

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.1653 of 2017

=====

1. Essar Power (Jharkhand) Limited, a company incorporated under the Companies Act, 1956, having its registered office at Prakash Deep Building, 10th Floor, 7 Tolstoy Marg, New Delhi- 110001, through its General Manager, Sri Lav Kumar, son of Late Beni Madhow Singh, resident of 403/D, Ganesh Apartment, Ashok Vihar, Ranchi- 834002.

.... Petitioner/s

Versus

1. Bihar State Power Holding Company Limited, through its General Manager (Commerce), having its registered address at 1st Floor, Vidyut Bhawan, Bailey Road, Patna- 800001, Bihar.

2. The Union of India, Ministry of Coal, having its address at Shastri Bhawan, P.O. & P.S. Parliament Street, Town & District New Delhi (N.C.T. of Delhi).

3. Axis Bank Limited through its Manager, having its office at 12, Mittal Tower A-Wing, 1st Floor Nariman Point, Mumbai- 400021.

.... Respondent/s

=====

Appearance :

For the Petitioner/s : Mr. Y.V. Giri, Sr. Advocate & Mr. Ashish Giri

For the Company : Mr. A.K.Ojha, SC & Mr. A.K. Karna, Advocate

=====

CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

CAV JUDGMENT

Date: 22.09.2017

Heard the parties.

2. In the present writ petition, petitioner is seeking the following reliefs: (a) Declaring that the Power Purchase Agreement dated 17.10.2011 (PPA) executed between the petitioner and erstwhile Bihar State Electricity Board (BSEB) (now Bihar State Power Holding Company Limited (BSPHCL/respondent no.1) (pursuant to being selected as the successful bidder in the Bid floated by respondent no.1 for long term procurement of electricity through tariff based on



competitive bidding), has become null and void, in light of cancellation of Chakla and Ashok karkata Captive Coal Blocks (Captive Coal Blocks) by judgment and order of the Hon'ble Supreme Court of India (Hon'ble Supreme Court) dated 25.8.2014 and 24.9.2014 passed in Writ Petition (Crl.) No.120 of 2012 (M.L. Sharma v. The Principal Secretary and others). The said Captive Coal Blocks were allocated to the petitioner by the Ministry of Coal, Government of India (MOC/Respondent no.2) to meet the fuel requirements for its 1800 MW Power Plant, being set up in Latehar, Jharkhand. The Bid dated 02.04.2011 submitted by the petitioner and the tariff quoted in the Bid, for supply of power to Respondent No.1, was promised, upon the availability of coal from the said Captive Coal Blocks

(b) Declaring that due to continuing Force Majeure Event affecting the petitioner, the petitioner has a right to terminate the Power Purchase Agreement, for brevity, PPA, and validly terminated the Power Purchase Agreement by issuing a termination notice in terms of Article 11.5.1 read with Articles 4.7.1, 4.7.3 and 9.3 of the PPA as it is unable to commence supply of power, to the Respondent No.1, within for a maximum period of twelve months beyond the Scheduled Delivery Date on account of Force Majeure Events. In this regard, the petitioner



had vide its letter dated 28.4.2014 and its other letters exchange with respondent no.1, duly intimated the respondent no.1 qua the continuing Force Majeure Events, affecting the petitioner, thereby preventing it from supplying power to respondent no.1 by the Schedule Delivery Date. Admittedly, the respondent no.1 has, by its letter dated 16.7.2014, acknowledged the continuous Force Majeure Events preventing the petitioner from commencing supply of power to it. (c) Declaring that the respondent no.1 is not entitled to recover an amount of Rs.157.5 Crs or part thereof from the petitioner by way of liquidated damages under the PPA. (d) quashing the letters dated 24.1.2017 by which the respondent no.1 has held the petitioner is guilty for delay and have shown intention to recover the liquidated damages and encash the contract performance guarantee. (e) Restraining respondent no.1 from arbitrarily invoking the Bank Guarantee No.13940100000324 dated 30.8.2011, for an amount of Rs.90,00,00,000/- (Rupees Ninety Crore only) (Contract Performance), furnished by the petitioner to the respondent no.1 in terms of Clause 2.2.9 of the Request for Proposal (RFP) dated 14.1.2011. To declare and hold, the termination of the PPA by the petitioner, in terms of Articles 11.5.1 is without any financial liability on either party (e) Directing respondent no.1 to return



the Contract Performance Guarantee to the petitioner forthwith, in terms of Articles 3.8 of the PPA. Article 11.5..1 read with 3.8 of the PPA, requires the respondent no.1 to forthwith return the Contract Performance Guarantee on termination of the PPA under Article 11.5..1 (f) by way of interim relief, restrain Axis Bank Limited (Axis Bank/respondent no.3) from giving effect to any demand/communication seeking invocation of Bank Guarantee with respect to Contract Performance Guarantee by Respondent no.1, the officers and/or its authorized representatives/agents and permitting encashment thereof.

3. During argument the petitioner has principally has placed thrust with respect to invoking Bank Guarantee of 90,00,000/- Crores for purported liquidated damages for an amount of Rs.157.5 Crores on account of failure to supply power in terms of the contract. Further argued that question of liquidated damage does not arise as the situation was beyond the control of Company as it was not possible to establish the generating power station and invoked the clause of Force Majeure. Further the thrust has been made the notice violates the provision of contract and violates fairness which was served upon the petitioner Company calling upon to pay the amount of liquidated damage of Rs.157.50 Crore from the date of receipt of



the letter failing which the Bihar State Power Holding Company Limited (hereinafter referred to as the Holding Company) will take appropriate legal action against the petitioner Company for recovery of the said amount.

Facts of the case:

4. The petitioner is a generating Company registered under the provision of Companies Act, 1956. As per petitioner Company was/is developing 180 MW thermal power plant at Village Tori, District Latehar in the state of Jharkhand whereas Respondent No.1, Bihar State Holding Company is integrated part of the Bihar State Electricity Board was constituted under Section 5 of the Indian Electricity (Supply) Act, 1948 which was unbundled into five successors Companies, namely, Bihar State Power Holding Company, Bihar State Power Generation Company Limited, Bihar State Power Transmission Company Limited, North Bihar Power Distribution Company Limited and South Bihar Power Distribution Company Limited.

5. In the year 2005 Union of India has issued an advertisement in the newspaper/website inviting application for grant of Captive Coal Blocks situated in the State of Jharkhand. On 24.10.2005 and 27.12.2006 the Essar Power Limited the parent Holding Company of the petitioner filed an application



seeking allocation of the Chakla and Ashok Karkata Central Coal Blocks respectively to use a source coal/fuel for generating 2000 MW pit-head plant set up in the State of Jharkhand. The Essar Power Limited entered into a memorandum of understanding with the Government of Jharkhand for establishing 2000 MW in two phases. In terms of Clause 6 of the MOU the Government of Jharkhand assured assistance in selecting the Coal Block within the State of Jharkhand and agreed to recommend the Essar Power Limited to the Government of India for allocation of Captive Coal Blocks for its power plant. The Union of India forwarded the application of Essar Power Limited to the Government of Jharkhand as well as other concerned ministries i.e. Ministry of Power for their consideration and recommendation. The Screening Committee, based on the recommendations of Government of Jharkhand and Ministry of Power recommended to Union of India (respondent no.2) on 1.9.2006 to allocate Captive Coal Block to Essar Power Limited, based on the said recommendation, the Union of India in exercise of power under Sections 3(3)(a)(iii) of the Coal Mines Nationalization Act, 1973 allocated the Captive Coal Block to Essar Power Limited on 20.2.2007.

6. Petitioner in compliance with the terms of allocation on



4.4.2007 and 19.11.2007 purchased the Geological Report from the Central Mine Planning and Design Institute for Chakla Coal Block and Ashok Karkata Central Coal Block respectively. The Ministry of Environment and Forests vide order dated 8.5.2009 granted clearance for unit I (phase I) of the power plant. So in this manner the Company has been insured the coal which is basic material for establishment of power plant was intended to be established in the State of Jharkhand.

7. The Power Holding Company vide NIT No. 02/PR/BSEB/2011 issued Request for Proposal (RFP) from interested bidder for long term procurement of electricity through tariff based competitive bidding. Essar Power Limited also participated in the bid by filing sealed tender, one for technical bid and another for financial bid. The tender was opened, it was found that Essar Power Limited petitioner was most responsive bidder being L-I the Holding Company issued letter of intent (LOI) on 17.8.2011. Essar Power Limited accepted the terms of LOI and forwarded his acceptance to the Holding Company on 20.8.2011. The Essar Power Limited informed the Holding Company that for execution of the work the present petitioner Company (Essar Power Jharkhand) Limited has been incorporated for execution of power purchase



agreement with the Holding Company (respondent no.I). The petitioner Company submitted a contract performance guarantee in favour of the Holding Company (respondent no. I) for an amount of Rs.90,00,000/- (90 Crore). The petitioner entered into power purchase agreement on 17.10.2011 for supply of 300 MW power for a period of 25 years. As per the petitioner, it, in right direction, made earnest effort to establish power plant, but failed on account of certain reasons which are beyond the control of the petitioner Company.

8. It will be relevant to take into consideration certain terms of condition of the agreement which are necessary for adjudicating the present dispute.

9. In the agreement erstwhile Bihar State Electricity Board (Now Power Holding Company and its sister concern) has been mentioned as procurer and Essar Power Limited, Jharkhand has been mentioned as seller. Article 4 of the agreement deals with the supply of power. Article 4.1 postulates date of commencement of supply of power to procurer i.e. Scheduled Delivery Date. According to Article 4.1.1 the Seller was responsible to commence supply of power up to the aggregated contracted capacity by the Scheduled Delivery Date i.e. 17.10.2015 in accordance with the provisions of the agreement.



Article 4.1.2 provides the seller shall give the procurer and the concerned Regional Load Dispatch Center (RLDC) at least 60 days advance preliminary written notice and at least 30 days advance final written notice of the date on which it intends to commence supply of power. It will be relevant to quote Articles 4.1, 4.1.1 and 4.1.2,4.7.

“4.1. Commencement of supply of power to procurer.

4.1.1. The Seller shall be responsible to commence supply of power up to the Aggregated Contracted Capacity by the Scheduled Delivery Date in accordance with the provisions of this agreement which is 17.10.2015. However, the Seller and the Procurer may mutually agree for commencement of supply of power in a phased manner from the Revised Scheduled Delivery Date(s) as specified in Article 3.3. of this Agreement.

4.1.2. The Seller shall give the Procurer and the concerned RLDC at least sixty (60) days advance preliminary written notice and at least thirty (30) days advance final written notice, of the date on which it intends to commence supply of power.”

Article 4.7 stipulates extensions of time and Article 4.7.1 deals with that in the event that the Seller is prevented from performing its obligations under Article 4.1.1 by the Revised



Scheduled Delivery Date(s) or the Scheduled Delivery Date as the case may be due to the reason mentioned there in (a) any Process Event of Default (b) Force Majeure Event affecting the procurer, (c) Force Majeure affecting seller that the revised scheduled delivery date, scheduled delivery date and the expiry date shall be deferred subject to the limit prescribed in the Article Error. Reference source not found for a reasonable period but not less than day for day basis to permit the Seller or the procurer through the use of due diligence to overcome the effects of the Force Majeure Events affecting the seller or the procurer or till such time such event of default is rectified by the procurer. Article 4.7.2 provides that in case of extension occurring due to reasons specified in Article 4.7.1(a) any of the dates specified therein can be extended, subject to the condition that the Scheduled delivery date would not be extended by more than twelve (12) months or the date on which the Seller elect to terminate the agreement whichever is later. Article 4.7.3 further provides in the event if such Force Majeury Event continues even after the maximum period of twelve (12) months, any of the parties may choose to terminate the agreement as per the provisions of Article 11.5. It will be relevant to quote Articles 4.7.4.7.1.4.7.2 and 4.7.3:



“4.7. Extensions of time.

4.7.1. In the event that the Seller is prevented from performing its obligations under Article 4.1.1 by the Revised Scheduled Delivery Date(s) or the Scheduled Delivery Date as the case may be due to

- (a) any Procurer Event or Default; or
- (b) Force Majeure Events affecting the Procurer, or
- (c) Force Majeure Events affecting the Seller,

The Revised Scheduled Delivery Date (s), Scheduled Delivery Date and the Expiry Date shall be deferred, subject to the limit prescribed in the Article Error. Reference source not found for a reasonable period but not less than day for day basis to permit the Seller or the Procurer through the use of due diligence to overcome the effects of the Force Majeure Events affecting the Seller or the Procurer or till such time such event of default is rectified by the Procurer.

4.7.2. In case of extension occurring due to reasons specified in Article 4.7.1(a) any of the dates specified therein can be extended, subject to the condition that the Scheduled Delivery Date would not be extended by more than twelve (12) months or the date on which the Seller to terminate the agreement whichever is later.



4.7.3. In case of extension of time due to reasons specified in Article 4.7.1(b) and (c), and if such Force Majeury Event continues even after the maximum period of twelve (12) months, any of the Parties may choose to terminate the Agreement as per the provisions of Article 11.5.”

Article 4.8 deals with liquidated damages for delay in commencement of supply of power to procurer. Article 4.8.1 provides that if the seller is unable to commence supply of power to the procurer by the Scheduled Delivery Date or the revised Scheduled Delivery Date, as the case may be, other than for the reasons specified in Article 4.7.1, the seller shall pay to procurer liquidated damages as per this Article 4.8.1., for the delay in such commencement of supply of power.

Provided that the Seller shall have the option to supply power from any alternative generation source from any alternative generation source from the Scheduled Delivery Date or the Revised Scheduled Delivery Date, as the case may be, for a continuous period not exceeding twelve (12) months at the same tariff as per the terms of this Agreement. If the seller fails to commence such supply of power or fails to achieve the required availability as mentioned above in this para, it shall pay to the procurer liquidated damages as per this Article 4.8.1.



Article 4.8.1 has also provided the methodology for calculation of the liquidated damages which is not very relevant for the purposes of this case. It will be proper to quote relevant portion of Articles 4.8 and 4.8.1:

“4.8. Liquidated Damages for delay in commencement of supply of power to Procurer

4.8.1. If the Seller is unable to commence supply of power to the Procurer by the Scheduled Delivery Date or the Revised Scheduled Delivery Date, as the case may be, other than for the reasons specified in Article 4.7.1, the Seller shall pay to Procurer liquidated damages as per this Article 4.8.1., for the delay in such commencement of supply of power and making the Contracted Capacity available for dispatch by the Scheduled Delivery Date or the Revised Scheduled Delivery Date, as the case may be.

Provided that the Seller shall have the option to supply power from any alternative generation source from the Scheduled Delivery Date or the Revised Scheduled Delivery Date, as the case may be, for a continuous period not exceeding twelve (12) months at the same Tariff as per the terms of this Agreement. Provided further that the cumulative Availability from such alternative generation source in the twelve (12)



months period shall not be less than the Normative Availability. If the Seller fails to commence such supply of power or fails to achieve the required availability as mentioned above in this para, it shall pay to the Procurer liquidated damages as per this Article 4.8.1.”

Articles 4.8.2, 4.8.3, 4.8.4 and 4.8.5 have provided the manner liquidated damages would be calculated. It will be relevant to quote Articles 4.8.2, 4.8.3, 4.8.4 and 4.8.5:

“4.8.2. The Seller’s maximum liability under this Article 4.8 shall be limited to the amount of liquidated damages calculated in accordance with Article 4.8.1 for and up to Twelve (12) Months of delay for commencement of supply of power from the Scheduled Delivery Date or the Revised Scheduled Delivery Date, as the case may be,

Provided that in case of failure of the Seller to start supply of power to Procurer even after expiry of twelve (12) Months from its Scheduled Delivery Date or the Revised Schedule Delivery Date, as the case may be, it shall be considered as a Seller Event of Default and provisions of Article 11 shall apply.

4.8.3. The Seller shall pay the amount calculated pursuant to Article 4.8.1 to the Procurer within ten (10) days of the earlier of;



(a) the date on which the Seller commences supply of power to the Procurer, or

(b) expiry of the 12(twelve) Months period mentioned in Article 4.8.2.

4.8.4. If the Seller fails to pay the amount of liquidated damages within the period of ten (10) days as specified in Article 4.8.3, the Procurer shall be entitled to recover the said amount of the liquidated damages by invoking the Contract Performance Guarantee. If the then existing Contract Performance Guarantee is for an amount which is less than the amount of the liquidated damages payable by the Seller to the Procurer under this article 4.8, then the Seller shall be liable to forthwith pay the balance amount within ten (10) days of the invocation of the Contract Performance Guarantee by the Procurer.

4.8.5. The Parties agree that the formula specified in Article 4.8.1 for calculation of liquidated damages payable by the Seller under this Article 4.8, read with Article 11 is a genuine and accurate pre-estimation of the actual loss that will be suffered by the Procurer in the event of Seller's delay in starting supply of power by the Scheduled Delivery Date or the Revised Scheduled Delivery Date, as the case may be."



10. Proviso mentioned in Article 4.8.2 which has been mentioned hereinabove shows that failure of the seller to start supply of power to procurer even after expiry of twelve (12) months from its Scheduled Delivery Date or the Revised Scheduled Delivery Date, it shall be considered as a seller event of default and the seller shall pay the amount calculated pursuant to Article 4.8.1 to the procurer within ten (10) days. Article 4.8.4 stipulates that if the Seller fails to pay the amount of liquidated damages within the period of ten (10) days as specified in Article 4.8.3, the Procurer shall be entitled to recover the said amount of the liquidated damages by invoking the Contract Performance Guarantee. If the then existing Contract Performance Guarantee is for an amount which is less than the amount of the liquidated damages payable by the Seller to the Procurer under this article 4.8, then the Seller shall be liable to forthwith pay the balance amount within ten (10) days of the invocation of the Contract Performance Guarantee by the Procurer.

11. So in this case, it is relevant that in the event of breach of contract the agreement, stipulates, about payment of liquidated damages which is to be calculated in terms of the agreement, in failure to pay the amount, the procurer (Holding



Company) was entitled for invoking the Bank guarantee. As in the present case emphasis has been given that they could not establish the Power Generating Unit on account of certain unsurmountable difficulty on account of the fact that allocation of power coal block was cancelled by Hon'ble Supreme Court vide order dated 24.9.2014 passed in the case of Manohar Lal Sharma v. The Principal Secretary & Ors in Writ Petition (Crl.) No.120 of 2012 after recording the finding that allotment was made by Government in arbitrary and illegal manner and accordingly Hon'ble Supreme Court cancelled the various captive block including Captive Coal Block allocated to the petitioner. Primary and main ground has been taken by the petitioner that in view of none availability of coal block, water and failure to get forest clearance which were beyond the control of petitioner which could not have been resolved vide letter dated 28.4.2014 invoked the provision mentioned in Article 9 which deals with Force Majeure has been defined reflects different facets. For the purposes of this case it will be relevant to quote Articles 9.1, 9.1.1, 9.2, 9.2.1, 9.2.3, 9.2.4, 9.2.5, 9.3 and 9.3.1:

Article: 9: Force Maneure

“9.1. Definitions

9.2.1 An affected Party means the Procurer or the Seller



whose performance has been affected by an event of Force Majeure.

9.2.3 An event of Force Majeure affecting the CTU/STU or any other agent of the Seller, which has affected the transmission facilities from the Power Station in the delivery Point, shall be deemed to be an event of Force Majeure affecting Seller.

9.2.4 Any event of Force Majeure affecting the performance of the Seller's contractors shall be deemed to be an event of Force Majeur affecting Seller only if the Force Majeure event is affecting and resulting in;

(a) late delivery of plant, machinery, equipment, materials, spare parts, Fuel, water or consumables for the Power Station; or

(b) a delay in the performance of any of the Seller's contractors.

