
(2018) 04 CAL CK 0008
In the Calcutta High Court
Case No : AP 455, 456, 616, 618 of 2014

JUTE CORPORATION OF INDIA LTD.

APPELLANT

Vs

ABL INTERNATIONAL LTD.

RESPONDENT

Date of Decision : 23-04-2018

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 34
Transfer of Property Act, 1882 — Section 53A, 106, 107
Registration Act, 1908 — Section 17, 49
Stamp Act, 1899 — Section 35
Indian Contract Act, 1872 — Section 73

Citation : (2018) 04 CAL CK 0008

Hon'ble Judges : I.P.MUKERJI, J

Bench : Single Bench

Advocate : Jishnu Saha, U. S. Menon, Rishav Banerjee, Zeeshan Haque, Abhirup Chakraorty, Tilak Bose, Anuj Singh, Soumabho Ghose, Debabrata Das, Partha Banerjee

Final Decision : Disposed Off

Judgement

There is a building popularly known as the Air Conditioned Market, at 1, Shakespeare Sarani, Kolkata â?" 700 071. At one point of time, it was the

only air conditioned market in this city. It was also one of the most fashionable places for shopping. With the advent of modern malls and super

markets, its popularity may now be shared with them but the value of the property is one of the highest in Kolkata. The fifth floor is owned by Vineet

Private Limited, the respondent in AP No.456 of 2014. It has a very large area of 19,035 square feet. The respondent in AP No.455 of 2014 ABL

International Ltd. is the owner of the seventh floor of the building, having an area of 17,320 square feet.

The two arbitration proceedings referred to above, AP 455 of 2014 and AP 456 of

2014 are Section 34 applications to set aside arbitral awards, both dated 20th December, 2013, taken out by Jute Corporation of India Ltd (the respondent). One award is in respect of each floor. These arbitral awards are also challenged by Vineet and ABL (the claimants) (AP 616 of 2014 and AP 618 of 2014).

At one point of time, a company by the name of Sudera Enterprise Private Ltd. owned the fifth and the seventh floors. Legal proceedings between

them and the respondent culminated in a Special leave petition before the Supreme Court of India. As a result of it, on 24th January, 2000, after

several rounds of discussion between the parties, Sudera executed separate alleged leases in favour of the respondent for the fifth and seventh floors.

Neither was registered. Both were under stamped. The fifth floor was allegedly demised with effect from 1st September, 1994 for ten years, expiring

on 1st September, 2004. The seventh floor, was allegedly demised from 1st January, 1997, for ten years expiring on 1st January, 2007.

On 31st August, 2000, the respondent sent out a notice to Sudera stating that they had decided to grant vacant possession of the fifth and seventh

floors to the claimants on 31st October, 2000. Sudera alleged wrongful termination of the leases. The claimants claimed damages computed on the

basis of lost rent payable @ Rs. 60 per sq. ft. per month for the whole of the demised period aggregating to Rs. 5,81,04,337.50.

Broadly, the defence taken by the respondent was as follows. The lease was unregistered. Therefore, it could not be for any term over one year. The

lease had to be taken as a month to month lease or tenancy. More than 15 daysâ?? notice had been given by them to each of the claimants to vacate

the property. As there was no demise for a term, there was no question of payment of any damages. It was also said on behalf of the respondent that

the damages claimed were not sustainable. The claimants had not been able to prove any. When the respondent left the premises, the claimants were

obliged to let the premises to someone else to mitigate their loss if any. Not having done so, they are not entitled to claim any amount under the award.

The claimants tried to counter this argument by contending that the earlier lease was to be taken to have been extended. There was a continuation of

the old lease. Therefore, it did not need any registration nor any stamps. The alleged lease agreements contained an arbitration clause. An application

was filed in this Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 (AP 53 of 2001) for appointment of an arbitrator. During the pendency of this application Sudera changed its name to Vineet Private Limited, (one of the claimants) which took over its rights and liabilities in respect of the fifth floor. Similarly, ABL International Limited, (ABL or claimant) took over its rights and liabilities in the seventh floor.

This Court, on 26th September, 2002, appointed Mr. Justice S. N. Bhattacharya, a retired Judge of this Court as the sole arbitrator to adjudicate upon the disputes between the parties in respect of both the floors. By the end of 2003, the parties filed and exchanged their pleadings. Vineet disclosed nine documents for the fifth floor. No documents were separately disclosed for the seventh floor. It was understood that these nine documents would be the disclosures of ABL International Limited, also for the seventh floor.

