Saisudhir Energy Limited vs Ntpc Vidyut Vyapar Nigam Limited on 8 September, 2016

Author: Manmohan Singh

Bench: Manmohan Singh

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*       IN THE HIGH COURT OF DELHI AT NEW DELHI

%                        Judgment reserved on: 11th August, 2016
                       Judgment pronounced on: 8th September, 2016

+              O.M.P. No.410/2015 & I.A. No.15360/2015

        SAISUDHIR ENERGY LIMITED                    ..... Petitioner
                     Through    Mr.C. Mohan Rao, Adv. with
                                Mr.Lokesh Kumar Sharma, Adv.

                              versus

        NTPC VIDYUT VYAPAR NIGAM LIMITED        ..... Respondent
                      Through  Mr.Maninder Singh, ASG with
                               Mr.Bharat Sangal, Mr.Prabhas
                               Bajaj & Ms.S.Spandana Reddy,
                               Advs.

+       O.M.P. No.446/2015, I.A. Nos.17294-96/2015 &
        20015/2015

        NTPC VIDYUT VYPAR NIGAM LTD                 ..... Petitioner
                      Through   Mr.Maninder Singh, ASG with
                                Mr.Bharat Sangal, Mr.Prabhas
                                Bajaj & Ms.S.Spandana Reddy,
                                Advs.

                              versus

        SAISUDHIR ENERGY LTD                            ..... Respondent
                     Through          Mr.C. Mohan Rao, Adv. with
                                      Mr.Lokesh Kumar Sharma, Adv.

        CORAM:
        HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.
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1. By way of this common order, I propose to decide the cross- objections filed by both the parties under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act"), arising out of the Arbitral Award dated 21st July, 2015 passed by the Arbitral Tribunal. Two out of

three Arbitrators have passed the Majority Award and the third Arbitrator has passed the dissenting Minority Award.

2. OMP No.410/2015 has been filed by M/s. Saisudhir Energy Ltd. (hereinafter referred to as "Saisudhir"), challenging the Arbitral Award dated 21st July, 2015 whereby the Arbitral Tribunal by majority held that NTPC Vidyut Vyapar Nigam Ltd. has not suffered any loss and hence is not entitled for any damages, but despite of the said finding, the Arbitral Tribunal granted damages of Rs.1.2 Crores. It is alleged that the Arbitral Tribunal in violation of Fundamental Policy of Indian law had passed the said direction. By the said petition, the minority Award has also been challenged as a whole.

3. NTPC Vidyut Vyapar Nigam Ltd. (hereinafter referred to as "NVVN") has filed OMP No.446/2015 for setting aside the Majority Award in its entirety and the Minority Award to the extent of the direction therein to NVVN to refund a sum of Rs.4 crores to Saisudhir.

4. NVVN is claiming for damages of Rs.54,12,32,000/- by alleging that that as per the Liquidated Damages (LD) clause in the contract, it is entitled for the said amount.

5. Brief facts of the case as per the pleadings are that:-

> (i) NVVN is a Government concern which has been identified by the Government of India as Nodal Agency for facilitating purchase and sale of solar PV power under the Jawaharlal Nehru National Solar Mission (JNNSM) of the Government of India.

Saisudhir is a Company incorporated under the Companies Act, 1956 who is engaged in the business of power generation.

(ii) The target of the Mission is to deploy 20,000 MW of grid-

connected solar power by the year 2022. The objective of the Mission is to promote ecologically sustainable growth while addressing India's energy security challenge. It will also constitute a major contribution by India to the global effort to meet the challenges of climate change, since solar energy is environment-friendly as it has zero emissions while generating electricity or heat. The Mission was launched with a view to achieve the long-term objective of facilitating sustainable power generation through alternative/renewable sources of energy, and reducing dependence on non-renewable sources of energy which are a major cause for environmental degradation and global warming.

(iii) In order to meet the objectives of the Mission, in view of the high cost of purchasing solar power, it was decided to bundle solar power along with cheaper unallocated quota of power generated at NTPC owned coal-based stations, and selling this bundled power to distribution utilities at CERC regulated prices. It was also decided that NVVN would enter into PPAs with Solar Power Developers with a commitment to purchase power at fixed rate for a period of 25 years.

In the guidelines for selection of the Solar Power Projects under the Mission, it has been provided that the objective of the guidelines is to, inter alia, facilitate a quick start up of the Mission and to facilitate speedier implementation of the new projects to be selected to meet the Phase-I target.

(iv) It has also been provided in the guidelines that final selection of the project shall be done on the basis of discount to be offered by the Solar Power Developers on the CERC approved tariff, being Rs.15.39 per unit. Further, the Bid Bond to be submitted by the Solar Power Developer would be proportional to the amount of discount voluntarily offered by the Solar Power Developer. As per Clause 4.6 of the PPA, the amount of liquidated damages for delay in commissioning of the project is directly proportional to the amount of Bid Bond.

(v) The foundation of allowing the Solar Power Developer to voluntarily decide the amount of Bid Bond and not to go for adventurous bidding was for the apparent reason that the bidder would exercise its choice for the Bid Amount having regard to the clear understanding that in the event it commits any delay in the execution of the project, it would become liable and would be in a position to pay damages to the extent of the Bid Bond.

6. Phase-1 Batch-II Guidelines were issued in August, 2011 by MNRE (GOI) for selection of grid connected Solar Power Projects. Accordingly, the NVVN issued Request for Selection (RfS) on 24th August, 2011 for inviting applications from interested Solar Power Project developers for setting up Solar Photo Voltaic Projects in accordance with the terms and conditions set out in the RfS.

Saisudhir under the above invitation submitted its RfS for setting up of 20 MW Solar PV Project at Plot No.27, Vidyuthnagar, Ananthapur - 515001, Andhra Pradesh who was selected in terms of RfS and the Power Purchase Agreement (PPA) was signed by the Saisudhir with the NVVN on 24th January, 2012. Thereafter, Request for Proposal (RfP) document was issued to the Saisudhir vide Letter dated 17th November, 2011. The NVVN then issued a Letter of Intent (LOI) to the Saisudhir for selection under JNNSM Phase-1 Batch-2 on 28th December, 2011.

7. Saisudhir at its own assessment of all relevant factors, had voluntarily submitted a bid of supplying power at Rs.8.22 per unit, offering a discount of Rs.7.17 per unit. As such, Saisudhir was required to submit a Bid Bond of Rs.50.154 crores, which was calculated on the basis of the amount of discount voluntarily offered by them. This Bid Bond was required as a security against the commitment of the Solar Power Developer to commence supply of solar power from the scheduled commissioning date, in consideration for which NVVN had agreed to purchase the solar power at a fixed rate for a period of 25 years. It had thus understood and had accepted that in the event of any delay, it shall be liable to pay a sum equivalent to the Bid Bond as liquidated damages.

8. NVVN had agreed to purchase solar power from Saisudhir at a fixed price of Rs.8.22 per unit [i.e. the price quoted by Saisudhir in its Bid] for a period of 25 years. In other words, in consideration for the commitment of Saisudhir to commence supply of solar power from 26th February, 2013, NTPC had guaranteed the purchase of such solar power at a fixed rate for a period of 25 years, notwithstanding the reduction in cost of production/purchase of solar power in the next 25 years.

8.1 Time was the essence for the entire process of selection as well as under the PPA for completing the conditions prescribed therein. In terms of Article 4.1.1 (c) of the PPA, Saisudhir was obliged, at its own cost and risk, to commence supply of power up to the contracted capacity to NVVN no later than the Schedule Commissioning date and continuance of the supply of power throughout the term of the Agreement. Schedule Commissioning date as defined under the PPA was 26th February, 2013. Therefore, it was imperative for the Saisudhir under the provisions of PPA, to commence supply of Power by 26th February, 2013.

8.2 It was agreed between the parties that any delay in commencement of supply of power entails LD as prescribed under the Article 4.6 of the PPA, and the extracts of the same have been reproduced herein below:

> "If the SPD is unable to commence supply of power to NVVN by the Scheduled Commissioning Date other than for the reason specified in Article 4.5.1 , the SPD shall pay to NVVN, Liquidated Damages for the delay in such commencement of supply of power and making the Contracted Capacity available for dispatch by the scheduled Commissioning date as per following:
>
> a) Delay upto one (1) month - NVVN will encash 20% of total Performance Bank Guarantee.
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> b) Delay of more than one(1) month and upto two months- NVVN will encash 40% of the total Performance Bank Guarantee
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> c) Delay of more than two month and upto three months- NVVN will encash the remaining Performance Bank Guarantee."

For delay beyond three months, Saisudhir would attract LD at the rate of Rs.1,00,000/- per MW per day for a period up to 18 months of signing of the PPA.

9. It is an admitted position that Saisudhir has failed to commission its project by the Scheduled Commissioning Date i.e. 26 th February, 2013.

10. The dispute in the present case has arisen from the delay caused by Saisudhir in providing solar power in terms of the Power Purchase Agreement executed between Saisudhir and NVVN. As per the terms of the PPA dated 24th January, 2012, Saisudhir was obliged to supply 20 MW of solar power from 26th February, 2013 for a period of 25 years. Saisudhir commissioned the supply of 10MW from 26th April, 2013, i.e. after a delay of two months from the Scheduled Commissioning Date. The remaining capacity of 10MW was commissioned by Saisudhir from 24th July, 2013, i.e. after a delay of approximately 5 months from the Scheduled Commissioning Date.

11. It was pleaded by the NVVN before the Arbitral Tribunal that electricity is utility service being provided by it. It is neither practical nor possible to compute damages for all tangible/intangible losses with reference to any utility where hundreds and thousands of the users/consumers are

dependent upon such utility service. It is a settled position in law that the named amount of damages in the agreement is the genuine pre-estimate and there is no obligation to prove the loss.

12. The contention of NVVN is that the contract being in respect of Public Utility Service, it is not possible to assess the loss and hence, the LD's as provided in the contract are liable to be allowed as genuine pre estimate of actual losses suffered. In support of the contention NVVN relied on the judgment of the Supreme Court in ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705 and other decisions of the Supreme Court and High Courts following the dicta of said judgment.

13. In order to justify the delay, it was stated by Saisudhir that due to various reasons which are completely beyond the control of the NVVN, (but not covered by the force majeure clause under the contract), the project was delayed. The Saisudhir could not commence production of energy by 26th February, 2013, the Commercial Operation Date. Saisudhir started pumping 10MW energy from 26th April, 2013 and the remaining 10MW Energy from 24th July, 2013. There was thus, a delay of 2 months in pumping 10MW and 5 months delay in pumping the remaining 10MW energy to the NVVN.

Saisudhir addressed a letter dated 30th January, 2013 to the NVVN seeking extension of time by two months, explaining the reasons for the delay in completing the project. The NVVN vide letter dated 31st March, 2013, rejected the request of the Saisudhir for extension of time stating that a notice of 'force majeure' under clause 11.5.1 of PPA is a necessary condition for entitlement of the benefit under force majeure clause and as the NVVN has not received any force majeure notice, the Saisudhir is not entitled for extension of time.

14. In view of rejection of extension of time, Saisudhir apprehended that the NVVN may encash the Bank Guarantees provided by Saisudhir who filed OMP No.173/2013 before this Court seeking to restrain from encashing the Bank Guarantees. This Court vide order dated 27th February, 2013 granted interim order in favour of the Saisudhir, restraining the NVVN from encashing the bank guarantees, with a direction to the Saisudhir to keep the bank guarantees alive. Thereafter, the Arbitral Tribunal of three members was constituted for adjudicating the disputes between the parties. This Court vide order dated 23rd May, 2013, permitted the parties to place the pleadings, which were available before this Court, before the Arbitral Tribunal for passing appropriate orders under Section 17 of the Act. The parties however, did not press for orders under Section 17 of the Act and addressed arguments on the main claims. The Bank Guarantees to the extent of Rs.54,12,32,000/- were extended from time to time and were valid till 25th August, 2015.

15. Saisudhir filed a claim statement, inter-alia, contending that NVNN has not invested a single rupee in the project and has not suffered any loss or damage and in view of the settled position of law, is not entitled for any damages or compensation and cannot invoke the Bank Guarantees. Under Claim No.2, Saisudhir claimed refund of the charges incurred by it in keeping the Bank Guarantees alive. By the time of filing the statement of claim, Saisudhir had incurred a sum of Rs.70,44,187/- in maintaining the Bank Guarantees and sought an award for the said amount plus the amount to be incurred in maintaining the Bank Guarantees during the pendency of arbitration proceedings. By the time of filing of the written submissions, the Saisudhir had incurred a sum of

Rs.1,71,83,047/- (The total amount incurred in maintaining the bank guarantee from July, 2013 to 25th August, 2015 is Rs.2,24,66,278/-) on count of maintaining Bank Guarantees and sought an award for the same under claim No.2.

