
(2015) 09 P&H CK 0450
In the Punjab And Haryana At Chandigarh
Case No : CP No. 13 of 2008 (OandM)

Super Cassettes Industries	Vs	APPELLANT
Singla Property Dealer Limited		RESPONDENT

Date of Decision : 04-09-2015

Acts Referred:

Contract Act, 1872 — Section 73, 74, 75
Transfer of Property Act, 1882 — Section 6(e)

Citation : (2016) 130 CLA 246 : (2016) 181 PLR 84

Hon'ble Judges : Rajesh Bindal, J.

Bench : Single Bench

Advocate : Mukesh Kumar Verma, Advocate, for the Appellant; Gaurav Chopra, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Rajesh Bindal, J.—The present petition has been filed for winding up of the respondent company on the plea that it had failed to pay its admitted debt.

2. It is pleaded that the petitioner company having business interest in music, besides other things had obtained licence from the Government of India to broadcast FM Radio in the City of Hissar. Agreement was executed between the petitioner company and the respondent company on 11.9.2006 granting licence to the respondent company for broadcasting sound recording in which the petitioner company had a copy right. The aforesaid agreement was replaced by another agreement dated 22.5.2007. It was for a period of three years at an annual licence fee of Rs. 22,000,00/-. The amount was to be paid in equal monthly installments. On failure to pay three installments, the petitioner/licensor was within its rights to cancel/terminate the licence and in that eventuality, the respondent company was liable to pay the entire balance licence fee for the remaining period. As the respondent-company had paid installments only for months of May to July, 2007 and the licence was directed to be terminated vide communication dated 14.9.2007, balance of Rs. 61,73,059/- was due from the

respondent company in terms of agreement signed between the parties, the respondent company having failed to pay the debt, despite statutory notice, it deserves to be wound up.

3. On the other hand, learned counsel for the respondent submitted that the agreement is not in dispute. There were certain excess payments made in terms of earlier agreement dated 11.9.2006, which were adjusted when fresh agreement was signed on 22.5.2007. After adjustment of installment of April, 2007, still additional sum of Rs. 3,81,424/- remained balance with the petitioner company. The respondent company paid installments for May to July, 2007 and there being certain problems, it had stopped playing music with effect from 1.9.2007 and a communication to that effect was sent to the petitioner on 3.9.2007. As the petitioner company responded by stating that they had not received the contents of the envelope, the same was sent afresh on 7.9.2007. For any period after September, 2007 onwards, the respondent company is not liable to pay any licence fee as it has never used the licence. He further submitted that the amount sought to be claimed while placing reliance on terms of the contract, cannot be said to be a debt due, rather it is a kind of penalty and for non-payment thereof, the company cannot be ordered to be wound up. In support of his arguments, reliance was placed upon Division Bench judgment of Delhi High Court in CO. PET. 458/2010- Tower Vision India Private Limited v. Procall Private Limited decided on 24.8.2012.

4. Heard learned counsel for the parties and perused the paper book.

5. Claim in the present petition is sought to be based by the petitioner company on the basis of licence agreement signed between the parties on 22.5.2007. The relevant clauses thereof, which are sought to be relied upon, are extracted below:--

"LICENCE AGREEMENT

RECITALS

"3. The Licenser and Licensee had entered into a License agreement dated 11-9-2006 wherein the Licenser had granted license (copyright license And performance license) to the licensee to broadcast licenser Sound Recordings from the Designated Radio Station on such terms and conditions as contained therein.

4. The Licenser and Licensee have, through mutual negotiations have arrived at commercial terms and want to enter into another agreement on such new terms and conditions and pursuant to such agreement both parties hereby execute this License Agreement and terminating the Agreement dated 11-09-2006. The agreement dated 11-9-2006 shall have no force from the date of execution of this Agreement.

XX XX XX

1. Definitions:

1.12 "Term" means a period of three years commencing from 1st April 2007 (Effective Date) hereof; and

xx xx xx

2. and 3 xx xx xx

4. License Fee

4.1 In consideration of Copyright and Performance License granted by the Licensor to the Licensee the Licensee shall pay a non-refundable Copyright License Fees and a non-refundable Performance License Fee to the Licensor for all broadcast of the Licensor Sound Recordings by the Designated Radio Station aggregating to Rs. 22,000,00/- (Rupees Twenty Two Lacs only) per annum.

