

\$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO (OS) NO. 275/2016**

Reserved on : 16th October, 2017
Date of decision : 18th January, 2018

NTPC VIDYUT VYAPAR NIGAM LIMITED Appellant

Through Mr. Vikas Singh, Sr. Advocate with Mr. Bharat Sangal, Ms. Anindita Deka & Ms. Isha Gupta, Advocates.

Versus

M/S SAISUDHIR ENERGY LIMITED Respondent

Through Mr. C. Mohan Rao & Mr. Lokesh Kumar Sharma, Advocates.

FAO (OS) NO. 281/2016

M/S SAISUDHIR ENERGY LIMITED Appellant

Through Mr. C. Mohan Rao & Mr. Lokesh Kumar Sharma, Advocates.

Versus

M/S NTPC VIDYUT VYAPAR NIGAM LIMITED Respondent

Through Mr. Vikas Singh, Sr. Advocate with Mr. Bharat Sangal, Ms. Anindita Deka & Ms. Isha Gupta, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE NAVIN CHAWLA

SANJIV KHANNA, J.:

NTPC Vidyut Vyapar Nigam Limited has filed FAO(OS) 275/2016, under Section 37 of the Arbitration and Conciliation Act, 1996 read with Section 10 of the Delhi High Court Act, 1966 partly impugning the judgment of the single Judge dated 8th September, 2016 passed in OMP No. 410/2015, *Saisudhir Energy Limited versus NTPC Vidyut Vyapar Nigam Limited* and OMP No. 446/2015, *NTPC Vidyut Vyapar Nigam Limited versus Saisudhir Energy Limited*. Saisudhir Energy Limited has also preferred an appeal, being FAO(OS) 281/2016 against the impugned judgment of the learned single Judge in the aforestated OMPs. For the sake of convenience, NTPC Vidyut Vyapar Nigam Limited has been referred to as NVVN and Saisudhir Energy Limited has been referred to as SEL in the present judgment.

2. The subject matter of challenge in the aforestated OMPs was the majority and minority awards, both dated 21st July, 2015 passed by the Arbitral Tribunal of three Arbitrators.

3. NVVN is a Government of India undertaking. It was designated as a nodal agency under the Jawaharlal Nehru Solar Mission, with the objective to deploy 20,000 megawatt of grid connected solar power by the year 2022 at a reasonable cost. The mission was promoted to create and establish an ecologically sustainable growth model for India's future energy requirements and to reduce India's dependence on non-renewable resources of energy. The mission postulated bundling of solar power, with a cheaper unallocated quota of power generated at NTPC coal base stations, to offset the high cost of generating solar power. NVVN was permitted and was

required to enter into Power Purchase Agreements (PPAs) with solar power developers with a commitment to purchase solar power at a fixed rate for 25 years. This bundled power was to be sold by NVVN to distribution utilities at the Central Electricity Regulatory Commission's (CERC) determined prices.

4. SEL, pursuant to competitive bidding, had signed and executed PPA dated 24th January, 2012 with NVVN, agreeing to supply electricity at the bid amount of Rs.8.22 per unit, thereby offering a discount of Rs.7.17 per unit over the CERC approved benchmark tariff of Rs.15.39. Based on the discount offered, SEL had furnished bid bond of Rs.50.154 crores in the form of bank guarantee. In addition, SEL had furnished bank guarantee of Rs.4 crores as earnest money towards the bid for 20 megawatt project and had given performance guarantee of Rs.6 crores. SEL had accordingly provided five bank guarantees totaling to Rs.60.154 crores.

5. As per the PPA, the scheduled commissioning date for supply of 20 megawatts solar power by SEL was 26th February, 2013. However, SEL could only commence production and started supplying 10 megawatts to NVVN from 26th April, 2013 instead of 20 megawatts of solar energy as per PPA. Supply of balance 10 megawatts of solar energy commenced from 24th July, 2013.

6. SEL vide letter dated 30th January, 2013 had sought extension of time by two months, citing various reasons and invoking *force majeure* clause. NVVN, however, rejected the said request vide letter dated 31st January, 2013 relying upon clause 11.5.1 of the PPA, which as per them was a pre-condition for invoking *force majeure* clause.

7. Apprehending punitive action, SEL had preferred OMP No. 173/2013 before the High Court of Delhi for restraining NVVN from encashing the bank guarantees. Interim relief against encashment of bank guarantees was granted and had continued till the arbitration proceedings were invoked and had commenced. The OMP was disposed of, vide order dated 23rd May, 2013 leaving it to the Arbitral Tribunal to decide the interim relief application under Section 17 of the Act. In the meanwhile, stay granted would continue. Before the Arbitral Tribunal, the parties did not press for disposal of the application for interim relief and the case proceeded for decision on merits.

