UNION OF INDIA

v.

RAMAN IRON FOUNDRY

March 12, 1974

[P. N. BHAGWATI AND P. K. GOSWAMI, JJ.]

Indian Arbitration Act (10 *of* 1940), *s.* 41 (*b*)—*Court when can issue interim in function. Indian Contract Act* (*9 of 1872*), *s. 74—Stipulation of amount of damages in contract—Claim for damages for breach—If claim for liquidated or unliquidated damages.*

'Sums due,' meaning of.

A dispute arose regarding the performance of a contract between the appellant and respondent, each party contending that the other had committed a breach of the contract and claiming large sums of money by way of damages. The appellant's claim was for damages stipulated under cl. 14 of the contract. The respondent was called upon to pay the amount claimed and was also informed that on failure to make the payment the appropriate officer would be authorised to recover the amount from the pending bills of the respondent in respect of other contracts under cl. 18 of the Contract. The respondent thereupon moved the High Court under s. 20 of the Arbitration Act, 1940, and the claim and counter claim were referred to arbitration. During the pendency of the arbitration some amounts became due and payable by the appellant to the respondent in respect of other contracts between them. The respondent applied to the High Court for an injunction restraining the appellant from recovering its claim for damages from the amounts which had fallen due and the High Court granted the injunction holding that cl. 18 did not authorise the appellant to appropriate the amounts of any pending bills of the respondent towards satisfaction of its claim for damages against the respondent unless such claim was either admitted by the respondent or adjudicated upon by the arbitrator or the Court.

Dismissing the appeal to this Court,

HELD : (1) The order of interim injunction cannot be said to be outside the scope of the High Court's power under s. 41 (b) of the Arbitration Act. [563D—E]

(*a*) Section 41 (b) says that the Court shall have, for the purpose of and in relation to arbitration proceedings, the same power of making orders in respect of any of the matters set out in the second schedule as it has for the purpose of and in relation to any proceedings before the Court and one of the matters set out in the second Schedule is 'interim injunction.' The Court has therefore power to issue interim injunction. But such interim injunction can only be for the purpose of and in relation to arbitration proceedings.The Court could not therefore make an interim order which, though ostensibly in form an order of interim injunction, in substance amounted to a direction to the appellant to pay the amounts due to the respondent under other contracts. [562F—563A]

(*b*) However, in the present case, the order of 'interim injunction' does not expressly or by necessary implication direct the appellant to pay amounts due to the respondent under other contracts. The appellant can still refuse to pay such amounts if it thinks it has a valid defence and the only remedy open to the respondent then would be to take measures in an appropriate forum. No breach of the interim injunction as such would be involved in non-payment of such amounts by the appellant to the respondent. The only thing which the appellant is interdicted from doing is to satisfy its claim for damages by appropriating such amounts. Such an order would be within the power of the court under s. 41 (b), because the claim for damages forms the subject matter of arbitration proceedings. [563A—D]

(2) The appellant had no right or authority under cl. 18 to appropriate the amounts of other pending bills of the respondent, in or towards satisfaction of its claim for damages against the respondent, and so, the High Court has justified in issuing the interim injunction. [569G]

A (*a*) Though the words "where any claim for the payment of a sum of money arises", occurring in the opening part of cl. 18 are words of great amplitude, covering even a claim for damages, it is a well settled rule of interpretation, applicable alike to instruments as to statutes that the meaning of ordinary words is to be found not so much in strict etymological propriety of language nor even in popular use as in the subject or occasion on which they are used and the object which is intended to be attained. The context and collection of a particular expression may show that it was not intended to be used in the sense which it ordinarily bears. B The words must therefore be read not in isolation but in the context of the whole clause. [564G—565B]

(*b*) The heading of the clause reads "Recovery of sums due". The heading cannot control the interpretation of a clause if its meaning is otherwise plain and unambiguous, but it can be referred to as indicating the general drift of the clause and affording a key to a better understanding of the meaning. When there is an obligation to pay a sum of money at a future date it is a debt *owing*, but when the obligation is to pay a sum of money *in presenti*, C it is a debt *due*. A sum due would therefore mean a sum for which there is an existing obligation to pay *in presenti* or in other words which is presently payable. [565 C-D, G-H]