4.2 That the non-refundable License Fee as per section 4.1 shall be paid by the Licensee to the Licensor on a advance monthly basis. The Licensee shall be obligated to pay every installment of License Fee (consolidated Copyright License Fee and Performance License) amounting to Rs. 1,83,334/- (One Lac Eighty Three Thousand Three Hundred Thirty Four only) plus applicable taxes within 7 days of beginning of the English Calendar, failing which the Licensor shall be at liberty to terminate the License Agreement.

xx xx xx

4.7 It is expressly agreed by and between the parties that in case of any default of payment as scheduled in clause 4.1, 4.2, 4.3 and 4.4 above, the Licensor can terminate the License Agreement by giving 15 days notice to the Licensee to rectify the payment breach and in case of a failure on part of the Licensee to rectify the payment breach within that 15 days notice period, the License Agreement can be terminated by the Licensor.

Provided further that in case of such termination the Licensee shall still be liable to pay the entire License Fee for the remaining term of this Agreement @ 22,000,00/- per annum."

6. The stand of the respondent is that after adjusting the installment for the month of April, 2007, out of the amount already paid during the currency of the earlier agreement, a sum of Rs. 3,81,424/- was lying balance with the petitioner company. It is not in dispute that the respondent company had paid three installments from May to July 2007. The respondent company had written a communication to the petitioner company on 3.9.2007 informing that it had stopped playing music with effect from 1.9.2007. As is apparent, the letter was sent through email as well as speed post. The same was responded to by the petitioner company while stating that the envelope sent through speed post on 31.8.2007 was just containing a blank paper. Immediately, the respondent company sent email on 7.9.2007 informing the petitioner company that it had stopped playing FM Radio with effect from 1.9.2007. The present petition has been filed by the petitioner company claiming balance of Rs. 61,73,059/- in

terms of the conditions laid down in licence agreement which provided that even if the agreement is terminated before its expiry, still the amount for the entire period will have to be paid by the respondent company. Whether amount mentioned in an agreement for unexpired period of lock-in period can be termed to be an admitted debt or in the form of damages?

7. Similar issue came up for consideration before Delhi High Court in Tower Vision India Private Limited's case (supra), where the following question was referred to by the learned Single Judge to the Division Bench for its opinion:--

"Whether in a contract for rendering of service/use of site, a stipulation to pay an amount for the "lock-in" period, is an admitted debt within the meaning of Section 433(e) of the Companies Act, 1956 or whether the same is in the nature of damages?"

8. Relevant paras of the aforesaid judgment are extracted below:--

"16. Consequences for breach of the contract are provided in Chapter VI of the Contract Act which contains three sections, namely, Section 73 to Section 75 . As per Section 73 of the Contract Act, the party who suffers by the breach of contract is entitled to receive from the defaulting party, compensation for any loss or damage caused to him by such breach, which naturally arose in usual course of things from such breach, or which the two parties knew when they make the contract to be likely the result of the breach of contract. This provision makes it clear that such compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach. The underlying principle enshrined in this Section is that a mere breach of contract by a defaulting party would not entitle other side to claim damages unless the said party has in fact suffered damages because of such breach. Loss or damage which is actually suffered as a result of breach has to be proved and the plaintiff is to be compensated to the extent of actual loss or damage suffered. When there is a breach of contract, the party who commits the breach does not eo instant i.e. at the instant incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. No pecuniary liability thus arises till the Court has determined that the party complaining of the breach is entitled to damages. The Court in the first place must decide that the defendant is liable and then it should proceed to assess what the liability is. But, till that determination, there is no liability at all upon the defendant. Courts will give damages for breach of contract only by way of compensation for loss suffered and not by way of punishment. The rule applicable for determining the amount of damages for the breach of contract to perform a specified work is that the damages are to be assessed at the pecuniary amount of difference between the state of the plaintiff upon the breach of the contract and what it would have been if the contract had been performed and not the sum which it would cost to perform the contract, though in particular cases the result of either mode of calculation may be the same. The

measure of compensation depends upon the circumstances of the case. The complained loss or claimed damage must be fairly attributed to the breach as a natural result or consequence of the same. The loss must be a real loss or actual damage and not merely a probable or a possible one. When it is not possible to calculate accurately or in a reasonable manner, the actual amount of loss incurred or when the plaintiff has not been able to prove the actual loss suffered, he will be, all the same, entitled to recover nominal damages for breach of contract. Where nominal damages only are to be awarded, the extent of the same should be estimated with reference to the facts and circumstances involved. The general principle to be borne in mind is that the injured party may be put in the same position as that he would have been if he had not sustained the wrong.