8. The majority Award dated 21st July, 2015 authored by Mr. K.K. Madan, Presiding Arbitrator and Mr. R.S. Krishnan, Arbitrator, referred to different clauses of the PPA and facts, and held that:

- (i) NVVN had not invested any money in the project,
- (ii) NVVN had not suffered any loss of capital or loss of interest on capital,
- (iii) NVVN had not suffered on account of breach/ failure to supply energy as no claim was made by any discom against them and no evidence in support was produced,
- (iv) NVVN had made no effort to prove any loss,
- (v) NVVN had failed to establish that the mission had suffered on account of delay.

(vi) NVVN was not entitled to any damages for loss on account of delay because the project was unlike construction of road, school, hospital, sewage pumping station, etc. for public purpose, and

(vii) the object of the project, i.e., the mission, being long-term promotion of solar energy for 25 years, delay of about 2 to 5 months was inconsequential.

Nevertheless, the majority Award directed that SEL should pay Rs.1.2 crores, being 20% of the amount specified in the original performance guarantee, @ Rs.30 lakhs per megawatt, for the delayed performance. This, payment was directed as there was a delay of 2 to 5 months in the supply of solar power as mandated by PPA. The claim of SEL for reimbursement of expenditure of Rs.1,71,83,047/- for renewing and maintaining bank guarantees was rejected. As per the majority Award, cost of arbitration was to be equally shared.

9. The minority Award authored by Mr. T.K. Dhar, Arbitrator, also dated 21st July, 2015, held that NVVN was entitled to encash the bank guarantees, excluding the bank guarantee of Rs.4 crores furnished as earnest money. He observed that the Arbitral Tribunal in its hearing held on 25th February, 2014 had directed renewal of bank guarantees for a reduced sum of Rs.53.9232 crores instead of Rs.60.154 crores. Accordingly, the NVVN was entitled to encash the bank guarantee for Rs.49.9232 crores. However, cost of arbitration would be shared equally.

10. Both, the majority Award and the minority Award, have extensively relied upon and interpreted Clause 4.6 of the PPA. Before dealing with the

awards and the decision of the Single Judge, it would be relevant to reproduce Clause 4.6 of the PPA, which reads as under:

“4.6 Liquidated Damages for delay in commencement of supply of power to NVVN

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

- a. Delay upto one (1) month- NVVN will encash 20% of total Performance Bank Guarantee proportionate to the Capacity not commissioned.*
- b. Delay of more than one (1) month and upto two months- NVVN will encash 40% of the total Performance Bank Guarantee proportionate to the Capacity not commissioned.*
- c. Delay of more than two and upto three months- NVVN will encash the remaining Performance Bank Guarantee proportionate to the Capacity not commissioned.*

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

4.6.3 The maximum time period allowed for commissioning of the full Project Capacity with encashment of Performance Bank Guarantee and payment of Liquidated Damages shall be limited to eighteen (18) months from the Effective Date. In case, the commissioning of the Power Project is delayed beyond eighteen (18) months from the Effective Date, it shall be

considered as an SPD Event of Default and provisions of Article 13 shall apply and the Contracted Capacity shall stand reduced/amended to the Project Capacity Commissioned within 18 months of the Effective Date and the PPA for the balance Capacity will stand terminated.

4.6.4 However, if as a consequence of delay in commissioning, the applicable tariff changes, that part of the capacity of the Project for which the commissioning has been delayed shall be paid at the tariff as per Article 9.2 of this Agreement.”

The heading of the said clause refers to liquidated damages payable for the delay in commencement of supply of power to NVVN. Sub-para 1 states that SEL would pay liquidated damages for delay in such commencement of supply and making the contracted capacity available by the scheduled commissioning date. Thereafter, clauses a, b and c stipulate that for delay upto one month NVVN would be entitled to encash 20% of the Performance Bank Guarantee proportionate to the capacity not commissioned; in case of delay between 1 to 2 months 40% of the total performance bank guarantee proportionate to the capacity not commissioned and for the delay between 2 to 3 months, remaining performance bank guarantee proportionate to the capacity not commissioned. Sub-clause 2 stipulates that in case there was delay beyond 3 months, NVVN would be entitled to liquidated damages @ Rs.1,00,000/- per Mega Watts per day for the delay in remaining capacity not commissioned. Clause 4.6.3 states that the maximum period for the commissioning of the full project capacity, even with encashment of performance bank guarantee and payment of liquidated damages, would be 18 months from the effective date and on failure and default beyond the said period, Article 13 of the contract would apply and the contracted capacity would stand reduced/amended and the PPA for the

balance capacity would stand terminated. Clause 4.6.4 states that if as a consequence of delay in commissioning, the applicable tariff changes for that part of the capacity of the project for which the commissioning has been delayed, shall be paid at the tariff as per Article 9.2 of the agreement.