9.2.5. similarly, any event of Force Majeure affecting the performance of the Procurer's contractor for setting up or operating Interconnection Facilities shall be deemed to be an event of Force Majeure affecting Procurer only if the Force Majeure event is resulting in a delay in the performance of Procurer's contractors.



9.3. Force Majeure

9.3.1 A “Force Majeure” means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices.”

Article 9.4 provides certain event will not be included as any event or circumstances which is within the control of the parties. It will be relevant to quote Articles 9.4 and 9.4.1:

“9.4 Force Majeure Exclusions

9.4.1 Force Majeure shall not include (i) any event of circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force Majeure:

(a) Unavailability, late delivery, or changes in cost of the plant machinery, equipment, materials, spare parts, Fuel or consumables for the Power Station;

(b) Delay in the performance of any contractor, sub-



contractor or their agents excluding the conditions as mentioned in Article 9.2;

(c) Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;

(d) Strikes or labour disturbance at the facilities of the Affected Party;

(e) Insufficiency of finances or funds or the agreement becoming onerous to perform; and

(f) Non-performance caused by, or connected with, the Affected Party's

(i) Negligent or intentional acts, errors or omissions;

(ii) Failure to comply with an Indian Law; or]

(iii) Breach of, or default under this Agreement or any other RFP Documents.”

Article 9.5 stipulates that affected party shall give notice to the other party of any event of Force Majeure as soon as reasonably practicable, but not later than seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. It will be relevant to quote Articles 9.5, 9.5.1 and 9.5.2:

“9.5. Notification of Force Majeure Event



9.5.1. The Affected Party shall give notice to the other Party of any event of Force Majeure as soon as reasonably practicable, but not later than seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. If an event of Force Majeure results in a breakdown of communication rendering it unreasonable to give notice within the applicable time limit specified herein, then the Party claiming Force Majeure shall give such notice as soon as reasonably practicable after reinstatement of communication, but not later than one (1) day after such reinstatement.

Provided that such notice shall be a pre-condition to the Affected Party's entitlement to claim relief under this Agreement. Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed. The Affected Party shall give the other Party regular (and not less than monthly) reports on the progress of those remedial measures and such other information as the other Party may reasonably request about the Force Majeure Event.

9.5.2 The Affected Party shall give notice to the other Party of (i) the cessation of the relevant event of Force Majeure;



and (ii) the cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this Agreement, as soon as practicable after becoming aware of each of these cessations.”

Article 11 stipulates events of default and termination.

Article 11.3 provides procedure for cases of Seller Event of Default which provides that the Procurer shall have the right to deliver to the Seller a notice with a copy to the Appropriate Commission and the Lenders Representative, of their intention to terminate this Agreement (Procurer Preliminary Default Notice) which shall specify in reasonable detail, the circumstances giving rise to the issue of such notice. Article 11.3.2 provides that on issuance of default notice the Consultation Period of ninety (90) days or such longer period as the Parties may agree, shall apply and it shall be the responsibility of the Parties to discuss as to what steps shall have to be taken with a view to mitigate the consequences of the relevant Event of Default having regard to all the circumstances. It will be relevant to quote Articles 11.3. 11.3.1 and 11.3.2:

“Article 11.3 Procedure for cases of Seller Event of Default

Article 11.3 Upon the occurrence and continuation of any



Seller Event of Default under Article 11.1., the Procurer shall have the right to deliver to the Seller a notice with a copy to the Appropriate Commission and the Lenders Representative, of their intention to terminate this Agreement (Procurer Preliminary Default Notice) which shall specify in reasonable detail, the circumstances giving rise to the issue of such notice.

Article 11.3.2 Following the issue of Procurer Preliminary Default Notice, the Consultation Period of ninety (90) days or such longer period as the Parties may agree, shall apply and it shall be the responsibility of the Parties to discuss as to what steps shall have to be taken with a view to mitigate the consequences of the relevant Event of Default having regard to all the circumstances.”

Article 11.4 deals with Termination for Procurer Event of Default which is not very much relevant. The most important Article dealing with scheme of resolution of dispute mechanism is Article 14 governing the law and dispute resolution which provides that either party is entitled to raise any claim, dispute or difference of whatever nature arising under, out of or in connection with this Agreement (Dispute) by giving a written notice (Dispute Notice) to the other Party, which shall contain description of the dispute, grounds for such dispute and all



written material in support of its claim. Dispute mechanism has been provided in Article 14.3 which deals with determination of the Tariff or any matter related to Tariff or claims made by any Party. Article 14.3.2 stipulates dispute resolution through arbitration which basically states that if the Dispute arises out of or in connection with any claims not covered in Article 14.3.1. 1(a) such dispute shall be resolved through arbitration under the Indian Arbitration and Conciliation Act, 1996. It will be relevant to quote Articles, 14, 14.1, 14.2, 14.2.1, 14.3, 14.3.1, 14.3.2 and 14.3.2.1:

“Article 14 Governing Law and Dispute Resolution

14.1 Governing Law.

14.2 Amicable Settlement and Dispute Resolution.

14.2.1 Amicable Settlement

Either party is entitled to raise any claim, dispute or difference of whatever nature arising under, out of or in connection with Agreement (Dispute) by giving a written notice (Dispute notice) to the other party which shall contain (i) a description of dispute (ii) the grounds of such dispute and (iii) all written material in support of its claim.

14.3 Dispute Resolution

14.3.1 Dispute Resolution by the Appropriate



Commission

14.3.2. Dispute Resolution through Arbitration

14.3.2.1 If the Dispute arises out of or in connection with any claims not covered in Article 14.3.1. 1(a) such Dispute shall be resolved by arbitration under the Indian Arbitration and Conciliation Act, 1996 and the Rules of the Indian Council of Arbitration, in accordance with the process specified in this Article. In the event of such Dispute remaining unresolved as referred to in Articles 14.2.1.3 hereof, any party to such Dispute may refer the matter to Registrar under the Rules of the Indian Council of Arbitration.

(i) The Arbitration Tribunal shall consist of three (3) arbitrators to be appointed in accordance with the Indian Council of Arbitration Rules

(ii) The place of arbitration shall be Patna, Bihar. The language of the arbitration shall be English.

(iii) The Arbitration Tribunal's award shall be substantiated in writing. The Arbitration Tribunal's award shall be substantiated in writing. The Arbitration Tribunal shall also decide on the costs of the arbitration proceedings and the allocation thereof.

(iv) The provisions of this Article shall survive the



termination of this PPA for any reason whatsoever.”

The petitioner-Company has started development of power plant in a right endeavour but could not commissioned the same on account of various circumstances which were beyond the control of the Company which has been quoted in paragraph 17 of the petition which are as follows:

“17. That the delay in development of the Captive Coal Blocks was attributable to:

(a) “Go- No Go” area

(i) That Mid-2009, MoEF and respondent No.2 devised a system of classification of coal blocks as “Go-No Go” area for mining activities. Due to the ambiguity in the implementation of this new system, the applications made by the petitioner were not being entertained by the concerned governmental Authorities, at all levels. Only on 25.11.2011, was the ‘Go- No Go’ concept abolished by MoEF. The same delayed the implementation of the Power Plant by two years

(b) Delay in approval of the Forest Diversion Proposal

(i) That the petitioner had submitted the Forest Diversion Proposal (FDP) to the State Nodal Officer on 11.12.2008. The same was forwarded to the District Forest Officer (DFO). Later on 18.12.2008. On 31.12.2008, DFO Latehar sought certain



clarification from the petitioner undertakes to file the same at the time of hearing if so required.

(ii) That during the period, Mid-2009 to 25.11.2011, due to the Go-No Go' issue, none of the applications/proposals made by the petitioner were entertained

(iii) That on 09.06.2011, the DFO- Latehar requested the Deputy Commissioner Latehar to grant a Certificate for compliance of the Forest Rights Act, 2006 (FRA-2006). The petitioner vide its letter dated 0.3.08.2011 also requested the Deputy Commissioner Latehar for grant of certificate.

(iv) That subsequently on the advice of the Deputy Commissioner, Latehar, Gram Sabha was conducted by the Circle Officer-Chandwa on 19.01.2012, 03.02.2012 and 05.02.2012

(v) That on 15.10.2012, the petitioner once again updated the DFO, Latehar qua the steps taken and requested for approval of the FDP.

(vi) That in the interregnum, MOEF issued multiple guidelines at regular intervals, due to which compliance took considerable time and all progress made earlier for approval of FDP became futile, as the same was requested to be revised each time and from the initial/base level.



(vii) That after compliance of all new guidelines, the petitioner submitted the revised FDP to DFO-Latehar on 08.07.2013, which was forwarded from the District to the State level on 25.10.2013.

(viii) That the petitioner had also sought intervention of the Hon'ble Governor of Jharkhand and his office on 16.03.2013 and 03.07.2013, respectively for expediting the petitioner's FDP application. The said letters were issued to the Hon'ble Governor of Jharkhand since there was no elected State Government of that point in time. The prevalent political instability, further delayed the decision making.

(ix) That on 27.1.2014, GoJ approved the FDP and forwarded it to MoEF for grant of Stage-I Forest Clearance. However, no Forest Clearance was granted.

© Delay in transfer of Surface Rights and surrender of Mineral Rights of the Chakla Coal Block

(i) That the Chakla Coal Block was earlier acquired under Coal Bearing Areas (Acquisition and Development) Act, 1957 by the Govt. of India and the ownership of the land vested with CCL. Immediately upon allotment of the coal block, intervention of Respondent No.2 was sought for ensuring (i) transfer of surface rights of the land in CCL and (ii) surrender of



mineral right to the G0J, so that Mining Lease could be executed, for development of the Chakla Coal Block Respondent No.2 vide its letter dated 22.08.2007 advised CCL for transfer of the surface rights and surrender of the mineral rights, so that steps could be undertaken for development of the said coal block. After repeated reminders and constant follow-ups (letters dated 07.09.2007, 25.10.2007, 20.10.2008, 30.10.2008 and 31.10.2008) the Conveyance Deed for transfer of surface rights was finally executed on 31.12.2008 and CCL surrendered the mineral rights on 04.09.2009.

(d) Delay in approval of diversion of Mahalania Nalla

(i) That on 15.02.2008, MoEF issued the Terms of Reference (TOR) for the Chakla Coal Block, requiring a detailed study of the entire existing natural drainage system etc. to be conducted, which, inter alia, included impact of diversion of the Mahalania Nalla (Nalla)

(ii) That the possibility of diversion of the Nalla was also considered by EAC in its meeting held on 24.11.2009, wherein EAC directed for approval for the said diversion to be obtained from the Flood & Irrigation Dept. Thereafter, on 04.06.2010, the petitioner submitted its proposal for diverting and re[routing of the Nalla passing over the Chakla Coal Block to the Water



Resources Department, Jharkhand (WRD)

(iii) That EAC in its meeting held on 30-31.08.2010 while recommending grant of Environmental Clearance for the Chakla Coal Block clarified that, the said recommendation was subject to approval of diversion of the Nalla by the Flood and Irrigation Department, within a year of the grant of the said approval. Acting upon the said directions, repeated requests were made on 28.08.2010, 09.09.2010, 17.09.2011, 14.10.2011 and 14.02.2012.

(iv) That WRD for reasons best known to it, on 25.07.2012 requested Damodar Valley Reservoir Regulation Committee (DVRRC) for their consent for the said diversion and re-routing of the Nalla. On 06.09.2012, DVRRC intimated that, the matter was beyond the mandate and purview of DVRRC and hence it was not possible to obtain consent. Thereafter on 07.03.2013, the petitioner was directed to engage Central water & Power Research Station, Pune (CWPRS) for undertaking the model study for the diversion of the Nalla. However, by its letter dated 08.05.2013, CWPRS declined to undertake the said assignment, on the ground that it undertook studies only on behalf of Government entities and not for private organizations. CWPRS further suggest ht the study could be



undertaken it Water and Power Consultancy Services (WAPCOS) was appointed. Accordingly, on 28.05.2013, the petitioner engaged WAPCOS for undertaking the study. Only a brief study report was submitted on 11.02.2014 and a final report is still awaited. The relevant documents are not being filed for the sake of brevity but the petitioner undertakes to file the same at the time of hearing, if so required.

(e) Delay in processing of Mining Lease Application

(i) That subsequent to the execution of the Conveyance Deed, the petitioner on 17.12.2008 requested DMO Latehar for processing the mining Lease application.

(ii) That on 14.11.2009, the petitioner requested the Deputy Commissioner Latehar for certification of Cadastral Map by GM land in the Chakla Coal Block.

(iii) That the petitioner on 02.02.2010 issued another reminder to Secretary, dept. of Mines and Geology, GoJ, for grant of Mining Lease.

(iv) That the details of the Cadastral Map were received only on 17.09.2010 from the Deputy Commissioner Latehar and the same were subsequently submitted to DMO Latehar for processing of the mining lease on 23.09.2010. The said delay in certification of the Cadastral Map was beyond the reasonable



control of the petitioner

(v) That upon repeated follow ups on the progress of the Mining Lease application, the petitioner was apprised of the fact that a Prospecting License application for Fire Clay by another agency had been applied for and the said area partially overlapped with the petitioner's Mining Lease Area. DMO-Latehar also apprised the petitioners that, reminder notices were sent to the Fire Clay agency however, there was no response from the said agency. Further during interactions, it was informed that recommendation for cancellation of the Prospecting license application for Fire Clay had already been made by the Deputy Commissioner Latehar to Director of Mines.

(vi) That on 18.05.2012, the Director of Mines requested the petitioner to furnish an undertaking for abiding by the decision of the Sub Committee (as and when set up for deciding the application for Fire Clay lease). The said undertaking was furnished by the petitioner on 19.05.2012.

(vii) That on 23.08.2012, the petitioner submitted the mining plan as approved by Respondent No.2 to the Director of mines with a request to expedite the processing of the Mining Lease application. Despite having provided all information and



documents required by the various authorities and several follow ups, having been made on regular basis, the Mining Lease application was not processed and remained pending before the Secretary (Mines) GoJ. The relevant documents are not being filed for the sake of brevity but the petitioner undertakes to file the same at the time of hearing, if so required”.

12. When the petitioner Company failed to achieve the substantial progress in setting up the power plant, petitioner made an application for grant of term of reference for environment clearance, for power plant on 25.4.2007. The application was considered by the Expert Appraisal Committee, Ministry of Environment and Forest in its meeting dated 9.7.2007. Ministry of Environment and Finance vide letter dated 1.8.2007 provided the detailed terms of reference for preparing Environment Impact Assessment (for brevity EIA) report and on public hearing and after consideration of the report of Environment Impact Assessment (EIA) and the same was submitted to the Ministry of Environment and Forest on 22.8.2008, for consideration and for grant of Environmental Clearance of the plant. The Environment Impact Assessment (EIA) report was considered by the Expert Appraisal Committee, Ministry of Environment and Finance after its



meeting on 12.3.2009, after great effort, was granted environmental clearance for unit I of Phase I of the power plant on 8.5.2009, on the premise that, there was insufficient water for entire power plant. On account of insufficient quantity of water for power plant the environment clearance as coal is the primary material, available at the Captive Coal Block was not granted. In such circumstances the petitioner was constrained to change the coal from domestic coal to imported coal, in this regard, an application was filed on 3.9.2012, the Ministry of Environment and Forest vide order dated 14.11.2013 granted environmental clearance for unit 2 phase I and unit no.3 of phase II of the power plant for a period of five years that caused delay in procuring the environmental and forest clearances. Further claim has been made that petitioner was not allocated sufficient water for its power plant caused adverse impact, narrated in paragraph nos. 21 to 25 of the writ petition. As per claim of the petitioner, Water Resources Department, Government of Jharkhand allocated the water to the petitioner Company after inordinate delay, on that account, petitioner was not in a position to undertake any further steps for drawal of water, by making necessary infrastructure for drawal of water and its storage a detailed project report for construction was



elementary necessity from creation of such facility. After repeated follow, up Water Resources Department finally approved the Detailed Project Report (the DPR) on 27.7.2013 but the consent of commencement of construction of necessary infrastructure for drawal of water having been not received till dated. It has further been submitted that both the rivers are seasonal and for that they were required to make arrangement for storage of water for entire period of years collected during the monsoon season to ensure availability of water in dry season as huge quantity of water was required for power plant. In such situation the petitioner was constrained to modify the project design, transfer it to air cooling system in place of conventional water cooling system.

13. Bajaj Infrastructure Finance Ltd., which was to finance the project but by letter dated 31.7.2013 cancelled its commitment of Rs.100 crores on account of delay in taking clearance from different departments, change in fuel, change in design, cost overruns. Further on 6.1.2014 and 17.1.2014 Andhra Bank and L & T Infra Finance respectively cancelled/suspended the commitment sanctioned for the power plant. It has been stated that despite best efforts the establishment of power plant came to grinding halt due to the



reasons beyond the control of the petitioner. Unprecedented Naxalite activities was biggest menace have been one of the reason for delay in establishing the project as has been submitted that Latehar district in the State of Jharkhand is very sensitive areas grappling with extremist movement and on that reason there has been frequent stoppage of work that causes interruption in implementation of the establishment of the power plant. Claim has been made by the petitioner that in view of the aforesaid factors which were/are beyond their control has written a letter dated 28.4.2014. A request was made by the petitioner to extend the period by two years of scheduled delivery date till 17.10.2017.

14. The Union of India, respondent no.2, issued show cause dated 16.12.2013 in respect of Chakla Coal Block calling upon the petitioner to show cause as to why the delay in the procurement of Chakla Coal Block would not be treated to be violation of the terms and conditions of the allotment. The petitioner has filed detailed show cause vide letter dated 1.1.2014 assigning reasons including documentary evidence to demonstrate that the delay in the development of the said coal block was due to reasons beyond its control and as such show-cause required to be dropped.



15. The Coal Controller also issued notice vide letter dated 16.1.2014 to the petitioner seeking status report of the development of the Captive Coal Blocks allocated to the petitioner. The petitioner informed, Union of India with respect to taking steps of his clearance and also highlighted that a meeting of the Forest Advisory Committee was scheduled to be held on 13.2.2014 where proposal for stage I for its clearance of Chakla Coal Blocks was to be considered. The Inter Ministerial Group vide order dated 7.2.2014 and 19.2.2014 de-allocated the Chakla Coal Block and Ashok Karkata Central Coal Block respectively. Against the action of the respondent the petitioner filed writ petition before High Court Jharkhand vide Writ Petition © No. 764 of 2014 and the Court vide order dated 11.2.2014 passed the interim order that no coercive steps would be taken against the petitioner till the time the matter was heard by the Jharkhand High Court. In the meantime, the matter with respect to two blocks with respect to the petitioner was placed before the Inter Ministerial Group and Inter Ministerial Group noted and reviewed 61 coal blocks allocated to private Company including this coal block which had not come in production and after considering various aspects of the matter the Inter Ministerial Group recommended for de-allocation of the Ashok



Karkata Central Coal Block allocated to the petitioner Company. It has been informed by the Government of India vide letter dated 19.2.2014 (Annexure-6) the decision with regard to recommendation of the Inter Ministerial Group have been considered and accepted by the competent authority on 11.2.2014 and further action has been put on hold in view of the interim order of the Jharkhand High Court in W.P.(C) 763 of 2014. In view of such development Essar Power (Jharkhand) Limited addressed a letter dated 28th April, 2014 (Annexure-7) to the Holding Company wherein it has been mentioned that on account of the compelling circumstances which are beyond the control of the petitioner the execution of Power Purchase Agreement has reached to near impossibility of his performance. Various grounds have been mentioned in the letter. Salient grounds have been taken for non-fulfillment of agreement on account of non-acquisition of implementation of clearance of power plant, on account of non-acquisition of land, non-allotment of sufficient water, due to political reason, on account of Naxalite movement and activities which led to frequent stoppage of work in the areas and non-availability of the coal from Chakla and Ashok Karkata Cola Blocks mentioned the cognitive problem faced by the petitioner Company and made a



request for revision of Scheduled Delivery Date by extending two years i.e. till 17.10.2017.