17. In *Murlidhar Chiranjilal Vs. Harishchandra Dwarkadas and Another*,¹ the Supreme Court highlighted two principles which follow from the reading of Section 73 of the Contract Act. The first principle on which damages in cases of breach of contract are calculated is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed; but this 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.

18. Thus, while on one hand, damages as a result of breach are to be proved to claim the same from the person who has broken the contract and actual loss suffered can be claimed, on the other hand, Section 74 of the Act entitles a party to claim reasonable compensation from the party who has broken the contract which compensation can be predetermined compensation stipulated at the time of entering into the contract itself. Thus, this section provides for pre-estimate of the damage or loss which a party is likely to suffer if the other party breaks the contract entered into between the two of them. If the sum named in the contract is found to be reasonable compensation, the party is entitled to receive that sum from the party who has broken the contract. Interpreting this provision, the Courts have held that such liquidated damages must be the result of a "genuine pre-estimate of damages". If they are penal in nature, then a penal stipulation cannot be enforced, that is, it should not be a sum fixed in terrarium or interrarium. This action, therefore, merely dispenses with proof of "actual loss or damage". However, it does not justify the award of compensation when in consequence of breach, no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.

19. The Supreme Court in the case of *Union of India (UOI) Vs. Raman Iron Foundry*,² expounded this very principle in the following words:

"9. Having discussed the proper interpretation of Clause 18, we may now turn to consider what is the real nature of the claim for recovery of which the appellant is seeking to appropriate the sums due to the respondent under other contracts. The claim is admittedly one for damages for breach of the contract between the parties. Now, it is true that the damages which are claimed are liquidated damages under Clause 14, but so far as the law in India is concerned, there is no qualitative difference in the nature of the claim whether it be for liquidated damages or for unliquidated damages. Section 74 of the Indian Contract Act eliminates the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties : a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty, and according to this principle, even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him, the stipulated amount being merely the outside limit. It, therefore makes no difference in the present case that the claim of the appellant is for liquidated damages. It stands on the same footing as a claim for unliquidated damages. Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due From the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not an actionable claim and this position is made amply clear by the amendment in Section 6(e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred. This has always been the law in England and as far back as 1858 we find it stated by Wightman, J., in *Jones v. Thompson* [1858] 27 L.J.Q.B. 234 "Exparte Charles and several other cases decide that the amount of a verdict in an action for unliquidated damages is not a debt till judgment has been signed". It was held in this case that a claim for damages does not become a debt even after the jury has returned a verdict in favour of the plaintiff till the judgment is actually delivered. So also in *O'Driscoll v. Manchester Insurance Committee* [1915] 3 K. B. 499, Swinfen Eady, L.J., said in reference to cases where the claim was for unliquidated damages : "... in such cases there is no debt at all until the verdict of the jury is pronounced assessing the damages and judgment is given". The same view has also been taken consistently by different High Courts in India. We may mention only a few of the decisions, namely, *Jabed*

Sheikh Vs. Taher Mallick, , S. Milkha Singh and Others Vs. N.K. Gopala Krishna Mudaliar and Others, and Iron and Hardware (India) Co. Vs. Firm Shamlal and Bros., . Chagla, C.J. in the last mentioned case, stated the law in these terms:

In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party.

As already stated, the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant. This statement in our view represents the correct legal position and has our full concurrence. A claim for damages for breach of contract is, therefore, not a claim for a sum presently due and payable and the purchaser is not entitled, in exercise of the right conferred upon it under Clause 18, to recover the amount of such claim by appropriating other sums due to the contractor. On this view, it is not necessary for us to consider the other contention raised on behalf of the respondent, namely, that on a proper construction of Clause 18, the purchaser is entitled to exercise the right conferred under that clause only where the claim for payment of a sum of money is either admitted by the contractor, or in case of dispute, adjudicated upon by a court or other adjudicatory authority. We must, therefore, hold that the appellant had no right or authority under Clause 18 to appropriate the amount of other pending bills of the respondent in or towards satisfaction of its claim for damages against the respondent and the learned Judge was justified in issuing an interim injunction restraining the appellant from doing so.