On behalf of the claimants a witness by the name of Goutam Ray gave evidence. The case of these parties was that the respondent could not have vacated either of the two floors before the expiry of the lease period and that they were liable to pay to the owners damages on the basis of the reasonable letting out value of the fifth floor up to 1st September, 2004 and of the seventh floor up to 1st January, 2007. According to the claimants, because the respondent was taking the premises for ten years they were charged a lower rate of rent. The normal rate of rent in the year 1997 was between Rs.60 and Rs.75 per square foot. In spite of that Sudera agreed to accept rent at the rate of Rs.27.35 per square foot per month on and from 1st December, 1999 and Rs.23.33 per square foot upto November, 1999. The claimants claimed it was not possible to let out the premises after they were vacated by the respondent because the demand for AC accommodation had ceased in Kolkata and they could not find another tenant.

By an order of this court dated 11th September, 2008 the Honâ??ble Mr. Justice Suhas Chandra Sen, a retired judge of the Supreme Court was appointed as the arbitrator, on the demise of Mr. Justice Bhattacharya. According to the respondent evidence was closed before Mr. Justice Bhattacharya. Only arguments had to be made. But the claimants wanted to adduce more evidence. They produced Panmal Sethia. His adducing evidence was opposed by the respondent. The learned Arbitrator allowed him to give evidence with regard to the steps taken to mitigate losses

between October 2003 to January 2005, subject to the decision taken, on its admissibility, at the conclusion of the proceedings.

The documents according to the respondent were relatable to Vineet Pvt. Ltd and none was produced on behalf of ABL International Ltd. On 20th

December, 2013 the learned Arbitrator made and published two separate awards for the fifth and seventh floors. The respondent says that their

objection regarding admissibility of fresh documents through Panmal Sethia was not dealt with by the learned Arbitrator, in the award. The learned

Arbitrator granted an award in favour of the claimants for Rs. 35 lakhs in respect of the fifth floor and Rs. 50 lakhs for the seventh floor with 10%

interest. In the awards, while assessing the damages, the learned Arbitrator had deducted the air conditioning charges as according to his lordship the

claimants could not claim the charges, as the air-conditioning facility was not used.

The claimants and the respondent have challenged these two separate awards by filing applications to set them aside. (AP 455 of 2014 The Jute

Corporation of India Ltd. v. ABL International Ltd. and AP 456 of 2014 The Jute Corporation of India Ltd. v. Vineet Pvt. Ltd. AP 616 of 2014

Vineet Pvt. Ltd. v. The Jute Corporation of India Ltd. AP 618 of 2014 ABL International Ltd. v. The Jute Corporation of India Ltd. Law on the

subject and the arbitrator's findings, whether sustainable?

Extension of lease Vs. Renewal:

The first point to be looked into is whether the leases were for ten years or were they from month to month. The lease documents dated 24th January,

2000 stated that the demise was for ten years from the date of expiry of the previous lease. The lease in respect of the fifth floor expired on 1st

September, 2004. The lease in respect of the seventh floor expired on 1st January, 1997. By the lease deed executed by the parties on 24th January,

2000, the fifth floor of the premises was demised for a further period of ten years with effect from 4th September, 1994. On the same day, the lease

deed for the seventh floor was executed. The demise of the seventh floor was for ten years till 1st January, 2007. Both the lease deeds are

unregistered and grossly under stamped. In each of the leases, the obligation was with the respondent to have it registered.

Now, the starting point is that if the lease was a demise for ten years it had to be

registered. Otherwise, legally, it was a month to month lease or tenancy. Now, if the lease or tenancy was from month to month then there was no demise. It was a monthly lease which could be determined by 15 days's notice. On 31st October, 2000 the respondent relinquished possession of the premises. Their contention was that since the lease was not registered there was no demise. It was a month to month lease or tenancy. There was no obligation to occupy it for the whole tenure or to pay damages for failure to occupy it for that period. The claimants say that the lease was not a fresh one. Not even renewal, but an extension of the previous leases. It did not require any registration.