(*c*) The language used in the body of the clause also supports the view that it is with recovery of sums presently due and payable by the respondent that this clause deals. The clause is merely intended to provide a *mode of recovery* of 'a claim for payment of a sum of money arising out of or under the contract.' It therefore D postulates a claim for a sum which is *due and payable*, that is, presently recoverable and it may be recovered by the mode therein provided. It is difficult to believe that the contracting parties could have intended that even though a sum is not due and payable by the respondent, the appellant should be entitled to recover it by adopting the mode set out in the clause. Such an interpretation would mean that as soon as a claim is made by the appellant, it would immediately become recoverable and the appellant, under the clause, would be entitled to sell of the securities of the respondent and appropriate the sale proceeds in or towards satisfaction of such claim, and in case that is insufficient, to recover the balance by appropriat- E ing other sums due to the respondent, and if there is even then a shortfall, to recover it personally from the respondent. And this consequence would ensue even if the claim is for a sum which the respondent is under no existing obligation to pay or which is not presently payable or is disputed as regards liability or quantum. It would be more consonant with reason and good sense to take the view, which is supported by the language of the clause that it does no more than merely provide an additional mode of recovery to the appellant and that the appellant is entitled to exercise the right conferred under it only where there is a claim *for a sum which is presently due and payable* by the respondent. The last F words of the clause namely, "the contractor shall on demand pay to the purchaser the *balance remaining due*", clearly postulate that the reference in the clause is to a sum presently due and payable by the respondent to the appellant. [566B—567B]

(*d*) It is not legitimate to construe the clause by reference to a corresponding clause which prevailed in the earlier standard form of contract where the words were 'whenever under the contract any sum of money is recoverable'. This is not a statute enacted by the legislature where it can be said that if the legislature has departed from the language used by it in an earlier enactment, it would be a G fair presumption to make that the alteration in the language was deliberate and was intended to convey a different meaning. This is a clause in a contract and in construing it any reference to a similar or dissimilar clause in another contract would be irrelevant. Moreover, on a question of construction of the clause the mere use of word 'claim' cannot be a decisive factor. The clause has to be read as a whole, and so read, it applies only where the appellant has a claim for a sum *presently due and payable* by the respondent. [567B—G]

(*e*) In the present case, the claim is for damages for breach of the contract. H The damages claimed are liquidated damages under cl. 14 of the Contract; but under Indian law there is no difference in the nature of the claim whether it be for liquidated damages or for unliquidated damages. Even if there is a stipulation for 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. The claim in the present case therefore stands on the same footing as a claim for unliquidated damages. A claim for unliquidated damages does not give rise to a debt until the liability is adjudicated upon and damages assessed by an 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 become entitled to a debt due from the other party. The only right which the party aggrieved by the breach has is the right to sue for damages and this is not an actionable claim. A claim for damages for breach of contract is therefore not a claim for a sum presently due and payable and the appellant is not entitled, in exercise of the right conferred upon it under cl. 18, to recover the amount of such claim by appropriating other sums due to the respondent. [567H—569G]

Kesoram Industries v. *Commissioner of Wealth Tax* [1966] 2 S.C.R. 688 followed.

Jones v. *Thompson* (1858) 27 L. J., Q. B. 234, *Jabed Sheikh* v. *Taher Malik* 45 Cal. Weekly Notes, 519 and *S. Malkha Singh* v. *M/s. N. K. Gopala Krishna Mudaliar* 1956 A.I.R. Pun. 174, referred to.

Iron & Hardware (India) Co. v. *Firm Shamlal & Bros.* 1954 A.I.R. Bom. 423 approved.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1330 of 1973

Appeal by special leave from the Judgment and Order dated the 22nd January, 1973 of the Delhi High Court in I. A. No. 1854 of 1972 in Suit No. 485 (A) of 1972 and

Civil Appeals Nos. 1224 & 1225 of 1973

Appeals by special leave from the Judgment and Order dated the 15th November, 1972 of the Delhi High Court in I. A. Nos. 846 and 119 of 1972 in Suit No. 158 of 1971.

L. N. Sinha, Solicitor General of India *Shyamala Pappu* & *S. P. Nayar* for the appellant (in all the appeals)

D. G. Singhania, M. K. Garg and *Shiv Khurana* for respondent (in C. A. 1330)

D. D. Sharma for respondent (in C.A.s. 1224-1225)

The Judgment of the Court was delivered by

BHAGWATI, J.—These appeals raise an interesting question relating to the interpretation of cl. 18 of the General Conditions of Contract contained in the Standard Form of Contract No. D.G.S. & D. 68. That is the standard form in which constracts are entered into by the Central Purchase Organisation of the Government of India for purchase of stores from third parties described as 'contractors and the question of interpretation which arises for determination is, therefore, one of some importance, affecting as it does a large number of people who enter into such contracts with the Government of India. The facts giving rise to these appeals follow a common pattern and it would, therefore, be sufficient if we set out the

A facts relating to civil appeals Nos. 1221 and 1225 of 1973. They bring out clearly the point which arises for consideration in all the three appeals.