11. The single Judge has elaborately examined various contentions raised on behalf of NVVN and SEL and the findings recorded in the Awards. He has held that delay in commencement of supply of electricity was not denied, *albeit* accepted by SEL and, therefore, there was a breach on their part. As per the PPA agreement, SEL was obliged to, at its own cost and risk, commence supply of electricity as per the scheduled date, i.e., 26th February, 2013, but SEL could only commence production and start supply of 10 Mega Watts from 26th April, 2013 and 20 Mega Watts from 24th July, 2013. The delay in commissioning was not attributable to *force majeure* or a fault of NVVN. SEL had not been able to justify the said delay before the Arbitration Tribunal. Provisions of Sections 73 and 74 of the Contract Act were examined with reference to Clause 4.6 of the PPA and the case law on the subject of liquidated damages, penalty, etc. The contention that NVVN had never claimed and pleaded that they had suffered loss or damages was negated referring to the averments made in the Statement of Defence filed on behalf of the NVVN before the Arbitration Tribunal, *inter alia*, recording that NVVN and SEL had entered into an agreement for purchase of solar power at the rate offered by SEL, which rate was fixed and operative for 25 years, irrespective of lower price expected in the future years. Timely completion was an essential part of the entire cycle of supply and onward distribution of electricity. Due to default, there was setback in meeting the

targets fixed for solar power. The failure had an adverse impact on the reputation of NVVN. The PPA was not entirely a commercial transaction, but it was a part of a scheme of prime public importance. There was overwhelming public utility associated with the PPA as the solar electricity was to be enjoyed by the public without detriment and adverse impact on environment. Clause 4.6 had postulated payment of liquidated damages and was a genuine pre-estimate mutually agreed to by the parties. In cases of public utility and objective, it is difficult if not impossible, to assess the actual loss. The fact that the damages were difficult to compute with precision, had strengthened the presumption that the sum agreed in Clause 4.6 was a genuine attempt to estimate losses and stipulated to overcome difficulties in proving loss. Thus, even if there was absence of proof of loss suffered by NVVN, the law mandates and requires payment of reasonable compensation upto the limit of stipulated damages. NVVN had claimed Rs.54,12,32,000/- computed as per Clause 4.6 of the PPA. Striking a balance, only half of the amount, i.e., Rs.27,06,16,000/-, was awarded with the direction that the amount would be paid @ Rs.25,00,000/- per month by adjustment from Rs.2.25 crores payable per month by NVVN to SEL for supply of solar power. The adjustment would begin from 1st October, 2016. SEL was to file an affidavit within two weeks by way of no objection and once the affidavit was filed, bank guarantees would be released.

12. Aggrieved, NVVN has filed the present appeal FAO(OS) No.275/2016 in which notice was issued vide order dated 23rd September, 2016 with the direction that the three bank guarantees issued by the bank on instructions of SEL shall be kept alive. The subsequent order passed on 6th

October 2016 directs that charges for keeping the said bank guarantees alive would be paid by NVVN. SEL has filed a cross-appeal against the said order of the single Judge in OMP 410/2015 and OMP 446/2015, being FAO (OS) 281/2016.

13. Contentions on behalf of SEL are:-

- (i) NVVN had raised fresh and contradictory contentions before the single Judge, which were never raised before the Arbitral Tribunal.
- (ii) The majority Award for detailed reasoning in paragraphs 89 to 93 had rejected the claim predicated on liquidated damages. Notwithstanding the said position, the single Judge has allowed liquated damages on vague allegations of tangible and intangible loss, which were never pressed before the Arbitral Tribunal.
- (iii) Single Judge has erroneously held that NVVN had pleaded loss.
- (iv) NVVN being a State was required to act in a fair and reasonable manner. Claim for liquidated damages of Rs.54,12,32,000/- amounting to nearly 1/3rd of the total project cost of Rs.193 crores was *ex-facie* highly unreasonable. Onus was on NVVN to establish that the claim for liquidated damages was reasonable.
- (v) Clause 4.6 of the PPA that prescribes a graded scale is a penalty clause, which has nothing to do with actual loss and was not a genuine estimate of actual loss. The clause is in the form of a

guarantee for timely execution of contract and to ensure that developer does not abandon the contract or work on the pretext of financial non-viability. Reliance was placed upon ***BSNL Vs. Reliance Communications Ltd.***, (2011) 1 SCC 394.