Furthermore, the respondent could not take advantage of its own wrong. It had the obligation to register the lease. Having not registered it, the rule of estoppel prevented them from asserting that the demise was not for ten years but was a month to month tenancy. They could not deny that they were obliged to occupy the premises for ten years and to pay for its occupation. Before scrutinising the award, let us have a broad look at the law on the subject. If the period of demise expires, then that period can be extended by a fresh demise, by whatever name you chose to call it. You may call it a new lease, a fresh lease or a renewal of the existing lease. The key factor is creation of a demise. Now, this creation of a demise of over one year requires registration under Section 107 of the Transfer of Property Act, 1882 read with Section 17 of Registration Act, 1908 and stamping under the Indian Stamp Act, 1898. The law does not know of any other way of creating or renewing a demise. Under no other circumstances a demise can be created or renewed but termed as an "extension" not requiring registration and stamping if it is so termed, it is to avoid registration and stamp duty.

An extension of lease occurs when, there is an underlying demise. For example, there is an existing demise for a period of twenty one years. But either party is given the option of determining the lease after ten years. If the parties continue the lease after ten years it could be said that its term has been "extended". Since the demise is underlying and existing, there is no need of registration or payment of stamp duty. Take another example. If there is a demise for seven years with an option to the lessee to automatically extend the same for a further period of four years. Then the

demise is taken to be for 11 years. An option to extend beyond seven years is exercised by the lessee. There is no fresh demise of the property or any

fresh creation of interest therein. This situation arose in the case *Banker V. Merckel* reported in 1960 (1) AER 668. In the case of renewal of a lease

one lease comes to an end, another lease is created by a fresh demise. (*State of U. P & Ors. Vs. Lalji Tandon (Dead) Through Lrs.* reported in 2004

(1) SCC 1). In *Provash Chandra Dalui Vs. Biswanath Banerjee* reported in AIR 1989 Supplementary 1 SCC 487, the difference between an

extension and a renewal of a lease was explained by the Supreme Court in the following manner:

“.....a distinction between “extension” and “renewal” is chiefly that in the case of renewal, a new lease is required while in the case

of extension the same lease continues in force during additional period by the performance of the stipulated act. In other words, the word

“extension” when used in its proper and usual sense in connection with a lease, means prolongation of the lease.”

(See also *State of Gujarat & Ors. Vs. Nirmalaben S. Mehta & Anr.* reported in 2016 9 SCC 240, *Sociedade De Fomento Industrial (P) Ltd. Vs. Hede*

& Company reported in 2007 5 SCC 614). If one is to look for a short but instructive summary of the law relating to renewal and extension of lease,

one should read paragraph 15 of the judgment of Mr. Justice Jayanta Kumar Biswas in *Ansuman Mullick Vs. Mallika Investment Co. (P) Ltd. & Ors.*

reported in AIR 2004 Cal 316 where the learned Judge has lucidly stated as follows:

“The legal position, therefore, is that renewal of lease and extension of lease are two distinctly separate concepts. While extension does not create

a fresh or new lease, renewal does. If It is a renewal and hence a fresh lease, it must be created according to provisions in Section 107 of the

Transfer of Property Act, 1882. Whether the option clause contained in a lease provides for renewal or extension is to be ascertained primarily from

its terms and conditions. If there is uncertainty or ambiguity, the other covenants of the lease would be read to find out the intention of the parties.

Oral evidence led by the parties at the trial would help to resolve the issue. But at interim stage the Court has to find out the answer only from the

lease and other undisputed pieces of admissible evidence.”

Let us examine the conclusions arrived at by the learned arbitrator. He held that the lease deed of 24th January, 2000 was a new lease deed. The

learned arbitrator rejected the argument of the claimants that the lease was an extension of the original one in the following words:

“It is true that the Lease Deed dated 24.01.2000 recites that it is an extension of the earlier Lease Deed. But, in fact, the earlier Lease Deed had

come to an end on expiry of the period of 21 years. The period of lease was not extended by the claimant. On the contrary, efforts were made to

evict the respondent and ultimately a Suit was filed for this purpose. When the new Lease Deed was executed on 24.01.2000, the original Lease Deed

had long expired and was not in force any more. In such circumstances, there cannot be an extension of a Lease which had ceased to exist. The

respondent is right in its contention that a Deed can be renewed only when the purported document was still alive and in force. The original Lease

came to end by efflux of time and was not renewed by the Lessor. In fact, the Lessor filed an eviction proceeding against the Respondent.