The respondent tendered for supply of certain quantity of foam compound to the appellant and its tender was accepted by the appellant by acceptance of Tender dated 16th July, 1968. The Acceptance B of Tender was subject to the General Conditions of Contract contained in the Standard Form of Contract No. D.G.S. & D. 68. The only clauses of the General Conditions of Contract which are material for our purpose are cls. 18 and 24 and they read as follows:

"18. RECOVERY OF SUMS DUE

Whenever any claim for the payment of a sum of money C 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, and for the purpose aforesaid, shall be entitled to sell and/or realise securities forming the whole or part of any such security deposit. In the event of the security being insufficient, the balance and if no security D has been taken from the contractor, the entire sum recoverable shall be recovered by appropriating any sum then due or which at any time thereafter may become due to the contractor under the contract or any other contract with the purchaser or the Government or any person contracting through the Secretary, if such sum even be not sufficient to cover the full amount recoverable, the contractor shall on demand pay to E the purchaser the balance remaining due.

"24. ARBITRATION

In the event of any question, dispute, or difference arising under these conditions or any special conditions of contract, or in connection with this contract, (except as to any matters F the decision of which is specially provided for by these or the special conditions) the same shall be referred to the sole arbitration of an Officer in the Ministry of Law, appointed to be the arbitrator by the Director General of Supplies & Disposals. It will be no objection that the arbitrator is a Government Servant, that he had to deal with the matters to which the contract relates or that in the course of his duties as a G Government servant he has expressed views on all or any of the matters in dispute or difference. The award of the arbitrator shall be final and binding on the parties to this contract.

. . . . . .

"Work under the contract shall, if reasonably possible, continue during the arbitration proceedings and no payment H due to or payable by the purchaser shall be withheld on account of such proceedings.

. . . . . .

The performance of this contract ran into difficulties and a dispute arose between the parties giving rise to claims by either party against the other. The respondent contended that the appellant had committed a breach of the contract and was, therefore, liable to pay to the respondent a sum of Rs. 2,35,800/- by way of damages suffered by the respondent by reason of the breach of the contract. The appellant, on the other hand, said that it was the respondent who had committed the breach of the contract and was liable to pay to the appellant by way of damages a sum of Rs. 2.28,900/- under clause 14 of the General Conditions of Contract. The Assistant Director of Supplies by his letter dated 30th March, 1971 called upon the respondent to make payment of the amount of Rs. 2,28,900/- and intimated that if the respondent failed to do so on or before 30th April, 1971, the Pay and Accounts Officer, New Delhi/Madras would be authorised to recover the same from the pending bills of the respondent in respect of other contracts. This dispute between the parties being a dispute arising out of the contract was liable to be settled by arbitration under cl. 24 of the General Conditions of Contract and the respondent, therefore, filed an application in the Delhi High Court under s. 20 of the Indian Arbitration Act for filing the Arbitration Agreement contained in that clause. The respondent also at the same time made an application to the Delhi High Court for an interim injunction restraining the appellant from recovering the amount of damages claimed by it from the pending bills of the respondent. This application was, however, rejected by the Delhi High Court on the ground that it was not shown that there were any pending bills of the respondent at that time out of which the threatened recovery could be made by the appellant. The application under s. 20 of the Indian Arbitration Act was thereafter heard by the Delhi High Court and by an order dated 5th May, 1972 the Delhi High Court allowed that application and ordered the arbitration agreement contained in cl. 24 to be filed and made an order of reference to arbitration in accordance with the arbitration agreement. The claim of the respondent against the appellant for Rs. 2,35,800/- and the counter-claim of the appellant against the respondent for Rs. 2,28,900/- thus became the subject matter of reference to arbitration. During the pendency of the arbitration some amounts became due and payable by the appellant to the respondent in respect of other contracts entered into between the parties. In view of the letter dated 30th March, 1971 the respondent apprehended that the appellant would appropriate these amounts towards recovery of the amounts of damages claimed by it even though the claim for damages was disputed by the respondent and was pending adjudication before the arbitrator. The respondent, therefore, made interim Application No. 119 of 1972 to the Delhi High Court on 17th January, 1972 under s. 41 read with the Second Schedule to the Indian Arbitration Act, 1940 praying that the *status quo* should be maintained and the appellant should be restrained from recovering its claim for damages from the amounts due and payable by the appellant to the respondent in respect of the pending bills. How it appears that this Interim Application No. 119 of 1972 was made in the Original Application under s. 20 of the Indian Arbitration Act,