- (vi) Decisions in ***ONGC Vs. Saw Pipes***, (2003) 5 SCC 705 and ***M/s. Construction & Design Services Vs. DDA***, (2015) 14 SCC 263 were distinguishable as they were based on entirely different facts. Single Judge has, therefore, erroneously awarded 50% of the amount stipulated in clause 4.6 of the PPA, in spite of the fact that no loss was suffered.
- (vii) The finding in the majority Award awarding compensation of Rs.1.2 crores was liable to be set aside being contradictory to fundamental policy of Indian law as held in ***Associated Builders Vs. DDA***, (2015) 3 SCC 49.
- (viii) The majority Award had also incorrectly rejected the claim of SEL for refund of Rs.1,71,83,047/- incurred on renewal of bank guarantees from time to time during the pendency of the arbitration proceedings. The guarantees were maintained at the instance and for the benefit of NVVN under compulsion and, hence, cost of renewal of bank guarantees should be borne and paid by NVVN.

14. The contentions on behalf of NVVN are:-

- (i) The majority arbitration Award was self-contradictory. The minority Award was substantially correct.
- (ii) The single Judge has rightly held that generation, distribution and transmission of electricity were in nature of

public utility and hence, it was impossible to estimate loss and damages suffered on account of delay in commissioning of the project. Amount mentioned in Clause 4.6 of the PPA was a genuine pre-estimate of damages and loss and, hence, there was no need for NVVN to prove actual loss as held in ***Saw Pipes Ltd.(supra)***, ***BSNL(supra)*** and ***M/s. Kailash Nath Associates Vs. Delhi Development Authority & Anr.*** (2015) 4 SCC 136.

(iii) Loss and damages on account of delay by SEL is *ex-facie* apparent for NVVN has agreed and was under contractual obligation to purchase electricity as per the rate fixed for 25 years, notwithstanding anticipated reduction in price of solar energy. The contention of SEL that NVVN had not made investment was incorrect for NVVN had agreed to purchase electricity at a fix rate for a period of 25 years. NVVN would pay Rs.750 crores to SEL on the basis of payment of Rs.2.5 crores per month. As per SEL, they had made investment of Rs.193 crores approximately. Liquidated damages of Rs.54 cores as agreed was not unreasonable in view of the total payment NVVN would make. SEL cannot plead that liquidated damages as agreed and fixed were harsh and onerous.

(iv) The single Judge has rightly interfered with the majority Award in view of the wrong application and understanding of legal ratio and Sections 74 and 75 of the Contract Act as held in ***Saw Pipes Ltd.(supra)***. The majority Award had incorrectly observed that NVVN had not averred and stated that they had suffered loss or damages. The single Judge in paragraph 62 of

the judgment has rightly held that NVVN had pleaded and asserted that they had suffered losses which could not be exactly evaluated.

(v) The single Judge had erred in applying the judgment in *Construction & Design Services* (supra) by reducing the liquidated damages to half on the pretext of reasonableness. The single Judge could not have gone into the question of reasonableness once SEL had agreed to liquidated damages. There was no other way to calculate loss. Reasonableness of liquidated damages could only be evaluated if it was possible to calculate actual or probable loss and not otherwise. Onus to establish to the contrary or the unreasonableness of liquidated damages was on SEL

15. Before we deal with the case law on the subject, we would like to record that the single Judge in categorical terms has rightly held, after quoting from the pleadings filed by NVVN before the Arbitral Tribunal, that they had pleaded having suffered tangible and intangible loss as nodal agency for delay and non-performance on the part of SEL. In paragraphs 61, 62 and 63, the single Judge has copiously reproduced different portions of the pleadings/written submissions filed by NVVN before the Arbitral Tribunal. In the said pleadings, NVVN had asserted that they would suffer loss, for they had agreed to purchase power for 25 years irrespective of fluctuation in the rate over the years. Further, the project in question was a public utility project and was of general public importance. It was not possible to assess loss because solar power to be generated from the project cannot be replaced by solar power generated by any other project as all such

solar projects were tied down with agreements to supply electricity to discoms after bundling of power. Supply of electricity was certainly a public utility service and in case of delay, it was practically impossible to assess loss as electricity supply was enjoyed by thousands of users and consumers. We have dealt with this aspect subsequently also.