The Lease Deed dated 24.01.2000 is a new Lease Deed altogether and not an extension of the earlier Lease. The Judgment relied upon by the

claimant do not support its contention in this Case. In the case of Provash Chandra Dalui & Anr. Vs. BIswanath Banerjee & Anr. AIR 1989 SC

1834, an extension was sought for within the validity of the period of Lease in the original Lease. In the instant case, no renewal of the original Lease

was allowed by the Lessor, the claimant herein even after expiry of the lease period. In the Case of Gajraj Singh Vs. State Transport Appellate

Tribunal, AIR 1997 SC 412, the issue before the Court was of a renewal of License under the Motor Vehicles Act as and by way of statutory

obligation under the Act.

These decisions do not in any way help the claimant’s contention that the second Lease was only a renewal of the earlier Lease which had

ceased to be in force. The second aspect of the controversy about the Lease Deed dated 24.01.2000 is about non-registration of the Lease Deed. It

has been contended on behalf of the respondent that the claimant was a beneficiary of the Lease Deed and should have got the Lease Deed

registered to protect its interest and occupation of the demised premises.

There is no documentary or oral evidence to support this contention of the

respondent. On the contrary, the claimant had called upon the respondent twice by two separate letters to get the Lease Deed registered. The respondent failed to do so nor did the respondent dispute its liability to get the Lease Deed registered. The Case of the respondent is that the claimant by virtue of the provision of Section 106 of the Transfer of Property Act became a monthly tenant and the Lease was lawfully terminated by a proper notice.

It has been contended by Mr. Abhrajit Mitra that that prayer in the statement of Claim, is not for specific performance or the Lease dated 24.01.2000

but for loss and damages for breach of contract. The effect of non-registration of the Lease Deed is that it cannot be produced in evidence to support

the contention of the claimant that the Lease was for a fixed period. But in the facts of this Case, it was not open to the respondent to vacate it

abruptly even before expiry of the lease period and within six months of the disposal of the Case by the Supreme Court recording the settlement

reached by the parties. Considering all aspects of the Case, I am of the view that the agreement between the parties were in the nature of a package

deal. The occupancy of the 5th floor by the respondent was regularised retrospectively at an agreed rate of rent.â??

I think his lordship has reached the correct view based on a correct appreciation of the law. It can never be said that at the time the lease deed was

executed there was in existence an underlying demise covering its entire duration. Registration & Stamping:

Let us see what is the effect of non-registration and non-stamping of the lease deed. The effect of non-registration is that no right in the property in

question is transferred. It cannot be received in evidence, under Section 49 of the Registration Act, 1908. However, the court can look into the

document for collateral purposes (see K.B. Saha and Sons Private Limited v. Development Consultant Limited reported in 2008 (8) SCC 564). The

subject deed of lease is also grossly understamped, the effect of which is that it cannot be looked into for any purposes under Section 35 of the Stamp

Act, 1899 (see SMS Tea Estates Private Limited v. Chandmari Tea Company Private Limited reported in 2011 (14) SCC 66).

Now, if this is the situation then the argument that it was a legal lease for a specific period of time does not hold water. The lease has to be treated as

a month to month lease or tenancy determinable by 15 day's notice. (see Food Corporation of India and Others v. Babulal Agarwal reported in

(2004) 2 SCC 712 and Rabindra Nath Pal v. Dr. Subodh Chandra Halder reported in 2006 CWN (Vol.110) 227). There was no demise as such. In

that case upon vacation of the premises in October, 2000, the respondent did not cause any damage to the claimants. Thus, they are not liable to

recompense the claimants for any alleged loss. I have already held that the argument of Mr. Saha that the parties merely extended the lease but not

renewed it cannot be supported.