20. In that case, Clause 18 of the contract entered into between the parties provide that whenever any claim for the payment of a sum of money arises out of or under the contract against the contractor, the purchaser shall be entitled to recover such sum by appropriating in whole or in part, the security, if any, deposited by the contractor. The purchaser/Union of India, invoking this clause, wanted to recover and adjust liquidated damages in terms of clause 14 of the contract. As is seen from the aforesaid extracted portion, the Court held that a claim for liquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is such a clause, the only right which the

plaintiff has is the right to go to Court and recover damages.

21. The Supreme Court also explained that damages are the compensation which a Court of Law gives to a party for the injury which he has sustained and the plaintiff does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of fiat of the Court. Therefore, it has to be decided by the Court, in the first instance, that the defendant is liable and then it proceeds to assess what liability is. Till that determination, there is no liability at all upon the defendant. The Court further went to the extent of holding that there would not be any debt payable unless the Court determines the liability. In this process, the Court also explained the concept of "debt" in the following manner:

"6. The first thing that strikes one on looking at Clause 18 is its heading which reads: "Recovery of Sums Due". It is true that a heading cannot control the interpretation of a clause if its meaning is otherwise plain and unambiguous, but it can certainly be referred to as indicating the general drift of the clauses and affording a key to a better understanding of its meaning. The heading of Clause 18 clearly suggests that this clause is intended to deal with the subject of recovery of sum due. Now a sum would be due to the purchaser when there is an existing obligation to pay it in praesenti. It would be profitable in this connection to refer to the concept of a "debt", for a sum due is the same thing as a debt due. The classical definition of "debt" is to be found in *Webb v. Stenton* [1883] 11 Q.B.D. 518 where Lindley, L.J., said : "... a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation". There must be debitum in praesenti; solvendum may be in praesenti or in future—that is immaterial. There must be an existing obligation to pay a sum of money now or in future. The following passage from the judgment of the Supreme Court of California in *People v. Arguello* [1869] 37 Calif. 524 which was approved by this Court in *Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, (Central) Calcutta*, clearly brings out the essential characteristics of a debt:

Standing alone, the word "debt" is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is debt due."

22. The Supreme Court in the matter of *Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.*, , in para 65 has discussed provisions of Section 73 and 74 of the Indian Contract Act and held as under:

"Under Section 73 , when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This Section is to be read with Section 74 , which deals with penalty stipulated in the contract, inter alia [relevant for the present case] provides that

when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach..."

23. In the matter of Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, (Central) Calcutta, , the Supreme Court considered the meaning of expression "debt owed". What does the word "debt" mean was also considered with reference to various English decisions and held as under:

"a debt is a sum of money which is now payable or will become payable in further by reason of a present obligation : debitum in presenti, solvendum in future."

The said decisions also accept the legal position that a liability depending upon a contingency is not a debt in presenti or in future till the contingency happened. But if there is a debt the fact that the amount is to be ascertained does not make it any the less a debt if the liability is certain and what remains is only the quantification of the amount."

24. What follows from the above is that even if there is a clause of liquidated damages, in a given case, it is for the Court to determine as to whether it represents genuine pre-estimate of damages. In that eventuality, this provision only dispenses with the proof of "actual loss or damage". However, the person claiming the liquidated damages is still to prove that the legal injury resulted because of breach and he suffered some loss. In the process, he may also be called upon to show that he took all reasonable steps to mitigate the loss. It is only after proper enquiry into these aspects that the Court in a given case would rule as to whether liquidated damages as prescribed in the contract are to be awarded or not. Even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him and what is stipulated in the contract is the outer limit beyond which he cannot claim. Unless this kind of determination is done by the Court, it does not result into "debt".