16. Saisudhir also claimed that it is entitled for costs of arbitration. NVVN submitted a claim for the sum of Rs.77,51,199/- and as the litigation costs incurred in the matter by the time of filing of written submissions including the amounts paid to the Arbitrators subsequent to reserving the award, the NVVN had incurred a sum of Rs.91,68,887/- on account of fee of Arbitrators, counsels' fee and travelling expenses, expenses toward Arbitration venue etc.

17. The main contention before the Arbitral Tribunal on behalf of Saisudhir was that NVVN has not invested a single rupee in the project and has not suffered any loss whatsoever thus, NVVN is not entitled for any damages. Referring to the provisions of Sections 73 and 74 of the Indian Contract Act and judgment of the Supreme Court in Fateh Chand v. Balkishan Dass, AIR 1963 SC 1405, Maula Bux v. Union of India, (1969) 2 SCC 554, Union of India v. Rampur Distillery and Chemicals Co. Ltd., (1973) 1 SCC 649, ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705, State of Kerala v. United Shipper and Dredgers Ltd., AIR 1982 Ker 281, Praveen Oberoi v. Raj Kumari, (2014) 207 DLT 116 and Vishal Engineers & Builders v. Indian Oil Corporation Ltd., (2012) 1 Arb.LR 253 (Delhi) (DB), Saisudhir contended that NVVN is not entitled for any damages, as it was a simple case of breach of contract.

18. It was alleged that NVVN at the best is entitled to compensation only to the extent of loss suffered. As NVVN has not suffered any loss in the present case, the question of compensation or damages does not arise and the entire project cost of Rs.193 Crores was incurred by Saisudhir. The NVVN was under an obligation to act in terms of as well as in furtherance of the objectives of the Mission i.e. propagation of Solar Energy; it cannot act in a manner detrimental to the objectives of the Mission, if this Court would permit the NVVN to encash Bank Guarantees for a short delay of few months, it would put a death knell on the project, which was to last for 25 years. It was also submitted before the Arbitral Tribunal by Saisudhir that as production of solar energy is not commercially viable and was conceived keeping in view the long term benefits, profit or immediate generation of energy is not the object of the Mission and the project cannot be jeopardized for the short delay. The project was to supply solar energy for 25 years and a delay of 2-5 months is inconsequential. It is stated by Saisudhir before the Arbitral Tribunal that NVVN is under a triple obligation: (i) as a State under Article 12 of the Constitution of India, (ii) under Section 74 of the Contract Act, and (iii) in terms of the objectives of the Mission; to act in a reasonable and fair manner. The NVVN should not act in an unfair manner to penalize Saisudhir for the short delay, for no fault of Saisudhir by seeking damages, when it suffered no loss at all.

19. The NVVN filed a statement of defence contending that under the Power Purchase Agreement, Saisudhir was under an obligation to set up the project at its own cost and risk and to commence supply of power to the contracted capacity. Due to delay in commencement of supply of power, the project as well as discoms, (who were to purchase power from the petitioner) suffered. According to the NVVN, its investment is in the form of the obligation to purchase power for 25 years and the damages stipulated under the contract are genuine estimate of the loss suffered; Saisudhir knowing

well the liability to pay damages submitted the Bank Guarantees, and Saisudhir was also not entitled for extension of time merely on asking. Referring to force majeure clause in the agreement, the NVVN contended that the same is not applicable. The NVVN also denied the plea of the Saisudhir that the damages are exorbitant or unreasonable.

20. The Arbitral Tribunal vide majority Award dated 21st July, 2015 has allowed the claims of the Saisudhir by holding that the NVVN cannot levy any Liquidated Damages, as the NVVN has not suffered any loss and hence, the burden of proof of proving the same is on the NVVN for the breach committed by the Saisudhir. It is further held that the NVVN has not suffered any loss, as the NVVN has not invested any money in the project and hence, is not entitled to the liquidated damages as claimed. It was opined by the Tribunal that the liquidated damages as levied by the NVVN is totally unreasonable and unjustified and Saisudhir is entitled for the return of BGs amount to Rs.53,92,32,000/- which was submitted by Saisudhir as a part of earnest money deposit (EMD).

21. The main reasons for passing the Majority Award by the Arbitral Tribunal after discussing the pleadings of the parties and the documents in favour of Saisudhir are mentioned in para 113 of the Majority Award which reads as under:-

> "113. From the above discussion, AT is of the view:
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> i. The respondent has not invested any money in the project.
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> ii. The respondent has not suffered any loss, as no effort has been made to prove the same. iii. The respondent had not suffered on account of its consequential breach to supply energy to discoms, as no claim of discoms against the respondent on account of consequential breach on part of the respondent, have been placed before the AT. iv. The respondent has also not suffered any loss of capital or loss of interest on capital, having not invested any amount in the project.
>
> v. The respondent has not established that the project has suffered on count of delay.
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> vi. The project is not of such a nature as to cause loss on count of mere delay unlike construction of a road for public purpose, school, hospital, sewage pumping station etc., vii. The object of the mission being long term promotion of solar energy (25 years in this case), a delay of about 2-5 months in the present case is not of much consequence."

22. It is also pertinent to mention here that despite of the said reasoning, in the Majority Award in para 114, it was held as under:-

> "114. In view of the above, it is difficult to hold that the respondent has suffered loss, which needs to be compensated by the claimant. The AT therefore holds that the respondent has not suffered any loss in completing the project in time. However, since the claimant has failed to complete the work in time and has delayed the same

> for 2-5 months, which has delayed the supply of power to the respondent, the AT is of the view that the claimant is liable to pay Rs.1.2 Crores to the respondent as 20% of the amount specified in the original performance guarantee at the rate of Rs.30 Lacs per MW for the delayed performance. The AT awards accordingly."

23. The second claim of the Saisudhir regarding charges and costs incurred in maintaining the bank guarantees was decided in para 115 of the Award. The relevant extracts of the same have been reproduced here as under:-

> "115. .....The claimant made a claim of Rs.1,71,83,047 on account of maintaining bank guarantees for the period of delay not attributable to the claimant. The respondent contended that the claimant had to maintain the bank guarantee as a consequence of the interim injunction obtained by the claimant. The interim orders are conditional in nature and for the benefit of the claimant. The claimant thus cannot seek to fasten the liability of maintaining the Bank Guarantees on the respondent. Thus the claim of the claimant for reimbursement of bank charges for maintaining the bank guarantees is rejected and AT awards nil amount against the same."

24. The minority award published on 21st July, 2015 by one of the Members of the Arbitral Tribunal who has taken a dissenting view and has arrived at different findings in paras 117 to 124, is contrary to the majority award. The said paras 117 to 124 read as under:

> "117. Further Clause 2.9 in its last para of Guidelines and Clause 3.19 of RfS (Para 3 at Page 116 of SOC) clearly stipulates that in case NVVN selects the Claimant and offers to execute the PPA and the Claimant refuses or is not in a position to implement /execute the PPA within the stipulated time frame, the BGs towards the EMD and Bid Bond shall be encashed by NVVN. It is thus amply clear that even prior to executing the PPA, the Claimant was certainly liable to have the BGs towards EMD and Bid Bond encashed on Claimant's failure to forge ahead with contract execution. This condition not being part of contract, it would be in the nature of guarantee and certainly not hit by Section 73 or Section 74 of The Indian Contract Act 1872, which deals only with contractual terms. It may perhaps be pertinent to reproduce Section 74 of The Indian Contract Act 1872 which stipulates as under:
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> Quote "Section 74 : Compensation for breach of contract where penalty stipulated for:- 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, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or 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 or, as the case may be, the penalty stipulated for. "

The breach, on the part of the Claimant in fulfilling its obligations, not only resulted in injury to the implementation of the Mission but also resulted in injury to the Discoms for failure to fulfill the renewable purchase obligation with the Discoms. The liquidated damages provided under the Clause 4.6 are a genuine pre-estimate of loss suffered by the Respondent, which cannot be directly evaluated or measured due to the nature of transaction and being formed partly from the Bid offer of the Claimant, made on its own volition. The factum of occurrence of loss in such a case is inherent in the delay on the part of the Claimant in the commissioning of the Project.

I am inclined to toe the line of argument of the Respondent as it obviously could not have pleaded the loss or produced any evidentiary evidence. The Respondent is, as such, entitled to receive from Claimant who has delayed the commissioning of the Power Plant a reasonable compensation.

118. It is an admitted fact that out of 20. MW, with COD being 26.02.2013 the Claimant commissioned 10MW on 26.04.2013 with a delay of 02 months the remaining 10MW on 24.07.2013 (Refer Page 1 RH-2) with a delay of about 05 months. It has to be noted that it may not be possible to work out the exact loss because the Solar Power to be generated cannot be replaced by Solar Power generated elsewhere as all such Solar Projects are tied up with their respective Agreements to supply discoms after bundling of Power. Therefore as LD and which is directly related to the bid submitted by the Claimant has to be treated as a genuine pro-estimate of loss and the Claimant is bound to pay LD to the Respondent in terms of Article 4.6 of the PPA (Refer Page 82 of SOC).

119. We must not lose sight of the fact that the Claimant was selected at the stage of RfP because of the discount offered by it. And accordingly the amount of Bid Bond submitted was directly proportional to the discount offered by the Claimant and in case it had offered lesser discount the amount of Bid Bond would have been less. The Claimant chose a discount of Rs.7.17/ unit and as such must mitigate its responsibility fully in term of an agreed PPA.

120. Here it may perhaps be prudent to cite also Sections 126 and 127 of The Indian Contract Act, 1872 which speaks of "Contract of Guarantee". A "Contract of Guarantee" is a contract to perform the promise or discharge the liability, of a third person in case of his default. Any benefit given to the principal debtor is a consideration to the surety for giving the guarantees. And in the present case the Bank is the surety for issuing the guarantee to NVVN on behalf of the Claimant Encashment of such guarantees is obviously distinct from damages for breach of contract. I am certainly convinced about it.

121. Further a reference to "Law of Guarantee" by Geraldine Andrews, 6th Edition, Sweet and Maxwell Chapter 16 at Page 616 (Refer Page 60 of RH-1) states and makes it distinctly clear that performance bond/performance guarantee are to be treated as substitutes for cash and are security for due performance which the beneficiary would be entitled to in case of alleged breach of contract (Refer Page 63 of RH-1). It was further held that such performance bonds or similar instruments performed the Role of an effective safeguard against nonperformance, inadequate performance or delayed performance.

122. In fact CONSTRUCTION LAW Volume-II by Julian Bailey (Refer Pages 66-70 of RH-1) clearly indicates that such performance bonds/ guarantees are distinct from the underlying contract and need to be given effect to.

123. A reference to Hudson's Building and Engineering Contracts 12th Edition (Pages 77- 81 of RH-1) and 1978 (1) ALL ER 976 Edward Owen Engineering Ltd. Vs. Barclays Bank International Ltd. (Pages 82-93 of RH-

1) holds that performance guarantees are virtually promissory notes payable on demand, to be honoured according to the agreed terms and conditions.

124. And even in 1986 II Lloyd's Report 146 Siporex Trade SA Vs. Banque Indo Suez (Refer Pages 94- 112 of RH-1), it was held at Page 106 of RH-1 that the whole commercial purposes of a performance bond is to provide security which is to be readily, promptly and assuredly realizable when the default occurs. And I accordingly hold that Respondents are entitled to encash the BGs."

25. However, in para 133.1, in the Minority Award, NVVN was asked to encash these BGs but partially accepted to the tune of Rs.4 Crores, i.e. the amount towards EMD lying in the form of Performance Bank Guarantee which NVVN should refund back to the Saisudhir within 90 days from the date of announcement of that Award, which is also challenged by the NVVN in its objections being OMP No.446/2015.

26. Notices in both the petitions were issued by the earlier Bench. Both the parties have made their submissions. They have also filed their written submissions. Mr.Maninder Singh, learned ASG and Senior Advocate instructed by Mr.Bharat Sangal, Advocate appeared on behalf of NVVN and addressed the arguments. On behalf of Saisudhir, Mr.C.Mohan Rao, Advocate with Mr.Lokesh Kumar Sharma has made the submissions.