A 1940 and the appellant, therefore, raised a technical objection that the Original Application under s. 20 having been disposed of, Interim Application No. 119 of 1972, as filed, could not be maintained. The respondent, in view of this technical objection raised on behalf of the appellant, filed another Interim Application No. 746 of 1972 as an independent application under s. 41 read with the B Second Schedule to the Indian Arbitration Act, 1940 on 16th May, 1972 praying for the same interim relief as was claimed in the earlier Interim Application No. 119 of 1972. Both these interim applications were resisted by the appellant relying on cl. 18 of the General Conditions of Contract but Mr. Justice Avadh Bihari of the Delhi High Court, who heard these interim application, took the view that cl. 18 did not authorise the appellant to appropriate the amounts of C any pending bills of the respondent towards satisfaction of its claim for damages against the respondent, unless such claim for damages was either admitted by the respondent or adjudicated upon by arbitration or suit in civil court. The learned Judge accordingly by an order dated 15th November, 1972 allowed both the interim applications and issued an interim injunction restraining the appellant "from effecting recovery of the amounts claimed to be due D from the other pending bills" of the respondent. The appellan t thereupon, with certificates obtained from the Delhi High Court, preferred Civil Appeals Nos. 1224 and 1225 of 1973 in this Court. One appeal was directed against the impugned order in so far it related to Interim Application No. 119 of 1972 and the other in so far as it related to Interim Application No. 846 of 1972. The appellant also preferred Civil Appeal No. 1330 of 1973 against a E similar order passed by the learned Judge in Interim Application No. 854 of 1972 in the other case.

There are in the main two grounds on which the learned Solicitor General, appearing on behalf of the appellant, challenged the order of Interim injunction made by Mr. Justice Avadh Bihari :

F A. The impugned order amounted in effect and substance to an order directing the appellant to pay the amounts of the pending bills of the respondent in respect of the other contracts and since the question of payment of the amounts of such pending bills did not form the subject matter of the reference which was pending before the arbitrator., the learned G Judge had no jurisdiction under s. 41 read with the Second Schedule to make such an order and the impugned order was, therefore, outside the scope of his power and hence invalid.

B. Clause 18 comes into play when there is a claim for payment of a sum of money arising out of or under the contract. It is not necessary that the sum of money must be H *due* and payable to the purchaser. It is enough if there is a claim even for damages. Whenever there is such claim, the purchaser is given a right under cl. 18 to recover it by appropriating "any sum then due or which at any time thereafter

may become due to the contractor under the contract" or under any other contract. The appellant was, therefore, entitled to recover the amount of its claim for damages against the respondent by appropriating the sums which subsequently became due to the respondent under other contracts, even though the claim for damages was contested by the respondent and was pending adjudication before the arbitrator. No interim injunction could be granted to prevent the exercise of such right. If interim injunction were to be granted in a case of this kind as of course merely on the ground, without anything more, that the claim for damages is pending adjudication and until it is determined in favour of the purchaser, it should not be allowed to be recovered by the purchaser out of other sums due to the contractor, it would render cl. 18 meaningless and inaffectual and the right to the purchaser under that clause would become illusory. Of course, it would be open to the court even in such a case to grant interim injunction, if it is satisfied that the claim for damages is *prima facie* not well founded and the balance of convenience requires that, pending adjudication, the purchaser should be restrained from effecting recovery of the claim for damages from out of other sums due to the contractor. But here admittedly neither of these two factors was taken into consideration by the learned Judges and the order of interim injunction made by him cannot, therefore, be sustained.

We shall proceed to examine these grounds in the order in which we have set them out.

Re: Ground A.