16. The Power Holding Company issued a notice dated 16.7.2014. Notice for termination of the Power Purchase Agreement in terms of Article 11.5 read with Article 4.7.3 of Power Purchase Agreement executed between erstwhile Bihar State Electricity Board and M/s EPJL(Essqr Power Jharkhand Limited) on 9.7.2010 and 17.20.2011 for supply of 450 MW and 300 MW power respectively for 25 years in terms of contract . In the said letter it has been informed that the Bihar has a meager generation capacity and the State is facing acute power shortage, to meet the demand of power to the State, on that account erstwhile BSEB, now BSP(H)CL had contracted the M/s EPJL for procurement of power. The delay in supply of contracted power from scheduled delivery date has the effect of upsetting the entire power planning of the State & compelling to procure costly power from other sources to meet the power deficit. This letter has taken note of latter dated 28.4.2014 where a request was made for extension of scheduled delivery date with no specific date has been provided nor any assurance & certainty in the power supply from a definite date has been mentioned. It has further been said that the issues of Forest



Clearance for captive Chakla coal block or reallocation of the captive Chakla Coal Block for the project or even final decision of the Court even though appears as bonafide ground on its face but the same, hardly resolved problems of power crises of the State of Bihar. In that circumstances an explanation was called to show-cause why the power purchase agreement executed on 9.7.2010 and 17.10.2011 for supply of power of 450 MW and 300 MW respectively be not terminated and encash the Contract Performance Guarantee against Rs.135 crores of liquidated damage suffered by the Power Holding Company due to non-supply of 450 and 300 MW. In addition to adjustment of Contract Performance Guarantee rest amount of Rs.45 Crores should be deposited by the petitioner Company within 10 days of termination of the Power Purchase Agreement, requested to give explanation within 15 days otherwise the Power Holding Company will be free to proceed in accordance with the provision of the Power Purchase Agreement.

17. On receipt of the same the petitioner Company gave its reply dated 24.7.2014 mentioning adoption of grounds mentioned in the letter dated 28th April, 2014 explained the delay in execution of work but in alternative, it has been requested for recalibrating the tariffs rate for providing the



power supply through alternative source. It has been requested that for 25 years Rs.3.06 per unit (450 MW) and Rs.3.69 (300 MW) was accepted by the Bihar State Power Holding Company Limited and adopted by the Bihar Electricity Recovery Committee (BERC) whereas prevailing tariff rate under competitive bidding is in higher side, example has been given Rs.5.73 per unit for UPPCL, Rs.4.892 per unit (Rajasthan) and Rs.4.9111 per unit (Tamil Nadu). In the said letter it has been mentioned that the Company has shown concerned about acute power shortage in the State of Bihar and extended offer to support Bihar State Electricity Board now Bihar State Power Holding Company to meet the power demand as the petitioner has strong power portfolio of 3910 MW of operational installed capacity. In the said letter it has been mentioned that first unit (600 MW) of Essar Power MP Ltd. has already achieved Commercial Operation date and second unit is expected to be commissioned in current financial year.

18. As per the claim of the petitioner, the Company has objected for termination of Power Purchase Agreements and levy of liquidated damages by the Power Holding Company and requested for grant of extension of Scheduled Delivery Date up-to 17.10.2017. The petitioner Company was/is committed to



supply the power but during the interregnum period proposal was extended for supply of power from an alternative source i.e. from Essar Power M.P. Ltd (EPMPL) subject to negotiation with respect to tariff. Petitioner has written a letter dated 5th August, 2014 to the then Chief Minister of Bihar wherein it has been informed to him that the ground for delay in establishment of power project which are beyond control of the petitioner Company specially in a situation of de-allocation of Coal Block which was allotted to the petitioner Company earlier. In the said letter it has been requested to the Chief Minister to intervene in the matter of extension of due delivery date of power till 9th July, 2017 for 450 MW of Power Purchase Agreement and extension of scheduled delivery date till October, 2017 for 300 MW Power Purchase Agreement. Offer was given that both parties can agree suitable changes in the agreement after obtaining approval of the appropriate Commission, if any. In the said letter it has been mentioned that the petitioner Company is capable to supply the power from the alternative source as, Company has alternative power backing from the power plant established in the State of Madhya Pradesh.

19. From the pleading of the writ petition it appears that the petitioner Company wrote similar letter to the Governor of



Bihar, made identical prayer for extension of time of scheduled delivery date of power. Petitioner Company made request to the Chief Minister to intervene in the matter to save the Power Purchase Agreement. While the matter was going on, the Hon'ble Supreme Court passed the order in W.P.(Crl.)No.120 of 2012 (Manohar Lal Sharma v. Principal Secretary & Ors) held that allotment of Coal Block made by the Screening Committee of the Government of India was illegal, defective, cancelled all Coal Blocks allotted to different private persons including the petitioner. The petitioner Company vide letter dated 9.10.2014 (Annexure-11) apprised this new development to Power Holding Company and as made it clear that the supply of power from generating stations was dependent on supply of coal from the Captive coal blocks Ashoka Karkata and Chakla Coal Blocks allocated for the project has been cancelled. In the said letter it has been mentioned that the Company opened a channel of discussion vide letter dated 5.8.2014 and 11.8.2014. The Company has written another letter dated 5.4.2016 (Annexure-12) Chairman-cum-Managing Director of the Holding Company with respect to Power Purchase Agreement and informed that Company could not established the power plant on account of the reasons which were/are



beyond its control and the Company mentioned the reasons point wise, explained, the out come of allotment of coal block at Ashok Karkata and Chakla Coal Blocks and the petitioner Company invoked clause of Force Majeure mentioned in Article 9.5 of Agreement taking plea of reasons beyond the control of petitioner. In the said letter it has been mentioned that Hon'ble Supreme Court has cancelled the allotment of the Coal Blocks and requested to extend the scheduled delivery date on account of Force Majeure and requested to grant consent on the proposal extended by the Company. It has been mentioned that the petitioner Company pursued issuance of linkage with various ministries to mitigate impact of cancellation of Ashok Karkata and Chakala Coal Blocks. It has been mentioned that even after best efforts the Force Majeure situation arising out of cancellation of coal blocks is still continuing, requested for kind consideration and information.

20. The petitioner Company has addressed three letters dated 24th July, 2014 (Annexure-13) , 5th August, 2014 (Annexure-14) and Ist December, 2014 (Annexure-15). In all the letters the Company has narrated the story of delay in establishing the power plant and has also mentioned that the Company has alternative strong power portfolio as the petitioner



Company can provide power from alternative source subject to recalibration of tariff at the market rate citing example of different tariff rate prevalent with respect to supply of power to different Power Holding Company. In all the letters petitioner Company has invoked the Force Majeure clause.

21. It has been stated that the events, circumstances and situation are such as have been explained by the petitioner Company, is beyond its control and it become impossible to supply the power on scheduled date. On 24.1.2017 two letters were issued by the Power Holding Company, both letters have been addressed to Director, Essar Power Jharkhand Ltd. by the Chief Engineer (System Operation), Bihar State Power Holding Company Limited (BSPHCL). In both the letters the Power Holding Company has mentioned Article 4.1. of the Power Purchase Agreement with Essar Power Limited was obliged to commence supply of power up-to the aggregate contracted capacity by the Scheduled Delivery Date i.e. 17th October, 2015 but failed to supply the power by due date, even thereafter for a period of more than 12 months as per Article 11.1.1(1) constitute seller event of default. Till date the Essar Power (Jharkhand) Ltd. has not established the generating station for meeting the supply of power to the Bihar State Power Holding



Company, invoked the provisions of Articles 11.1. and 11.3 of the Power Purchase Agreement and in consequence thereof gave default notice and copy was given to M/s Axis Bank. Another letter of the same date by the same authority was issued mentioned, in terms of Article 4.1 of the Power Purchase Agreement, the Company was to supply the power by 17th October, 2015 and the delay has been made beyond 12 months from the Scheduled Delivery Date constitute seller event of default. It has been mentioned in the letter that in terms of Article 4.8 the Power Holding Company is entitled to liquidate damage for an of Rs. 157.50 Crores and has invoked to encash the Performance Bank Guarantee which was executed by the petitioner Company in favour of the Bihar State Electricity Board and issued letter to the Axis Bank to remit the amount of Rs.90 crores in the account of the Power Holding Company and further made a demand of rest amount of rs.67,50 crores as outstanding dues against the Essar Power (Jharkhand) Ltd. In the said letter it has been mentioned that payment of liquidated damages within 21 days from the date of the receipt of the letter, failing which the Power Holding Company would take appropriate legal action against Essar Power (Jharkhand) Limited for recovery of the said amount.



22. It appears from the record that the petitioner Company with respect Power Purchase Agreement dated 9.7.2010 has issued notice under Article 11.5.1 read with Article 4.7.1, 4.7.3 and 9.3 of the Power Purchase Agreement making a prayer that Power Purchase Agreement dated 9.7.2010 became null and void and treat Power Purchase Agreement validly terminated by the petitioner Company and made a prayer that Power Holding Company be restrained from invoking the Bank Guarantee provided by the petitioner Company of amounting to Rs.135 Crores. The petitioner approached this Court. This Court disposed of the matter having given liberty to both the parties to approach the appropriate forum/Tribunal for redressal of grievance in case the respondent Company declined the request of the petitioner Company for extension of time and reasonable enhancement of the agreed tariff of power and treat the attending circumstances as material breach of the conditions of the agreement and thereby decided to terminate/rescind the Power Purchase Agreement. In that event the respondent Company shall not invoke/encash the bank guarantee furnished by the petitioner Company for a period of 15 days therefrom. Further the Court has held that such order of restrain against encashment of Contract Performance Guarantee in no manner inure to the



advantage of the petitioner Company or the disadvantage to the respondent Power Company in any dispute/proceeding to be raised in this application. It will be relevant to quote last paragraph of the aforesaid order:

“ Having given anxious considerations to the contentions of the parties, this Court is of the view that the issues/disputes which have been raised herein cannot be entertained in the writ jurisdiction of the Court. The parties have forum(s) to raise such disputes effectively for adjudication. The prayer(s) made in the application is/are, therefore, declined. Both parties granted liberty to approach the appropriate forum/Tribunal for redressal of grievance in case the respondent Company declined the request the petitioner Company for extension of time and reasonable enhancement of the agreed tariff of power and treat the attending circumstances as material breach of the conditions of the agreement and thereby decide to terminate/rescind the Power Purchase Agreement. In that event the respondent Company shall not invoke/encash the bank guarantee furnished by the petitioner Company for a period of 15 days therefrom. This Court, however, would further clarify that such restrain order against encashment of Contract Performance Guarantee in no manner inure to



the advantage of the petitioner Company or the disadvantage to the respondent Power Company in any dispute/proceeding to be raised in this regard.”

23. Against that order the petitioner approached to this Court in L.P.A. No. 1978 of 2016 and in paragraph 20 the Court has set aside the observation made in the writ petition. Accordingly the same has been expunged, direction given to the Holding Company to consider afresh, representation dated 24.8.2014, on its own merit, uninfluenced by any observations made on the merit of the case of the petitioner Company by the learned Single Judge, for a limited purpose the appeal was allowed. It will be relevant to quote paragraph nos. 20 and 21 of the aforesaid judgment:

“20. This appeal also deserves to be allowed relying on the ratio of the Supreme Court, in Tin Plate Co. (Supra). Hence, this appeal is partly allowed. We set aside the impugned observations, made in the order, under appeal, dated 23.7.2015. Consequently, the observations, made in the order, dated 23.7.2015, passed in CWJC No. 10122 of 2015, shall stand expunged.

21. It is, however, made clear that since the order, dated 18.6.2016, passed by the respondent no.1, Power Company, is based on the impugned observations made in CWJC No.10122 of 2015, the



order dated 18.06.2016, aforementioned is also bad in law and, therefore, needs to be set aside, which we hereby do and it is hereby accordingly directed that the appellant's representation, dated 28.04.2014, made to the respondent no.1, Power Company, be considered afresh on its own merit uninfluenced by any of the observations made on the merit of the appellant's case by the learned Single Judge in the order, under appeal."

24. During pendency of this writ application Bihar State Power Holding Company wrote a letter vide letter dated 20.1.2017 to the Bank, thereby invoked the encashment of Bank Guarantee, accordingly the amount of Rs.90 Crore has been credited to the account of Bihar State Power Holding Company, the action of Bihar State Power Holding Company has been challenged vide I.A. No.673 of 2017.

25. In view of the aforesaid fact the counsel for the petitioner Company has submitted that the Company has entered into an agreement for power supply but in view of attending facts and circumstances have been created in such manner brought the situation of impossibility to establish the power plant and supply the power in terms of agreement on or before the scheduled delivery date. It has further been said that the



petitioner Company has faced several hurdles to establish power plant ultimately failed to achieve on account of judgment and order of Hon'ble Supreme Court thereby scrapped the allotment of captive Coal Block of Chakla and Ashoka Coal Blocks which proved to be final nail in the coffin. The petitioner Company did not receive proper co-operation either from the State Government or its Officers as at every steps, the Company faced hurdle in establishment of the power plant, on that account the petitioner Company has invoked the Force Majeur clause of Agreement, looking the impossibility to supply of power on due date. It has further been submitted that the Company has faced several different nature of hurdle which are beyond the reasonable control of the Company to over come the same such as environment clearance, water requirement, extremists problem, delay in transfer of surface right by the State Government, de-allocation of the Coal Blocks which is primary source of the fuel for generating the power. In such circumstances, the contract should be treated to be terminated invoking of Article Force Majeure.

26. Learned counsel for the petitioner submits that before invoking provision of encashment of Bank Guarantee proper and sufficient notice was not given to the Company



and as such the action of the Power Holding Company is an arbitrary and illegal act encashing the said amount of the bank guarantee, making demand for payment of other amount without being adjudicated at proper forum. It has further been submitted, facts of present case are so lucid and clear it does not require that this matter be referred to the arbitrator or ask the petitioner to approach any other forum for resolution of dispute in a case of undisputed fact, this forum is proper and effective for settling the dispute and as such writ petition is maintainable and this Court must give direction that the Power Holding Company to return the amount of bank guarantee which has been credited to its account whereas counsel for the Bihar Power Holding Company submits that as the nature of dispute relates to the disputed question of fact and law, the agreement itself provides a forum for redressal of the grievance, the petitioner must exhaust that remedy which in the nature of arbitration. It has further been submitted that the claim of Force Majeure is preceded by fact that the petitioner by different dates has suggested to enhance tariff rate capable to supply power from alternative source, mentioning market rates of tariff for supply of power to different Electricity Boards. It has further been said that in terms of the agreement there is



provision for granting supply of power from different sources and letters addressed to the Officers of Holding Company expressly mentioned that they have strong power portfolio in the Madhya Pradesh and they are capable to supply power but not at the rate mentioned in the agreement but at enhanced rate in such situation, invoking of provision of Force Majeure clause is not applicable. On account action of petitioner Company, Power Holding Company has suffered a liquidated damages of Rs.135 crores and rightly the Company has invoked the bank guarantee. The agreement of bank guarantee is not part of the present agreement but a separate agreement in between the petitioner Company, Bank as well as respondent are privy to the contract and there is no need to give any notice for invoking the encashment of the amount of bank guarantee which cannot be said to be bad in law.

27. In the present case this Court has to decide (i) whether in the facts and circumstances of the case this Court should straightway adjudicate the dispute raised by the petitioner or it should be relegated to the Arbitral Tribunal in terms of the agreement reached between the parties adjudicate the dispute involved in the present case.(ii) Whether the claim of the petitioner for Force Majeure is proper invocation of Clause in



view of the terms of the agreement providing there in circumstances which may give rise to any party for invocation, on conclusion arrived at, Company could not supply the power on account of such factors which are beyond the control of petitioner. (iii) Whether the Bank guarantee is a part of the agreement or it is different agreement to the main agreement and it was required to follow and comply the conditions stipulated in the main agreement, without compliance of conditions can not invoke bank guarantee.

28. In the present case the respondent Power Holding Company has taken a plea that there is disputed question of fact as the petitioner has claimed that he could not discharge his responsibility on account of the reason beyond control, sought defence of applicability of Force Majeure as well as has denied the liability of liquidated damages which cannot be adjudicated in the present proceeding in stead of, approaching this Court, in terms of the agreement, the alternative forum is available by way of resolution through and by arbitrator who will be appointed in terms of the Arbitration Act, 1996 whereas learned counsel for the petitioner has stated it is not so, all the matters should be decided by the arbitrator, as in the present the facts are not disputed, the action of



respondent is illegal and arbitrary hence this Court should exercise the power under Article 226 of the Constitution of India as there is no absolute bar placed on this Court to exercise the power and decide the issue on its merit, it has been submitted that Hon'ble Supreme Court in some cases, even the disputed question of fact has been gone into when the action of the State or the instrumentality of the State reflects arbitrary exercise of power bereft of rationality and reasonability in taking action. The High Court has a wide jurisdiction under Articles 226 and 227 of the Constitution to correct the illegality in a particular facts and circumstances as referred to exercise the jurisdiction is self imposed restriction. To deal with this issue let us examine the judgments rendered by Hon'ble Supreme Court with respect to exercise of power under what circumstance the writ court should exercise the power conferred under Articles 226 and 227 of the Constitution of India or this is a fit case the parties may be relegated to redress their grievance before alternative forum.

29. The issue of maintainability of writ petition, in view of the alternative remedy, came for consideration before Hon'ble Supreme Court in the case of **Salonah Tea Co. Ltd. and others v. Superintendent of Taxes, Nowgong and others, reported in (1988) 1 SCC 401** where the writ petition was filed



claimed that assessment were illegal and direction be issued to refund the tax amount which was unauthorizedly collected. The matter relates to illegal recovery of the tax. The question came for consideration for maintainability of writ petition as plea was taken the tax cannot be refunded, being barred by limitation. The Court has held that Article 226 of the Constitution was discretionary and the High Court in the exercise of its discretion did not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there was inordinate delay on the part of the petitioner in filing a writ petition and such delay was not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction. The rule of laches or delay is not a rigid rule which can not be cast in a strait-jacket formula to exercise the power of writ jurisdiction. There may be cases where despite delay and creation of third party right the High Court may still in the exercise of its discretion interfere and grant relief to the petitioner, further every discretion must be exercised fairly and justly so as to promote justice and not to defeat it. It will be relevant to quote paragraph no. 26 of the aforesaid judgment:

“26. In State of Madhya Pradesh and others etc. etc. v.



Nandlal Jaiswal and others etc. etc., A.I.R. 1987 S.C. 251 this principle was reiterated by Bhagwati, C.J. that it was well settled that the power of the High Court to issue an appropriate writ under [Article 226](#) of the Constitution was discretionary and the High Court in the exercise of its discretion did not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there was inordinate delay on the part of the petitioner in filing a writ petition and such delay was not satisfactorily explained, the High Court might decline to intervene and grant relief in the exercise of its writ jurisdiction. The evolution of this rule of laches or delay was premised upon a number of factors. The High Court did not ordinarily permit a belated resort to the extraordinary remedy under the writ jurisdiction because it was likely to cause confusion and public inconvenience and bring in its train new injustices. It was emphasised that this rule of laches or delay is not a rigid rule which can be cast in a straitjacket formula. There may be cases where despite delay and creation of third party rights the High Court may still in the exercise of its discretion interfere and grant relief to the petitioner. But where the demand of justice is so compelling that the High Court would be inclined to interfere in spite of delay or creation of third party rights would by their very nature be few and far between. Ultimately it would be a matter within the discretion of the Court; ex hypotheses every discretion must be exercised fairly and justly so as to promote



justice and not to defeat it. We are in respectful agreement with this approach also.”