27. Mr.C.Mohan Rao, learned counsel appearing on behalf of Saisudhir has referred the relevant part of the pleadings, various paras of majority award as well as minority award. He also referred large number of judgments in support of his submissions. He says that the facts and circumstances in the present case are materially different than the case of Saw Pipes (supra). The facts in present case are similar to the judgment of Kailash Nath Associates v. DDA, (2015) 4 SCC 136. He argued that NVVN in the present case has neither invested any amount nor suffered any loss and proved any damages. Thus, the plea of NVVN is not substainable.

28. Mr.Rao submits that the Supreme Court in Kailash Nath Associates (supra) explained as to when a LD clause in a contract may be taken as pre estimate of losses suffered and held as under:-

> "43.1 Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable

compensation can be awarded not exceeding the amount so stated."

Mr.Rao argues that the Supreme Court in BSNL v. Reliance Communications Ltd., (2011) 1 SCC 394, explained that when the amount stipulated is in terrorem or forces a party to perform the contract, it would amount to penalty. It was held as under:-

> "47. According to Chitty on Contracts "whether a provision is to be treated as a penalty is a matter of construction to be resolved by asking whether at the time the contract was entered into the predominant contractual function of the provision was to deter a party from breaking the contract or to compensate the innocent party for breach. The question to be always asked is whether the alleged penalty clause can pass muster as a genuine pre- estimate of loss". (See para 26-126 of Chitty on Contracts, 30th edition) The fact that damage is difficult to assess with precision strengthens the presumption that a sum agreed between the parties represents a genuine attempt to estimate it and to overcome the difficulties of proof at the trial."

He also relied upon the relevant extract of the Law of Contract by G.H. Treitel (10th edition), as per which a clause is penal if it provides for -

> ".....a payment stipulated as in terrorem of the offending party to force him to perform the contract. If, on the other hand, the clause is an attempt to estimate in advance the loss which will result from the breach, it is a liquidated damages clause. The question whether a clause is penal or pre-estimate of damages depends on its construction and on the surrounding circumstances at the time of entering into the contract."
>
> "Lastly, the fact that a sum of money is payable on breach of contract is described by the contract as "penalty" or "liquidated damages" is relevant but not decisive as to categorization."

29. He says that if the pleadings in the above matter are examined, it is clear that the objective of the mission was promotion of solar power and not immediate supply of power. NVVN had admitted that LDs are levied not due to delay in delivery of power or delay in sale of power due to delay in commissioning of the project. NVVN never contended that the LDs were agreed as pre-estimate of losses as it pleaded that the objective of the LDs was to prevent Saisudhir from abandoning the project. In case the objectives of the Mission is considered in a meaningful manner, it would appear that in fact, the nature of contract was not in respect of Public Utility and the LDs are not stipulated as pre-estimate of losses. Thus, none of the arguments advanced on behalf of NVVN before this Court is contrary to the pleadings and against the settled legal position. The main purpose of inclusion of Clause 6.4 in the Contract was that his client should not break the contract. The said clause was stipulated in the nature of terrorem so that his client must perform the contract in time and the said clause amount to penalty and not damages.

He submits that the Supreme Court in Kailash Nath Associates (supra) also held that "Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section." As NVVN had not suffered any loss, therefore, it is not entitled for any damages.

30. Mr.Rao has referred the pleadings which indicate that the object of the Mission was promotion of solar energy and not immediate supply of solar power to any consumer. The Mission was conceived as a long term measure. The Mission has set the ambitious target of generation of 20000 Mega Watts (MW) of Solar Power by 2022 through "long term policy, large scale deployment goals, aggressive R & D."

Mr.Rao has also referred the preamble of the Mission among others which provided that "The successful implementation of the JNNSM requires the identification of resources to overcome the financial, investment, technology, institutional and other related barriers, which confront solar power development in India. The penetration of solar power, therefore, requires substantial support." The scope and objectives of the Mission are:

i) To facilitate of quick start of JNNSM.

ii) To ensure serious participation for projects to be

selected under JNNSM. (LD's are provided to ensure this objective)

iii) To facilitate speedier implementation of the new projects to be selected to meet the Phase-I target of JNNSM.

iv) To enhance the confidence in the project developers; and

v) To provide manufacturing in solar sector in India.

31. He submits that the Mission was to be implemented in three phases. NVVN was appointed as a Nodal Agency for the implementation of Phase-I of the Mission. The first phase was divided into two batches. The capacity allocated under Batch-I was 150 MW Photovoltaic (PV) power generation. Under Batch-I, Saisudhir gave a bid for and successfully implemented a 5 MW project. Batch-II targeted 350 MW of PV power. Bids were invited for setting up of the project by the bidders at their own cost and bids are awarded to a bidder giving maximum discount on the bench mark tariff fixed by the Central Electricity Regulatory Commission (CERC). The CERC approved tariff under Batch-II was Rs.15.39 per unit. On this Saisudhir gave a discount of Rs.7.17 per unit offering to supply Solar Power at Rs.8.22 per unit.

Mr.Rao states that despite of investing more than the estimated project cost of Rs.193 Crores, Saisudhir could not complete the project in time due to various reasons completely beyond its control including the reason of non-availability of sand in view of complete ban imposed on sand

mining in Andhra Pradesh by the High Court of Andhra Pradesh. Saisudhir, therefore, addressed a letter to NVVN seeking extension of time by 2 months vide letter dated 13th January, 2013. NVVN rejected the request for extension of time by its letter dated 31st January, 2013.

In the very first paragraph of the claim statement filed before the Arbitral Tribunal Saisudhir contended that:

> "1. .....The contention of the claimant in essence is that the respondent is not entitled for any damages as the respondent has not invested a single rupee towards the project and has not suffered any loss or damage. The respondent is merely a nodal agency for the implementation of the Jawaharlal Nehru National Solar Mission (JNNSM) and is required to act in conformity with the policies and objections of the mission and cannot take any action contrary to the objectives of the mission. The action of the respondent in seeking damages from the claimant has the effect of stifling and killing the development and production of solar energy. It is the further contention of the claimant that the respondent is also not entitled for any damages in view of provisions of Section 73 & 74 of the Indian Contract Act."

32. Mr.Rao says that though the NVVN has not suffered any loss, however, in paragraph 1 of reply to the statement of claim, it is contended that "....The delay in commissioning of project, therefore, delays purchase and sale of solar power causing loss of committed energy to discoms". Further, NVVN in paragraph 14 of reply to the statement of claim contended that "Failure of the claimant in performing his obligations under the PPA would not only result in injury for failure to perform in implementation of JNNSM but would also result in injury to discoms for failure to fulfilment of Renewable Purchase Obligation (RPO) with them. The respondent thus suffered tangible and intangible losses as a Nodal Agency for non performance of claimant."

33. Mr.Rao also submits that NVVN admitted in its pleadings that the objectives of the Mission who is not designated as nodal agency for any purpose other than procuring solar power and therefore, it cannot be canvassed that it was also designated for furthering any of the purposes or objectives of the Mission except for the purchase of solar power.

34. Mr.Rao submits that the contention of the parties regarding the objectives of the mission was considered in the majority award in paras 69 to 73 who rejected the contention of NVVN. The majority award held as under:

> "71. The Mission was conceived with the avowed object of promoting Solar Power. It was not profitable or commercially viable to set up a Solar Power plant. Serious impetus is required to promote Solar Power, keeping in view the future power requirements. The objectives and the measures required to be taken to promote Solar Power are clearly spelt out in the preamble of the Mission. Everyone, who is associated with the Mission are bound by the objectives of the Mission. No one, particularly the agency that was entrusted with the task of implementing the Mission can contend that it is not bound by the objectives of the Mission. The best laid out

> plans go wary because long term goals envisaged by Mission are usually ignored for short term immediate benefits jeopardising the Mission. It is therefore, difficult to accept the contention of the respondent that it is merely concerned with the purchase of Solar Power and is not concerned with the objectives of the Mission. Considering the JNNS Mission and its objectives, the contention of the respondent that it is merely a nodal agency for procuring solar power from SPD's and is not concerned with the objectives of the Mission cannot be accepted. It is clear from clause 2.7 (d) of the guidelines for selection of Solar PV projects that an SPD is required to provide bank guarantees on count of bid bond on a graded scale in order to discourage adventurous bids. It is open to the respondent to sustain the same on the grounds specified in the Mission documents. It is not open to the respondent to contend that it is not at all concerned with the objectives of the Mission. Various provisions in the Mission documents are to be considered harmoniously keeping in view the objectives sought to be achieved by Mission and the portion in the preamble designating the respondent as a nodal agency for procuring solar power from SPD's cannot be read in isolation completely excluding other provisions and the objectives."

He submits that it has incorrectly come to the conclusion in the minority award wherein while dealing with the guidelines of Clause 2.6 it was held that ".....justifiably there was no other purpose for NVVN other than procuring Solar Power under PPA." This finding in the minority award that objectives of the mission are not binding on NVVN, which is nodal agency for the implementation of the Mission is absolutely perverse.

35. The other contention of Saisudhir is that NVVN is under a Triple Obligation to act in a reasonable and fair manner. Firstly, being State within the meaning of Article 12 of the Constitution of India (in refusing to grant reasonable extension of time considering Saisudhir was at no fault in completing the project and was prevented in view of blanket ban on sand mining in Andhra Pradesh by the High Court of Andhra Pradesh.) Secondly, keeping in view of the objectives of the mission viz; promotion of Solar Power and finally, in terms of Section 74 of the Indian Contract Act, which mandates reasonable damages in case of loss.

It is submitted by Mr.Rao that the judgments relied on by NVVN however does not support the contention of NVVN and have specifically provided that the State must act in a reasonable and fair manner. The issue regarding the requirement of NVVN to act in a reasonable and fair manner was considered in the majority award in paragraphs 75 to 84. Quoting from the very same judgments relied on by NVVN, the majority award held:

> "80. The legal position is thus exactly the opposite of what has been propounded by the respondent. While according to the respondent "The principles of administrative law like fairness, arbitrariness etc. have no place when dealing with the commercial transactions in which the government is a party," the judgment relied on by the respondent itself has clearly and categorically stated that "the court can examine the decision making process and interfere if it is found vitiated by malafides unreasonableness and arbitrariness. The state, its corporations, instrumentalities and

agencies have the public duty to be fair to all concerned".

81. Thus the contention of the respondent that it is not required to act in a fair and reasonable manner cannot be accepted. ....."

Thus, the majority award is not required to be interfered with.

36. It is contended by Mr.Rao that his client Saisudhir had pleaded and produced the evidence in support of the contention that NVVN had not suffered any loss who contrary to the scheme and object of the Mission has levied damages. The majority award in paragraphs 89 to 93 considered the contention of NVVN that the claim is premature. It was held as under:

> "91. .....The contention that the respondent has not raised any demand for liquidated damages hence the claim is premature is misleading, as the respondent, under the facts of the case, is not required to raise any demand. The respondent however, is under an obligation to justify its entitlement for liquidated damages once the same is under challenge. Even in the written arguments, rather than providing justification, the respondent resorted to a misleading contention that it has not pleaded any loss as it had not raised any demand. The loss, if any, is a question of fact, which the Tribunal has to determine on the basis of pleadings and proof. Once the claimant has asserted that the respondent has not invested a single rupee and has not suffered any loss, it is imperative for the respondent to give a justifiable response. The respondent cannot shirk or avoid its burden of showing loss merely on the ground that it has not raised the demand. Loss is different from raising a demand on account of loss. When the only dispute between the parties is whether the respondent is entitled to damages, for the loss sustained, the respondent escapes the liability to show the loss on the ground that it has not raised the demand. The question is, the entitlement of the respondent for damages, which it is under an obligation to justify irrespective of the fact whether it chose to make a demand for the same or not."

37. It is stated by Mr.Rao that the majority award considered the contention of NVVN that due to delay in supply of power mission has suffered loss in paragraph 101 of the award. The majority award held as under:

> "101. The claimant on the other hand submitted that the Mission has not suffered any loss on account of delay. According to the claimant if the respondent is permitted to levy damages it would put a death knell on the claimant and the Mission would suffer. Except for making a statement the respondent has not stated as to what loss the Mission has suffered. We would have accepted the contention of the respondent that the Mission had suffered loss, had the claimant abandoned the project. In such a case loss to the Mission could have been assumed. We are not inclined to accept the contention that the Mission has suffered loss on count of delay. The very object of providing the high bid bond was 'to prevent adventurous bidding'. The respondent in the Written Submissions (in para 2.6) contended that the bid bond is submitted to

> ensure that the bidder executes the contract and does not run away after selection. In the present case the bidder certainly did not run away, though there was delay. It is thus difficult to accept the contention that the Mission has suffered on count delay in completing the project."