In my view, for non-registration of the lease deed and under stamping thereof the lease or tenancy became a month to month legal tenancy. Neither

the lease deeds could be looked into by the learned arbitrator to ascertain the terms and conditions thereof. Therefore, the duration of the lease was

immaterial. In the award the learned arbitrator has enumerated all the circumstances in the award including the litigation before the Supreme Court of

India preceding execution of the lease deed and come to the conclusion that it was a "package deal" between the parties. The respondent

agreed to occupy the premises for a fixed period of time on payment of rent. They had the duty to register the lease. They did not. Its decision to

suddenly withdraw from the said premises from November, 2000 was wrongful. The learned Arbitrator invoked the principles of an equitable lease,

including those enshrined in Section 53A of the Transfer of Property Act, 1882, protecting the possession of a lessee in possession, for the acts of

omission and commission of the transferor and applied it to the claimants'/lessors' benefit. There is some support for the learned

arbitrator's view in Suleman Haji Ahmed Umar Vs. P.N. Patel reported in AIR 1933 Bombay 381. Now, let us see examine the findings of the

learned arbitrator with regard to the effect of non-registration and under stamping of the lease deed. The learned arbitrator has opined that the

obligation was of the lessee to register the deed. The learned arbitrator made the following findings:

"There is no documentary or oral evidence to support this contention of the respondent. On the contrary, the claimant had called upon the

respondent twice by two separate letters to get the lease deed registered. The respondent failed to do so. Nor did the respondent dispute its liability to

get the lease deed registered. The effect of non-registration of the lease deed is that it cannot be produced in evidence to support the contention of the

claimant that the lease was for a fixed period. But in the facts of this case, it was not open to the respondent to vacate it abruptly even before expiry

of the lease period and within six months of the disposal of the case by the Supreme Court recording the settlement reached by the parties.

Considering all aspects of the case, I am of the view that the agreement between the parties were in the nature of a package deal. The occupancy of

the 5th floor by the respondent was regularised retrospectively at an agreed rate of rent. Under the lease deed dated 05-12-1972, the respondent

occupied the said premises till 01-09-1994 and thereafter up to 01-09-2004 by mutual agreement. There was no provision in the lease deed enabling

the respondent to terminate the lease although it was specifically provided that in certain situations, the claimant could terminate the lease.

What the new lease deed dated 24-01-2000 has done is to regularize the occupancy by the respondent of the said premises during the disputed period

and to fix the date of expiry of the lease till 02-09-2004. There was no termination of the lease of the respondent by the claimant by virtue of the

provision of Section-106 of the Transfer of Property Act because a monthly tenant and the lease was lawfully terminated by a proper notice. It has

been contended by Mr. Abhrajit Mitra that the prayer is the statement of claim, is not for specific performance or the lease dated 24.01.2000 but for

loss and damages for breach of contract.â??

PLAUSIBLE VIEW

The grounds which an award can be challenged under Section 34 of the said Act are indeed very limited. Taking note of all the authorities on the

subject, the Supreme Court in *Associate Builders Vs. Delhi Development Authority* reported in 2015 3 SCC 49 has summarised the law governing

challenge to an arbitration award. If an award is against the substantive law of India it can be said to be patently in violation of the law. It can also be

set aside if it is so unreasonable, perverse or irrational, that it falls short of the standards set by the Court. Violation of the principles of natural justice,

non-compliance with a statute and judicial pronouncements are examples of factors rendering an award violative of law. These kinds of awards are

vulnerable.

If there are two equally tenable views the learned Arbitrator is entitled to take one which according to him is tenable. He has taken a plausible or tenable view. The law laid down by our Courts is that the Court hearing the setting aside application is not hearing an appeal. It will not substitute its view for that of the arbitrator. The learned Arbitrator has held the lease to be an equitable one so that the respondent did not have the power to surrender it before its expiry. Hence, I find nothing wrong with this part of the award.

Lock-in-Period:

Mr. Saha had cited various authorities arising out of a term in the deed of lease that the lessee could not leave the premises within the time â??which is a fixed period within the demiseâ?. He argued that usually these leases contained an agreed amount as liquidated damages to be paid in case the lessee was in breach of his promise. He compared the provision in the subject lease deed with regard to its duration as the â??lock-in-periodâ?. The stipulation as to rent was taken to be which was the minimum amount payable by the lessee on quitting the premises prior to the expiry of the lease.