30. The matter again came for consideration before Hon'ble Supreme Court in the case of **Whirl Pool Corporation v. Registrar of Trade Marks, Mumbai and others, reported in (1998) 8 SCC 1** where the Court has dealt and delineated the exercise the power under Article 226 of the Constitution under what circumstances and ground, the High Court would be correct to exercise the power under Article 226 of the Constitution of India. The Court has held that the power under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, for the enforcement of any of the fundamental rights contained in Part III of the Constitution but also for any other purpose. The High Court under Article 226 of the Constitution has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restriction one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But, the alternative remedy,



has been consistently held by this court not to operate as a bar at least in three contingencies, namely, where the writ petition has been filed for the enforcement of fundamental right or where there has been a violation of the principle of natural justice or where the order or proceedings is without jurisdiction or the vires of an Act has been challenged. Principle to refuse to exercise discretionary jurisdiction in the event of availability of alternative remedy except on satisfying any of the situation mentioned herein above. The exercise of power under Article 226 of the Constitution is the rule requiring the exhaustion of statutory alternative remedies before the writ petition is entertained is a rule of policy, convenience and discretion rather than a rule of law. It will be relevant to quote paragraph nos. 14, 15 and 16 of the aforesaid judgment:

“14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for “any other purpose”.

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case,



has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

16. Rashid Ahmed v. Municipal Board, Kairama laid down that existence of an adequate legal remedy was a factor to be taken into consideration in the matter of granting writs. This was followed by another Rashid case, namely, K.S. Rashid & Son v. Income Tax Investigation Commission which reiterated the above proposition and held that where alternative remedy existed, it would be a sound exercise of discretion to refuse to interfere in a petition under Article 226. This proposition was, however, qualified by the significant words, 'unless there are good grounds



therefor', which indicated that alternative remedy would not operate as an absolute bar and that writ petition under Article 226 could still be entertained in exceptional circumstances."

31. The same issue came for consideration before Hon'ble Supreme Court in the case of **ABL International Ltd. and another v. Export Credit Guarantee Corporation of India Ltd. and others**, reported in (2004)3 SCC 553. The issue was related to the contract matter. In that case fact was that Rassik Woodworth Limited entered into a contract with M/s RVO Kazpishepromsyrio, a State owned Corporation of Kazakhstan for supply of 3000 metric tons of tea. As per the original agreement, the pay for such tea exported was to be made by the Corporation by barter of goods mentioned in the schedule to the said agreement. It also provided that the payment made by the Corporation was to be guaranteed by the Government of Kazakhstan. The said agreement was amended whereby it was provided that contract of barter of goods would not be finalized for any reason then the Corporation was to pay to the exporter for the goods received by it in US dollars within 120 days from the date of the delivery and said payment was to be remitted by the Kazak Corporation to the Bank account of the exporter at



Delhi. This amended agreement also provided for a guarantee being given by the ministry of Foreign Economic Relations of Kazakhstan for prompt payment of such consideration amount. Under the agreement respondent was assigned a part of the said export contract accordingly supplied the goods and as per direction of the Reserve Bank of India to cover the risk assigned contract made by the appellants as per the said assigned contract. As per the case of appellant, payment of consideration amount by partner of good could not finalized, agreement was arrived at for payment of consideration amount in US Dollar, certain payments were made but rest consideration amount was not paid, and Kazashastan Government failed to fulfill its quarantee, the appellants approached Export Credit Guarantee Corporation of India Ltd for payment but repudiated the claim. The dispute arose led to filing of the writ application. The question arose for maintainability of the writ application a plea was taken that nature of dispute is contractual dispute can be settled through alternative redressal forum. The Calcutta High Court in the Single Bench has taken a view that dispute between the parties arising out of the contract, the State for the purpose of Article 12 of the Constitution was bound by the terms of the contract, therefore, for such non-performance, a writ was



maintainable whereas Division Bench in appeal has just taken a reverse view and the matter came before Hon'ble Supreme Court for reconsideration. The Hon'ble Supreme Court after placing reliance on the earlier judgment of **Ramana Dayaram Shetty v. International Airport Authority of India, reported in (1979) 3 SCC 489** where the Hon'ble Supreme Court has held that the instrumentality of the State is an authority under Article 12 of Constitution of India cannot commit breach of a solemn undertaking to the prejudice of the other party which acted on that undertaking or promise and put itself in a disadvantageous position. The authority under Article 12 of the Constitution if it backs out from such a promise, it cannot be said that the only remedy for the aggrieved party would be suing for damages for breach and that it could not compel the Corporation for specific performance of the contract, after dealing with the large number of cases, the Court has held once State or instrumentality is party to contract, has obligation to act justly and reasonably in terms of Article 14 of the Constitution, any decision or action will be tested on the anvil of Article 14 of the Constitution of India the writ court will have jurisdiction to interfere in the event of arbitrary and unreasonable exercise of power by the State or instrumentality of the State. The High



Court in exercise of power conferred under article 226 of the Constitution of India has jurisdiction to adjudicate the issue both facts as well as of law. Exercise of jurisdiction is discretionary but it should be exercised on sound judicial principle not on whim and fancy. It will be relevant to quote paragraph nos. 11,12,13, 15,16, 17, 19, 22 and 23 of the aforesaid judgment:

“11. In the case of Gujarat State Financial Corporation Vs M/s. Lotus Hotels Pvt. Ltd. [1983 (3) SCC 379] this Court following an earlier judgment in R.D. Shetty Vs. International Airport Authority of India [1979 (3) SCC 489] held:

"The instrumentality of the State which would be 'other authority' under [Article 12](#) cannot commit breach of a solemn undertaking to the prejudice of the other party which acted on that undertaking or promise and put itself in a disadvantageous position. The appellant Corporation, created under the [State Financial Corporation Act](#), falls within the expression of 'other authority' in [Article 12](#) and if it backs out from such a promise, it cannot be said that the only remedy for the aggrieved party would be suing for damages for breach and that it could not compel the Corporation for specific performance of the contract under [Article 226](#)."

12. The learned counsel appearing for the first



respondent however, submitted that this Court has taken a different view in the case of Life Insurance Corporation of India Vs. Escorts Ltd. & Ors. [1986 (1) SCC 264] wherein this Court held:

"If the action of the State is related to contractual obligations or obligations arising out of the tort, the court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field.

The difficulty will lie in demarcating the frontier between the public law domain and the private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances. When the State or an instrumentality of the State ventures into the corporate world and purchases the shares of a company, it assumes to itself the ordinary role of a shareholder, and dons the robes of a shareholder, with all the rights available to such a shareholder.

There is no reason why the State as a shareholder



should be expected to state its reasons when it seeks to change the management, by a resolution of the company, like any other shareholder."

(Emphasis supplied).

13. We do not think this Court in the above case has, in any manner, departed from the view expressed in the earlier judgments in the case cited hereinabove. This Court in the case of Life Insurance Corporation of India (Supra) proceeded on the facts of that case and held that a relief by way of a writ petition may not ordinarily be an appropriate remedy. This judgment does not lay down that as a rule in matters of contract the court's jurisdiction under [Article 226](#) of the Constitution is ousted. On the contrary, the use of the words "court may not ordinarily examine it unless the action has some public law character attached to it" itself indicates that in a given case, on the existence of the required factual matrix a remedy under [Article 226](#) of the Constitution will be available. The learned counsel then relied on another judgment of this Court in the case of State of U.P. & Ors. Vs. Bridge & Roof Company (India) Ltd. [1996 (6) SCC 22] wherein this Court held: "Further, the contract in question contains a clause providing inter alia for settlement of disputes by reference to arbitration. The arbitrators can decide both questions of fact as well as questions of law. When the contract itself provides for a mode of settlement of disputes arising from the contract,



there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under [Article 226](#). The existence of an effective alternative remedy - in this case, provided in the contract itself - is a good ground for the court to decline to exercise its extraordinary jurisdiction under [Article 226](#)."

15.The learned counsel then contending that this Court will not entertain a writ petition involving disputed questions of fact relied on a judgment of this Court in the case of State of Bihar v. Jain Plastics and Chemicals Ltd. wherein this Court held (SCC p218, para 7)

'7 In our view, it is apparent that the order passed by the High Court is, on the face of it, illegal and erroneous. It is true that many matters could be decided after referring to the contentions raised in the affidavits and counter affidavits, but that would hardly be a ground for exercise of extraordinary jurisdiction under Article 226 of the Constitution in case of alleged breach of contract. Whether the alleged non-supply of road permits by the appellants would justify breach of contract by the respondent would depend upon facts and evidence and is not required to be decided or dealt with in a writ petition. Such seriously disputed questions or rival claims of the parties with regard to breach of contract are to be investigated and determined on the basis of evidence which may be led by the parties in



a properly instituted civil suit rather than by a court exercising prerogative of issuing writ.”

16. A perusal of this judgment though shows that a writ petition involving serious disputed questions of facts which requires consideration of evidence which is not on record, will not normally be entertained by a court in the exercise of its jurisdiction under [Article 226](#) of the Constitution of India. This decision again, in our opinion, does not lay down an absolute rule that in all cases involving disputed questions of fact the parties should be relegated to a civil suit. In this view of ours, we are supported by a judgment of this Court in the case of [Smt. Gunwant Kaur & Ors. vs. Municipal Committee, Bhatinda and Ors.](#) [1969 (3) SCC 769] where dealing with such a situation of disputed questions of fact in a writ petition this Court held :

"14. The High Court observed that they will not determine disputed question of fact in a writ petition. But what facts were in dispute and what were admitted could only be determined after an affidavit in reply was filed by the State. The High Court, however, proceeded to dismiss the petition in limine. The High Court is not deprived of its jurisdiction to entertain a petition under [Article 226](#) merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under [Article 226](#) the High Court has jurisdiction to try issues both of fact and law.



Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons.

15. From the averments made in the petition filed by the appellants it is clear that in proof of a large number of allegations the appellants relied upon documentary evidence and the only matter in respect of which conflict of facts may possibly arise related to the due publication of the notification under [Section 4](#) by the Collector.

16. In the present case, in our judgment, the High Court was not justified in dismissing the petition on the ground that it will not determine disputed question of fact. The High Court has jurisdiction to determine questions of fact, even if they are in



dispute and the present, in our judgment, is a case in which in the interests of both the parties the High Court should have entertained the petition and called for an affidavit in reply from the respondents, and should have proceeded to try the petition instead of relegating the appellants to a separate suit."

17. The above judgment of Smt. Gunwant Kaur (*supra*) finds support from another judgment of this Court in the case of [Century Spinning and Manufacturing Company Ltd. & Anr. vs. The Ulhasnagar Municipal Council & Anr.](#) [1970 (1) SCC 582] wherein this Court held :

"Merely because a question of fact is raised, the High Court will not be justified in requiring the party to seek relief by the somewhat lengthy, dilatory and expensive process by a civil suit against a public body. The questions of fact raised by the petition in this case are elementary."

19. Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of Smt. Gunwant Kaur (*supra*), this Court even went to the extent of holding that in a writ petition, if facts required, even oral evidence can be taken. This



clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and or involves some disputed questions of fact.

22. We do not think the above judgment in *VST Industries Ltd. (supra)* supports the argument of the learned counsel on the question of maintainability of the present writ petition. It is to be noted that *VST Industries Ltd.* against whom the writ petition was filed was not a State or an instrumentality of a State as contemplated under [Article 12](#) of the Constitution, hence, in the normal course, no writ could have been issued against the said industry. But it was the contention of the writ petitioner in that case that the said industry was obligated under the concerned statute to perform certain public functions, failure to do so would give rise to a complaint under [Article 226](#) against a private body. While considering such argument, this Court held that when an authority has to perform a public function or a public duty if there is a failure a writ petition under [Article 226](#) of the Constitution is maintainable. In the instant case, as to the fact that the respondent is an instrumentality of a State, there is no dispute but the question is: Was first respondent discharging a public duty or a public function while repudiating the claim of the



appellants arising out of a contract ? Answer to this question, in our opinion, is found in the judgment of this Court in the case of [Kumari ShriLekha Vidyarthi & Ors. vs. State of U.P.& Ors.](#) [1991 (1) SCC 212] wherein this Court held :

"The impact of every State action is also on public interest. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of [Article 14](#) being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters."

23. It is clear from the above observations of this Court, once State or an instrumentality of State is a party to the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of [Article 14](#) of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the above said requirement of [Article 14](#) then we have no hesitation that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent. In this context, we may note that though the first



respondent is a company registered under the [Companies Act](#), it is wholly owned by the Government of India. The total subscribed share capital of this company is 2,50,000 shares out of which 2,49,998 shares are held by the President of India while one each share is held by the Joint Secretary, Ministry of Commerce and Industry and Officer on Special Duty, Ministry of Commerce and Industry respectively. The objects enumerated in the Memorandum of Association of the first respondent at Para 10 states :

"To undertake such functions as may be entrusted to it by Government from time to time, including grant of credits and guarantees in foreign currency for the purpose of facilitating the import of raw materials and semi-finished goods for manufacture or processing goods for export."

Para 11 of the said object reads thus :

"To act as agent of the Government, or with the sanction of the Government on its own account, to give the guarantees, undertake such responsibilities and discharge such functions as are considered by the Government as necessary in national interest."

32. Identical issue came for consideration in the case of **Food Corporation of India and another v. Seil Ltd. and others**, reported in (2008) 3 SCC 440. In that case the matter relates to levy of sugar under Essential Commodities Act. Sugar



Company under the law was to supply Sugar to the Central Government or State Government or to the body owned or control of Central or State Government to a certain percentage at the price fixed under the Essential Commodities Act so that Sugar be made available at subsidized rate and rest sugar was to be sold in the open market. The Seil Ltd. has received letters of allotment for supply of sugar both to FCI as also UPPCE. Claims were lodged for the price of levy sugar both with FCI as also the Directorate of Sugar, Ministry of Food and Civil Supply. The Central Government sanctioned the claim of the respondent with respect to sugar supply to UPPCE. The Company demanded price of levy sugar from FCI. The appellant demanded for a no-dues certificate. It raised other objections including weight and quality of the sugar in relation to the supplies made to the Central Government. The payment was withheld on account of shortage of supply of sugar during the period 1983 to 1995, that led to dispute. The High Court has taken a view that so far supply to the Food Corporation of India this controversy with respect to payment, would be settled by the civil court. So far supply made to the Central Government, State Government and their other agencies direction may be issued for payment. The matter reached to the Hon'ble Supreme



Court where plea was taken that in contractual matter no writ petition would be maintainable. In the case of breach of contract on the part of the State agency the writ petition will not be maintainable specially in a disputed question of fact where quality and quantity of supply of sugar was under dispute. The Hon'ble Court has held that disputes involving public law element are amenable to writ jurisdiction. Once the State or any instrumentality of State is party to contract, it has an obligation to act fairly, justly and reasonable within the requirement of Article 14 of the Constitution of India. It does not only act as court of law but also court of equity. A clear error or omission on the part of the court to consider a justifiable claim on its part would be subject to judicial review, amongst others on the principle of *actus curiae neminem gravabit* i.e. an act of the court shall prejudice none and the Court held Article 14 of the Constitution of India has received a liberal interpretation over the years and the Court has expanded by creative interpretation of the Court. It will be relevant to quote paragraph nos. 23 and 25 of the aforesaid judgment:

“23. [Article 14](#) of the Constitution of India has received a liberal interpretation over the years. Its scope has also been expanded by creative interpretation of the court. The law has



developed in this field to a great extent. In this case, no disputed question of fact is involved.

*25. We do not, thus, find any substance in the contention of Mr. Sharan that while exercising its review jurisdiction, no interest on the principal sum could have been directed to be granted by the High Court. A writ court exercises its power of Review under [Article 226](#) of the Constitution of India itself. While exercising the said jurisdiction, it not only acts as a court of law but also as a court of equity. A clear error or omission on the part of the court to consider a justifiable claim on its part would be subject to review; amongst others on the principle of *actus curiae neminem gravabit* (An act of the courts shall prejudice none). We appreciate the manner in which the learned Judge accepted his mistake and granted relief to the respondents.”*

33. Identical issue came for consideration before Hon’ble Supreme Court in the case of **United Bank of India v. Satyawati Tondon and others**, reported in (2010) 8 SCC 110 where the High Court has exercised jurisdiction under the writ with respect to the matter related to the action taken by the Bank under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short “the SARFAESI ACT”) under Section 13(4), straightway the



person aggrieved approached to the writ court under Article 226 of the Constitution of India which was entertained and interim relief, restrained the Bank to proceed under SARFAESI ACT was passed in favour of the guarantor of the loan. Hon'ble Supreme Court has held that the rule of exhaustion of alternative remedy is a rule of discretion and not one of the compulsion but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal and revision and the particular legislation contains a detailed mechanism for redressal of his grievance. It will be relevant to quote paragraph nos. 44 to 49 of the aforesaid judgment:

“44. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under [Article 226](#) of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is



bound to keep in view while exercising power under [Article 226](#) of the Constitution.

45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under [Article 226](#) of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.

46. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in



Baburam Prakash Chandra Maheshwari v. Antirim Zila Parishad AIR 1969 SC 556, Whirlpool Corporation v. Registrar of Trade Marks, Mumbai (1998) 8 SCC 1 and Harbanslal Sahnia and another v. Indian Oil Corporation Ltd. and others (2003) 2 SCC 107 and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass appropriate interim order.

47. In Thansingh Nathmal v. Superintendent of Taxes (1964) 6 SCR 654, the Constitution Bench considered the question whether the High Court of Assam should have entertained the writ petition filed by the appellant under Article 226 of the Constitution questioning the order passed by the Commissioner of Taxes under the Assam Sales Tax Act, 1947. While dismissing the appeal, the Court observed as under:

".....The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Articles. But the exercise of the jurisdiction is discretionary: it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort that jurisdiction is not intended as an alternative



remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under [Article 226](#), where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under [Article 226](#) trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under [Article 226](#) of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."

48. *[In Titaghur Paper Mills Co. Ltd. v. State of Orissa](#) (1983) 2 SCC 433, a three-Judge Bench considered the question whether a petition under [Article 226](#) of the Constitution should be entertained in a matter involving challenge to the*



order of the assessment passed by the competent authority under the [Central Sales Tax Act, 1956](#) and corresponding law enacted by the State legislature and answered the same in negative by making the following observations:

*"11. Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the Prescribed Authority under sub-section (1) of [Section 23](#) of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under sub-section (3) of [Section 23](#) of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under [Section 24](#) of the Act. [The Act](#) provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under [Article 226](#) of the Constitution. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in *Wolverhampton New Waterworks Co. v. Hawkesford* in the following passage:*



"There are three classes of cases in which a liability may be established founded upon statute. . . . But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. . . the remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspapers Ltd. and has been reaffirmed by the Privy Council in Attorney-General of Trinidad and Tobago v. Gordon Grant & Co. Ltd. and Secretary of State v. Mask & Co. It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine."

49. The views expressed in Titaghur Paper Mills Co. Ltd. v. State of Orissa (supra) were echoed in Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd. and others (1985) 1 SCC 260 in the following words:

"Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill- suited to meet



the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to [Article 226](#) of the Constitution. But then the Court must have good and sufficient reason to bypass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under [Article 226](#) of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged."