16. The majority Award on the question of liquidated damages in paragraph 27 has referred to the contention of SEL that the amount stipulated as genuine pre-estimate of damages was not sufficient and the claimant must show that it had suffered some loss. Thereafter, they had referred to the contentions raised by the parties and different judicial pronouncements. In paragraph 91, they have rejected the contention that the claim made was pre-mature and NVVN had not raised demand for liquidated damages. In paragraph 95, the majority Award holds that SEL was liable to pay damages not on account of breach simplicitor but on account of loss. It was further held that NVVN cannot plead and contend that SEL had agreed to pay damages. The fact that NVVN had agreed to make payment over a period of 25 years would not show that they had suffered any loss. Thereafter, the majority Award holds:-

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

exception all the judgments reiterated the very same legal position.

99. The question that needs answering is whether the respondent has suffered any loss. The claimant contended that the respondent has not invested a single rupee and has not suffered any loss. The claimant also contended that the respondent has not even made an effort to show that it had suffered any loss. Answering the contention that the respondent made no effort to show the loss, the respondent contended it was not required to plead loss as the claim was premature. The respondent in the statement of defense contended that the delay in completing the project has resulted in an injury to the Mission and also to the discoms as failure on part of the claimant to supply Solar Power resulted in respondent failing to supply energy to the discoms. During the course of arguments relying on the judgment of Saw Pipes Case (Supra), the respondent contended that the works being in the nature of public utility as in the case of breach of construction of roads, it is impossible to assess the exact loss, hence, the stipulated amount may be taken as the loss suffered. The respondent also contended that the amount stipulated is genuine pre-estimate of actual loss suffered. Finally, the respondent submitted two judgments in the case of Construction and Design Services (supra) to contend that the respondent is entitled for damages again on the basis that the works are in the nature of public utility service.

XXXX

101. The claimant on the other hand submitted that the Mission has not suffered any loss on account of delay. According to the claimant if the respondent is permitted to levy damages it would put a death knell on the claimant and the Mission would suffer. Except for making a statement the respondent has not stated as to what loss the Mission has suffered. We would have

accepted the contention of the respondent that the Mission had suffered loss, had the claimant abandoned the project. In such a case loss to the Mission could have been assumed. We are not inclined to accept the contention that the Mission has suffered loss on count of delay. The very object of providing the high bid bond was to prevent adventurous bidding'. The respondent in the Written Submission (in para 2.6) contended that the bid bond is submitted to ensure that the bidder executes the contract and does not run away after selection. In the present case the bidder certainly did not run away, though there was delay. It is thus difficult to accept the contention that the Mission has suffered on count delay in completing the project.

XXXX

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

[Emphasis supplied]

17. Referring to the judgment in the case of **Construction & Design Services** (supra), the same was distinguished and it was observed:-

“109. In Design Services the court found that the works were in respect of public utility service of the nature which would cause loss on count of delay. The court has not held that the delay in respect of public utility service per se would result in loss. The above comparison shows that reasonable damages were allowed in the said case for justifiable reasons and the position in the present case is entirely different. The Mission was conceived to promote solar energy keeping in view the future power requirements and not for

immediate consumption. The purpose and objective of the Mission cannot be ignored to assume loss on count of delay. The loss cannot be presumed in view of peculiar facts of the case and the objectives of the Mission. Setting up of solar power plant under JNNSM cannot be compared with construction of a road, a Sewage Treatment Plant, a hospital or a school or any other public utility service of similar nature. Thus, the judgments rendered in Design Services is not applicable to the facts of the present case.”

[Emphasis supplied]

18. Accordingly, the majority Award held that it was difficult to hold that NVVN had suffered a loss, which was to be compensated. At the same time, in the majority Award, it was held that SEL must pay Rs.1.2 crores to NVVN being 20% of the amount specified in the original performance guarantee @ Rs.30 lacs per Mega Watt for the delayed performance.