The cases which Mr. Saha gave us are:

(Satya Narain Sharma â?"Huf Vs. Ashwani Sarees Pvt. Ltd. reported in ILR (2009) IV Delhi 601) (Abheya Realtors Private Limited Vs. SSIPL

Retail Limited reported in 2009 SCC Online Cal 2715) (HJ Corporate Services Pvt. Ltd. Vs. Greater Nashik Infracon Private Limited reported in

2015 SCC Online Bom 7707) (Globsport India Private Limited V. Mayfair Housing Private Limited reported in 2015 SCC Online Bom 4176) In my

opinion the argument concerning a â??lock-in periodâ? in the lease has no application to this case. First of all in these cases there was a legal lease in

favour of a lessee with the stipulation that it could not leave the premises before a particular time without paying liquidated damages. In our case,

there is no such lease. There is at best an equitable lease. Furthermore, I do not find any concrete term in the deed of lease specifying a liquidated

amount payable in case of breach by the lessor. Damages â?" Mitigation Now, I come to the last part of the dispute involved. It relates to damages.

Was the award of damages by the learned arbitrator in favour of the claimants in accordance with law?

Now, let see how the parties argued the case on damages. According to the

claimants the normal rate of rent in the year 1997 was between Rs.60 to Rs.75 per square foot. In spite of that, the claimants had agreed at the rate of Rs.27.35 square foot per month. According to them they had allowed the respondent to stay on the premises at a low rent because their occupation was to be long.

This argument was contested by the respondent by referring to the recital in the lease deed which said that the consolidated rent agreed between the

parties was fair and reasonable. The claimants argued that after the respondent vacated the premises on 31st October, 2010 it was not possible for

them to find a new tenant. This was in addition to the plea taken by them that the claimants were unable to establish how they had discharged their

duty of mitigating damages. Thereafter, the learned Arbitrator proceeded to assess the damages. He noted that the lessee had agreed to pay a

monthly consolidated rent of Rs. 27.35 per sq. ft. out of which Rs. 3.33 was basic rent Rs. 4.95 was service charge and Rs. 19.07 was air

conditioning charges. He went to observe that the claimants had actually disconnected the air conditioning service on the failure of the lessee to pay

the charges. He held on that basis that the air conditioning charges were altogether a separate claim. In our country the award of damages is

governed by Section 73 of the Contract Act. Section 73 is set out below:-

â??73. Compensation for loss or damage caused by breach of contract.â??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.â??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.â??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.â??

A claim in damages arises from the date of breach of contract committed by a party. Compensation is granted for direct loss or damage and not for

something remote arising out of the breach. The explanation is very important. It says that in estimating of loss or damage the means which existed for

the party suffering the breach to reduce the loss and damage must be taken into account. Relying on the explanation great emphasis was placed on

the duty to mitigate on the part of the claimants, by Mr. Bose. This was his alternative argument, the primary being that since the lease or tenancy

was monthly and the respondent had vacated the premises after serving an adequate notice under the Transfer of Property Act, 1882, there was no

question of the claimants suffering any loss and damage. The premises were surrendered to the claimants on 31st October, 2000.

Mr. Bose submitted that the claimants had not taken any steps to mitigate the damages by letting out the premises to another tenant or lessee. In fact

they kept the premises vacant for the entire unexpired period of the lease. Thereafter, they claimed the alleged damages suffered for the entirety of

this period. But in awarding damages the learned Arbitrator felt that it should be calculated on the basic rent during the unexpired of the lease. The air

conditioning system was not in operation. So those charges could not be included in the award. The learned Arbitrator granted the basic rent for the

unexpired term of the lease to be paid within three months from the date of the award failing which the respondent would have to pay interest at the

rate of Rs.10% per annum till the date of the award from the date of final payment. The learned Arbitrator has not considered the question of

mitigation of damages at all. In one line he has dealt with the issue, accepting the evidence of the claimants that they could not get a lessee or tenant

for those two floors, in the following manner:

â??However, the claimant has adduced evidence to show that the disputed premises could not be let out during the unexpired lease period. The

respondent has not produced any evidence to the contrary.â? The plaintiff cannot claim the entire damages that has occurred due to the breach of the

defendant. He had a duty to reasonably reduce the damages as far as possible so that the sum awarded to him was reasonable. Treitel in the Law of

Contract has elucidated on this principle as follows:-

Two ideas are usually discussed under this heading. The first is that the plaintiff cannot recover for a loss that he ought to have avoided. He is

said to be under a duty to mitigate. This expression will be used here even though it is open to the objection that breach of the duty has

given rise to no legal liability but only reduces the amount that the plaintiff can recover,. The second idea is that the plaintiff has to give credit for

certain for certain benefits accruing to him in consequence of the breach. Here it can be said that his loss is in fact mitigated.