34. In the case of **City and Industrial Development Corporation v. Dosu Aardeshir Bhiwandiwalla and others**, reported in (2009)1 SCC 168 the question arose about an issue of litigation of using the land by instrumentality of the State without acquisition is unconstitutional and contrary to the provisions of Article 300-A of the Constitution of India. No State or any authority of the State is entitled to deprive any citizen of India of his property without following due process of law and



without acquiring such property in accordance with law as in the case the Corporation which was State under Article 12 of the Constitution of India illegally and unauthorisedly using the land without acquisition. A complaint was made in the shape of the writ application before the High Court, The Court directed the Collector, Raigad to take steps for acquiring the land by following due process of law within one year of receiving the requisition from City and Industrial Development Corporation, SLP was filed by the Corporation which was rejected. Thereafter review petition was filed which was also dismissed. Before Hon'ble Supreme Court one of the issue was raised about entertainment of the writ application and has held that since writ of mandamus is highly discretionary. The relief cannot be claimed by way of right inasmuch as the High Court should have refused to entertain the application on the ground of delay and laches on account of unexplained delay and the laches. The Court has held that while exercising its extraordinary jurisdiction under Article 226 is duty bound to consider whether adjudication of writ petition involves any complex and disputed questions of facts and whether that can be satisfactorily resolved or whether the petitioner has any alternative or effective remedy for the resolution of the dispute. It will be relevant to quote



relevant portion of paragraph nos. 29 and 30 of the aforesaid judgment:

“22. In our opinion, the High Court while exercising its extraordinary jurisdiction under [Article 226](#) of the Constitution is duty bound to take all the relevant facts and circumstances into consideration and decide for itself even in the absence of proper affidavits from the State and its instrumentalities as to whether any case at all is made out requiring its interference on the basis of the material made available on record. There is nothing like issuing an ex-parte writ of Mandamus, order or direction in a public law remedy. Further, while considering validity of impugned action or inaction the court will not consider itself restricted to the pleadings of the State but would be free to satisfy itself whether any case as such is made out by a person invoking its extra ordinary jurisdiction under [Article 226](#) of the Constitution.

30. The court while exercising its jurisdiction under [Article 226](#) is duty bound to consider whether :

- (a) adjudication of writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;*
- (b) petition reveals all material facts;*
- (c) the petitioner has any alternative or effective remedy for the resolution of the dispute;*
- (d) person invoking the jurisdiction is guilty of*



unexplained delay and laches;

(e) ex facie barred by any laws of Limitation;

(f) grant of relief is against public policy or barred by any valid law; and host of other factors”.

35. Similar point came for consideration in the case of **Union of India and others v Tantia Construction Private Ltd.**, reported in (2011) 5 SCC 697. Eastern Railway invited tender for the work of construction of a rail over bridge at Bailey Road, Patna and the tender documents provided that the construction work was to be completed within 15 months from the date of issuance of the letter of acceptance. Accordingly, parties have entered into agreement On account of some of the procedural formalities including the change of the span of the bridge, change in the design of the pier cap, the requirement of shifting obstacles like a temple, police station, electrical pole etc. including the delay in preparation of the designs and drawing which was involved to be worked by the agency. On account of changes in the design whereby the viaduct had to be extended involving an additional cost of Rs.36.11 crores. The railway sought consent for execution of the complete work including revised work but the Company has refused to give their consent for execution of complete work at revised cost.



Railway issued separate tender for the additional work of the extended portion viaduct for the railway over bridge but no response was received and the cost of revised and reassessed. Corrigendum were issued from time to time in connection with the tender of the additional work. Two Companies have come forward for additional work. While tender process of extended was going on and matter was under consideration, Respondent Company offered to execute the work at the same rate and terms and conditions of the contract agreement, but on condition that the price would increase due to the price variation clause, be payable to the Company. The dispute arose about the rate of execution of work between Tania Construction and Railway Administration. The Company has approached this Court. In the writ application, the challenge was direction of the Railway Authorities for completion of work including extended work, has raised the point that Company having failed to any suitable response to the fresh tender with respect to additional work railway authority cannot compel the Company to complete the additional work at an arbitrarily low price, when the additional work was not part of the original tender. Learned Single Bench of this Court has held that there was no breach of agreement, as the



Union of India, itself altered the agreement by separately tendering the extended work. Consequently the entire work could not be thrust upon Tantia Construction and the Railway was free to get the viaduct constructed separately by any other contractor and the Company was ready to do the balance work from the left over tender, the rescinding of the entire work by the Railway and to re-tender the entire block could not certainly be at the risk and cost of the respondent Company and the Company cannot be saddled to bear the cost of work which was never undertaken to execute. The Railway Administration was directed to clear the payment of the respondent. The matter went to the Hon'ble Supreme Court. A plea of alternative remedy for redressal of grievance by arbitrator was taken and a plea was taken that Article 226 of the Constitution of India is not a proper forum of the adjudication which was challenged by Tantia Construction and submitted that alternative remedy does not place any fetter on the exercise of power by the High Court under Article 226 of the Constitution of India. Alternative remedy is rule of discretion and not one of compulsion and there could be contingencies in which the High Court would exercise its jurisdiction in spite of availability of an alternative remedy. The Supreme Court has refused to interfere in the matter holding that



alternative remedy is not absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. It will be relevant to quote paragraph nos. 21, 22 and 33 of the aforesaid judgment:

“21. In support of his aforesaid submissions Mr. Chakraborty firstly relied and referred to the decision of this Court in [Harbanslal Sahnia vs. Indian Oil Corporation Ltd.](#) [(2003) 2 SCC 107], wherein this Court observed that the Rule of exclusion of writ jurisdiction by availability of an alternative remedy, was a rule of discretion and not one of compulsion and there could be contingencies in which the High Court exercised its jurisdiction inspite of availability of an alternative remedy.

22. Mr. Chakraborty also referred to and relied on the decision of this Court in [Modern Steel Industries vs. State of U.P. and others](#) [(2001) 10 SCC 491], wherein on the same point this Court had held that the High Court ought not to have dismissed the writ petition requiring the Appellant therein to take recourse to arbitration proceedings, particularly when the vires of a statutory provision was not in issue. Reference was also made to the decision of this Court in [Whirlpool Corporation vs. Registrar of Trade](#)



Marks [(1998) 8 SCC 1]; National Sample Survey Organisation and Another vs. Champa Properties Limited and Another [(2009) 14 SCC 451] and Hindustan Petroleum Corporation Limited and Others vs. Super Highway Services and Another [(2010) 3 SCC 321], where similar views had been expressed.

33. Apart from the above, even on the question of maintainability of the writ petition on account of the Arbitration Clause included in the agreement between the parties, it is now well-established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. The various decisions cited by Mr. Chakraborty would clearly indicate that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution.”

36. In the case of **Executive Engineer, Southern Electricity Supply Company of Orissa Limited (South Co) and another v. Sri Seetaram Rice Mill**, reported in (2012) 2



SCC 108 where without exhausting alternative remedy of appeal, preferred, the writ application challenging the provisional order of assessment. The Court has held that High Court would not normally interfere in exercise of its jurisdiction under Article 226 of the Constitution of India where statutory alternative remedy is available but it is equally settled that there are some exceptions and the High Court would exercise the power with circumspection in exceptional cases, particularly, where the cases involve a pure question of law or vires of an Act are challenged. The availability of alternative statutory or other remedy by itself may not operate as an absolute bar for exercise of jurisdiction by the courts. It will normally depends upon the facts and circumstances of the case. It will be relevant to quote paragraph nos. 80, 81 and 82 of the aforesaid judgment:

“80. It is a settled canon of law that the High Court would not normally interfere in exercise of its jurisdiction under [Article 226](#) of the Constitution of India where statutory alternative remedy is available. It is equally settled that this canon of law is not free of exceptions. The courts, including this Court, have taken the view that the statutory remedy, if provided under a specific law, would impliedly oust the jurisdiction of the Civil Courts. The High Court in exercise of its extraordinary jurisdiction under [Article 226](#) of the Constitution of India can entertain



writ or appropriate proceedings despite availability of an alternative remedy. This jurisdiction, the High Court would exercise with some circumspection in exceptional cases, particularly, where the cases involve a pure question of law or vires of an Act are challenged. This class of cases we are mentioning by way of illustration and should not be understood to be an exhaustive exposition of law which, in our opinion, is neither practical nor possible to state with precision. The availability of alternative statutory or other remedy by itself may not operate as an absolute bar for exercise of jurisdiction by the Courts. It will normally depend upon the facts and circumstances of a given case. The further question that would inevitably come up for consideration before the Court even in such cases would be as to what extent the jurisdiction has to be exercised.

81. Should the Courts determine on merits of the case or should it preferably answer the preliminary issue or jurisdictional issue arising in the facts of the case and remit the matter for consideration on merits by the competent authority? Again, it is somewhat difficult to state with absolute clarity any principle governing such exercise of jurisdiction. It always will depend upon the facts of a given case. We are of the considered view that interest of administration of justice shall be better subserved if the cases of the present kind are heard by the courts only where it involves primary questions of jurisdiction or the



matters which goes to the very root of jurisdiction and where the authorities have acted beyond the provisions of the Act. However, it should only be for the specialized Tribunal or the appellate authorities to examine the merits of assessment or even factual matrix of the case.

*82.It is argued and to some extent correctly that the High Court should not decline to exercise its jurisdiction merely for the reason that there is a statutory alternative remedy available even when the case falls in the above-stated class of cases. It is a settled principle that the Courts/Tribunal will not exercise jurisdiction in futility. The law will not itself attempt to do an act which would be vain, *lex nil frustra facit*, nor to enforce one which would be frivolous *lex neminem cogit ad vana seu inutilia*--the law will not force any one to do a thing vain and fruitless. In other words, if exercise of jurisdiction by the Tribunal *ex facie* appears to be an exercise of jurisdiction in futility for any of the stated reasons, then it will be permissible for the High Court to interfere in exercise of its jurisdiction. This issue is no longer *res integra* and has been settled by a catena of judgments of this Court, which we find entirely unnecessary to refer to in detail. Suffices it to make a reference to the judgment of this Court in the case of [Whirlpool Corporation v. Registrar of Trade Marks, Mumbai](#) [(1998) 8 SCC 1] where this Court was concerned with the powers of the Registrar of*



Trade Marks and the Tribunal under the Trade and [Merchandise Marks Act](#), 1958 and exercise of jurisdiction by the High Court in face of availability of a remedy under the Act.”

37. The Hon’ble Supreme Court recently has considered the parameter and scope of power of High Court under Article 226 of the Constitution of India in what circumstances, even in the case of alternative remedy, in stead of asking to avail that remedy, would directly exercise jurisdiction, has been dealt with and delineated in the case of **Joshi Technologies International, INC v. Union of India and others**, reported in (2015) 7 SCC 728. In that case Joshi Technologies International has entered into an agreement relating to exploration of certain oil fields in the state of Gujrat. It started production and was submitting income tax return on the income generated from the aforesaid production. In the returns the appellant claimed benefit under Section 42 of the Income Tax Act, 1961 (in short the Act). Section 42 of the Act is special provision for the deductions in the case of business for prospecting etc. for mineral oil. The Income Tax Authorities extended the benefit of granting deduction under Section 42 of Income Tax Act. The Company submitted return for the year 2005-2006 taking benefit of Section 42 of the Act, while making assessment,



Assessing Officer observed that as there is no such stipulation in the agreement between Joshi Technologies with the Central Government, in absence of such stipulation in the agreement, the Joshi Technologies was not entitled for the benefit of Section 42 of the Act. The question arose with regard to the entitlement of benefit to the petitioner arising from Section 42 of the Act. The petitioner approached to Delhi High Court under Article 226 of the Constitution of India which was dismissed holding that the petitioner was not entitled to any deduction under Section 42 of the Act in absence of the stipulation in the contract signed by the parties. The matter reached to Hon'ble Supreme Court, Hon'ble Court has dealt with the case on merit as also taken into consideration in what circumstances, circumference and parameter, the Court would exercise discretionary jurisdiction under Article 226 of the Constitution of India. The Court has held that in a matter of private character or purely contractual field, no such public law element is involved, mandamus will not lie. The Court has further held that the State or instrumentality of the State cannot be allowed to act arbitrarily and its action must be in conformity with the principle which meets the test of reason and relevance. Where an authority, appears, acting unreasonably, the Court is not power less and a



writ of mandamus can be issued for performing its duty free from arbitrariness and unreasonableness. It has further taken the view that where the contract entered into between the State and the persons aggrieved is non-statutory and purely contractual and the right are governed only by the terms of the contract, no writ or order can be issued under Article 226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple. Ordinarily where a breach of contract is complained of, a party complaining of such breach may, sue for specific performance of the contract, if contract is capable of being specifically performed, or the party may sue for damages. Such a suit would ordinarily be cognizable by the civil court. The High Court in its extraordinary jurisdiction would not entertain a petition either for specific performance of contract or for recovering damages. A right to relief flowing from a contract has to be claimed in a civil court where a suit for specific performance of contract or for damages could be filed. The Court has held that in the matter of contractual obligations or obligations arising out of the tort, the court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the court will examine actions of the State if they pertain to the public law domain and refrain



from examining them if they pertain to the private law filed. It is very difficult to demarcate the frontier between the public law domain and the private law field. The question would be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged while performing the action, the public law or private law character of the action and a host of other facts and circumstances would be relevant for consideration. The Court has held that the High Court under Article 226 of the Constitution of India has plenary jurisdiction and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of its power. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons for which the Court thinks it necessary to exercise the said jurisdiction and all the proposition has been culled out by the Hon'ble Supreme Court in paragraph



nos. 62 to 70 of the aforesaid judgment. It will be relevant to quote paragraph nos. 62 to 70 of the aforesaid judgment:

“62. The question came up for consideration again in the case of Kumari Shrilekha Vidyarthi etc. etc. v. State of U.P. and others. In that case, State of U.P. had issued Government order dated 6.2.1990 whereby appointments of all Government Counsels (Civil, Criminal, Revenue) in all the Districts of the State of U.P. were terminated w.e.f. 28.2.1990, irrespective of the fact whether the term of the incumbents had expired or was subsisting. Validity of this G.O. was challenged by many of these Government Counsels whose appointments were terminated and one of the issues to be determined by the court was as to whether writ petition was maintainable challenging this G.O., as according to the Respondent State the appointment of these Government Counsel was purely contractual and writ petition to enforce the contract was not maintainable.

63. After noticing this argument of the respondents, the Supreme Court formulated the question to be decided in the said case, in the following words:

“.....The learned Additional Advocate General did not dispute that if Art. 14 of the Constitution of India is attracted to this case all State actions, the impugned circular would be liable to be quashed if it suffers from the vice of arbitrariness. However, his argument is that there is no such vice. In the



ultimate analysis, it is the challenge of arbitrariness which the circular must challenge of arbitrariness withstand in order to survive. This really is the main point evolved for decision by us in the present case".

64.The Court then examined the nature of appointment of the Government counsel in the Districts with reference to the various legal provisions including legal Remembrance Manual and Section 24 Code of Criminal procedure as well as decision of Supreme Court in which character of engagement of a Government counsel was considered. After analyzing these provisions and case law, the Supreme Court concluded in the following manner, describing the nature of appointment of District Government counsel:

"17. We are, therefore, unable to accept the argument of the Ld. Addl. Advocate General that the appointment of District Government Counsel by the State Government is only a professional engagement like that between a private client and his lawyer, or that it is purely contractual with no public element attaching to it, which may be terminated at any time at the sweet will of the Government excluding judicial review. We have already indicated the presence of public element attached to the 'office' or post of District Government Counsel of every category covered by the impugned circular. This is sufficient to attract



Article 14 of the Constitution and bring the question of validity of the impugned circular within the scope of judicial review.

18. The scope of judicial review permissible in the present case, does not require any elaborate consideration since even the minimum permitted scope of judicial review on the ground of arbitrariness or unreasonableness or irrationality, once Art. 14 is attracted, is sufficient to invalidate the impugned circular as indicated later. We need not, Therefore, deal at length with the scope of judicial review permissible in such cases since several nuances of that ticklish question do not arise for consideration in the present case.

19. Even otherwise and sans the element so obvious in these appointment and its concomitants viewed as purely contractual matters after the appointment is made, also attract Art. 14 and exclude arbitrariness permitting judicial review of the impugned state action. This aspect is dealt with hereafter.

20. Even apart from the premises that 'office' or post of D.G.Cs. has a public element which alone is sufficient to attract the power of judicial review for testing validity of the impugned circular on the anvil of Art.14, we are also clearly of the view that this power is available even without that element on the premise that after initial appointment, the



matter is purely contractual. Applicability of Art. 14 to all executive actions of the State being settled and for the same reason its applicability at the threshold to the making of a contract in exercise of the executive power being beyond dispute, can it be said that the State can thereafter cast off its personality and exercise unbridled power unfettered by the requirements of Art. 14 in the sphere of contractual matters and claim to be governed therein only by private law, principles applicable to private individuals whose rights flow only from the terms of the contract without anything more ? We have no hesitation in saying that the personality of the State, requiring regulation of its conduct in all spheres by requirements of Art. 14 does not undergo such a radical change after the making of a contract merely, because some contractual rights accrue to the other party in addition. It is not as if the requirements of Art. 14 and contractual obligations are alien concepts, which cannot co-exist.

21. The preamble of the Constitution of India resolves to secure to all its citizens Justice, social economic and political: and Equality of status and opportunity. Every State action must be aimed at achieving this goal. Part IV of the Constitution contains 'Directive principles of State Policy' which are fundamental in the governance of the



country and are aimed at securing social and economic freedoms by appropriate State action which is complementary to individual fundamental rights guaranteed in part III for protection against excesses of State action, to realise the vision in the preamble. This being the philosophy of the constitution, can it be said that it contemplates exclusion of Art. 14 non arbitrariness which is basic to rule of law from State actions is contractual field when all actions of the State are meant fore public good and expected to be fair and just? We have no doubt that the Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the preamble. In our opinion, it would be alien to the Constitutional scheme to accept the argument of exclusion of Art. 14 in contractual matters. The scope and permissible grounds of judicial review in such matters and the relief which may be available are different matters but that does not justify the view of its total exclusion. This is more so when the modern t rend is also to examine the unreasonableness of a term in such contractual where the bargaining power is unequal so that these are not negotiated contracts but standard from contracts between unequals.

22. There is an obvious difference in the contracts between private parties and contracts to which the



State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimum requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Art. 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Art. 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Art. 14 of non-



arbitrariness at the hands of the State in any of its actions.

Xx

xx

xx

34. In our opinion, the wide sweep of Art. 14 undoubtedly takes within its fold the impugned circular issued by the State of U.P. in exercise of its executive power, irrespective of the precise nature of appointment of the Government counsel in the districts and the other rights, contractual or statutory, which the appointees may have. It is for this reason that we base our decision on the ground that independent of any statutory right, available to the appointments, and assuming for the purpose of this case that the rights flow only from the contract of appointment, the impugned circular, issued in exercise of the executive power of the State, must satisfy Art. 14 of the Constitution and if it is shown to be arbitrary, it must be struck down. However, we have referred to certain provisions relating to initial appointment, termination or renewal of tenure to indicate that the action is controlled at least by settled guidelines, followed by the State of U.P. for a long time. This too is relevant for deciding the question of arbitrariness alleged in the present case"

65. Similarly, in State of Gujarat v. M.P. Shah Charitable Trust[14], this Court reiterated the principles that if the matter is governed by a



contract, the writ petition is not maintainable since it is a public law remedy and is not available in private law field, for example, where the matter is governed by a non-statutory contract.

66. At this stage, we would like to discuss at length the judgment of this Court in ABL International Ltd. (supra), on which strong reliance is placed upon by the counsel for both the parties. In that case, various earlier judgments right from the year 1954 were taken note of. One such judgment which the Department in support of their case had referred to was the decision of Apex Court in case LIC of India v. Escorts Ltd.[15] wherein the Court had held that ordinarily in matter relating to contractual obligations, the Court would not examine it unless the action has some public law character attached to it. The following passage from the said judgment was relied upon by the respondents:

".....If the action of the State is related to contractual obligations or obligations arising out of the tort, the court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in demarcating the frontier between the public law domain and the private law



field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances. When the State or an instrumentality of the State ventures into the corporate world and purchases the shares of a company, it assumes to itself the ordinary role of a shareholder, and dons the robes of a shareholder, with all the rights available to such a shareholder. There is no reason why the State as a shareholder should be expected to state its reasons when it seeks to change the management, by a resolution of the company, like any other shareholder."