19. We have deliberately and intentionally quoted different portions of the majority Award to highlight that the findings recorded therein on the question of liquidated damages and even on the question of public utility are unacceptable and fall foul of the fundamental policy of Indian law and, therefore, challenge thereto merits acceptance. Decision of the Supreme Court in *M/s. Kailash Nath Associates* (supra) has extensively referred to the earlier case law on the subject, including decisions in the case of *Fateh Chand Vs. Balkishan Das*, (1964) 1 SCR 515, *Maula Bux Vs. Union of India*, (1969) 2 SCC 554 and *Saw Pipes Ltd.* (supra) and has held as under:-

“43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:

43.1. *Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.*

43.2. *Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.*

43.3. *Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.*

43.4. *The section applies whether a person is a plaintiff or a defendant in a suit.*

43.5. *The sum spoken of may already be paid or be payable in future.*

43.6. *The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.*

43.7. *Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.”*

20. The aforesaid dictum or principles state that in case of breach, the aggrieved party can receive as reasonable compensation, the sum named in the contract as liquidated amount if it is a genuine pre-estimate of damages and is found to be such by the Court. In other cases, where a sum is named in contract as liquidated damages, only reasonable compensation can be awarded not exceeding the amount so stated as damages. Similarly where amount fixed is in nature of penalty, only a reasonable amount of compensation not exceeding the penalty amount can be awarded. Reasonable compensation has to be fixed on well-known principles as applicable to the law of contract. In view of language of Section 74, breach of contract, damage or loss caused as a consequence of the breach is a *sine qua non*. Party must prove actual loss and damage. However, there are class of cases where damage or loss is difficult or impossible to prove and in such cases, liquidated amount named in the contract, if it is a genuine pre-estimate of damage or loss, can be awarded. This is the purport of the expression “whether or not actual damage or loss is proved to have been so caused thereby” used in Section 74 of the Contract Act.

21. Decision in the case of **BSNL** (*supra*) observed that if loss accruing to the claimant from default cannot be accurately and reasonably ascertained, then such terms may not be classified as penalty. This strengthens the presumption that a sum agreed between the parties represents a genuine attempt to estimate the damages and to overcome difficulties of proof at trial.

22. We would also like to reproduce the relevant observations on Section 74 of the Contract Act in **Saw Pipes Ltd.** (*supra*), which are as under:-

“64. It is apparent from the aforesaid reasoning recorded by the Arbitral Tribunal that it failed to consider Sections 73 and 74 of the Contract Act and the ratio laid down in Fateh Chand case [Fateh Chand v. Balkishan Dass, (1964) 1 SCR 515 : AIR 1963 SC 1405] , SCR at p. 526 wherein it is specifically held that jurisdiction of the court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; and compensation has to be reasonable. Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasises that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him....”

[Emphasis supplied]

23. A reading of the aforesaid quotation would show that the Supreme Court has held in the said case that once there was breach of contract,

Section 74 mandates that the complaining party is entitled to receive reasonable compensation, whether or not actual loss is proved. Where compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract, there is no question of proving such loss and the party is not required to lead evidence to prove actual loss. Further, it is for the party contesting the claim to establish that penalty or compensation contemplated was in any way unreasonable. Otherwise, it will be appropriate for the Arbitral Tribunal to rely upon clear and unambiguous terms of the contract.

24. In ***Construction & Design Services*** (supra), Section 74 of the Contract Act and the case law on the subject was extensively examined in the context of public utility service. The said case related to construction of sewage pumping stations. It was held:-

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

suffered by the respondent-plaintiff, the observations in the order of the Division Bench that the project being a public utility project, the delay itself can be taken to have resulted in loss in the form of environmental degradation and loss of interest on the capital are not without any basis.

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

On the question of quantum of damages, it was held as under:-

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

18. Accordingly, this appeal is partly allowed and the decree granted by the High Court is modified to the effect that the

respondent-plaintiff is entitled to half of the amount claimed with rate of interest as awarded by the High Court. Out of the amount deposited in this Court, the respondent will be entitled to withdraw the said decretal amount and the appellant will be entitled to take back the remaining.”

[Emphasis supplied]

25. We do not appreciate how the aforesaid principles would help SEL or support the finding recorded by the majority Award. In fact the principles enumerated substantially support NVVN. Once it is accepted and admitted by the Arbitrators, who had authored the majority Award, that the object and purpose of the mission was to promote ecologically sustainable growth model for India's future energy estimate and to reduce India's dependence of non-renewable sources of energy, it would follow that the PPA entered into had a social and larger objective and purpose. It was difficult, if not impossible, to prove the actual damage or loss to the society and, therefore, the requirement to prove and establish actual and ascertained loss, was dispensed with. When the PPA contract was entered into, parties were aware of their obligations and also as to the fact that the entire investment was to be made by SEL and that the rate of supply was fixed as per the offer of SEL. The price fixed was good and valid for the entire agreed term of 25 years, even if the rates, as envisaged, were likely to fall. In fact they have fallen. It was difficult, *albeit* impossible, to prove the quantum of damages, which should be awarded and paid in case of a breach on account of delay. The breach of this stipulation was accepted. Given the aforesaid facts, the issue would have been what could be the amount of damages and loss, which should be paid. This was to be addressed in clause 4.6 of the PPA. The amount stipulated in the PPA as held by the majority was liquidated

damages and not penalty. Legal ratio in the aforestated decisions, as elucidated, support the view taken by the single Judge, and in fact negates the legal position adopted by the majority Arbitrators, which we would observe was contradictory.

