by conduct and acquiescence by it to the new arrangement. The plea that it was done under compulsion, and not voluntarily, is devoid of any material, substance and evidence. It is unacceptable and merits no consideration. Alternatively, if it was an assignment under Clause 5 of the agreement, there had been no termination of the contract by the respondent. Waiver by conduct was considered in ***P. Dasa Muni Reddy vs. P. Appa Rao,*** (1974) 2 SCC 725, observing as follows:

> "13. Abandonment of right is much more than mere waiver, acquiescence or laches…..Waiver is an intentional relinquishment of a known right or advantage, benefit, claim or privilege which except for such waiver the party would have enjoyed. Waiver can also be a voluntary surrender of a right. The doctrine of waiver has been applied in cases where landlords claimed forfeiture of lease or tenancy because of breach of some condition in the contract of tenancy. The doctrine which the courts of law will recognise is a rule of judicial policy that a person will not be allowed to take inconsistent position to gain advantage through the aid of courts. Waiver some times partakes of the nature of an election. Waiver is consensual in nature. It implies a meeting of the minds. It is a matter of mutual intention. The doctrine does not depend on misrepresentation. Waiver actually requires two parties, one party waiving and another receiving the benefit of waiver. There can be waiver so intended by one party and so understood by the other. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of waiver. There should exist an opportunity for choice between the relinquishment and an enforcement of the right in question….."

23. Waiver could also be deduced from acquiescence, was considered in ***Waman Shriniwas Kini vs. Ratilal Bhagwandas & Co.,*** 1959 Supp (2) SCR 21, observing as follows:

> "13……Waiver is the abandonment of a right which normally everybody is at liberty to waive. A waiver is nothing unless it amounts to a release. It signifies nothing more than an intention not to insist upon the right. It may be deduced from acquiescence or may be implied…."

24. Exhibit 'C' was a loan application, submitted by the appellant to the WBIDC. There is no evidence that it was prepared together with the respondent. The intent and purpose of a loan application is entirely different, relevant only for the purpose of the borrower vis-à-vis the lender. The most fundamental characteristic a prospective lender will want to examine in a loan application are assessment of the Credit History of the Borrower, Cash Flow History and Projections for the Business, Collateral that is Available to Secure the Loan and Character of the Borrower. The profitability projections in such an application are only broad estimates based on assumptions and presumptions of the borrower intended to convince the lender of the viability of its project, in absence of which the loan application itself may not be considered. The appellant's projections in it of assumed estimated profitability for viability of the project also went completely awry from its own admission that there was no likelihood of profit in

the next 5 to 6 years. Viability of the project for sanction of loan cannot lead to an automatic presumption of profits, in the facts of the case, especially when there is evidence that the appellant did not even deploy manpower in accordance with the projections made by it in the loan application. It was not sanctioned on basis of the assumption of the appellant for earning profits. The loan was sanctioned by the WBIDC on basis of the techno-economic feasibility report by WEBCON Exhibit 'F1'. The loan application, after consideration, lost its independent identity and got subsumed in Exhibit 'F1'.Annexure 'M' to the plaint containing the projected estimated profitability was only a reproduction of Exhibit 'C'. The primary document was Exhibit 'F1', which took into consideration Exhibit 'C' also. The former being inadmissible in evidence, as not having been proved in accordance with law, the appellant cannot seek to prove indirectly what it has been unable to prove directly. The conclusion of the appellate court that Exhibit 'F-1' being the primary document, the claim for loss of anticipated profits on basis of Exhibit 'C' was unsustainable, cannot be faulted with.

25. In the facts of the present case, it cannot be held that the breach alone was the cause for loss of anticipated profits, much less was it the primary or dominant reason. The appellate court has

adequately discussed the appellant's letter dated 04.07.1987 thanking the respondent for its advertising support. During the year 1986-87, the respondent spent Rs.2,05,13,376.14 for advertising purposes evident from its balance sheet. Similarly, in 1987-88, it spent Rs.1,65,87,158.73 towards advertisement and sale promotions. On the contrary, for the year ending 31.03.1987, the appellant spent Rs.6,68,856.00 towards advertisement and in the year 1987-88 it spent only Rs.39,288.00. The fact that it was unable to pay for the concentrates seeking deferred payment, acknowledgement on 09.05.1988 that it would continue to suffer loss for the next six years upto 1992-93 seeking long term credit for five years for supply of concentrates and its acknowledgement in letter dated 27.04.1987 that due to "many factors already discussed with you we have not been able to run the factory and the sales of our product have not picked up in the market", and not to press for payment of consultancy fees, failure to deploy adequate manpower as per its own projections demonstrates the poor financial condition of the appellant as the prime reason for its inability to run the plant and earn profits. As against a value of Rs.4,26,685.19 of raw materials in 1989, the appellant had an over draft of Rs.13,89,000.00. It had a credit entry of Rs.5,135.00 only in July, 1988 in its account with the State Bank of India. The current account with the Union Bank of India reflected a balance of

Rs.1,28,619.25 on 28.03.1989. The Bank balance on 31.03.1989 reflected from its balance sheet was only Rs.43,345.38, and its loss as reflected in the balance sheet on 31.03.1987 was Rs.18,47,018.11. In the facts of the present case, it cannot be held that the breach by the respondent was the cause, much less the dominant cause for loss of anticipated profits by the appellant. In ***Galoo Ltd.*** (supra) the emphasis was on the common sense approach, holding that the breach may have given the opportunity to incur the loss but did not cause the loss, in the sense in which the word "cause" is used in the law. The following passage extracted therein from Chitty on Contracts, 26th ed. (1989) Vol. 2, pp. 1128-1129, para 1785 may be usefully set out:

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

26. ***Wellesley Partners LLP*** (supra) itself carves out an exception to the principle that a contract breaker is liable for damage resulting from his breach, if at the time of making the contract, a reasonable person in his shoes would have had damage of that kind in mind as

not unlikely to result from a breach. After noticing The Achilleas (2009) AC 61 it was observed:

> "69……The Achilleas shows that there may be cases, where based on the individual circumstances surrounding the making of the contract, this assumed expectation is not well founded.