This Court dealt with this judgment in the following manner:

"13. We do not think Court in the above case has, in any manner, departed from the view expressed in the earlier judgments in the case cited hereinabove. This Court in the case of Life Insurance Corporation of India (Supra) proceeded on the facts of that case and held that a relief by way of a writ petition may not ordinarily be an appropriate remedy. This judgment does not lay down that as a rule in matters of contract the



court's jurisdiction under Article 226 of the Constitution is ousted. On the contrary, the use of the words "court may not ordinarily examine it unless the action has some public law character attached to it" itself indicates that in a given case, on the existence of the required factual matrix a remedy under Article 226 of the Constitution will be available."

67. Insofar as the argument of the respondents in the said case that writ petition on contractual matter was not maintainable unless it is shown that the authority performs a public function or discharges a public duty, is concerned, it was answered in the following manner:

"22. We do not think the above judgment in VST Industries Ltd. (supra) supports the argument of the learned counsel on the question of maintainability of the present writ petition. It is to be noted that VST Industries Ltd. against whom the writ petition was filed was not a State or an instrumentality of a State as contemplated under Article 12 of the Constitution, hence, in the normal course, no writ could have been issued against the said industry. But it was the contention of the writ petitioner in that case that the said industry was obligated under the concerned statute to perform certain public functions, failure to do so would give rise to a complaint under Article 226 against a private body. While considering such argument,



this Court held that when an authority has to perform a public function or a public duty if there is a failure a writ petition under Article 226 of the Constitution is maintainable. In the instant case, as to the fact that the respondent is an instrumentality of a State, there is no dispute but the question is: was first respondent discharging a public duty or a public function while repudiating the claim of the appellants arising out of a contract ? Answer to this question, in our opinion, is found in the judgment of this Court in the case of Kumari Shri Lekha Vidyarthi & Ors. vs. State of U.P. & Ors. [1991] (1) SCC 212] wherein this Court held: "22....The impact of every State action is also on public interest.

24.....It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters.

" 23. It is clear from the above observations of this Court, once State or an instrumentality of State is



a party to the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the above said requirement of Article 14 then we have no hesitation that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent."

68. The Court thereafter summarized the legal position in the following manner:

"27. From the above discussion of ours, following legal principles emerge as to the maintainability of a writ petition :-

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of facts arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.

28. However, while entertaining an objection as to the maintainability of a writ petition under Article



226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power [See: Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai & Ors. [1998 (8) SCC 1]. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the court thinks it necessary to exercise the said jurisdiction."

69. The position thus summarized in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under



certain circumstances, can refuse to exercise. It also follows that under the following circumstances, 'normally', the Court would not exercise such a discretion:

69.1. the Court may not examine the issue unless the action has some public law character attached to it.

69.2. Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.

69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

69.4. Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.

70. Further legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to the contracts entered into by the State/public Authority with private parties, can be summarized as under:

70.1. At the stage of entering into a contract, the State acts purely in its executive capacity and is



bound by the obligations of fairness.

70.2. State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practice some discriminations.

70.3. Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, Involving examination and cross- examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases court can direct the aggrieved party to resort to alternate remedy of civil suit etc.

70.4. Writ jurisdiction of High Court under Article 226 was not intended to facilitate avoidance of obligation voluntarily incurred.

70.5. Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever



be that a licensee can work out the license if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the license, if he finds it commercially inexpedient to conduct his business.

70.6. Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

70.7 Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

70.8. If the contract between private party and the State/instrumentality and/or agency of State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitutional of India and invoking its



extraordinary jurisdiction.

70.9. The distinction between public law and private law element in the contract with State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract. This Court has maintained the position that writ petition is not maintainable. Dichotomy between public law and private law, rights and remedies would depend on the factual matrix of each case and the distinction between public law remedies and private law, field cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision making process or that the decision is not arbitrary.

70.10. Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision



arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

70.11. The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. Keeping in mind the aforesaid principles and after considering the arguments of respective parties, we are of the view that on the facts of the present case, it is not a fit case where the High Court should have exercised discretionary jurisdiction under Article 226 of the Constitution. First, the matter is in the realm of pure contract. It is not a case where any statutory contract is awarded.”

38. Recently this Court in Division Bench has also considered the scope of Article 226 of the Constitution of India in the matter of contractual dispute in the case of Baidyanath Singh v. The State of Bihar and others, (L.P.A. No.1861 of 2016) placing reliance on large number of judgments of Hon’ble Supreme Court, has set out that, the Court in contractual matter will not examine the issues involved therein under Article 226 of the Constitution of India unless contract is statutory contract



or the action involved public law element. In case of a breach of contract, the party complaining of such breach may sue for specific performance of the contract if the contract is capable of being specifically performed otherwise, the party may sue for damages. The power of judicial review conferred on this Court under Article 226 of the Constitution of India could be invoked in contractual matters only if the public law element is present and not in respect of the contracts falling within the realm of private law. The Court has also held that every act of a statutory bodies, like private parties, have power to contract or deal with property. Such activity has not raised any issue of public law element or it is not a statutory contract, the Court has refused to grant relief to the appellant.

39. In view of the aforesaid discussion it emerges that in the contractual matter unless there is public law element is involved or in a statutory contract, the Court should not exercise the power under Article 226 of the Constitution of India as well as action under challenge, is not suffering from arbitrariness and unreasonableness which would be tested on the touch stone of Article 14 of the Constitution of India. The Court would exercise the power conferred under Article 226 of the Constitution of India when the order has been passed without



hearing the parties is against the natural justice or the order has been passed outrageous to judicial conscience, no prudent or reasonable person would pass such order. When the challenged has been made about the action of instrumentality of State if it is purely contractual dispute, the Court would ask the parties to settle the dispute before civil court or machinery as provided under the agreement/contract.

40. This Court would give its opinion with respect to present case, whether it is a fit case to exercise jurisdiction under Article 226 of the Constitution of India as it will be dependent on later discussion and finding.

41. Second issue which has been raised by the petitioner, that the action is violative of Article 14 of the Constitution of India and against to the natural justice, in view of the admitted facts that on account of special attending facts and circumstances and reasons which were beyond the control the petitioner on that account could not discharge the contractual duty as failed to provide power on the schedule delivery date which have been explained in various letters, such as on account of failure to get clearance of prospective licence with respect to Chakla Coal Mines and Ashoka Karkat Coal Mines, failure of State Government to acquire and transfer the Government land lying



within the project area, acquisition of land by the Government and settling the dispute with respect to land of SC and ST, fallen within the project area and non-availability of water for running the power plant and other incidental matter lastly, which finally made it impossible to honour the schedule delivery date on account of cancellation of coal blocks by the Hon'ble Supreme Court. It has further been said that the Company vide letter dated 28.4.2014 (Annexure-7) has elaborately explained the causes of failure to provide power on and before the schedule date of delivery and made a request for extension of schedule date of delivery by two years till 17.10.2017. Though the Power Holding Company vide letter dated 16.7.2014 (Annexure-8) has sought explanation as to why Power Purchase Agreement be not terminated under Article 11.5 read with Article 4.7.3 of Power Purchase Agreement mentioning therein, the delay in supply of contracted power from schedule date of delivery has affected entire power planning of the State and compelled to procure costly power from other sources and also mentioned, the letter dated 28.4.2014 does not give any assurance and certainty in the power supply from a definite date. The issue of Forest clearance for captive Chakla Coal Block or reallocation of the captive Chakla Coal Block for project or the final decision of the Court may be



bonafide reason do not resolve the issue of power supply on Schedule Delivery Date. It has been given notice under Sub Article 4.7.3 and 11.5.1 of Power Purchase Agreement explain why agreement be not terminated and encash Contract Performance Guarantee amount for Rs.135 crores. The petitioner Company responded vide letters dated 24th July 2014, 5th August ,2014 and 9th October, 2014 and without considering the attending facts and circumstances and explanation submitted by the petitioner and without paying heed to request for extension of scheduled delivery date, vide two letters dated 24.1.2017 (Annexure-16 series) and in terms of Article 11.3 gave default notice to the effect that petitioner Company failed to commence supply of power by scheduled delivery date thereafter for a period of 12 months, the same constitute the event of seller default as per Article 11.1.1 called upon to pay liquidated damages within 21 days failing which it will take appropriate legal action in accordance with law. But counsel for the petitioner submits that before completion of 21 days, has invoked the Bank Guarantee on 31.1.2014, has been claimed that it violates the natural justice is against to the fairness on the part of the Power Holding Company violates Article 14 of the Constitution of India. It has further been said that the entitlement of liquidated damages cannot be



unilaterally be decided by the Power Holding company as it can be decided by an independent arbitrator merely because they feel that they are entitled to liquidate damage without considering the issue of attending facts and circumstances and the situation which are beyond its control which entitled the petitioner Company to terminate the agreement to supply the power on the scheduled delivery date in terms of the agreement falls under category of Force Majeure cannot be held liable to pay any liquidated damages whereas Power Holding Company submits that the Contract Performance Guarantee is an independent and separate contract. The petitioner Company has given a guarantee in favour of the erstwhile BSEB (now Holding Company) the Bank is a guarantor, even in the case of unilateral invoking of payment of bank guarantee for breach of condition the Bank is/was bound to honour the payment under the coverage of the guarantee. It has further been argued that Holding Company had already given notice, much prior to, invocation of guarantee, in the year 2014 itself and all the time notices were served upon the petitioner is explicit contemplating for taking action in terms of the agreement. It has further been argued that the terms of the Bank guarantee was irrecoverable, obligation was attached to the Bank towards the Power Holding Company, in case of demand, they cannot refuse to



obligate the Power Holding Company to credit the amount of guarantee it has further been submitted that the Court should not interfere in the matter of invoking the Bank guarantee only in case of fraud and other alike grounds Court can pass an order of injunction but apart from those grounds the Court should refused to interfere in the matter. In terms of commitment made by the Bank to the Power Holding Company, on demand they are/were bound to transmit the money without demur. On this issue certain judgments are relevant to be looked into. On the point of assessment of liquidated damages, quantification of the same and invoking the Clause Force Majeur is not part of the Bank guarantee can be looked into by the independent arbitrator. The issue of rightful invocation dependent on several factors, as in the agreement there is stipulation of power supply from alternative source, inasmuch as the petitioner Company has extended offer to supply power from alternative sources subject to revision rate of tariff giving example of sale of power to different Holding Company of different States.

42. This Court has given anxious consideration to the arguments of both sides, this Court would examine conflict of interest of both sides and decide the issue, as petitioner Company has invoked the Force Majeure clause to repudiate the claim of



liquidated damage of Holding Company whereas Holding Company after addressing letters unilaterally without the intervention of adjudicatory body has claimed liquidated damage and invoked the bank guarantee. Will the decision of the Holding Company will be treated to be final or is dependent on the final outcome the issue will be decided in properly constituted legal proceeding.

43. In order to arrive to final conclusion, it will be relevant to examine following judicial pronouncement of Hon'ble Court. It will be relevant to consider the case of M/s J.G. Engineers Pvt. Ltd. v. Union of India and another, reported in **AIR 2011 SC 2477, State of Karnataka v. Shree Rameshwara Rice Mills, Thirthahalli, reported in 1987(2) SCC 160 and 2013(1) PLJR 595**. All the three judgments have been placed by the petitioner for the proposition that unilateral decision of the Power Holding Company without adjudication by the independent arbitrator calling to pay liquidated damages and action of invoking Bank Guarantee is an act of arbitrariness, unreasonable and illegal violates Article 14 of the Constitution and in such circumstances the, claim of the respondent that they should go for an arbitration in terms of Clause of the agreement, would not be fetter the writ court to grant relief to the petitioner.



44. It will be relevant to discuss the judgments pressed in service by the petitioner, in the case of Shree Rameshwara Rice Mills (supra). The fact of case of State of Mysore had entered into an agreement with Shree Rameshwara Rice Mills to purchase paddy and to hull the paddy and supply rice. The State of Mysore alleged that the Company had committed breach of the contract by making short delivery of rice and demanded payment of damages assessed at Rs. 7344.16 by the Deputy Commissioner. As the respondent failed to pay the damages the State initiated proceedings under the Revenue Recovery Act to recover the amount as if it were arrears of land revenue. A suit was filed challenging the recovery proceedings and sought a permanent injunction to restrain the State from pursuing the recovery proceedings. The trial court dismissed the suit but the appellate court decreed the suit. Second appeal was filed. The matter was referred to the Full Bench on account of two conflicting judgments, and Full Bench answered the reference in following manner:

“where an agreement between the State and private person provides that for any breach of any of the condition of such agreement by such person he shall be liable to pay damage as may be assessed by the State and that any amount that may become due



or payable by such person to the State under any part of that agreement, shall be deemed to be and may be recovered from such person as if they were arrears of land revenue- (1) the State is not competent to adjudicate upon the question whether such person committed breach of contract and that the State is not competent to assess damage for any breach of the contract which is not admitted by the otherside (ii) damages so assessed cannot be recovered from such person as if they were arrears of land revenue.

45. The matter ultimately went to the Hon'ble Supreme Court, The Court has interpreted the terms of the agreement that right of the second party to assess the damages would arise only if the breach of conditions is admitted or if no issue is made of its. If it was the intention of the parties that the officer acting on behalf of the State was also entitled to adjudicate upon a dispute regarding the breach of conditions, the wording of Clause 12 would have been entirely different. The Court held that terms of the agreement cannot relate such a manner of empowering the officer of the State to decide upon the question of breach as well as assess the quantum of damages as party to the agreement cannot be an arbiter in his own cause. Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be made by an



independent person or body and not by the party to the contract. So this proposition gives the idea of an inference that if the party is disputing, committing breach of contract as well as damages in such circumstances, it is the independent arbitrator would decide the issue. But if the party accepts breach then in that circumstances authorized persons will be empowered to assess the amount of damages. It will be relevant to quote paragraph nos. 7 and 8 of the aforesaid judgment:

“7. On a consideration of the matter we find ourselves unable to accept the contentions of Mr. Iyenger. The terms of Clause 12 do not afford scope for a liberal construction being made regarding the power of the Deputy Commissioner to adjudicate upon a disputed question of breach as well as to assess the damages arising from the breach. The crucial words in clause 12 are "and for any breach of conditions set forth hereinbefore, the first party shall be liable to pay damages to the second party as may be assessed by the second party". On a plain reading of the words it is clear that the right of the second party to assess damages would arise only if the breach of conditions is admitted or if no issue is made of it. If it was the intention of the parties that the officer acting on behalf of the State was also entitled to adjudicate upon a dispute regarding the breach of conditions the wording of Clause 12 would have been entirely different. It cannot also be



argued that a right to adjudicate upon an issue relating to a breach of conditions of the contract would flow from or is inhered in the right conferred to assess the damages arising from a breach of conditions. The power to assess damages, as pointed out by the Full Bench, is a subsidiary and consequential power and not the primary power. Even assuming for argument's sake that the terms of Clause 12 afford scope for being construed as empowering the officer of the State to decide upon the question of breach as well as assess the quantum of damages, we do not think that adjudication by the Officer regarding the breach of the contract can be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interests or justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract. The position will, however, be different where there is no dispute or there is consensus between the contracting parties regarding the breach of conditions. In such a case the Officer of the State, even though a party to the contract will be well within his rights in assessing the damages occasioned by the breach in view of the specific terms of Clause 12.

8. We are, therefore, in agreement with the view of the Full Bench that the powers of the State under an



agreement entered into by it with a private person providing for assessment of damages for breach of conditions and recovery of the damages will stand confined only to those cases where the breach of conditions is admitted or it is disputed.”

46. In the case of M/s J.G. Engineers Pvt. Ltd. the facts were that the Union of India awarded the work to M/s J.G. Engineers Pvt. Ltd. for extension of terminal building at Guwahati airport. As per the contract, the date of commencement of work was 10.4.1993 and the period of completion of the work was 21 months, to be completed in different stages. As the Company (M/S J.J. Engineering) did not complete the first phase of the work within the stipulated time, the Union of India terminated the contract which was challenged before the Guwahati High Court. The Court interfered in the matter and directed the respondents to grant time. Accordingly the time was extended. Even, within the extended period the work was not completed, led to termination of contract on the ground of non-completion of work. The challenged was made to the Gauhati High Court and the High Court referred the matter to the arbitration for adjudication. In that case the Court has held that agreement is not the decision of any authority on the issue whether the contractor was responsible for the delay or the department was



responsible for the delay or on the question whether termination/rescission is valid or illegal. What is made final, is the decisions on consequential issues relating to quantification, if there is no dispute as to who committed breach. If the contractor admits that he is in breach, or if the Arbitrator finds that contractor is in breach by being responsible for the delay, the decision of the officer will be final and Court has held that in fact the question whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach. That question can only be decided by only an adjudicatory forum, that is, a court or an Arbitral Tribunal and the question whether the Company was responsible or respondents were responsible for the delay in execution of the work is arbitrable issue has to be examined by the arbitrator and if it is found that the Government was responsible in such circumstances the claim of liquidated damages cannot be held to be legal and permissible in law. It will be relevant to quote paragraph nos. 14, 15 (relevant portion), 16 and 17 of the aforesaid judgments:

“14. Thus what is made final and conclusive by



clauses (2) and (3) of the agreement, is not the decision of any authority on the issue whether the contractor was responsible for the delay or the department was responsible for the delay or on the question whether termination/rescission is valid or illegal. What is made final, is the decisions on consequential issues relating to quantification, if there is no dispute as to who committed breach. That is, if the contractor admits that he is in breach, or if the Arbitrator finds that the contractor is in breach by being responsible for the delay, the decision of the Superintending Engineer will be final in regard to two issues. The first is the percentage (whether it should be 1% or less) of the value of the work that is to be levied as liquidated damages per day. The second is the determination of the actual excess cost in getting the work completed through an alternative agency. The decision as to who is responsible for the delay in execution and who committed breach is not made subject to any decision of the respondents or its officers, nor excepted from arbitration under any provision of the contract.

15. In fact the question whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach. That question can only be decided by only an adjudicatory forum, that is, a court or an Arbitral



Tribunal. [In State of Karnataka vs. Shree Rameshwara Rice Mills](#) (1987 (2) SCC 160) this Court held that adjudication upon the issue relating to a breach of condition of contract and adjudication of assessing damages arising out of the breach are two different and distinct concepts and the right to assess damages arising out of a breach would not include a right to adjudicate upon as to whether there was any breach at all. This Court held that one of the parties to an agreement cannot reserve to himself the power to adjudicate whether the other party has committed breach. This court held :

16. The question whether the issue of breach and liability are excluded from arbitration, when quantification of liquidated damages are excluded from arbitration was considered by this Court in [Bharat Sanchar Nigam Ltd. vs. Motorola India Ltd.](#) (2009 (2) SCC 337). This court held :

"The question to be decided in this case is whether the liability of the respondent to pay liquidated damages and the entitlement of the appellant, to collect the same from the respondent is an excepted matter for the purpose of Clause 20.1 of the General Conditions of contract. The High Court has pointed out correctly that the authority of the purchaser (BSNL) to quantify the liquidated damages payable by the supplier Motorola arises once it is found that the supplier is liable to pay the damages claimed. The decision contemplated under Clause 16.2 of the



agreement is the decision regarding the quantification of the liquidated damages and not any decision regarding the fixing of the liability of the supplier. It is necessary as a condition precedent to find that there has been a delay on the part of the supplier in discharging his obligation for delivery under the agreement. It is clear from the reading of Clause 15.2 that the supplier is to be held liable for payment of liquidated damages to the purchaser under the said clause and not under Clause 16.2. The High Court in this regard correctly observed that it was not stated anywhere in Clause 15 that the question as to whether the supplier had caused any delay in the matter of delivery will be decided either by the appellant/BSNL or by anybody who has been authorized on the terms of the agreement. Reading Clause 15 and 16 together, it is apparent that Clause 16.2 will come into operation only after a finding is entered in terms of Clause 15 that the supplier is liable for payment of liquidated damages on account of delay on his part in the matter of making delivery. Therefore, Clause 16.2 is attracted only after the supplier's liability is fixed under Clause 15.2. It has been correctly pointed out by the High Court that the question of holding a person liable for Liquidated Damages and the question of quantifying the amount to be paid by way of Liquidated Dmages are entirely different. Fixing of liability is primary, while the quantification, which is provided for under Clause



16.2, is secondary to it.