It was common ground between the parties that the order of interim injunction was made by the learned Judge under s. 41 (b) read with the Second Schedule to the Indian Arbitration Act, 1940. Now s. 41(b) says that the court shall have, for the purpose of and in relation to arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of and in relation to any proceedings before the Court and one of the matters set out in the Second Schedule is "interim injunction". The Court has, therefore, power under s.41 (b) read with the Second Schedule to issue interim injunction, but such interim injunction can only be "for the purpose of and in relation to arbitration proceedings". The arbitration proceedings in the present case were for determination of the mutual claims of the appellant and the respondent arising out of the contract contained in the acceptance of Tender dated 16th July, 1968. The question whether any amounts were payable by the appellant to the respondent under other contracts was not the subject matter of the arbitration proceedings. The Court obviously could not, therefore, make an interim order which, though ostensibly in form an order of interim injunction, in substance amounted to a direction to the appellant to pay the amounts due to the respondent under other contracts. Such an interim order would clearly not be for the purpose of or in relation to the arbitration proceedings as required by

A s. 41 (b). But here the order of interim injunction made by the learned Judge does not, expressly or by necessary implication, carry any direction to the appellant to pay the amounts due to the respondent under other contracts.. It is not only in form but also in substance a negative injunction. It has no positive content. What it does is merely to injunct the appellant from recovering, *suo moto*, the damages claimed by it from out of other amounts due to the respon-
B dent. It does not direct that the appellant shall pay such amounts to the respondents. The appellant can still refuse to pay such amounts if it thinks it has a valid defence and if the appellant does so, the only remedy open to the respondent would be to take measures in an appropriate forum for recovery of such amounts where it would be decided whether the appellant is liable to pay such amounts to the respondent or not. No breach of the order of interim injunction
C as such would be involved in non-payment of such amounts by the appellant to the respondent. The only thing which the appellant is interdicted from doing is to make recovery of its claim for damages by appropriating such amounts in satisfaction of the claim. That is clearly within the power of the Court under s. 41(b) because the claim for damages forms the subject matter of the arbitration pro-
D ceedings and the Court can always say that until such claim is adjudicated upon, the appellant shall be restrained from recovering it by appropriating other amounts due to the respondent. The order of interim injunction made by the learned Judge cannot, therefore, be said to be outside the scope of his power under s. 41 (b) read with the Second Schedule.

Re: Ground B.

E That takes us to the second ground of challenge against the order of interim injunction. This ground of challenge is based on the proper interpretation of cl. 18. The argument of the appellant was that what is required for attracting the applicability of cl. 18 is a mere *claim* for payment of a sum of money arising out of or under the contract against the contractor and it is not necessary that a sum of money must be actually *due and payable* from the contractor to the pur-
F chaser. If the purchaser has a claim for payment of a sum of money against the contractor, he would be entitled to exercise the right given under cl. 18, even though such claim may not be for a sum due and payable but ay be for damages and it may be disputed by the contractor and may not have been adjudicated upon in a court of law or by arbitration. The purchaser can in such a case recover the amount of his claim, without resort to a court of law or arbitration, by
G appropriating sums due to the contractor under the same contract or under other contracts. If the claim of the purchaser is not well founded and the appropriation made by him is, therefore, unjustified, the contractor can always institute a suit or arbitration for recovering the sums due to him which have been wrongly appropriated by the purchaser and in such suit or arbitration, the court or the arbitrator, as the case may be, would examine the validity of the claim
H against which appropriation has been made by purchaser and if the claim is found to be unsustainable, set at naught the appropriation and pass a decree or award for the sums due to the contractor. But the court cannot and should not restrain the purchaser from exercising

his right of appropriation merely because the claim against which appropriation is sought to be made by the purchaser is disputed by the contractor and is pending adjudication before a court of law or arbitrator. The court should not prevent the normal operation of cl. 18 by interfering with it, unless it appears to the court *prima facie* that the claim which is sought to be recovered by appropriation is not well founded and the balance of convenience lies in favour of restraining the purchaser from recovering it by appropriation. The respondent, however, disputed the validity of this construction placed on cl. 18 by the appellant and contended that though the words used in the opening part of cl. 18 are "any claim for the payment of a sum of money", which are general words of apparently wide amplitude sufficient to cover even a claim for damages arising out the contract, a proper construction of the clause read as a whole clearly suggests that these words are intended to refer only to a claim for a sum due and payable and do not take in a claim for damages which is disputed by the contractor. It is only when a claim for damages is adjudicated upon by a civil court or an arbitrator and the breach of the contract is established and the amount of damages ascertained and decreed that a debt due and payable comes into existence; till then it is nothing more than a mere right to sue for damages and it does not fall within the words of cl. 18. Moreover, cl. 18 merely provides a mode of recovery and it can have no application where a claim, even though it be for a sum due and payable, is disputed by the contractor and has to be established in a court of law or by arbitration: cl. 18 applies only where a claim is either admitted, or in case of dispute, substantiated by resort to the judicial process. Therefore, when the purchaser has a claim for damages which is disputed by the contractor, the purchaser is not entitled under cl. 18 to recover the amount of its claim for damages by appropriating other sums due to the contractor until the claim for damages is adjudicated upon and culminates in a decree. The appellant in the present case had consequently no right under cl. 18 to appropriate sums due to the respondent under other contracts in satisfaction of its claim for damages against the respondent, when the claim for damages was pending adjudication before the arbitrator and the learned Judge was right in restraining the appellant from doing so by issuing an interim injunction. These were broadly the contentions of the parties under this head of challenge and the question is which of these rival contentions is correct.