It is also contended by Mr.Rao that the majority award also considered the contention of NVVN that the delay has resulted in injury to the discoms due to the delay in paragraph 102 of the Award. The majority award held as under:

> "102. The further contention of the respondent is that the delay has caused an injury to discoms as the respondent has failed to supply energy to discoms. The contention is not that the respondent has suffered any injury. The contention is that the breach on part of the claimant has resulted in consequential breach on part of the respondent is supplying energy to the discoms. Thus conversely, the respondent can claim damages from the claimant on the discoms making claim for damages against the respondent. Discoms however, made no claim for damages against the respondent. Consequential breach on part of the respondent has not resulted in any loss to the respondent and hence, the respondent cannot raise any claim against the claimant."

He submits that after appreciation of pleadings and law, the Arbitral Tribunal held as under:

> "98. The law on the aspect of liquidated damages is crystal clear. The principle has been reiterated time and again. Breach simplicitor would not entitle a party for damages. A party who suffered loss on account of breach is entitled to be compensated for the loss suffered and to the extent of loss suffered. In case where an amount is stipulated, a party who suffered loss on count of breach would be entitled for reasonable compensation not exceeding the amount. This aspect is clear from the judgments quoted above. Without exception all the judgments reiterated the very same legal position."

> "105. As stated, the law is consistent and all the cases cited before us, Court have held that a party can claim damages only when it suffers loss. In Fateh Chand, Maula Bux, Rampur Distillery, United Shippers and Dredges, Praveen Oberoi, Vishal Engineers the courts denied damages on the ground that the party claiming damages have not suffered any loss."

38. It is also submitted by Mr.Rao that on one hand, the NVVN had not pleaded or made any effort to show that it had suffered any loss on count of delay, as the stand of the NVVN was that the discoms have suffered the loss, the mission has sufferd the loss and it is premature for the NVVN to quantify the loss as it had not taken any action even to encash the bank guarantees and the said contentions were considered and rejected by the majority Arbitral Tribunal by giving reasons. On the other hand, the minority award held that it is inclined to toe the line of argument of the NVVN as it obviously could not have pleaded the loss or produced any evidentiary evidence. The NVVN is,

as such, entitled to receive from the Saisudhir who had delayed the commissioning of the Power Plant a reasonable compensation.

39. It is submitted that the decision in minority award granting compensation of Rs.49,92,32,000/- is absolutely perverse. The minority award could not have granted any compensation after holding that there are no pleadings or evidence in support of the claim for damages.

40. Mr.Rao states that the decision in the minority award that NVVN has not pleaded any loss, there is no evidence and still NVVN is entitled for damages is absolutely perverse. The reasoning given in the majority award is flawless and cannot be interdicted under Section 34 of the Act. Thus, the objections of NVVN are liable to be dismissed.

41. Mr.Rao submits that the majority award, however, in violation of Fundamental Policy of Indian law granted Rs.1.2 crores as damages. The majority award held as under:-

> "114. In view of the above, it is difficult to hold that the respondent has suffered loss, which needs to be compensated by the claimant. The AT therefore holds that the respondent has not suffered any loss in completing the project in time. However, since the claimant has failed to complete the work in time it has delayed the same for 2-5 months, which has delayed the supply of power to the respondent, the AT is of the view that the claimant is liable to pay Rs.1.2 Crores to the respondent as 20% of the amount specified in the original performance guarantee at the rate of Rs.30 Lacs per MW for the delayed performance."

42. Mr.Rao contends that the majority arbitrations having correctly appreciated the position of law that loss is sine qua non for damages and damages cannot be granted merely on count of breach and having specifically held that "In view of above it is difficult of hold that the respondent has suffered any loss which needs to be compensated by the claimant. The AT therefore, holds that the respondent has not suffered any loss in completing the project in time" violated the Fundamental Policy of Indian law by awarding damages of Rs.1.2 Crores.

The award of Rs.1.2 Crores as damages is clearly by disregarding the biding judgments of the Courts which the majority arbitrators have taken note of. The Supreme Court in Associate Builders v. DDA (2015) 3 SCC 49 in para 27 held as under:

> "Coming to each of the heads contained in Saw Pipe judgment, we will first deal with the head 'fundamental policy of Indian law'. It has already been seen from Renusagar Judgment that violation of Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the biding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law."

Mr.Rao argued that the majority Arbitrators having once come to the conclusion that damages cannot be awarded in the absence of loss, and having held that NVVN has not suffered any loss, disregarded the binding judgments. Hence, the award of damages of Rs.1.2 crores in favour of NVVN is in violation of Fundamental Policy of Indian Law.

43. With regard to reliance on the judgment of the Supreme Court in ONGC v. Saw Pipes (supra), Mr.Rao submits that as per NVVN, damages were awarded in the said judgment, without there being a finding of loss and the arbitrators have committed a patent illegality in holding that ONGC had suffered loss. In support thereof, the NVVN relied upon paragraph 106 of the Majority award in which it has been held as under:

> "106. Damages were allowed in the case of Saw Pipes and Construction and Design Services cases on a specific finding that the breach has resulted in losses. In Saw Pipes there is a specific findings that ONGC suffered huge loss on count of failure to supply pipes. It is not even contended in Saw Pipes that what has been stipulated as liquidated damages was unreasonable. Thus in the said case breach, loss as well as reasonableness of damages stipulated are proved. For the said reason the court allowed damages."

Mr.Rao says that the contention of NVVN that in Saw Pipes (supra) damages were awarded even in the absence of finding of loss is incorrect. In fact in that case there was a clear finding of loss but there was no proof regarding the extent of loss. This is evident from para 67 of the said judgment which is reproduced here as under:

> "67. Take for illustration construction of a road or a bridge. If there is delay in completing the construction of road or bridge within the stipulated time, then it would be difficult to prove how much loss is suffered by the society/State. Similarly, in the present case, delay took place in deployment of rigs and on that basis actual production of gas from platform B-121 had to be changed. It is undoubtedly true that the witness has stated that redeployment plan was made keeping in mind several constraints including shortage of casing pipes. The Arbitral Tribunal, therefore, took into consideration the aforesaid statement volunteered by the witness that shortage of casing pipes was only one of the several reasons and not the only reason which led to change in deployment of plan or redeployment of rigs Trident II platform B-121. In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that the party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provisions of Sections 73 and 74 of the Indian Contract Act. There was nothing on record that compensation contemplated by the parties was in any way unreasonable. It has been specifically mentioned that it was an agreed genuine pre-estimate of damages duly agreed by the parties. It was also mentioned that the liquidated damages are not by way of penalty. It was also provided in the contract that such damages are to be recovered by the

purchaser from the bills for payment of the cost of material submitted by the contractor. No evidence is led by the claimant to establish that the stipulated condition was by way of penalty or the compensation contemplated was, in any way, unreasonable. There was no reason for the Tribunal not to rely upon the clear and unambiguous terms of agreement stipulating pre-estimate damages because of delay in supply of goods. Further, while extending the time for delivery of the goods, the respondent was informed that it would be required to pay stipulated damages.

Mr.Rao says that in Saw Pipes case (supra), the Supreme Court found that due to breach on part of Saw Pipes, ONGC had suffered loss. Specifically there is proof of loss in the form of redeployment of rigs Trident II platform B-121 but 'difficult to prove exact loss or damage.' Mr.Rao referred the LD clause in Saw Pipes (supra) case which is entirely different from the LD clause in the present case. The LD clause in the Saw Pipes case (supra) provided as under:

"38. .....

"11. Failure and termination clause/liquidated damages.--Time and date of delivery shall be essence of the contract. If the contractor fails to deliver the stores, or any instalment thereof within the period fixed for such delivery in the schedule or at any time repudiates the contract before the expiry of such period, the purchaser may, without prejudice to any other right or remedy available to him, recover damages for breach of the contract:

(a) Recovery from the contractor as agreed liquidated damages are not by way of penalty, a sum equivalent to 1% (one per cent) of the contract price of the whole unit per week for such delay or part thereof (this is an agreed, genuine pre-estimate of damages duly agreed by the parties) which the contractor has failed to deliver within the period fixed for delivery in the schedule, where delivery thereof is accepted after expiry of the aforesaid period. It may be noted that such recovery of liquidated damages may be up to 10% of the contract price of whole unit of stores which the contractor has failed to deliver within the period fixed for delivery....."

It is stated by Mr.Rao that Saw Pipes (supra) is a case where the parties have agreed that "this is an agreed, genuine pre-estimate of damages duly agreed by the parties." In view of this clause, the Supreme Court held as under:

"41. Therefore, when parties have expressly agreed that recovery from the contractor for breach of the contract is pre-estimated genuine liquidated damages and is not by way of penalty duly agreed by the parties, there was no justifiable reason for the Arbitral Tribunal to arrive at a conclusion that still the purchaser should prove loss suffered by it because of delay in supply of goods.

42. .....Not only this, it was also agreed that:

(a) liquidated damages for delay in supplies will be recovered by paying the authority from the bill for payment of cost of material submitted by the contractor;

(b) liquidated damages were not by way of penalty and it was agreed to be genuine pre-estimate of damages duly agreed by the parties;

(c) this pre-estimate of liquidated damages is not assailed by the respondent as unreasonable assessment of damages by the parties."

44. In a nut shell, counsel has referred the following different features between the Saw Pipes case (supra) and the present case who has tried to canvass that due to which the ratio of Saw Pipes (supra) cannot be applied to the present case:

i. In Saw Pipes (supra) parties have specifically agreed that the LD's are genuine pre-estimate of actual damages and not penalty.

In the present case, contract merely provided LD and has not specified whether it is genuine pre-estimate or penalty. The present case is squarely covered by the judgment of Kailash Nath Associates (supra) ii. In Saw Pipes (supra) no evidence is led by the claimant to establish that the stipulated condition was by way of penalty.

In the present case, Saisudhir specifically pleaded that LD's are in the nature of penalty (para 19 of claim statement) NVVN admitted/pleaded that the LD's are provided to prevent the bidder from abandoning the project and to secure performance of contract and also pleaded that where the LD's are intended to secure performance of the contract' it would be penalty. Thus, admittedly the present case is a case of penalty.

iii. In Saw Pipes (supra) there are no pleadings or evidence that the compensation contemplated was, in any way, unreasonable.

45. It is submitted by him that in the present case, Saisudhir pleaded that the entire action of NVVN is unreasonable. It was also pleaded that NVVN levy of damages is not reasonable and is in violation of Section 74 of the Contract Act. Once the facts in the present case are to be considered as different from other cases referred by Mr.Maninder Singh, learned ASG, no advantage can be derived by the NVVN. Mr.Rao submits that the Arbitral Tribunal was correct to the extent that "In Saw Pipes there is a specific finding that ONGC suffered huge loss on count of failure to supply pipes. It is not even contended in Saw Pipes that what has been stipulated as liquidated damages was unreasonable" and the objection of NVVN is absolutely not correct.

46. The objections of NVVN based on Public Utility and it is impossible to assess damages hence, NVVN is entitled for agreed LD's cannot be raised as NVVN has failed to plead the same.

47. The first submission of Mr.Maninder Singh, learned ASG is that the majority award is patently illegal and suffers from errors apparent on the face of the record. It is rendered against the pleadings, law and contrary to the relevant clauses of the contract, therefore, it deserves to be set aside by this Court. It is submitted by him that the Arbitrators, even while holding that it is difficult to hold that NVVN has suffered loss, have thereafter held that "therefore, NVVN has not suffered any loss." He says that the Arbitrators have failed to appreciate the settled position of law that in cases where it is difficult or impossible to compute the actual loss suffered as a result of the breach of contract, the genuine pre-estimate of damages, as provided in the contractual terms agreed to between the parties, would be treated as a measure for the reasonable compensation for liquidated damages to be awarded. He referred the celebrated judgment of the Supreme Court in the case of Saw Pipes (supra).

48. Mr.Maninder Singh submits that the law laid down in the above referred case is being followed in all subsequent judgments delivered by the Supreme Court and the High Courts. The said judgment is binding in nature. But in the majority award, the Arbitral Tribunal without appreciating the real disputes has published the Award which is perverse and against the public policy.