Quantification of liquidated damages may be an excepted matter as argued by the appellant, under Clause 16.2, but for the levy of liquidated damages, there has to be a delay in the first place. In the present case, there is a clear dispute as to the fact that whether there was any delay on the part of the respondent. For this reason, it cannot be accepted that the appointment of the arbitrator by the High Court was unwarranted in this case. Even if the quantification was excepted as argued by the appellant under Clause 16.2, this will only have effect when the dispute as to the delay is ascertained. Clause 16.2 cannot be treated as an excepted matter because of the fact that it does not provide for any adjudicatory process for decision on a question, dispute or difference, which is the condition precedent to lead to the stage of quantification of damages."

(emphasis supplied)

17. In view of the above, the question whether appellant was responsible or respondents were responsible for the delay in execution of the work, was arbitrable. The arbitrator has examined the said issue and has recorded a categorical finding that the respondents were responsible for the delay in execution of the work and the contractor was not responsible. The arbitrator also found that the respondents were in breach and the termination of



contract was illegal. Therefore, the respondents were not entitled to levy liquidated damages nor entitled to claim from the contractor the extra cost (including any escalation in regard to such extra cost) in getting the work completed through an alternative agency. Therefore even though the decision as to the rate of liquidated damages and the decision as to what was the actual excess cost in getting the work completed through an alternative agency, were excepted matters, they were not relevant for deciding claims 1, 3 and 11, as the right to levy liquidated damages or claim excess costs would arise only if the contractor was responsible for the delay and was in breach. In view of the finding of the arbitrator that the appellant was not responsible for the delay and that the respondents were responsible for the delay, the question of respondents levying liquidated damages or claiming the excess cost in getting the work completed as damages, does not arise. Once it is held that the contractor was not responsible for the delay and the delay occurred only on account of the omissions and commissions on the part of the respondents, it follows that provisions which make the decision of the Superintending Engineer or the Engineer-in-Charge final and conclusive, will be irrelevant. Therefore, the Arbitrator would have jurisdiction to try and decide all the claims of the contractor as also the claims of the respondents. Consequently, the award of the Arbitrator on items 1,



3 and 11 has to be upheld and the conclusion of the High Court that award in respect of those claims had to be set aside as they related to excepted matters, cannot be sustained.”

47. This issue has come for consideration before this Court in the case of **M/s NCC Ltd. v. The State of Bihar & others**, reported in 2013(1) PLJR 952. There M/s NCC Ltd. was awarded contract for execution of certain works for restoration of Eastern Gandak Canal System including Gandak Barrage and its appurtenants after tender was floated for the said purpose. The work was to be completed by a particular date. In the agreement there was reciprocal promises by which the promiser and the promisee had to fulfill their part of obligation as per the contract i.e. authorities had to provide with encumbrance free sites so as to enable the petitioner to complete the contract i.e. for necessary approvals and necessary permissions, issue approved drawings to conduct joint measurement of structure, required to be repaired. As the work could not be completed the Engineer-in-Chief, Water Resources Department sought clarification on eight issues including not achieving proportionate progress in the work and was to give reply within 15 days as to why blacklisting proceeding should not be initiated against the Company. On the same date the show cause notice and the impugned order were issued invoking



Clauses 3.3. and 4.8 of the SBD it was declared the Company defaulter and debarred from participating in any future tender. The Court has held that blacklisting has civil consequences, should not be taken lightly, without giving an opportunity, the action is arbitrary and liable to be set aside. One of the question was raised about maintainability of the application under Article 226 of the Constitution of India, the Court has held that as there was violation of natural justice leads to an inference of arbitrary exercise of power and held that writ petition is maintainable. The Court further held that if the parties to the agreement claiming damages and holding the other side liable for delay cannot be decided unilaterally but can only be decided by an independent arbitrator. If the first party accept laches only then the other side can assess the damage. It will be relevant to quote paragraph nos. 24 to 26 of the aforesaid judgment:

“24. The effect of an order declaring defaulter is grave enough so as to debar a contractor from participating in any future tender. Clause 3.3 of the SBD itself makes it clear that if such an action is taken by any of the authorities, including any State or any public sector undertaking or even by the Central Government, then the other authorities act upon the said defaulter orders and the contractor in question is practically debarred from participating in any future



tender with all such authorities. Such an action would have serious consequences upon the right of a contractor to exercise his fundamental right under Article 19(1)(g) of the Constitution and hence cannot be considered as a purely contractual situation or violation of contractual right. Thus, the issue not only of jurisdiction but also of compliance of principles of natural justice would automatically arise in such cases and it cannot be assumed that such a matter is not maintainable of the writ applications is, accordingly, rejected.

25. *From a perusal of the facts and circumstances enumerated above it is evident that in the present matter the petitioners have been declared defaulters in carrying out their contractual work by the authorities of the State which factual situation is denied by the petitioners who have on the other hand made allegations against the State authorities as being equally liable and at fault in the matter,. The contention of learned counsel for the petitioners that in such circumstances the issue regarding default can only be decided by an impartial adjudicatory body has much force in view of the law laid down by the Apex Court in M/s J.G. Engineers case(supra). The Apex Court has clearly held that the question whether the other party has committed a breach cannot be decided by the partly which alleges the breach nor the contract can provide that one party to the contract can decide whether they committed the breach or the*



other party committed the breach, which question can only be decided by a judicial forum, i.e. a court or an Arbitral Tribunal.

26. The said proposition laid down by the Apex Court applies squarely in the present situation where the petitioners have been declared defaulters by alleging breach of contractual terms on their part and as being liable and at fault on account of the slow progress of the work as compared to what was required under the contract. This should be specially so since the petitioners not only do not admit such allegation of liability and fault on their part as made by the respondents but have on the contrary raised the plea of liability and fault on the part of the State authorities in the matter on various grounds. It is evident that the authorities of the State have the power to debar a contractor from participating in future contract after they are declared defaulter on account of not making the targeted progress to the extent of 80% in the work, still the finding regarding the default cannot be made by the State authorities and that must come from a proper adjudicatory forum, whether a court or arbitral tribunal. Only after such finding it can be open to the authorities of the State to declare a contractor as a defaulter and debar it from participating in future and debar it from participating in future tenders. It is evidence that the effect of such declaration as defaulter and debarment would have serious civil consequence on the party



concerned and cannot be left to be decided by the party which has made allegation against whom also there is counter allegation by the contractor concerned.”

48. In view of the aforesaid discussions and applying the principle that has been propounded by Hon'ble Supreme Court as well as by this Court, applying the said principle in the present case, the parties have entered into an agreement fixing the scheduled delivery date of power but failed to supply the same. The petitioner Company has brought facts, showing, attending facts and circumstances for its inability to abide by the terms of the contract which are beyond its control of petitioner, claimed applicability of Force Majeure clause and said that agreement will be treated to have been terminated whereas as per Power Holding Company, in contra, submits that agreement postulates particular date for supply of power inasmuch as agreement postulates supply of power through alternative source notices were issued on different dates reminding the petitioner Company schedule date of supply of power inasmuch as the petitioner Company has made a statement that they have strong power portfolio in the State of Madhya Pradesh but has offered the power in higher rate. It has been submitted that in view of letters addressed to the Power Holding Company itself



reflects petitioner cannot be invoked Force Majeure clause of agreement and Power Holding Company is entitled to liquidate damage in the terms of the agreement. So in view of seriously disputed facts, in the present writ proceeding, it is very difficult to adjudicate the dispute that whether the petitioner has made out a case of Force Majeure and it is not liable to pay any liquidated damages vice versa it is also very difficult to adjudicate that Power Holding Company will also be entitled for liquidated damages in view of the fact that petitioner has failed to honour to Scheduled Delivery Date to provide power writing different letters stating that they could not establish the power project on account of certain factors which are beyond its control through repeatedly protecting strong power portfolio, shown eagerness to provide power but in high tariff. Inasmuch as the petitioner has approached this Court vide C.W.J.C. No. 10122 of 2015 making a prayer for issuance of an appropriate writ/order/direction to declare that Power Purchase Agreement dated 9.7.2010 has become null and void and also to treat the Power Purchase Agreement as validly terminated by the petitioner-Company in view of the termination notice dated 9th July, 2015 (Annexure-8) issued under Article 11.5.1 read with Articles 4.7.1, 4.7.3 and 9.3 of the Power Purchase Agreement.



This Court has refused to adjudicate the dispute in the writ jurisdiction and has given liberty to the parties to raise the dispute before the appropriate forum/Tribunal for redressal of the grievances. It will be relevant to quote relevant portion of the aforesaid judgment:

“Having given anxious considerations to the contentions of the parties, this Court is of the view that the issues/disputes which have been raised herein cannot be entertained in the writ jurisdiction of the Court. The parties have forum(s) to raise such disputes effectively for adjudication. The prayer(s) made in the application is/are, therefore, declined. Both parties are granted liberty to approach the appropriate forum/Tribunal for redressal of the grievance in case the respondent Company declines the request of the petitioner Company for extension of time and reasonable enhancement of the agreed tariff of power and treat the attending circumstances as material breach of the conditions of the agreement and thereby decide to terminate/rescind the PPA. In that event the respondent Company shall not invoke/encash the bank guarantee furnished by the petitioner Company for a period of 15 days therefrom. This Court, however, would further clarify that such restraint order against encashment of CPG in no manner inure to the advantage of the petitioner Company or the disadvantage to the respondent power Company in



any dispute/proceeding to be raised in this regard.”

49. The order of the learned Single Judge was modified in L.P.A. No.1978 of 2016. In such circumstances it will not be appropriate for this Court to adjudicate the dispute as to whether the petitioner Company has made out a case for invoking Clause of Force Majeure and contract agreement has been terminated. In contra, Power Holding Company is claiming the liquidated damage requires adjudication of disputed question of facts, entitlement depends upon finding recorded judicial body, only on affirmative finding, would make entitle to liquidate damage. In the contract, already clause of arbitration has been provided where full-fledged enquiry would be conducted with respect to factual aspect which is not very much clear about quantum of amount of damage would be calculated by the appropriate forum.

50. In such view of the matter, the action of the Power Holding Company to terminate the contract and claim of liquidated damages can only be adjudicated by the Arbitration Tribunal, not by this Court in this present proceeding. Hence the action of the Power Holding Company to claim liquidated damage of Rs.135 Crores will only be subject matter of



Arbitration. Unilateral decision of entitlement of aforesaid amount of liquidated damage cannot be approved, but will be treated to claim of Power Holding Company against the petitioner Company, any decision arising out of legal proceeding will be final.

51. In the present case, learned counsel for the petitioner has raised objection that petitioner Company was not given chance of hearing nor the Power Holding Company has considered the explanation submitted by it and without giving any reason has terminated the agreement and sought damage of Rs.135 Crores and for that he has placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Oryx Fisheries Private Limited v. Union of India and others**, reported in (2010) 13 SCC 427. There certificate of registration was cancelled without giving proper opportunity. In that case the Court has held that while exercising the administrative function the Court has held that while cancelling the registration certificate the authority was required to act fairly and in compliance with the principle of natural justice. It has been held that a quasi judicial authority while acting in exercise of its statutory power must act fairly and must act with an open mind while initiating a show cause proceeding. As show cause



proceeding is meant to give the person proceeded against reasonable opportunity of defence. The authority must get an effective opportunity to rebut the allegations contained in the show cause notice and prove his innocence and it should not be empty formality. The order must also be speaking with a reason otherwise it leads to an inference of arbitrary exercise of power. It will be relevant to quote paragraph 40 of the aforesaid judgment:

“40. In M/s Kranti Associates (supra), this Court after considering various judgments formulated certain principles in para 51 of the judgment which are set out below a. In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

b. A quasi-judicial authority must record reasons in support of its conclusions. c. Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

d. Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

e. Reasons reassure that discretion has been



exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.

f. Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

g. Reasons facilitate the process of judicial review by superior Courts.

h. The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice. i. Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

j. Insistence on reason is a requirement for both judicial accountability and transparency.

k. If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the



person deciding is faithful to the doctrine of precedent or to principles of incrementalism. l. Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or 'rubber-stamp reasons' is not to be equated with a valid decision making process.

m. It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor (1987) 100 Harward Law Review 731-737).

n. Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See (1994) 19 EHRR 553, at 562 para 29 and Anya vs. University of Oxford, 2001 EWCA Civ 405, wherein the Court referred to [Article 6](#) of European Convention of Human Rights which requires, "adequate and intelligent reasons must be given for judicial decisions".

o. In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of



giving reasons for the decision is of the essence and is virtually a part of "Due Process".

52. He has also placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Gorkha Security Services v. Government (NCT of Delhi) and others**, reported in (2014) 9 SCC 105. There only question was raised about form and contents of show cause notice which is mandatorily required to mention in the show cause notice about proposed action to be taken is part of natural justice. The Hon'ble Supreme Court after considering previous judgments in paragraph 22 recorded, two requirements of show cause notice, one of the requirement is reflection of proposed punishment. It will be relevant to quote paragraph 22 of the aforesaid judgment:

"22.The High Court has simply stated that the purpose of show cause notice is primarily to enable the noticee to meet the grounds on which the action is proposed against him. No doubt, the High Court is justified to this extent. However, it is equally important to mention as to what would be the consequence if the noticee does not satisfactorily meet the grounds on which an action is proposed. To put it otherwise, we are of the opinion that in order to fulfill the requirements of principles of natural justice, a show cause notice should meet the following two



requirements viz:i) The material/ grounds to be stated on which according to the Department necessitates an action;

ii) Particular penalty/action which is proposed to be taken. It is this second requirement which the High Court has failed to omit.

we may hasten to add that even if it is not specifically mentioned in the show cause notice but it can be clearly and safely be discerned from the reading thereof, that would be sufficient to meet this requirement. ”

53. In the present case, this Court is of the view that as Power Holding Company has not exercises the administrative function rather it has taken action in terms of the agreement and in view of the fact this Court is of the view that the judgment placed by the petitioner Company is not applicable to the facts and circumstances of this case. If the parties are under obligation to take action in terms of the agreement and that action cannot be said that he has exercised jurisdiction by way of quasi judicial function. The parties are bound by the terms and condition of the agreement and it has to be tested whether the action has been taken in terms of contract in between the parties.

54. In such view of the matter, the proposition that has been raised by the petitioner on the basis of the aforesaid judgment is



not applicable to the present case. Here the question has been raised even if this Court has held that unilaterally party cannot decide about invocation of Force Majeure clause or entitlement of liquidated damages, can only be decided by the independent arbitrator but petitioner has also challenged the invocation of Bank Guarantee.

55. So in this case it has to be seen in view of the aforesaid discussion, this Court should give direction to the Power Holding Company to return the amount which has been credited to its account by invoking the Bank guarantee. For deciding this issue, this Court would consider judgments of the Hon'ble Supreme Court for arriving to correct finding on this issue. As the petitioner has taken a plea that invocation of Bank Guarantee depends on termination of main contract and when termination of main contract is not proper and justified, the invocation of bank guarantee is also illegal and improper whereas Power Holding Company has taken a plea that Bank guarantee is an independent, distinct and separate contract in between the guarantor, Bank and person entitled to benefit thereof i.e. guarantee recipient and is not qualified and governed by the main contract, but on performance of obligations mentioned in the agreement of the Bank guarantee, invocation thereof is



permissible only against a breach of conditions in Letter of intent (LOI) between guarantee. It has been stipulated that decision of guarantee as to breach of conditions is absolute and binding on the Bank hence the moment written demand was made on Bank invoking the guarantee pursuant to breach of covenants between guarantee recipient and respondent, Bank was bound to honour the payment under the guarantee.

56. It is an admitted fact that in the main contract there is a provision for Contract Performance Guarantee, as Article 4.8.4 provides that if the Seller fails to pay the amount of liquidated damages within the period of ten (10) days, the Procurer shall be entitled to recover the said amount of the liquidated damages by invoking the Contract Performance Guarantee it is an agreement, between the petitioner and Power Holding Company whereas Bank guarantee is an assurance given by the Bank which provides that guarantor Bank hereby expressly agrees that it shall not require any proof in addition to the written demand from the Procurer made in any format, raised at the address of the guarantor Bank in order to make the said payment to the Procurer but guarantee is restricted to Rs.90 Crores, it also provides that Bank will liable to pay the guaranteed amount or any part thereof under this Bank guarantee only if the Procurer



serves upon The Bank a written claim or demand. The guarantor Bank shall not require any proof in addition to the written demand from the Procurer to justify the invocation of the Procurer this Bank Guarantee nor shall the guarantor Bank have any recourse against the Procurer in respect of any payment made hereunder. It will be relevant to quote relevant portion of the Bank Guarantee:

“ The Guarantor Bank hereby expressly agrees that it shall not require any proof in addition to written demand from Procurer made in format raised out the above mentioned address of Guarantor Bank, in order to make the said payment made hereunder.

The guarantor Bank shall not require the Procurer to justify the invocation of this Bank guarantee nor shall the guarantor Bank have any recourse against the Procurer in respect of any payment made hereunder”.

57. In the case of **United Commercial Bank v. Bank of India and others**, reported in AIR 1981 SC 1426 the question was raised whether the Bombay High Court has rightly exercised the power in granting temporary injunction restraining the Bank transmit the amount the Bank guarantee. The main question was raised, whether the Court should in a transaction



between a banker and a banker grant an injunction, at the instance of the beneficiary of an irrevocable letter of credit, restraining the issuing bank from recalling the amount paid under reserve from the negotiating bank, acting on behalf of the beneficiary against a document of guarantee/indemnity at the instance of the beneficiary? It has been held that the nature of the contractual obligations flowing from a banker's letter of irrevocable credit and more particularly, the rights of the seller as the accredited party or beneficiary of the credit against the issuing and drawee bank is not required to remain with the underlying contract between the buyer and seller. Duties of a bank under a letter of credit are created by the document itself, but in any case it has the power and is subject to the limitations which are given or imposed by it, in the absence of the appropriate provisions in the letter of credit., It has further been held that the High Court usually refrain from granting injunction to restrain the performance of the contractual obligations arising out of a letter of credit or a bank guarantee between one bank and another. The Court should not interfere in the normal circumstances except in a proper case of fraud made out by the Bank. The Court will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to the



Bank or stipulated in the contracts. The Courts are not concerned with their difficulties to enforce such claims, these are risks which the merchants take. It will be relevant to quote paragraph nos. 38, 40 and 41 of the aforesaid judgment:

“38. It the light of these principles, the rule is well established that a bank issuing or confirming a letter of credit is not concerned with the underlying contract between the buyer and seller. Duties of a bank under a letter of credit are created by the document itself, but in any case it has the power and is subject to the limitations which are given or imposed by it, in the absence of the appropriate provisions in the letter of credit.