THE DUTY TO MITIGATE has two aspects: in the first place, the plaintiff must take reasonable steps to minimise his loss; and secondly he

must forbear from taking unreasonable steps that increase his loss. the injured party need only take such steps as are reasonable; it has been

held that he need not take steps which would involve him in complicated litigation or which would ruin his commercial reputation.

Viscount Haldane, put it in this way in *British Westinghouse Electric and Manufacturing Vs. Underground Electric Railways Co. of London Ltd.*

[(1912 A.C. 673 at p.689)] The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle

is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars

him from claiming any part of the damages which is due to his neglect to take such steps.

This principle was approved by the Supreme Court in the case of *M/s. Murlidhar Chiranjilal Vs. Marishchandra Dwarkadas &Ors.* reported in AIR

1962 SC 366. Whether a loss is avoidable by reasonable action on the part of the plaintiff is a question of fact not law. This was decided in *Payzu Ltd*

Vs. Saunders (1919) 2 K.B. 581. The decision of the Court of Appeal in the case of *Solholt* reported in 1983 VOL 1 Lloyds Report 608 cited

by Mr. Bose, restated the principle of law laid down in the *British Westinghouse* case. In *Pannalal Jugatmal Vs. State of Madhya Pradesh* reported in

AIR 1963 Madhya Pradesh 242 a division bench of the Madhya Pradesh High Court ruled that the plaintiff owed a duty to prove that he did not

possess means of remedying the inconvenience caused by the nonperformance of the contract. Mr. Justice Shiv Dayal delivering the judgment said

The explanation casts a burden upon the person complaining of breach of the contract to show that he did not possess means of remedying the

inconvenience caused by the non-performance of the contract. The law, for wise reasons, imposes upon a party subjected to injury from a breach of contract the active duty of making reasonable exertions to render the injury as light as possible.â??

A similar view had been expressed earlier by a division bench of the Oudh High Court in *Mt. Aliya Begam & Ors. Vs. Mt. Mohini Bibi & Ors.*

reported in 1943 Oudh 17. Thirdly the evidence on which the learned arbitrator came to this finding was the document disclosed in respect of the fifth

floor. Relying on these documents he came to the above finding with regard to the seventh floor, as well. If the respondent had determined the

contract abruptly then the lease rent could not be taken as the only factor in calculating damages. The factor for calculating damages would be the

reasonable letting out value of the premises for the whole of this unexpired period. The claimants may not have let out the premises at the existing

rent. The claimants were enjoined with a duty to adduce other evidence also to show that they were entitled to damages at the rate of Rs. 60 per

square foot per month or that they were getting lower rent or that they were not getting a tenant. It was the duty of the claimants to show how they

could have mitigated these damages by induction of another lessee or tenant for the whole of the unexpired period of the lease or part of it.

Part Award â?" Bad:

Therefore, this Court is not satisfied with the principle applied by the learned Arbitrator in arriving at damages. In this area the award of the learned

Arbitrator is against the substantive law of India. This part of the award is plainly unreasonable, irrational and based on no evidence. The award so far

as it deals with the damage part is set aside. The learned Arbitrator is now of very advanced age. In those circumstances, it may not be possible for

him to readjudicate the matter on remand. I appoint the Honâ??ble Mr. Justice Dipak Saha Roy, a retired Judge of this Court as the arbitrator to

whom the damages part of the claim of each of the two references is remitted for making and publishing a fresh award upon hearing the parties in

respect of the same. Before the learned Arbitrator embarks on the reference another opportunity should be given to the parties to disclose evidence in

this area only, examine witnesses, produce documents and then finally make arguments. Thereafter, the award may be finally made and published.

The learned Arbitrator shall be entitled to remuneration of Rs.34,000/per sitting to be shared equally by the parties. He shall appoint a clerk and stenographer whose remuneration should be fixed by him and borne similarly by the parties. His lordship is requested to enter upon the reference forthwith on service of a copy of this order. Considering the long pendency of this dispute he is requested to make and publish the award within six months of communication of this order, although his mandate will not be terminated before expiry of the time granted by the Arbitration and Conciliation Act, 1996. The above four applications are disposed of accordingly. Certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.