The observations noticed therein from para 23 and 24 of the ***Parabola case*** (2011) QB 477 are also considered relevant as follows:

> "23….The next task is to quantify the loss. Where that involves a hypothetical exercise, the court does not apply the same balance of probability approach as it would to the proof of past facts. Rather, it estimates the loss by making the best attempt it can to evaluate the chances, great or small (unless those chances amount to no more than remote speculation) taking all significant factors into consideration.
>
> 24…..The judge had to make a reasonable assessment and different judges might come to different assessments without being unreasonable. An appellate court will be slow to interfere with the judge's assessment.

27. The appellate court with reference to evidence has adequately discussed that the appellant failed to take steps to mitigate it losses under the Explanation to Section 73 of the Act. We find no reason to come to any different conclusion from the materials on record. If concentrates were available from M/s. VEC, the appellant had to offer

an explanation why it stopped lifting the same after having done so for nearly a year, and could have continued with the business otherwise and earned profits as observed in ***Payzu Ltd.*** (supra)**.** It could also have taken steps to sell the unit after its closure in May, 1989 rather than to do so belatedly in 1996. No reasonable steps had been displayed as taken by the appellant for utilisation of its bottling plant by negotiations with others in the business. Nothing had been demonstrated of the injury that would have been caused to it thereby.

28. That leaves the question with regard to reliance loss and the expectation loss. Whether the two could be maintainable simultaneously or were mutually exclusive? In Pullock & Mulla, 14th Edition, Volume II, page 1174, the primary object for protection of expectation interest, has been described as to put the innocent party in the position which he would have occupied had the contract been performed. The general aim of the law being to protect the innocent party's defeated financial expectation and compensate him for his loss of bargain, subject to the rules of causation and remoteness. The purpose of protection of reliance interest is to put the plaintiff in the position in which he would have been if the contract had never been made. The loss may include expenses incurred in preparation by the innocent party's own performance, expenses incurred after the breach

or even pre-contract expenditure but subject to remoteness. The following passage from the same is considered appropriate for extraction:

"No Recovery for Both, the Expectation Loss and the Reliance loss."

> Although the rules as to damages seek to protect both the expectation and the reliance interests, the innocent party cannot ordinarily recover both expectation loss, viz., loss of profit, and reliance loss, viz., expenses incurred in reliance on the promise; that would involve double counting. He has to choose between the two measures.
>
> However, he cannot claim reliance losses to put himself in a better position that if the contract had been fully performed: else, the award of damages for reliance losses would confer a windfall on the plaintiff, and would increase the damages in proportion to the claimant's inefficiency in performance, rather than in proportion to the gravity of the breach, and probably of normal principles of causation. In such cases, therefore, the plaintiff can recover the loss on account of the wasted expenditure or outlay only to the extent of the expected gain; and the onus of proving lies on the party committing the breach to show that the reliance costs (or any part of them) would not have been recouped, and would still have been wasted, had the contract been performed."

29. In **C & P Haulage** (supra), which considers **Cullinane** (supra) also, it has been observed as follows:

> "The law of contract compensates a plaintiff for damages resulting from the defendant's breach; it does not compensate a plaintiff for damages resulting from his making a bad bargain. Where it can be seen that the plaintiff would have incurred a loss on the contract

> as a whole, the expenses he has incurred are losses flowing from entering into the contract, not losses flowing from the defendant's breach. In these circumstances, the true consequence of the defendant's breach is that the plaintiff is released from his obligation to complete the contract-or in other words, he is saved from incurring further losses. If the law of contract were to move from compensating for the consequences of breach to compensating for the consequences of entering into contracts, the law would run contrary to the normal expectations of the world of commerce. The burden of risk would be shifted from the plaintiff to the defendant. The defendant would become the insurer of the plaintiff's' enterprise. Moreover, the amount of damages would increase not in relation to the gravity or consequences of the breach but in relation to the inefficiency with which the plaintiff carried out the contract. The greater his expenses owing to inefficiency, the greater the damages."

30. In view of the conclusion, that the appellant was not entitled to any expectation loss towards anticipated profits, for reasons discussed, any grant of reliance loss would tantamount to giving a benefit to it for what was essentially its own lapses. There are no allegations of any deficiency in the plant. Contrary to its claim of Rs.2.52 crores towards cost of the plant, the learned Single Judge awarded Rs.1.60 crores without any discussion for the basis of the same. Though the appellant had preferred a cross appeal, it did not press the same.

31. The aforesaid discussion leads to the inevitable conclusion that the appellant had failed to establish its claim that the breach by the respondent was the cause for loss of anticipated profits, that the profitability projection in its loan application was a reasonable basis for award of damages towards loss of anticipated profits. The appellant had failed to abide by its own obligations under Exhibit 'C' and lacked adequate infrastructure, finances and manpower to run its business. It also failed to take reasonable steps to mitigate its losses. The appeal lacks merit and is dismissed.

……………………………….J.
(Ranjan Gogoi)

……………………………….J.
(Navin Sinha)

New Delhi,
June 19, 2017