49. It is argued by Mr.Maninder Singh that the finding in para 106 of the Majority Award about the mandate of Saw Pipes case (supra) by mentioning that ONGC in that case had suffered huge loss on count of failure to supply pipes is entirely incorrect. On this aspect, I agree with the argument of Mr.Maninder Singh that the Majority Award is totally contrary to the observations made at page 43 of the Saw Pipes (supra) judgment, wherein the Arbitral Tribunal in that case had recorded a specific finding that ONGC had failed to establish any loss.

50. Mr.Maninder Singh, learned ASG has refuted the submissions made on behalf of Saisudhir that NVVN has neither proved nor pleaded that any loss has been caused to it on account of the delay caused by Saisudhir in commissioning of the solar power. He also submits that the Saisudhir was neither forced, nor the amount mentioned in clause 4.6 stipulated is in terrorem, as Saisudhir with open eyes had signed the contract and it knew the consequences in case of delay in the project. It was a commercial deal; Saisudhir now cannot be permitted to give any excuse by making the submission that the clause is in the nature of forcing a party to perform the contract, thus, it would be merely penalty.

He submits that the said contention is false and contrary to pleadings of the NVVN and the Contract, as it was specifically pleaded that loss has been caused to it by the said delay on account of Saisudhir.

51. Mr.Maninder Singh, learned ASG submits that from the day one the disputes had arisen between the parties, the submission of NVVN was that electricity is utility service being provided by it. It is submitted that it is neither practical nor possible to compute damages for all tangible/intangible losses with reference to any utility where hundreds and thousands of the users/consumers are dependent upon such utility service. It is a settled position in law that the named amount of damages in the agreement is the genuine pre-estimate and there is no obligation to prove the loss.

52. Mr.Maninder Singh also submits that it is an admitted position that as per sale price of Rs.8.22 per unit quoted by them, Saisudhir is receiving revenue of approximately Rs.2.5 crores per month from the sale of solar power to NVVN and this amount per annum is to the tune of approximately Rs.30 crores. The total revenue earned by Saisudhir from the solar power project over a period of 25 years, for which NVVN is obliged to purchase solar power at a fixed rate, would amount to approximately Rs.750 crores [Rs.30 crores per annum X 25 years = Rs.750 crores]. As such, the compensation for pre- estimated damages arising from delay in commissioning the project, being Rs.60.154 crores as calculated in terms of Clause 4.6 and agreed to by the parties, would amount to only about 8% of the total revenue earnings of Saisudhir from the Solar Power Project (being approx. Rs.750 crores).

Mr.Maninder Singh, learned ASG submits that from the above, it becomes clear that in such contracts as in the present case, where the actual loss/damage cannot be computed/assessed, the genuine pre-estimate of damages, as agreed between the parties, serves as a measure for reasonable compensation to be awarded in case of breach of the contract.

53. He submits that all arguments of judicial review etc. raised on behalf of Saisudhir before this Court are as if a Writ Petition is being considered by this Court for non-grant of an opportunity to participate in the bidding process under the Mission. In the present case, a contract has followed the Mission and the entire relationship between NVVN and Saisudhir is to be determined within the four corners of the agreement signed between them. NVVN had entered into this contract purely as a commercial contract for supply of electricity to be distributed to thousands and millions of consumers as utility service.

54. He refuted the argument on behalf of Saisudhir that the objective of the Solar Mission is not for immediate supply of electricity is totally misconceived. The obligations of the contractor are governed by the contract where the stipulation in Clause 4.6 has been accepted and where even one day's delay invites imposition of liquidated damages. Similarly, the guidelines which were sought to be relied upon have no overriding effect on the contract executed between the parties. The relationship between the parties is purely governed by the contract. Thus, the Arbitral Award dated 21st July, 2015 deserves to be set aside by this Court, being contrary to the terms of the contract and also the statutory provisions of the Contract Act as well as the judgments of the Supreme Court and the High Courts.

55. Let me now deal with the legal issues raised by both the parties in view of facts and circumstances in the present matter. Firstly, I would like to refer the provision of relevant Clause 4.6 of the pre- estimate liquidated damages of the PPA which is reproduced herein below:-

> "....4.6 Liquidated Damages for delay in commencement of supply of power to NVVN
> 4.6.1 If the SPD is unable to commence supply of power to NVVN by the Scheduled Commissioning Date other than for the reasons specified in Article 4.5.1, the SPD shall pay to NVVN, Liquidated Damages for the delay in such commencement of supply of power and making the Contracted Capacity available for dispatch by the Scheduled Commissioning Dates as per the following:

a. Delay upto one (1) month - NVVN will encash 20% of total Performance Bank Guarantee proportionate to the Capacity not commissioned.

b. Delay of more than one (1) month and upto two months - NVVN will encash 40% of the total Performance Bank Guarantee proportionate to the Capacity not commissioned.

c. Delay of more than two and upto three months -

NVVN will encash the remaining Performance Bank Guarantee proportionate to the Capacity not commissioned.

4.6.2 In case the commissioning of Power Project is delayed beyond three (3) months, the SPD shall pay to NVVN, the Liquidated Damages at rate of Rs.1,00,000/- per MW per day of delay for the delay in such remaining Capacity which is not commissioned. The amount of liquidated damages would be recovered from the SPD from the payments due on account of sale of solar power to NVVN....."

56. In terms of Sub-clauses a, b & c of Article 4.6.1 of PPA depending on the actual delay in the commissioning of the project, the NVVN's case before the Arbitral Tribunal as well as before this Court is that NVVN is entitled to levy liquidated damages amounting to 20%, 40% or remaining 40% of the total Performance Bank Guarantee proportionate to the delay, by encashing the said Bank Guarantees. The said Article 4.6 is an integral part of the Power Purchase Agreement which is not disputed by any party.

57. As far as the delay in commencement of supply of powers is concerned, it is not denied by the Saisudhir that there is a breach on its part. It is also not disputed that the time was the essence of the contract. As per Clause 4.1.1 (c) of the Contract Agreement, the Saisudhir was obliged at its own cost and risk to commence the supply of power as per schedule date, i.e. 26th February, 2013 which is not supplied as on date and the delay has happened. Counsel for the Saisudhir does not dispute the figure of calculation of liquidated damages imposed by NVVN.

Saisudhir also does not dispute the factual position that the delay caused in commissioning the solar power in the present case is not attributable to Force Majeure, nor its case is attributed towards NVVN, rather it is admitted that the delay has occurred on the side of Saisudhir who had tried to justify before the Arbitral Tribunal, nor the said clause of force majeure was invoked by the Saisudhir.

58. It is apparent from the above that Clause 4.6 of the PPA provides for the pre-estimate of damages, as agreed between the parties, to be paid by Saisudhir to NVVN in case of any delay in supply of solar power as per the terms of the Contract. The provision of Clause 4.6, agreed to between the parties, provides for the formula/methodology for genuine pre-estimate of damages. The quantum of delay and the quantum of electricity are relevant factors in operating the provision

of Clause 4.6 of the Agreement.

59. The principles of law governing the provision for genuine pre- estimate of damages in contracts where it is difficult or impossible to compute the amount of actual loss caused by breach of contract in those type of cases where in a contract for supply of a public utility service, one would get the answer from the provisions of Sections 73 and 74 of the Indian Contract Act, 1872 as well as the various judicial pronouncements of the Supreme Court and the High Courts, who have, from time to time, interpreted the above said provisions after considering the respective clauses of liquidated damages as agreed between the parties.

60. The said relevant provisions have been reproduced herein below:

> Section 73 of the Contract Act provides as under:-
>
> "73. Compensation for loss or damage caused by breach of contract.-- 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.--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.--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...."

Section 74 of the Contract Act, which deals with liquidated damages for breach of contract, provides as under:-

> "74. Compensation for breach of contract where penalty stipulated for:- [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, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or 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 or, as the case may be, the penalty stipulated for.
>
> Explanation.-- A stipulation for increased interest from the date of default may be a stipulation by way of penalty.] Exception -- When any person enters into any

bail-bond, recognizance or other instrument of the same nature or, under the provisions of any law, or under the orders of the [Central Government] or of any [State Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.-- A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested....."

61. There is no force in the argument of Mr.Rao that the NVVN has pleaded anywhere in the pleading that NVVN has suffered any damages or any amount is invested, rather as per the pleadings in the Statement of Defence filed on behalf of NVVN before the Arbitral Tribunal, the argument of the learned ASG is correct. The relevant averments made therein are reproduced herein below:-

".....The amount of liquidated damages is a genuine pre-estimate of the actual loss suffered by the Respondent due to the delay by the Claimant in supply of solar power. Not only had the Respondent made an investment in this project by agreeing to purchase the solar power from the Claimant at a rate offered by them in RFP for 25 years, irrespective of any fluctuation in the rate over the years, but had also been dependent on the Claimant's promise to fulfill his obligations under the contract on time so that the Respondent could in turn fulfill his responsibilities as the nodal government agency for supply of solar power to the distributors. Therefore, since the amount of pre estimated damages to be paid by the Claimant on default had been voluntarily agreed to by both the parties at the time of signing of the PPA, the Claimant shall now be liable to pay the same....."

".....It is denied that the Respondent has not invested any money towards the project as alleged. It is submitted that the investment of the Respondent is in its commitment to the Claimant to purchase power from the Claimant's Project at a agreed higher rate tariff for full term of 25 years irrespective of competition/lower price expected in Solar Power in future years. The delay in commissioning of project, therefore, delays the purchase and sale of solar power, causing loss of committed energy to Discoms....."

".....In fact the discounted tariff which has been offered by the Claimant is still much higher than the tariff fixed by CERC for (non-solar) Thermal Power Plants and the Claimant to take advantage of this higher tariff for a period of 25 years, of its own volition and will made its bid for the project and gave the discount....."

".....That failure of the Claimant in performing his obligations under the PPA would not only result in injury for failure to perform in implementation of the JNNSM but would also result in injury to Discoms for failure to fulfilment of

Renewable Purchase Obligation (RPO) in terms of Article 6.8.3 of the PSA signed by Respondent with them. The Respondents has thus suffered tangible and intangible losses as a Nodal Agency for non-performance of Claimant....."

".....It is however denied that the Respondent is not entitled to any damages as alleged. It is denied that the Respondent has not suffered any loss as alleged....."

".....That the PPA was signed only under the condition that the Claimant Company should start the supply of power on or before the Scheduled Commissioning Date so that the Respondent Company could further sell the solar power bundled with thermal power to distribution Companies for distribution to the general public for domestic and commercial use. It is submitted that timely supply of solar power by the Claimant was an essential part of the entire cycle of sale and onward distribution of electricity by the Respondent company and because of the delay by the Claimant, the Respondent has not only suffered a huge loss of profit but has also fallen back on its own target of supplying solar power to the electricity distributors due to no fault of their own. Moreover, the Respondent Company has agreed under the PPA to buy solar power from the Claimant at the rate proposed by the Claimant for 25 years irrespective of any fluctuation in the actual rate over the years. Not only does this reflect the trust of the Respondent in the Claimant company's ability to honour the contract but also shows the enormous investment made by the Respondent by way of commitment and reputation in the entire Scheme. Consequently, the Liquidated Damages fixed under the clause 4.6 of the PPA are completely justified in light of the losses suffered by the Respondent....."

".....In the present case, the amount stipulated as liquidated damages is a genuine pre estimate of the damages suffered by the Respondent as elaborated earlier. Under no circumstances can it be said that clause 4.6 is meant as a threat to the Claimant or that the amount is so extravagant or unconscionable as to completely exceed the actual quantum of damages. In fact, clause 4.6 of the PPA envisages encashment of only 20% of the total Performance Bank Guarantee proportionate to the capacity not commissioned for a delay of upto one month, 40% encashment for delay of one month to two months and the remaining value of the guarantee only after a delay of more than two months upto three months. This clearly shows that the amount of liquidated damages is only to mitigate the damages suffered by the Respondent as a consequence of delay and is hence distributed over a period of time to be levied only when actual damages are caused and also to give an opportunity to the Claimant to commence supply as early as possible to avoid paying a higher amount of liquidated damages....."

".....It is submitted that as already elucidated in the previous paras, the Respondent has suffered huge losses because of the delay by the Claimant in commissioning the solar power project. Further, it is denied that the liquidated damages provided under clause 4.6 is not a genuine pre estimate of loss suffered by

the Respondent....."