26. We would also reject the contention of SEL that NVVN has not acted in a fair or reasonable manner by claiming damages. Indeed, they must claim damages when there is a breach of contract of this nature. If the mandate of mission was promotion and increase in solar power production, commercial production of which was expensive but necessary for ecological sustainable growth model for India's future energy requirements, failure on the part of SEL to abide and adhere to the time schedule and yet not pay damages would have been arbitrary and unreasonable.

27. The next question relates to reasonableness and quantum of damages i.e. genuine pre-estimate of damages and loss. It is in the light of the aforesaid position that the single Judge, keeping in mind the minority Award and the majority Award, had adopted the ratio/formula applied in ***Construction and Design Services (supra)*** and had directed:-

*"89. Considering the peculiar fact and circumstances in the present case also which are somehow similar to the case of **Construction and Design Services (supra)**. I am of the view to award half of the amount claimed by the NVVN as reasonable compensation as against provided compensation by modifying the Award published by minority Arbitrators and by setting aside the Award published by majority Arbitrators as the finding arrived in the majority award are wholly contrary to law, facts and the Clause 4.6 of the Contract. The said findings are perverse, illogical and shake the conscious of the court when the same are applied to the facts and circumstances of the present case. Now, the question is how to recover the payment of 50% LD by NVVN from Saisudhir. NVVN did not suffer any*

loss so as to claim damages. The reasons for awarding half of the amount in this matter are that NVVN did not invest any amount in the project nor the NVVN has proved any actual damage, although there was no requirement in law. The objective of the Mission was to promote Solar Power, though NVVN impliedly agreed that supply is not the objective of the Mission. One of the reasons for providing steep LD's was that it did not want any developers to abandon the contract. The delay in commissioning of the project in itself has not caused any loss. Saisudhir has incurred Rs. 193 crores on the project. The loan was taken from the bank. The project is to last for 25 years. The delay is only for few months. It is a clear case of hardship otherwise it would put a death of knell of the project.

90. As far as the mode of payment is concerned, balance has to be strike in view of the situation in the matter. NVVN has claimed damages of Rs. 54,12,32,000/-. Now, it is to be considered as how half of the amount is to be received by NVVN. It is difficult because of the reason that it is a solar project. It is a dream project of the Government. This Court does not wish that the project should be killed. In view of such LD imposed by NVVN, the condition of the Saisudhir is in bad shape, as I have been informed that the bank has initiated the proceedings against Saisudhir.

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

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

28. On the said question, we are in agreement with the single Judge that there is a need to balance equities and compute a fair and reasonable amount. The amount awarded by the majority Arbitrators is just Rs.1.2 crores, which is a paltry and insignificant amount, which goes on the wrong precept and principle that the NVVN must prove the actual loss suffered and then only they would be entitled to damages. The majority Award, therefore, had erred and was contrary to the public policy, i.e., fundamental policy of Indian law and had required interference. The minority Award had awarded Rs. 49.9232 crores.

29. On the question of reasonable damages and computation in terms of Clause 4.6 of the PPA, counsel for SEL had submitted that the total project cost was Rs. 193 crores. In case entire claim of NVVN is accepted, SEL would be liable to pay Rs. 50.82 crores to NVVN which is more than 1/4th of the capital cost of the project. SEL receives Rs. 2.25 crores per month from NVVN as per the sale price agreed for 20 megawatt of solar power. In case full amount as claimed by NVVN is awarded, SEL would be liable to pay nearly 2 years gross earnings as liquidated damages for a delay of 2-5 months. Even as per the damages awarded by single Judge, SEL would be liable to pay more than 27 crores which is equal to 1 year gross earning. Period of delay is not so huge and long. SEL also incurs running expenses and capital expenses. It is also submitted that there was no substantial decrease in the cost of purchase of solar power and NVVN has not invoked the reduction provision. The argument that there was fall in price, is far-fetched. Thus, damages stipulated in Clause 4.6 are not genuine pre-estimate of loss caused. NVVN on the other hand has submitted that SEL

would be paid about Rs. 750 crores over a period of 25 years on small capital investment of Rs. 193 crores on which they would have got tax benefit. This factor cannot be overlooked when question of reasonableness of damages and genuine pre-estimate is examined in a public utility contract.