25. At this juncture, we would like to refer to the judgment of Bombay High Court in the case of E-City Media Private Limited a Private Limited Company Vs. Sadrta Retail Limited a Public Limited Company, (rendered by Single Judge). In this case also, winding up petition was filed on account of alleged dues stipulated in the contract in case of breach. Facts of the case disclose that the petitioner had appointed the respondent as an exclusive agent for designated branding sites situated within the premises of a shopping mall. The petitioner had permitted the respondent to display advertisements at the Mall, in a theatre and upon ticket jackets. The contract was to commence on 22.5.2008 and was to conclude on 31.7.2009. This term was extended by a formal amendment till September, 2009. The agreement also provided that in the event respondent fail to make payment for a period of one month, during the term of the agreement, the petitioner would be at liberty to terminate the agreement with notice of seven days. In that event, respondent was obliged to make good losses and damages which may be suffered by the petitioner. The respondent was liable to pay entire royalty/minimum guaranteed amount mentioned in the agreement with interest @ 18% per annum on alleged breach committed by the respondent. The petitioner terminated the contract and demanded the entire amount of royalty/minimum guaranteed amount. On the respondents failure to pay, winding up petition was filed. The Court dismissed the said petition holding that it was not maintainable upon a claim for damages which could not be treated as debt. It was held that damages become payable only when they are crystallized upon adjudication. Until and unless an adjudication takes place with a resultant decree for damages, there is no debt due and payable. Damages require adjudication. Until then, the liability of a party in alleged breach of a contract does not become crystallized. In support of this view, the Court referred to a Division Bench judgment of Karnataka High Court in Greenhills Exports (Private) Limited, Mangalore and Others Vs. Coffee Board, Bangalore, in the following words:

"...Mr. Justice R.V. Raveendran (as the Learned Judge then was) speaking for the Division Bench formulated the propositions of law which emerge from judgments of the Supreme Court and the High Court. The Court held as follows:

(i) A "Debt" is a sum of money which is now payable or will become payable in future by reason of a present obligation. The existing obligation to pay a sum of money is the sine qua non of a debt. "Damages" is money claimed by, or ordered to be paid to; a person as compensation for loss or injury. It merely remains a claim till adjudication by a court and becomes a "debt" when a court awards it.

(ii) In regard to a claim for damages (whether liquidated or unliquidated), there is no "existing obligation" to pay any amount. No pecuniary liability in regard to a claim for damages, arises till a court adjudicates upon the claim for damages and holds that the defendant has committed breach and has incurred a liability to compensate the plaintiff for the loss and then assesses the quantum of such liability. An alleged default or breach gives rise only to a right to sue for damages and not to claim any "debt". A claim for damages becomes a "debt due", not

when the loss is quantified by the party complaining of breach, but when a competent court holds on enquiry, that the person against whom the claim for damages is made, has committed breach and incurred a pecuniary liability towards the party complaining of breach and assesses the quantum of loss and awards damages. Damages are payable on account of a fiat of the court and not on account of quantification by the person alleging breach.

(iii) When the contract does not stipulate the quantum of damages, the court will assess and award compensation in accordance with the principles laid down in Section 73 . Where the contract stipulates the quantum of damages or amounts to be recovered as damages, then the party complaining of breach can recover reasonable compensation, the stipulated amount being merely the outside limit.

(iv)...

(v) Even if the loss is ascertainable and the amount claimed as damages has been calculated and ascertained in the manner stipulated in the contract, by the party claiming damages, that will not convert a claim for damages into a claim for an ascertained sum due. Liability to pay damages arises only when a party is found to have committed breach. Ascertainment of the amount awardable as damages is only consequential."

26. Reading of the aforesaid judgments and the ratio laid down therein would amply demonstrate that the legal position propounded by learned Single Judge in Manju Bagai (supra) is the correct legal position of law and we agree with the same. We now proceed to apply this legal principle to each of the cases before us."

9. In Manju Bagai Vs. Magpie Retail Ltd., , Delhi High Court inter-alia held that whether a particular clause about predetermined liquidated damages represents genuine covenanted pre-estimate of damages or it is in the nature of penalty has to be judged in the facts of each case and in the background of relevant factors which are case specific. The party claiming it may have to prove actual damages suffered.

10. After applying the aforesaid enunciation of law, Delhi High Court dismissed all the petitions.

11. If the principles of law as laid down by Delhi High Court are considered in the facts of the present case, it is evident that winding up of the respondent company is being sought on the ground that liquidated damages as mentioned in the business agreement have not been paid. The petitioner company has not been able to show that the same is on account of pre-estimated genuine damages, rather the amount as has been mentioned establishes that it is a kind of penalty and a penal stipulation cannot be enforced in the absence of any proof of actual loss, which a party to the contract is bound to make good to the other party.

12. For the reasons mentioned above, the amount of damages claimed cannot be

said to be admitted debt on account of which the respondent company can be directed to be wound up. The present petition is accordingly dismissed.