".....Not only had the Claimant known from the very beginning i.e. since before the signing of the PPA, of its financial liability in case of delay in commissioning the project, the amount to be paid as damages was also known and is completely reasonable considering the extent of the loss incurred by the Respondent company....."

62. The second argument of Mr.Rao has also no force that the NVVN has not pleaded its case of public utility and no benefit can be derived by the NVVN, as in para-19 of the Statement of Defence filed before the Arbitral Tribunal, it was specifically pleaded as under:-

".....That the PPA was signed only under the condition that the Claimant Company should start the supply of power on or before the Scheduled Commissioning Date so that the Respondent Company could further sell the solar power bundled with thermal power to distribution Companies for distribution to the general public for domestic and commercial use. It is submitted that timely supply of solar power by the Claimant was an essential part of the entire cycle of sale and onward distribution of electricity by the Respondent company, and because of the delay by the Claimant, the Respondent has not only suffered a huge loss of profit but has also fallen back on its own target of supplying solar power to the electricity distributors due to no fault of their own. Moreover, the Respondent Company has agreed under the PPA to buy solar power from the Claimant at the rate proposed by the Claimant for 25 years, irrespective of any fluctuation in the actual rate over the years. Not only does this reflect the trust of the Respondent in the Claimant company's ability to honour the contract but also shows the enormous investment made by the Respondent by way of commitment and reputation in the entire Scheme. Consequently, the Liquidated Damages fixed under the clause 4.6 of the PPA are completely justified in light of the losses suffered by the Respondent."

63. Third submission of Mr.Rao is without any substance that NVVN has not specifically pleaded that it has suffered any damages, as well as the issue of public utility. It is evident from the pleadings and the written submissions filed on behalf of NVVN before the Arbitral Tribunal, inter alia, alleged as under:-

"3.21 It must also be kept in mind that though it is a purely commercial transaction but it relates to a service of prime public importance and deprivation of such public utility though not capable of being strictly evaluated can be compensated for by the Arbitrators.

3.22 Please see Hon'ble Supreme Court Judgment in 2003 (5) SCC 705 ONGC Vs. Saw Pipes Ltd. wherein it was specifically laid down that the in construction of public utilities like roads, bridges etc. (which would include solar power plants) it would be difficult to prove how much loss is suffered by the society/state on account of delay in

performance of the contract. It was further laid down that in such cases if the parties have a pre-estimated such loss, it would be unjustified to come at a conclusion that the party in breach need not pay compensation as the party aggrieved could not prove the actual loss.

3.23 In the present case also the Claimant has admittedly delayed in commissioning its Solar Power Project by nearly two months in regard to 10MW and by about 4 months in regard to the remaining 10 MWs. The scheduled commissioning date as per the PPA was 26.02.2013.

However, the Claimant commissioned 10MW on 26.04.2013 and the remaining 10 MW on 24.07.2013.

3.24 It is noteworthy that in case of Solar PV power projects, in case of failure of the claimant to commission the project or in case of delay in such commissioning, it is not possible to assess the loss because the Solar Power to be generated by the Claimant's project cannot be replaced by Solar Power generated by any other project as all such Solar Projects are tied down with agreements to supply various discoms after bundling of power. Such power also cannot be replaced by thermal power as that would be contrary to the purposes of the JNNNSM and would not be usable to fulfill the requirement of various discoms to use a proportion of renewable energy in their business.

3.25 It is therefore clear that in the present case though a loss occurs due to delay in commissioning of the Claimant's project, it cannot be evaluated as stated above and therefore the pre-estimate of such loss stated as liquidated damages and which is directly relatable to the bid submitted by the Claimant has to be treated as a genuine pre-estimate of loss and would not fall within the definition of penalty as contained in Section 74 of the contract act. Thus, the Claimant is bound to pay liquidated damages to the Respondent in terms of Article 4.6 of the PPA (Page 82 of Volume 1).

.....

3.30 .....the investment of the NVVN in this project is the promise to buy power from the Claimant at a fix rate for 25 years.

.....

6.2 It must be kept in mind that the LD are being levied not due to delay in delivery of power or delay in sale of power but it is due to delay in commissioning of the project. It is noteworthy that as argued hereinabove, in the instant case the fact that there is a loss is evident from the delay in commissioning of the Plant and there being non-availability of contracted capacity of 20MW power from the project for the delay period. In absence of a process to evaluate the exact loss in case of a solar PV Project being a public utility, a graded figure agreed to between the parties as a genuine pre-estimate of damages would be a legally binding provision on the Claimant....."

64. Admittedly, the electricity is utility service; the facility is to be enjoyed by the public immediately once it is supplied. It is practically impossible to assess loss as the said utility is enjoyed by

thousands of users/consumers who all the times kept on waiting for utility service.

65. From the nature of the clause, the liquidated damages provided under Clause 4.6 are a genuine pre-estimate of the damages, agreed to by the parties, and have nothing to do with the actual proof of loss. The definition of the penalty clause as given by Black's Law Dictionary, Eighth Edition, on page 1169 is "a contractual provision that assesses against a defaulting party an excessive monetary charge unrelated to the actual harm."

66. One of the contentions on behalf of Saisudhir in its arguments is that NVVN has not proved any loss from the delay caused by Saisudhir in commissioning the supply of solar power. From a reading of the provision of Section 74 of the Contract Act, it becomes abundantly clear that when a genuine pre-estimate of damages for breach of contract is provided in the contract, as agreed by the parties, the party complaining of breach would be required to receive such reasonable compensation whether or not actual damage or loss is proved to have been caused thereby.

67. As far as back in 1969, while dealing with the provisions of Section 73 and 74 of the Contract Act, three Judges Bench of the Supreme Court made the following pertinent observations in the case of Maula Bux (supra) :-

> "6. .....It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree, and the court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression 'whether or not actual damage or loss is proved to have been caused thereby' is intended to cover different classes of contracts which come before the courts. In case of breach of some contracts it may be impossible for the court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him....."

68. It is clear that in such contracts where it is difficult/impossible to assess the actual loss, the genuine pre-estimate of damages as agreed between the parties may be taken into consideration as the measure of reasonable compensation. In the present case, the agreement in question is a contract for supply of electricity which is further to be bundled with power from other sources and supplied to various distribution utilities for further supply to individual consumers. The distribution of power which were to be generated by the Saisudhir was supposed to be utilized by the consumers.

69. In the case of Saw Pipes (supra), the Supreme Court was seized with an Arbitral Award arising out of a dispute regarding a contract for supply of steel casing pipes. In that case, the respondent had delayed the supply of casing pipes to the petitioner beyond the agreed date of delivery. Clause 11

of the Contract in that case provided for the recovery of liquidated damages from the contractor in case of delay in supply of the casing pipes. Despite holding that the delay in supply could not be attributed to a Force Majeure event [as in the present case], the Arbitral Tribunal passed its award in the following terms:-

> "34. .....Thereafter, the Arbitral Tribunal considered various decisions of this Court regarding recovery of liquidated damages and arrived at the conclusion that it was for the appellant to establish that it had suffered any loss because of the breach committed by the respondent in not supplying the goods within the prescribed time-limit. The Arbitral Tribunal thereafter appreciated the evidence and arrived at the conclusion that in view of the statement volunteered by Mr. Arumoy Das, it was clear that shortage of casing pipes was only one of the other reasons which led to the change in the deployment plan and that it has failed to establish its case that it has suffered any loss in terms of money cecause of delay in supply of goods under the contract. Hence, the Arbitral Tribunal held that the appellant has wrongfully withheld the agreed amount of US $ 3,04,970.20 and Rs 15,75,559 on account of customs duty, sales tax, freight charges deducted by way of liquidated damages....."

In the case of Saw Pipes (supra), it has been recorded by the Supreme Court that the Arbitral Tribunal had come to the conclusion that ONGC had failed to establish suffering of any loss. It was also observed that Saw Pipes (supra) was also not a case of force majeure. The Tribunal, on such a finding that ONGC had not suffered any loss, had held that the money retained by the ONGC was wrongful. The said finding of the Arbitral Tribunal had been upheld by both the Single Judge as well as the Division Bench of the Bombay High Court.

The Supreme Court had reversed the finding of the Arbitral Tribunal and held that liquidated damages would be payable as genuine estimate of the losses and made the following observations:-

> "64. It is apparent from the aforesaid reasoning recorded by the Arbitral Tribunal that it failed to consider Sections 73 and 74 of the Indian Contract Act and the ratio laid down in Fateh Chand case wherein it is specifically held that jurisdiction of the court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; and compensation has to be reasonable. 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. Take for illustration: if the parties have agreed to purchase cotton bales and the same were only to be kept as a stock-in-trade. Such bales are not delivered on the due date and thereafter the bales are delivered beyond the stipulated time, hence there is breach of the contract. The question which would arise for consideration is -- whether by such breach the party has suffered any loss. If the price of cotton bales fluctuated during that time, loss or gain could easily be proved. But if cotton bales are to be purchased for manufacturing yarn, consideration would be different.....

..... 66. In Maula Bux case the Court has specifically held that it is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree and the court is competent to award reasonable compensation in a case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. The Court has also specifically held that in case of breach of some contracts it may be impossible for the court to assess compensation arising from breach.

67. Take for illustration construction of a road or a bridge. If there is delay in completing the construction of road or bridge within the stipulated time, then it would be difficult to prove how much loss is suffered by the society/State. Similarly, in the present case, delay took place in deployment of rigs and on that basis actual production of gas from platform B-121 had to be changed..... In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that the party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provisions of Sections 73 and 74 of the Indian Contract Act. There was nothing on record that compensation contemplated by the parties was in any way unreasonable. It has been specifically mentioned that it was an agreed genuine pre-estimate of damages duly agreed by the parties. It was also mentioned that the liquidated damages are not by way of penalty..... There was no reason for the Tribunal not to rely upon the clear and unambiguous terms of agreement stipulating pre-estimate damages because of delay in supply of goods.....

68. From the aforesaid discussions, it can be held that:

(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation....."

70. Yet in another decision in the case of BSNL v. Reliance Communications Ltd., (2011) 1 SCC 394, the Supreme Court was dealing with Clause 6.4.6 of the Interconnection Agreement between BSNL and Reliance Communication which provided for damages in case of wrongly routed calls. It was detected by BSNL that Reliance was indulging in "call masking" so as to tamper with CLI (Calling Line Identification) of International Long Distance (ILD) calls and camouflaging them as local calls, so as to avoid the higher charges prescribed for ILD calls. In the said clause 6.4.6, it had been provided that even if some unauthorized calls were detected, BSNL would be liable to recover the highest applicable call charges for all the calls recorded on the trunk group of Reliance for the preceding two months. Relying on the said clause, BSNL raised bills on Reliance levying "penalty" for illegal routing of calls.

On behalf of Reliance, it had been contended that not only is Clause 6.4.6 itself penal in nature, further that BSNL was under an obligation to draw distinction between unauthorized calls and calls without/modified CLI. In other words, it had been contended on behalf of Reliance that the Clause 6.4.6 providing for damages was penal in nature, and that BSNL had not proved the amount of actual loss suffered by it. It was, inter alia, contended by the counsel for Reliance that:-

"20. The learned counsel submitted that under the Contract Act no party is entitled to recover punitive damages for any breach of contract. That, in terms of Section 73 of the Act, the party which suffers by any breach of contract 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.

Such compensation is not to be given for any remote or indirect loss or damage.

21. According to the learned counsel, in terms of Section 73 of the Contract Act in order to receive compensation for loss or damage, the party claiming such compensation must prove the alleged loss or damage. However, Section 74 carves out an exception to the ordinary legal requirement of proving loss or damage. In terms of Section 74 when a contract is breached, if a sum is named in the contract as the amount to be paid in case of such breach or if the contract contains no other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual loss or damage 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 or, as the case may be, the penalty stipulated for. It thus follows, according to the learned counsel, from Section 74 of the Contract Act that regardless of whether the contract specifies a sum to be paid in the event of breach or whether it contains any other penal provision, the party complaining of the breach is only entitled to receive reasonable compensation.

22. In the alternative, the learned counsel submitted that inasmuch as Clause 6.4.6 provides for payment of an amount beyond reasonable compensation for loss or damage, it is to that extent unenforceable in law. In this connection the learned Senior Counsel has placed reliance on the judgments, Fateh Chand v. Balkishan Dass; BSNL v. Motorola India (P) Ltd.; Maula Bux v. Union of India and Union of India v. Raman Iron Foundry. According to the learned counsel Clause 6.4.6 is wholly one-sided penal provision inasmuch as it entitles the appellant to receive monies from Reliance on account of breach and not vice versa....."