40. In view of the banker's obligation under an irrevocable letter of credit to pay, his buyer-customer cannot instruct him not to pay. In Hamzeh Malas v. British Imex Industries Ltd. the plaintiffs, the buyers, applied for an injunction restraining the sellers, the defendants, from drawing under the credit established by the buyer's bankers. This was refused, Jenkins, L.J. stating, at p. 129, that:

..... the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods which imposes on the banker an absolute obligation to pay....



and that 'this was not a case in which the Court ought to exercise its discretion and grant the injunction'. The same considerations apply to a bank guarantee.

41, A letter of credit sometimes resembles and is analogous to a contract of guarantee. In Elia and Anr v. Matsas and Ors. Lord Denning, M.R., while refusing to grant an injunction stated:

..... a bank guarantee is very much like a letter of credit. The courts will do their utmost to enforce it according to its terms. They will not in the ordinary course of things, interfere by way of injunction to prevent its due implementation. Thus they refused in Malas v. British Imex Industries Ltd. But that is not an absolute rule. Circumstances may arise such as to warrant interference by injunction.

A Bank which gives a performance guarantee must honour that guarantee according to its terms. In R.D. Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd., Kerr, J. considered the position in principle. We would like to adopt a passage from his judgment at p. 761:

It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such



obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims; these are risks which these merchants take. In this case the plaintiffs took the risk of the unconditional wording of the guarantees. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged.

(Emphasis supplied.) The observations of Kerr, J. have been cited with approval by Lord Denning, M. R. in Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.”

58. In the case of **U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd, reported in (1988) 1 SCC 174.** the Hon’ble Supreme Court has dealt with the same issue with regard to granting injunction for remitting the money in case of invocation of Bank guarantee. The Court is of the view that only in exceptional cases, the courts would interfere



with the machinery of irrevocable obligations assured by banks. In the case of a confirmed performance guarantee, just as in the case of a confirmed letter of credit, the bank was only concerned to ensure that the terms of its mandate and confirmation had been complied with and was in no way concerned with any contractual disputes which might have arisen between the buyers and sellers. If demands for payment has been made on the Bank under the agreement, it is not made out, demands were fraudulent or other special circumstances, the order of injunction should not be passed. It will be relevant to quote extract of paragraph nos. 15, 16, 17, 19, 21, 23, 26, 28, 30 and 33 of the aforesaid judgment:

“15. The Court of Appeal emphasised that an elaborate commercial system had been built up on the footing that a confirmed letter of credit constituted a bargain between the banker and the vendor of the goods, which imposed upon the banker an absolute obligations to pay, irrespective of any dispute there might be between the parties whether or not the goods were up to contract. The principle was that commercial trading must go on the solemn guarantee either by the letter of credit or by bank guarantee or irrespective of any dispute between contracting parties whether or not the goods were upto contract. The banks cannot be absolved of their responsibility



to meet the obligations.

16..... Two years later, shipowners claimed arbitration with charterers to assess demurrage for which first lien was exercised and claimed to enforce guarantee. Plaintiff claimed declaration that guarantee was not valid and injunction to restrain shipowners or their agents from enforcing guarantee. First and second defendants appealed against granting of injunction by Blain, J.

17....."i) only in exceptional cases would the courts interfere with the machinery of irrevocable obligations assumed by banks. In the case of a confirmed performance guarantee, just as in the case of a confirmed letter of credit, the bank was only concerned to ensure that the terms of its mandate and confirmation had been complied with and was in no way concerned with any contractual disputes which might have arisen between the buyers and sellers. Accordingly, since demands for payment had been made by the buyers under the guarantees and the plaintiffs had not established that the demands were fraudulent or other special circumstances, there were no grounds for continuing the injunctions.

19..... A judge granted the plaintiffs an interim injunction in the terms of the injunction claimed by the writ but subsequently another judge discharged the injunction. The plaintiffs appealed to the Court of Appeal in England. It was held by a Bench consisting



of Lord Denning M. R., Browne and Geoffrey Lane, LJ that a performance guarantee was similar to a confirmed letter of credit. Where therefore, a bank had given a performance guarantee it was required to honour the guarantee according to its terms and was not concerned whether either party to the contract which underlay the guarantee was in default. The only exception to that rule was where fraud by one of the parties to the underlying contract had been established and the bank had notice of the fraud. Accordingly, as the defendants' guarantee provided for payment on demand without proof or conditions, and was in the nature of a promissory note payable on demand and the plaintiffs had not established fraud on the part of the buyers, the defendants were required to honour their guarantee on the demand made by the Libyan Bank. It followed that the judge had been right to discharge the injunction and that the appeal would be dismissed.

21. But the net effect of the injunction is to restrain the bank from performing the bank guarantee. That cannot be done. One cannot do indirectly what one is not free to do directly. But a maltreated man in such circumstances is not remedyless. The respondent was not to suffer any injustice which was irretrievable. The respondent can sue the appellant for damages. In this case there cannot be any basis for apprehension that irretrievable damages would be caused if any. I am of the opinion that this is not a



case in which injunction should be granted An irrevocable commitment either in the form of confirmed bank guarantee or irrevocable letter of credit cannot be interfered with except in case of fraud or in case of question of apprehension of irretrievable injustice has been made out.

23..... It followed that the contractual duty owed by an issuing or confirming bank to the buyer to honour the credit notified by him on presentation of apparently conforming documents by the seller was matched by a corresponding contractual liability on the part of the bank to the seller to pay him the amount of the credit on presentation of the documents The bank's duty to the seller was only vitiated if there was fraud on the part of the seller, and the bank remained under a duty to pay the amount of the credit to the seller even if the documents presented, although conforming on their face with the terms of the credit, nevertheless contained a statement of material fact that was not accurate. These principles must in my opinion apply in case of bank guarantees in internal trade within a country.

26..... In that suit application was made for temporary injunction. The Court was of the view that the matter would still be referred to arbitration and in those circumstances if bank guarantees were permitted to be encashed, it would be improper. I am however, unable to sustain this view, in view of the well-settled principle on which bank guarantees are



operated.

28..... It is not the decision that there should be a prima facie case. In order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of bank guarantee, there should be serious dispute and there should be good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise the very purpose of bank guarantees would be negated and the fabric of trading operation will get jeopardised.

30..... This Court observed that the High Court was wrong in granting the temporary injunction restraining the appellant bank from recalling the amount paid to the respondent bank. This Court reiterated that Courts usually refrain from granting injunction to restrain the performance of the contractual obligations arising out of a letter of credit, or a bank guarantee between one bank and another. If such temporary injunction were to be granted in a transaction between a banker and a banker, restraining a bank from recalling the amount due when payment was made under reserve to another bank or in terms of the letter of guarantee or credit executed by it the whole banking system in the country would fail.

33. This Court found that this case was covered. The Court observed that the Court should not, in



transaction between a banker and banker, grant an injunction at the instance of the beneficiary of an irrevocable letter of credit, restraining the issuing bank from recalling the amount paid under reserve from the negotiating bank, acting on behalf of the beneficiary against a document of guarantee, indemnity at the instance of the beneficiary.”

59. The same view has been reiterated by Hon’ble Supreme Court in the case of **Hindustan Steel Works Construction Ltd. v. Tarapore & Co. and another**, reported in (1996) 5 SCC 34. It has been held that the Bank guarantee is the contract between the Banker and the beneficiary is independent of and unqualified by the contract of sale or other underlying transaction. The Court has held that in a situation of fraud the Court will interfere otherwise not. The Court is of the view that even there is dispute between the parties, if demand is placed by beneficiary Bank cannot refuse to transmit the same and Court will not refuse to interfere in the matter. It will be relevant to quote paragraph nos. 8, 9, 17, 18, 20, 21 and 22 of the aforesaid judgments:

“8. With respect to an irrevocable letter of credit this Court in the case of [Tarapore & Co. vs. Tractors Export, Moscow](#) 1969 (2) SCR 920 pointed out that such a contract between the banker and the beneficiary is independent of and



unqualified by the contract of sale or other underlying transaction and quoted with approval the following observations made by Jenkins L.J. in *Hamzeh Malas and Sons vs. British Imex Industries Ltd.* 1958 (2) Q.B. 127:

"We have been referred to a number of authorities, and it seems to be plain enough that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character and in my judgment, it would be wrong for this court in the present case to interfere with that established practice."

9. [In United Commercial Bank vs. Bank of India](#) 1981 (3) SCR 300 this Court again emphasised that obligation of a Bank in such a case is absolute, as a letter of credit constitutes the sole contract with the banker and the bank issuing the letter of credit has no concern with any question that may arise between the seller and the purchaser of the goods. Therein the following passage from the judgment of Kerr. J. in *R.D. Horbottle (Mercantile) Ltd. vs. National Westminster Bank Ltd.* 1977 (3) W.L.R. 752 was quoted as a correct statement of law on the



point:

"It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possible in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims; these are risks which these merchants take. In this case the plaintiffs took the risk of the unconditional wording of the guarantees. The machinery and commitments of banks are on different level. They must be allowed to be honoured free from interference by the courts. Otherwise, trust in international commerce could be irreparable damaged."

17. Mukherji, J. referred to the following paragraph from the judgment in R D,. Harbottle (Mercantile) Ltd. vs. National Westminster Bank Ltd. 1977 2 All ER 862 and then stated that in his view the said view represents the correct state of law:

"Only in exceptional cases would the courts interfere with the machinery of irrevocable



obligations assumed by banks. In the case of a confirmed performance guarantee, just as in the case of a confirmed letter of credit, the bank was only concerned to ensure that the terms of its mandate and confirmation had been complied with and was in no way concerned with any contractual disputes which might have arisen between the buyers and sellers. Accordingly, since demands for payment had been made by the buyers under the guarantees and the Plaintiffs had not established that the demands were fraudulent no other special circumstances, there grounds for continuing the injunction...."

(Emphasis supplied)

18. What Mukherji, J. has stated in paragraph 34 of his judgment, namely, that "It is only in exceptional cases that is to say in case of fraud or in case, irretrievable injustice be done the courts should interfere" is really the ratio of the decision of this Court in U.P. Cooperative Federation Ltd. (supra) Therefore, fraud cannot to be said to be the only exception. In a case, where the party approaching the court is able to establish that in view of special equities in his favour if injunction as requested is not granted then he would suffer irretrievable injustice, the court can and would interfere. It may be pointed out that fraud which is recognised as an exception is the fraud by one of the parties to the underlying contract and which has the effect of



vitiating the entire underlying transaction. A demand by the beneficiary under the bank guarantee may become fraudulent not because of any fraud committed by the beneficiary while executing the underlying contract but it may become so because of subsequent events or circumstances. We see no good reason why the courts should not restrain a person making such a fraudulent demand from enforcing a bank guarantee.

20. Lastly, the learned counsel for the appellant relied upon the following observations made in paragraph 60 of the 3-Judge decision of this Court in [Svenska Handelsbanken vs. M/s Indian Charge Chrome](#) 1994 (1) SCC 502:

"60. We have referred to the observations of both Sabyasachi Mukherji as well as Shetty, JJ. in extenso to emphasise that in case of confirmed bank guarantee/irrevocable letters of credit, it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case and fraud has to be an established fraud."

21. In that case the question which fell for consideration was whether the High Court was right in taking the view that while deciding an application for interim relief against enforcement of a bank guarantee general principles of injunction on lenders should be applicable and not the principles of injunction. in relation to bank guarantee. This Court was not called upon to



decide whether apart from the case of fraud there can be any other exceptional case wherein the court can interfere in the matter of encashment of a bank guarantee. It is also significant to note that the said observation in paragraph 60 has been made after quoting the following observation made by Mukherji, J. in paragraph 21 of his judgment in U.P. Cooperative Federation Ltd. (supra):

"..... An irrevocable commitment either in the form of confirmed bank guarantee or irrevocable letter of credit cannot be interfered with except if a case of fraud or a case of a question of apprehension of irretrievable injustice has been made out. This is the well-settled principle of law in England. This is also the well-settled principle of law in India. No fraud and no question of irretrievable injustice was involved."

22. Therefore, we cannot attach much importance to the use of the word "and" in the observation that "it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case....". It is also significant to note that in that case this Court referred to the decision of Court of Appeal in England in the case of Elia and Rabbath vs. Matsas and Matsas 1966 (2) Lloyd's Rep 495 and distinguished it by stating that the facts of that case were peculiar but did not state that the view taken in that case is not correct. The decision in Handerson vs. Canadian Imperial Bank of



Commercie and Peat Marwick Ltd. 40 British Columbia LR 318 was also referred to and distinguished on the ground that the facts of that case were peculiar but with respect to the decision in that case also it has not been stated that it does not represent the correct position of law. That was not a case of that type of fraud which has been recognised as an exception to the rule though the request by the beneficiary for payment was considered fraudulent in the circumstances because there was no right to payment. This Court also referred to the case of Itek Corpn. vs. The First National Bank of Boston 566 Fed Supp 1210. In that case the underlying contract had become impossible of performance, because of 'force majeure'. It was an event subsequent to the execution of the contract. Yet injunction was granted by the court on the ground that the plaintiff had no adequate remedy at law and the allegations of irreparable harm were not speculative but genuine and immediate and the plaintiff would have Suffered irreparable harm if the request for relief was not granted. Though this Court observed that "this judgment is based on peculiar facts" has not disapproved the view taken in that case."

60. Latest judgment which is near to the fact of the present case in the case of **Gujarat Maritime Board v. Larsen &**



Toubro Infrastructure Development Projects Ltd., reported in (2016) 10 SCC 46. In this case Gujarat Maritime Board invited bids for development of Sutrapada Port and Larsen & Toubro Infrastructure Development Project Ltd. was selected and was granted Letters of Intent (LoI). The Company had requested for change of location from Sutrapada to Kachchigarh and the bank guarantee was extended. At the instant of the Larsen and Toubro Infrastructure Development Project Ltd., Yes Bank furnished a Bank guarantee to the Maritime Board for an amount of Rs.5,00,00,000/-. The Bank guarantee was irrecoverable, absolute and unequivocal. At the new site Larsen and Toubro Infrastructure could not proceed with the work. The Gujarat Maritime Board cancelled LoI and on the same day invoked the Bank guarantee furnished by the Bank. Larson and Toubro Infrastructure Development Projects Ltd. approached the writ court, challenging cancellation of LoI and invocation of the Bank guarantee. The writ petition was allowed. Hon'ble Supreme Court has said that High Court has committed an error in interfering with notice of invoking Bank Guarantee as Bank Guarantee is an independent contract between the guarantor Bank and the guarantee appellant. The guarantee is unconditional. No doubt the performance guarantee is against the breach by the Larson and



Toubro Infrastructure but between the bank and Gujarat Maritime Board the specific condition incorporated in the Bank Guarantee is that the decision of the appellant as to the breach is binding on the Bank and set aside the judgment of the Gujarat High Court. It will be relevant to quote paragraph nos. 9, 11, 12 and 13 of the aforesaid judgment:

“9. Unfortunately, the High Court went wrong both in its analysis of facts and approach on law. A cursory reading of LoI would clearly show that it is not a case of forfeiture of security deposit “... if the contract had frustrated on account of impossibility...” but invocation of the performance bank guarantee. On law, the High Court ought to have noticed that the bank guarantee is an independent contract between the guarantor-bank and the guarantee-appellant. The guarantee is unconditional. No doubt, the performance guarantee is against the breach by the lead promoter, viz., the first respondent. But between the bank and the appellant, the specific condition incorporated in the bank guarantee is that the decision of the appellant as to the breach is binding on the bank. The justifiability of the decision is a different matter between the appellant and the first respondent and it is not for the High Court in a proceeding under [Article 226](#) of the Constitution of India to go into that question since several disputed questions of fact are



involved.

11.It is contended on behalf of the first respondent that the invocation of Bank Guarantee depends on the cancellation of the contract and once the cancellation of the contract is not justified, the invocation of Bank Guarantee also is not justified. We are afraid that the contention cannot be appreciated. The bank guarantee is a separate contract and is not qualified by the contract on performance of the obligations. No doubt, in terms of the bank guarantee also, the invocation is only against a breach of the conditions in the LoI. But between the appellant and the bank, it has been stipulated that the decision of the appellant as to the breach shall be absolute and binding on the bank.

12. An injunction against the invocation of an absolute and an unconditional bank guarantee cannot be granted except in situations of egregious fraud or irretrievable injury to one of the parties concerned. This position also is no more res integra. [In Himadri Chemicals Industries Limited v. Coal Tar Refining Company](#)[2], at paragraph -14:

“14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank



guarantee or a letter of credit:

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit.

(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties



concerned.”

13. The Guarantee given by the bank to the appellant contains only the condition that in case of breach by the lead promoter, viz., the first respondent of the conditions of LoI, the appellant is free to invoke the bank guarantee and the bank should honour it ... “without any demur, merely on a demand from GMB (appellant) stating that the said lead promoter failed to perform the covenants...”. It has also been undertaken by the bank that such written demand from the appellant on the bank shall be ... “conclusive, absolute and unequivocal as regards the amount due and payable by the bank under this guarantee”. Between the appellant and the first respondent, in the event of failure to perform the obligations under the LoI dated 06.02.2008, the appellant was entitled to cancel the LoI and invoke the bank guarantee. On being satisfied that the first respondent has failed to perform its obligations as covenanted, the appellant cancelled the LoI and resultantly invoked the bank guarantee. Whether the cancellation is legal and proper, and whether on such cancellation, the bank guarantee could have been invoked on the extreme situation of the first respondent justifying its inability to perform its obligations under the LoI, etc., are not within the purview of an inquiry under [Article 226](#) of the Constitution of India. Between the bank and the appellant, the moment there is a written demand for



invoking the bank guarantee pursuant to breach of the covenants between the appellant and the first respondent, as satisfied by the appellant, the bank is bound to honour the payment under the guarantee.

61. In view of the aforesaid discussion it is very much clear that in the present case also the Bank guarantee is an independent instrument apart from the contract between the petitioner and Power Holding Company. In the contract/agreement different stipulation have been mentioned, the entitlement of liquidated damages and also mentions entitlement of the right to invoke Force Majeure clause are disputed claims have been made by both parties rival claims cannot be settled in the present proceeding but so far prayer of the petitioner that this Court should issue a mandatory injunction directing the Bank to remit back the amount of Rs.90 corers which has been remitted to the Power Holding Company on account of invocation can not be obliged by this Court to the petitioner in view of terms, condition and stipulation mentioned the Bank Guarantee which is extensive, unequivocal, irrevocable in nature which is a quite distinct, different, independent instruments and the Bank could not have refused to honour the demand made by the Power Holding Company and this Court could have only interfered when the petitioner Company would



have been able to make out a case of fraud. In such view of the matter this Court is not inclined to give direction to the Power Holding Company to credit Rs. 90 crores to the account of the petitioner Company which has been received from the Axis Bank as the amount of Bank Guarantee, but return of said amount will be subject to issues settled in legal proceeding.

62. In view of the aforesaid discussion this Court is of the view that the terms of contract itself provide forum for resolution of dispute and the question of invocation for Force Majeure clause by petitioner or claim of liquidated damages by Power Holding Company can be resolved by an independent arbitrator, Power Holding Company unilaterally cannot decide entitlement of liquidated damages nor unilateral claim of protection under Force Majeure would be available but can only be adjudicated by an independent arbitrator, as one cannot be judge of his own cause.

63. In this view of the matter the parties may go for arbitration by an appointment of independent arbitrator to adjudicate the dispute. This Court refuses to issue writ of mandamus commanding the Power Holding Company to re-deposit the money in the Bank or to account of petitioner Company. It is also equally clear the Power Holding Company



would not take repressive measure to recover the amount of liquidated damage as Power Holding Company unilaterally decided this claims over the petitioner Company.

64. Accordingly this writ petition is partly allowed and partly dismissed.

(Shivaji Pandey, J)

Vinay/-

AFR/NAFR	AFR
CAV DATE	14.2.2017
Uploading Date	7.10.2017
Transmission Date	NA