A B C D E F

It is true that the words "any claim for the payment of a sum of money" occurring in the opening part of cl. 18 are words of great amplitude, wide enough to cover even a claim for damages, but it is a well settled rule of interpretation applicable alike to instruments as to statutes that the meaning of ordinary words is to be found not so much in strict etymological propriety of language nor even in popular use as in the subject or occasion on which they are used and the object which is intended to be attained. The context and collocation of a particular expression may show that it was not intended to be used in the sense which it ordinarily bears. Language is at best an imperfect medium of expression and a variety of meanings may often

G H

A lie in a word or expression. The exact colour and shape of the meaning of any word or expression should not be ascertained by reading it in isolation, but it should be read structurally and in its context, for its meaning may vary with its contextual setting. We must, therefore, read the words 'any claim for the payment of a sum of money' occurring in the opening part of cl. 18 not in isolation but in the context of the whole clause, for the intention of the parties is to be gathered not from one part of the clause or the other but from the clause taken as a whole. It is in the light of this principle of interpretation that we must determine whether the words 'any claim for the payment of a sum of money' refer only to a claim for a sum due and payable which is admitted or in case of disputes, established in a court of law or by arbitration or they also include a claim for damages which is disputed by the contractor.

The first thing that strikes one on looking at cl. 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 cl. 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* (1) 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*. (2) which was approved by this Court in *Kesoram Industries* v. *Commissioner of Wealth Tax* (3) 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."

This passage indicates that when there is an obligation to pay a sum of money at a future date, it is a debt owing but when the obligation is to pay a sum of money in *praesenti*, it is a debt due. A sum due would, therefore, mean a sum for which there is an existing obligation to pay in *praesenti* or in other words, which is presently payable.

(1) [1883] 11 Q.B.D. 518. (2) [1865] 37 Calif. 524.
(3) [1966] 2 S.C.R. 688.

Recovery of such sums is the subject matter of cl. 18 according to the heading. That is the dominant idea running through the entire cl. 18. A

The language used in the body of cl. 18 also supports the view that it is with recovery of sums presently due and payable by the contractor to the purchaser that this clause deals. It may be noted that cl. 18 does not lay down the substantive rights and obligations of the parties under the contract. It is merely intended to provide *a mode of recovery* of "a claim for payment of a sum of money arising out of or under the contract". It, therefore, postulates a claim for a sum which is due and payable, that is, presently recoverable and may be recovered by the mode therein provided. It is difficult to believe that the contracting parties could have intended that even though a sum is not due and payable by the contractor to the purchaser under the contract, the purchaser should be entitled to recover it by adopting the mode set out in cl. 18. It is important to note that cl. 18 does not create a lien on other sums due to the contractor or give to the purchaser a right to retain such sums until his claim against the contractor is satisfied. If merely a right of lien or retention were given to secure payment of a claim, then even if the claim were for a sum not presently due and payable, the provision perhaps would not have been so startling or unusual. But here the right given to the purchaser under cl. 18 is a right to *recover* the amount of his claim by appropriating other sums due to the contractor and, on the interpretation of the appellant, this can be done even if the claim is for a sum which is not due or payable in *praesenti* and the purchaser is otherwise not entitled to recover it. That would indeed be a highly extra-ordinary result which we would be loathe to reach in the absence of clear and compelling language. This interpretation, if accepted, would mean that as soon as a claim is made by the purchaser, it would immediately become recoverable and the purchaser would be entitled to sell off the securities of the contractor and appropriate the sale proceeds in or towards satisfaction of such claim and in case that is insufficient, recover the balance by appropriating other sums due to the contractor and if there is even then a shortfall, recover it personally from the contractor, for the last words of cl. 18 provide that "the contractor shall on demand pay to the purchaser the balance remaining due". And this consequence would ensue even if the claim is for a sum which the contractor is under no existing obligation to pay or which is not presently payable or is disputed as regards the existence of liability or its quantum. A mere making of a claim by the purchaser would impose a liability on the contractor to pay it. That surely could not have been the intention of the contracting parties. It would be more consonant with reason and good sense to take the view, which, as pointed out above, is plainly and indubitably supported by the language used by the contracting parties, that cl. 18 does no more than merely provide an additional mode of recovery to the purchaser, and the purchaser is entitled to exercise the right conferred under that clause only where there is a claim for a sum which is presently due and payable by the contractor. This view, indeed, becomes irresistible B C D E F G H