On the other hand, the contention on behalf of BSNL was in the following terms:-

"10. .....In this regard, the learned Senior Counsel submitted that the agreement pertains to telecommunication services which is a capital intensive venture and which requires seamless and uninterrupted service. A disruption in such services would result not only in financial loss to BSNL and Reliance but also to a large number of subscribers of both the companies. Moreover, the learned Senior Counsel submitted that it is technically impossible for BSNL to trace or block a call with a tampered (masked) CLI. That, on a given day a single PoI handles millions of minutes of calls which are handed over to BSNL and in such a situation it is not commercially feasible to decipher which call is genuine and which call is without CLI/tampered CLI. Thus, Clause 6.4.6 should be interpreted against the background knowledge referred to above and, if so read, it becomes clear that the said clause is inserted in the agreement for commercial prudence as a thumb rule and should as such be interpreted in that manner.....

x x x x x

> 12. Lastly, according to the learned counsel, where a contract prescribes payment of a sum on default, even if the sum payable may be larger than the actual loss, when the contract is between parties with equal bargaining power, and as long as the sum payable is not extravagant, it should not be characterised as penalty. Similarly, where an agreed sum is payable upon a default, if the loss accruing to the claimant from the default in question cannot be accurately or even reasonably be ascertained, then such sum cannot be classified as penalty and once a stipulation is held not to be a penalty, there is no need for actual proof of loss....."

The Supreme Court while accepting the contentions of BSNL, and rejecting the submissions made on behalf of Reliance, it held as under:-

> "46. .....It is not possible to trace each such unauthorised call, particularly its nature, as to from which place it originated and if it was possible the cost of tracing such call(s) may be much more than actual damage, if ascertainable, and therefore, a "rough and ready measure"

is provided in Clause 6.4.6 which measure is a reasonable pre-estimate of damage.

(iv) Whether Clause 6.4.6 represents penalty or pre- estimate of reasonable compensation for the loss?

47. According to Chitty on Contracts "whether a provision is to be treated as a penalty is a matter of construction to be resolved by asking whether at the time the contract was entered into the predominant contractual function of the provision was to deter a party from breaking the contract or to compensate the innocent party for breach. The question to be always asked is whether the alleged penalty clause can pass muster as a genuine pre- estimate of loss." (See Paras 26-126 of Chitty on Contracts, 30th Edn.) The fact that damage is difficult to assess with precision strengthens the presumption that a sum agreed between the parties represents a genuine attempt to estimate it and to overcome the difficulties of proof at the trial.

48. According to the Law of Contract by G.H. Treitel (10th Edn.), a clause is penal if it provides for "a payment stipulated as in terrorem of the offending party to force him to perform the contract. If, on the other hand, the clause is an attempt to estimate in advance the loss which will result from the breach, it is a liquidated damages clause. The question whether a clause is penal or pre-estimate of damages depends on its construction and on the surrounding circumstances at the time of entering into the contract."

49. Lastly, the fact that a sum of money is payable on breach of contract is described by the contract as "penalty" or "liquidated damages" is relevant but not decisive as to categorisation.....

x x x x x

52. ..... Thus, in our view, Clauses 6.4.6(a) and 6.4.6(b) provide for pre-estimate of damages. It is so also for one more reason. The clause, as stated above, restricts the higher IUC rate made applicable for calls only for last two preceding months and not for last three years or the longer period. These time lines are an indicia showing that Clause 6.4.6 is not penal but a pre-estimate of reasonable compensation for the loss foreseen at the time of entering into the agreement.

53. Lastly, it may be noted that liquidated damages serve the useful purpose of avoiding litigation and promoting commercial certainty and, therefore, the court should not be astute to categorise as penalties the clauses described as liquidated damages. This principle is relevant to regulatory regimes. It is important to bear in mind that while categorising damages as "penal" or "liquidated damages", one must keep in mind the concept of pricing of these contracts and the level playing field provided to the operators because it is on costing and pricing that the loss to BSNL is measured and, therefore, all calls during the relevant period have to be seen. (See Communications Law in India by Vikram Raghavan at p. 639.) Since Clause 6.4.6 represents pre-estimate of reasonable compensation, Section 74 of the Contract Act is not violated. Thus, it is not necessary to discuss various judgments of this Court under Section 74 of the Contract Act....."

As such, in BSNL v. Reliance, the Supreme Court held that:-

> "a. Where actual loss / damage is unascertainable, the clause for liquidated damages would be a "rough and ready" measure which would serve as a reasonable pre-estimate of damages.
>
> b. The fact that damage is difficult to assess with precision strengthens the presumption that a sum agreed between the parties represents a genuine attempt to estimate it and to overcome the difficulties of proof at the trial."

71. It is contended by Mr.Maninder Singh, learned ASG that the judgment in the case of Saw Pipes (supra), and the argument of public utility service was placed before the Tribunal in the present case. It is only the judgment in the case of M/s Construction & Design Service v. Delhi Development Authority, reported in (2015) 14 SCC 263, which had become available after the hearing before the Arbitral Tribunal was over, that was placed before the Arbitral Tribunal and, admittedly, opportunity was given to the counsel on behalf of Saisudhir to make its submissions.

72. Mr.Maninder Singh has also referred another decision on utility services rendered by the Division Bench of this Court in the case of Saini Construction Company v. Delhi Jal Board, decided on 29th October, 2015 in RFA(OS) No. 48/2015. In the said case, which dealt with a contract for laying water pipelines, "penalty" levied on the contractor for causing delay in the performance of the contract, the Single Judge of this Court, while dismissing the suit filed on behalf of the petitioner, inter alia, held as under:-

> "(i). .....The defendant was well within its right to levy penalty (10% of contract value) in terms of clause 2 of contract entered into between the parties in view of dictum of law laid down by Supreme Court in the decision reported as (2003) 5 SCC

705 ONGC Vs. Saw Pipes Ltd. that where contract itself has pre-estimated liquidated damages which would be incurred by the department in the case of breach, there is no necessity on the part of department to prove actual losses suffered by it....."

While dismissing the appeal against the judgment of the Single Judge, the Division Bench of this Court held as under:-

"46. The upshot of the above discussion is that the delay in start/completion of execution of work is entirely attributable to the plaintiff.

47. Concededly, clauses 2 and 3 of the contract entered into between the parties prescribes levy of penalty @ 10% of contract value as also forfeiture of security deposit and invocation of performance guarantee upon the contractor (plaintiff) in case of breach of contract committed by the contractor.

48. Law on the subject has been authoritatively laid down in paragraph 68 of decision of Supreme Court reported as 2003 (5) SCC 705 ONGC vs. Saw Pipes Ltd. which reads as under.....

49. In a nutshell, Supreme Court holds in Saw Pipes's case (supra) that a liquidated damage would be a damage which on the face of it ensues if there is a breach of a contract, but its estimation is not possible and thus the parties would be perfectly justified in quantifying the same as a reasonable pre-estimate of the loss. Such am amount would be recoverable as a loss; without proof of the quantum of the loss; because the quantum has been agreed to by the parties; and the loss is inherent.

50. Suffice it to state that observations made by Supreme Court in para 68 of Saw Pipes's case (supra) are squarely applicable in the present case as per which delayed constructions such as completing construction of road or bridges within stipulated time would be difficult to be linked with actual losses suffered by the State and in such cases the pre-estimated damages envisaged in the contract have to be paid.

51. Now, laying of water pipes is not something from which revenue would be generated by the State. It is a public utility service for providing water to its citizens. That apart, in a delayed project, interest on blocked capital would obviously be a measure of damages.

52. In view thereof, no fault can be found with the act of defendant of levying penalty in terms of clauses 2 and 3 of contract entered into between the parties upon the plaintiff for having delayed execution of work in question. 53. In view of above discussion, the present appeal is dismissed with cost against the appellant and in favour of the respondent....."

73. It is confirmed by Mr.Maninder Singh that the view of the Division Bench of this Court has been upheld by the Supreme Court vide order dated 29th February, 2016, wherein the Supreme Court had dismissed the SLP filed against the abovementioned judgment of this Court, being SLP(C) No.5324/2016.

74. He has also referred the decision of a Single Bench of this Court who has taken the same view in the case of M/s Forbes Gokak Ltd. v. Central Warehousing Corporation, decided on 1st February, 2010 in OMP No.306/2000 wherein the argument for requirement of actual proof of loss was rejected by the Single Judge of this Court and it was held as under:-

> "19. Mr. Alag thereafter referred to para 26 of the Award and contended that the respondent corporation had not proved any loss and he accordingly argued that thus liquidated damages could not have been awarded. Mr. Alag also in support of the proposition that loss should actually have been proved has relied upon the judgments of the Supreme Court in the cases of Fateh Chand Vs. Balkishan Das AIR 1963 SC 1405 and Maula Bux Vs. Union of India AIR 1969 2 SSC 554.
>
> 20. In my opinion, the contention of Mr. Alag that since the admitted fact is that loss has not been proved, therefore, no amounts could have been awarded towards liquidated damages is not a correct argument. The Supreme Court in the judgment of ONGC Vs. Saw Pipes (2003) 5 SCC 705 has considered all earlier judgments as regards Section 74 of the Contract Act, including the judgment in Maula Bux case. The Supreme Court in Saw Pipe s case has said that there are two types of contracts when we talk of imposition of liquidated damages under Section 74 of the Contract Act. In the first type of contracts, where loss is caused, the same can be proved, then, in such cases, the person who suffers loss must necessarily prove the loss in spite of the fact that there is a provision for liquidated damages and the figure of liquidated damages is only the upper limit of damages to be awarded. The second type of contracts are those contracts where losses cannot be easily proved. These contracts are such as for building of a toll road or construction of an oil rig. These examples have been specifically given along with the law with respect to Sections 73 and 74 of the Contract Act in paras 46, 64, 66 and 67 of the Saw Pipes case.....
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> 21. I have recently had the occasion to consider the judgment in Saw Pipe's case in the OMPs 498/2007 reported as Belco Enterprises Vs. DTC decided on 21st January, 2010 wherein by referring to the aforesaid paras in Saw Pipes case, I have held that where there is delay in supply of the buses after fabrication of the bus bodies by the contractor to the Delhi Transport Corporation, then, once there is a clause of liquidated damages, actual damages need not to be proved. In that judgment I have given the rationale that ridership in a bus is not something which can be easily proved and therefore parties were fully entitled to agree on a genuine pre-estimate of damages because either the buses could have run full or could have run empty or could have run partly full or partly empty. It is to overcome these types of situations where losses cannot be easily proved that the concept of liquidated damages has been

brought in by the legislature in the form of Section 74 of the Contract Act and accordingly explained by the Supreme Court in the Saw Pipes case.

In the present case, on account of the delays and defaults in completion of the transportation in the prescribed time by the petitioner it cannot be disputed that there would have been loss of business, reputation, good will etc. to the respondent and which losses are such which cannot be easily proved. Once the quality of services of the respondent had fallen on account of the tardy action of the petitioner it was bound to cause loss of business to the respondent and which loss cannot easily be proved inasmuch as how many customers the respondent lost on account of delays caused by petitioner and how many more customers respondent would have had if work had been done on time and the business profits consequently in each of the circumstance it would have generated or lost, cannot be easily proved. Consequently, it was fully open to the parties, in cases such as the present, to fix a clause with respect to liquidated damages as a genuine pre-estimate of damages and which they have so done.

In my opinion, therefore, the contention of Mr. Alag that losses have to be actually proved, is not a sound contention and in fact it has been rejected by the Supreme Court in the Saw Pipes case. I therefore, reject this contention as urged on behalf of the counsel for the petitioner....."

75. Lastly, Mr.Maninder Singh, learned ASG has heavily relied upon the recent decision of the Supreme Court wherein the same principles of law with respect to contracts where it is difficult/impossible to assess the actual loss were reiterated by the Supreme Court in its judgment in the case of M/s Construction & Design Service (supra).

76. From all the decisions referred by Mr.Maninder Singh, learned ASG, it is clear beyond any doubt that Section 74 of the Contract Act stipulates that in case of breach of contract, the party complaining the breach is entitled to receive reasonable damages whether or not actual loss is proved to have been caused by such breach.