30. When we examine Clause 4.6 of the PPA which postulates a graded scale of damages depending upon period of default, to the facts of the present case, the following position emerges:

S. No.	Solar Power yet to be Commissioned (MW)	Delay (in months)	Delay (particular dates)	Application of Cl. 4.6 of PPA	Amount
1.	20	1	26th February, 2013 - 25th March, 2013	20% * 56.154cr	11.23cr
2.	20	1-2	26th March, 2013 - 25th April, 2013	40% * 56.145cr	22.46cr
3.	10	2-3	26th April, 2013 - 25th May, 2013	50% * 22.464 (remaining bank guarantee proportionate to the capacity not commissioned)	11.23cr
4.	10	3-5	26th May, 2013-23rd July, 2013	1,00,000*10*59 (1Lakh per MW per day)	5.9cr
TOTAL					50.82cr

The aforesaid table would show that there would be a reduction in the quantum of damages payable after 3 months as per Clause 4.6 of the PPA. A higher rate of damages are payable for the first 3 months which would have the effect of forfeiture and encashment of the bank guarantee of Rs.44.92 crores. If we apply the formula applicable for the period after 3 months, i.e. Rs.1,00,000 per megawatt per day, for the first three months also, the amount payable for the three months would be Rs. 14.8 crores. The table below applies, the formula of Rs.1,00,000 per megawatt per day for the entire period of delay. The reason why a higher amount is payable for the first three months under clause 4.6 is the reduced sale price offered by SEL. Thus an anomalous situation arises. Damages as per Clause 4.6 of the PPA, suffer a reduction for the period of delay after 3 months.

31. Applying the formula Rs. 1,00,000 per megawatt per day to the facts of the present case, the amount payable is:

S. No.	Solar Power yet to be Commissioned (MW)	Delay (in months)	Delay (particular dates)	Application of Cl. 4.6 of PPA	Amount (Rs.)
1.	20	1	26th February, 2013 - 25th March, 2013	$1,00,000 \times 20 \times 28$	5.6cr
2.	20	1-2	26th March, 2013 - 25th April, 2013	$1,00,000 \times 20 \times 31$	6.2cr
3.	10	2-3	26th April, 2013 - 25th May, 2013	$1,00,000 \times 10 \times 30$	3.0cr

4.	10	3-5	26th May, 2013-23rd July, 2013	1,00,000*10*59	5.9cr
TOTAL					20.7cr

32. Given the aforesaid position on application of clause 4.6 of the PPA, and also keeping in mind the factors enumerated above, it would be appropriate and proper that SEL is asked to pay damages @ Rs. 1,00,000/- per megawatt per day for the entire period, i.e. Rs. 1,00,000/- per day for 20 megawatt till 26th April, 2013 and for 10 megawatt from 27th April, 2013 till 24th July, 2013. SEL must also pay the bank guarantee charges which have been paid by NVVN during pendency of arbitration proceedings, before the single Judge and the Division Bench. The amount of bank guarantee charges would be computed by NVVN within 3 weeks and informed to SEL.

33. Ld. single Judge had fixed monthly installments to be recovered from monthly bills, for the payment of damages. Award was passed on 21st July, 2015 and single Judge had passed the impugned order on 8th September, 2016. SEL has been receiving payment since 26th April, 2013 and 24th July, 2013 for 10 and 20 megawatt of electricity. We have partly reduced the amount payable. We do not think it is necessary to fix monthly installments for payment. Rs. 20.70 crores plus bank guarantee charges would be paid by SEL within 6 weeks from today, failing which it would be open for NVVN to encash bank guarantee and recover Rs.20.70 crores and also bank guarantee renewal charges. It is further directed that in case there is default

and payment is not received, SEL would be liable to pay interest at 18% p.a. with yearly rests from the date of Award till payment is made.

34. With the discussion, we dispose of the two appeals, with the modification made above. In the facts of the case, there would be no order as to costs.

-sd-

(SANJIV KHANNA)
JUDGE

-sd-

(NAVIN CHAWLA)
JUDGE

JANUARY 18, 2018
VKR /NA/ssn