A when we consider the last words of cl. 18, namely, "the contractor shall on demand pay to the purchaser the balance remaining due", which clearly postulate that the reference in the clause is to a sum presently due and payable by the contractor to the purchaser, so that, if any balance remains unrecovered after adopting the special mode of recovery provided in the clause, such balance must be paid by the contractor to the purchaser on demand. The appellant laid great B emphasis on the use of the word 'claim' in the opening part of cl. 18 and contended that the Standard Form of Contract which was in use prior to the adoption of the present Standard Form of Contract, cl. 14, and which corresponded to the present cl. 18, opened with the words " whenever under this contract any sum of money is recoverable from and payable by the contractor", but this formula was deliberately and advisedly altered when the present Standard Form was C introduced and instead, the words "whenever any claim for the payment of sum of money arises...." were substituted and this change in phraseology indicated that in order to attract the applicability of the present cl. 18 it was not necessary that there should be a sum due and payable by the contractor to the purchaser but it was enough if there was a mere claim on the part of the purchaser for pay- D ment of a sum of money by the contractor, irrespective of whether such sum of money was presently due and payable or not. This contention is, in our opinion, wholly untenable. We do not think it is ligitimate to construe cl. 18 of the contract between the parties by reference to a corresponding clause which prevailed in an earlier Standard Form of Contract. This is not a statute enacted by the Legislature where it can be said that if the Legislature has departed E from the language used by it in an earlier enactment, it would be a fair presumption to make that the alteration in the language was deliberate and it was intended to convey a different meaning. It is a clause in a contract which we are construing and there, any reference to a similar or dissimilar clause in another contract would be irrelevant. The only question before us is, what does cl. 18 mean and that depends on the plain interpretation of its language in the context F in which it occurs. Moreover, on a question of construction of cl. 18, mere use of the word "claim" cannot be a decisive factor. Cl. 18 has to be read as a whole, each part throwing light on the other, without any undue emphasis on one word or the other. We cannot allow our interpretation of cl. 18 to be hijacked from its true course by the use of a solitary word such as "claim", but we must arrive at the true meaning of the clause by construing it in all its parts and in its proper contextual G setting. So viewed, it is clear that cl. 18 applies only where the purchaser has a claim for a sum presently due and payable by the contractor.

Having discussed the proper interpretation of cl. 18, we may now turn to consider what is the real nature of the claim for recovery of H 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 cl. 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. Sec. 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 diffierence 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 s. 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* (1) "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*,(2) 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* v. *Taher Mallik*,(3) *S. Malkha Singh* v. *M/s N. K. Gopala Krishna Mudaliar*(4) and *Iron & Hardware (India) Co.* v. *Firm Shamlal & Bros.*(5)

(1) [1858] 27 L. J., Q.B. 234.
(2) [1915] 3 K. B. 499.
(3) 45 Cal. Weekly Notes, 519.
(4) 1956 A.I.R. Pun. 174.
(5) 1954 A.I.R. Bom. 423.

A 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
B 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
C 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.
D 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
E 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 cl. 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 cl. 18, the purchaser
F 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 cl. 18 to appropriate the amounts of other pending bills of the respondent in or towards satisfaction of its claim for damages against the respondent and the learned
G Judge was justified in issuing an interim injunction restraining the appellant from doing so.

We accordingly dismiss the appeals. The appellant in each appeal will pay the costs of the respondent all throughout.

V.P.S. *Appeals dismissed.*