In the present case, breach of contract is admitted by the Saisudhir. No doubt, loss is not proved. There are pleadings by way of defence on behalf of NVVN that the loss has been suffered due to non-supply of power to the consumers in time, which is public utility service. The NVVN was pressing for compensation named in Clause 4.6 of the Contract; it is genuine pre-estimated damages and it is difficult to assess being the supply of power a subject of public utility. Although, Saisudhir has tried to justify its position, by stating that the present case does not cover with the guidelines and principles laid down in Saw Pipes (supra), however, if any one examine the pleadings and relevant clauses of the contract, the situation is otherwise as canvassed by the Saisudhir.

77. As admittedly, there was breach on the part of Saisudhir on account of delay supply of power. The electricity is utility service. The facility was to be enjoyed by the consumers. There is a provision for damages under Clause 4.6 which are in the nature of fixed compensation and nothing to do with actual damages to be proved. There was pleading that it is difficult of assess the same being a case of public utility. It is a commercial contract. Both the parties have signed with open eyes. NVVN is a Government concern. It is a nodal agency for facilitating purchase and sale of Solar P.V. Power.

Thus, there is no force in the submissions of Mr.Rao that NVVN is nobody to receive the compensation as it was merely working for Mission and if compensation at all suffered, it was only Mission and not NVVN. It is a matter of fact that NVVN has signed the contract who is a responsible person in the dispute. Even, Saisudhir has raised the claims against NVVN and not against the mission. Thus, the arguments are without any valid force.

78. Under these circumstances, the facts of the present case and law applicable thereon are directly covered under the decisions of Saw Pipes (supra) and recent judgment of the Supreme Court in Construction and Design Services (supra) wherein the situation as in the present case is similar to a large extent. The other set of decisions referred by Mr.Rao are not applicable to the facts and situations available in the present case. In those cases, the issue of public utility services and the difficulty of non-assessing of compensation were not involved. Thus, those decisions are clearly distinguishable in the situation available in the present case.

79. The point which falls for consideration is whether in a contract involving public utility service in the absence of proof of any loss suffered by the party complaining the breach, the Court has to grant pre-estimated sum stipulated in the contract as damages in full or the Court has any other alternative left to grant reasonable compensation uptil the limit of stipulated damages as claimed in the contract.

80. Mr.Maninder Singh, learned ASG is of the opinion that the Court has to assume the amount stipulated as pre-estimated damages in the contract, as the amount contemplated by the parties at the time of contract as correct without any need for any formal sum, the Court has to proceed further in granting the said stipulated amount in full especially in a case of public utility services inasmuch as in such cases, the compensation of actual loss is not possible due to non financial nature of losses which are additionally required to be considered along with financial losses. Thus, the Court has no option but to assume the entire sum as correct and in such a case, the Court shall not go into the aspect of the damages irrespective of the fact whether the Court has the option to grant reasonable compensation as damages in alternative to the pre-estimated damages in full as per Section 74 of the Contract Act.

81. The contention of Mr.Maninder Singh has been examined. The point which the learned counsel wants this Court to consider has already been revisited by the Supreme Court by examining its own decision in the case of ONGC (Supra) in its another decision in the case of Construction and Design Services which is heavily relied upon by Mr.Maninder Singh, learned ASG wherein similar point fell for consideration and the Supreme Court speaking through Justice Adarsh Kumar Goel framed the said question in the following manner:

> "2. The question raised for our consideration is when and to what extent can the stipulated liquidated damages for breach of a contract be held to be in the nature of penalty in the absence of evidence of actual loss and to what extent the stipulation be taken to be the measure of compensation for the loss suffered even in the absence of specific evidence. The further question is whether burden of proving that the amount stipulated as damages for breach of contract was penalty is on the person committing

breach."

The said case was also relating to the contract involving public utility service which is for construction of sewerage pumping station which can be evinced from para 4 of the said judgment. The said contract also contained pre-estimated damages in the event of any delay in completion of said project. Para 3 of the said judgment has been reproduced herein below:-

> "3. The respondent, Delhi Development Authority, awarded a contract vide agreement dated 4-10-1995 to the appellant for constructing a sewerage pumping station at CGHS area at Kondli Gharoli at Delhi. Clause 2 in the agreement provided as follows:
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> "The contractor shall comply with the said time schedule. In the event of the contractor failing to comply with this condition, he shall be liable to pay as compensation an amount equal to one per cent or such smaller amount as the Superintending Engineer, Delhi Development Authority (whose decision shall be final) may decide on the said estimated cost of the whole work for everyday that the due quantity of work remains incomplete; provided always that the entire amount of compensation to be paid under the provisions of this clause shall not exceed ten per cent of the estimated cost of work as shown in the tender."

The Supreme Court in the referred case after quoting the findings rendered by the Courts below proceeded to examine the decision passed in the case of Saw Pipes (supra) and other related decisions like Fateh Chand (supra) and thereafter proceeded to observe in para 14 of the judgment as under:

> "14. There is no dispute that the appellant failed to execute the work of construction of sewerage pumping station within the stipulated or extended time. The said pumping station certainly was of public utility to maintain and preserve clean environment, absence of which could result in environmental degradation by stagnation of water in low lying areas. Delay also resulted in loss of interest on blocked capital as rightly observed in para 7 of the impugned judgment [DDA v.Construction & Design Services, U.P. Jal Nigam, RFA (OS) No. 35 of 2010, decided on 10-2-2012 (Del)] of the High Court. In these circumstances, loss could be assumed, even without proof and burden was on the appellant who committed breach to show that no loss was caused by delay or that the amount stipulated as damages for breach of contract was in the nature of penalty. Even if technically the time was not of essence, it could not be presumed that delay was of no consequence. Thus, even if there is no specific evidence of loss suffered by the respondent-plaintiff, the observations in the order of the Division Bench that the project being a public utility project, the delay itself can be taken to have resulted in loss in the form of environmental degradation and loss of interest on the capital are not without any basis."

82. From reading of para 14, it is clear that the Supreme Court has observed that delay in execution of the contract involving public utility service where there is delay in completion of project, the loss could be assumed even without formal proof and the said loss would also include non financial loss like loss on environment degradation, loss on interest on capital, etc. However, by saying so, Supreme Court has not divested the powers of the court to examine the reasonability of the grant of damages which may in terms of Section 74 of the Act mean that damages in part as a matter of compensation or uptil the limit of pre-estimated sum as mentioned in the contract depending upon the touchstone of principle of compensation which is governing the rule of grant of damages.

83. Of course, it is left to the discretion of the Court as to what can constitute compensation to the party in a given case. This can be seen by going through the decision of Construction (supra) in para 15 onwards of the said case wherein after observing that the loss could be assumed in the cases involving delay in execution of public utility contract, Supreme Court proceeded to venture into the discussion of grant of compensation to the party complaining the breach as against grant of full amount on presumptuous basis. Para 15 of the said judgment has been reproduced herein below:

> "15. Once it is held that even in the absence of specific evidence, the respondent could be held to have suffered loss on account of breach of contract, and it is entitled to compensation to the extent of loss suffered, it is for the appellant to show that stipulated damages are by way of penalty. In a given case, when the highest limit is stipulated instead of a fixed sum, in the absence of evidence of loss, part of it can be held to be reasonable compensation and the remaining by way of penalty. The party complaining of breach can certainly be allowed reasonable compensation out of the said amount if not the entire amount. If the entire amount stipulated is genuine pre-estimate of loss, the actual loss need not be proved. Burden to prove that no loss was likely to be suffered is on the party committing breach, as already observed."

84. Thereafter, the Supreme Court in that case proceeded to exercise its discretion of treating half of the sum as claimed in the contract as reasonable compensation. This can be evinced by reading para 17 of the judgment which has been reproduced herein below:

> "17. Applying the above principle to the present case, it could certainly be presumed that delay in executing the work resulted in loss for which the respondent was entitled to reasonable compensation. Evidence of precise amount of loss may not be possible but in the absence of any evidence by the party committing breach that no loss was suffered by the party complaining of breach, the court has to proceed on guesswork as to the quantum of compensation to be allowed in the given circumstances. Since the respondent also could have led evidence to show the extent of higher amount paid for the work got done or produce any other specific material but it did not do so, we are of the view that it will be fair to award half of the amount claimed as reasonable compensation."

85. Upon fair reading of the relevant paragraphs of the judgment passed by the Supreme Court in the case of Construction and Design Services (supra), it is clear that the Supreme Court has retained

the power of the court to examine as to what extent the party complaining the breach is entitled to compensation in the event of breach in the contract involving public utility service containing pre-estimated damages and the same is rightly so in view of the provision of Section 74 of the Act.

86. In fact, the Supreme Court itself treated half of the sum contemplated in the contract as reasonable damages. Therefore, the submission of Mr.Maninder Singh, learned ASG for grant of full compensation as provided in clause 4.6 has already been answered by Supreme Court itself in its own judgment referred by him above which has considered all the decisions referred by Mr.Maninder Singh

87. Coming back to the present case, since the delay in execution is at the stage of prior to commencement of the work in the contract where the delay has been explained by Saisudhir on account of various reasons and there is no evidence of any suffering of loss nor it was proved. On the contrary, it is the case of Saisudhir that the amount stipulated is terrorem in nature and his client in a way is forcing to perform the contract and at the best, it should be the amount of penalty.

88. It was also canvassed that the provision of Clause 4.6 of the Contract was kept only for the purpose to defer his client from breaking the contract in-between period, although the main purpose of the Mission was to ensure serious participation for project, to facilitate speedier implementation of the new project and to enhance the confidence in the project development and to provide manufacturing in solar sector in India. It was submitted that though Saisudhir had invested project cost of Rs.193 crores and it could not complete the project in time due to reasons beyond its control.

89. Considering the peculiar fact and circumstances in the present case also which are somehow similar to the case of Construction and Design Services (supra), I am of the view to award half of the amount claimed by the NVVN as reasonable compensation as against provided compensation by modifying the Award published by minority Arbitrator and by setting aside the Award published by majority Arbitrators as the findings arrived in the majority award are wholly contrary to law, facts and the Clause 4.6 of the Contract. The said findings are perverse, illogical and shake the conscious of the court when the same are applied to the facts and circumstances of the present case. Now, the question is how to recover the payment of 50% LD by NVVN from Saisudhir. NVVN did not suffer any loss so as to claim damages. The reasons for awarding half of the amount in this matter are that NVVN did not invest any amount in the project nor the NVVN has proved any actual damage, although there was no requirement in law. The objective of the Mission was to promote Solar Power, though NVVN impliedly agreed that supply is not the objective of the Mission. One of the reasons for providing steep LD's was that it did not want any developers to abandon the contract. The delay in commissioning of the project in itself has not caused any loss. Saisudhir has incurred Rs.193 crores on the project. The loan was taken from the bank. The project is to last for 25 years. The delay is only for few months. It is a clear case of hardship otherwise it would put a death of knell of the project.

90. As far as the mode of payment is concerned, balance has to be strike in view of the situation in the matter. NVVN has claimed damages of Rs.54,12,32,000/-. Now, it is to be considered as how half of the amount is to be received by NVVN. It is difficult because of the reason that it is a solar

project. It is a dream project of the Government. This Court does not wish that the project should be killed. In view of such LD imposed by NVVN, the condition of the Saisudhir is in bad shape, as I have been informed that the bank has initiated the proceedings against the Saisudhir.

Thus, in view of the peculiar facts and circumstances, I am of the view that half of the amount of damages, i.e. Rs.27,06,16,000/- shall be received by the NVVN by adjusting Rs.25 lac every month from the revenue of approximately Rs.2.25 crores per month which is being received from NVVN.

The said amount of Rs.25 lac monthly adjustment of amount would be deducted from 1st October, 2016 till the half of the amount is paid by the NVVN. No objection by way of affidavit be filed within two weeks from today. Once the affidavit is filed, the bank guarantees would be released and Saisudhir, however, would not be entitled to claim maintenance charges and costs, as claimed.

91. Both the petitions are accordingly disposed of. Pending applications also stand disposed of. Parties to bear their own costs.

92. This Court wishes to put on record its appreciation for the co-operation and fairness in making their submissions to the point by Mr.Maninder Singh, learned ASG appearing on behalf of NVVN, as usual, and also Mr.C.Mohan Rao, Advocate appearing on behalf of Saisudhir who has argued the matter so well and, thus, this Court feels that Mr.Rao possesses all the qualities of a Senior Advocate.

(MANMOHAN SINGH) JUDGE SEPTEMBER 08, 2016