
(2012) 08 DEL CK 0049

In the Delhi High Court

Case No : CO. Petition 458 of 2010 and CA No. 2179 of 2010, CO. Petition 302 of 2009 and CO. Petition 393 of 2010

Tower Vision India Pvt. Ltd.

APPELLANT

Vs

Procall Private Limited
 Silvermoon Construction Pvt.
Ltd. Vs South Asian Hospitality Services Private Limited

 PVP Entertainment Ltd. and Another Vs OMAXE Limited

RESPONDENT

Date of Decision : 24-08-2012

Acts Referred:

Carriers Act, 1865 — Section 8
Companies Act, 1956 — Section 2(m), 433, 433(e), 434, 438
Contract Act, 1872 — Section 73, 74, 75
Transfer of Property Act, 1882 — Section 6(e)

Citation : (2013) 112 CLA 364

Hon'ble Judges : Rajiv Sahai Endlaw, J;A.K. Sikri, J

Bench : Division Bench

Advocate : Sanjay Jain with Mr. Uttam Datt, Ms. Ritika Pal, Ms. Akanksha, Mr. Abhijit Mittal and Ms. Sonam Singh, in CO. PET. 458/2010 and CA No. 2179/2010, Mr. Jay Salva, with Ms. Shilpi, Ms. Amrita and Mr. Prabhat, in CO. PET. 302/2009 and Ms. Ranjana Roy Gawai with Mr. Krishna Keshav and Ms. Tushita Ghosh, in CO. PET. 393/2010, for the Appellant; Maninder Singh, with Mr. Manish Srivastava and Mr. Pankaj Bhagat, Advocates in CO. PET. 458/2010 and CA No. 2179/2010, None in CO. PET. 302/2009 and Mr. Ramesh Singh with Mr. Sumit Attri, Advocates in CO. PET. 393/2010, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, Acting Chief Justice

1. All these three company petitions are referred by the learned Company Judge to the Division Bench for decision. Initially Company Petition No. 458/2010 had come up before the Company Judge and was heard on 31.10.2011 when following order was passed:

After hearing the parties at length, this Court is of the view that following

question need to be answered by a Division Bench of this Court as the said issue arises in a number of matters and an authoritative pronouncement of the same is required:-

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

The present reference has been made as this Court has some doubts with regard to the judgment rendered by another learned Single Judge of this Court in *Manju Bagai vs. Magpie Retail Ltd.*, 175 (2010) DLT 212.

Accordingly, the present matter is referred to a Division Bench. Let the papers be placed before appropriate Division Bench on 1st December, 2011, subject to orders of Hon'ble the Acting Chief Justice.

As this issue came up subsequently in other two petitions, they have also been referred to the Division Bench. That is how we have heard these matters. It would be pertinent to point out that at the time of hearing, the counsel for all the parties in all these petitions agreed that it is not only the question which is formulated to be answered, but on the basis of answer given to the aforesaid question and applicability thereof in each case, the company petitions themselves be decided on merits as it would be reflected in our discussion, answer to the question cannot be in vacuum and may vary depending upon the facts of each case. In this backdrop, we resume our discussion by taking note of the facts in all these cases.

Co. Pet. 458/2010

2. The petitioner company, in this petition, is primarily engaged in the business of providing infrastructure provisioning services to telecom operators across the country. This business includes providing "passive infrastructure services" to various telecommunication operators at the telecom sites of the petitioner. These services include the provision of telecommunication towers, shelters, diesel generators, air conditioners, batteries, transformers and other passive infrastructure equipments and the continuous maintenance of such equipment. For providing these services known as "infrastructure provisioning services" (hereinafter referred to as "the services"), the petitioner enters into "Master Service Agreements" with its clients, i.e. telecommunication operators. Thereafter, for the purpose of making a requisition for each individual site and the terms and conditions governing the arrangement between the petitioner and the concerned service provider in respect thereof, an Infrastructure Providing Service Order is executed between the parties. The respondent is also a telecom company which is engaged in the business of, inter alia, providing mobile radio trunking services and it commenced its digital push to talk services in the year 2008. The petitioner and the respondent entered into Master Service Agreement ("MSA") dated 2.1.2008 which was amended vide an addendum dated

29.2.2008. As per the terms and conditions of the MSA, the petitioner was required to provide shareable roof top tower sites and ground based tower sites, upon request from respondent. The petitioner was required to build and deliver to the respondent in accordance with Infrastructure Provisioning service orders duly signed thereby, completely built-up new sites (i.e. anchor sites) as well as provision of space and services on existing sites to be used by the respondent on a sharing basis with other existing operators (i.e. shared sites), as per the standard site specifications, for the purpose of installing and operating the telecommunications equipment by the respondent. The MSA further provided that respondent would be liable to pay interest @ 9% per annum on any delayed payments to the petitioner.

3. Another significant clause with which we are directly concerned was "lock-in period" clause in the said agreement as per which the minimum period for which the respondent was to pay for the aforesaid services was five years and even if the respondent were to terminate the agreement prematurely, it was liable to pay the charges for the aforesaid period termed as lock-in period. Relevant clause in this behalf is clause 11 which was amended vide addendum and the amended clause reads as under:

7. Clause 11.3 and 11.4 of the Agreement (Lock In Period) are hereby amended and are hereby replaced with the following clauses:

11.3 Anchor Sites: with Respondent to Anchor Sites a Lock In period of 10 (ten) years shall apply, however, the Operator shall be liable for payment of the IP Fees with respect to any specific Anchor Site as follows:

11.3.1 If the termination takes place during the initial 2 (two) years as of Commencement Date, then the Operator will pay 100% of the IP Fees for the balance of the initial 2 year period and 50% of the IP Fees for the remaining 8 years.

11.3.2 If the termination takes place after the initial 2 (two) years as of the commencement date then the Operator will pay 50% of the IP fees for the remaining of the 10 years Lock In Period.

11.4 Shared Sites: with respect to Shared Site, a Lock In Period of 5 (Five) years shall apply, however, the Operator shall be liable for payment of the IP Fees with respect to any specific Shared Site as follows:

11.4.1 If the termination takes place during the initial 2 (two) years as of Commencement Date, then the Operator will pay 100% of the IP Fees for the balance of the initial 2 year period and 30% of the IP fees for the remaining 3 years.

11.4.2 If the termination takes place after the initial 2 (two) years as of Commencement date, then the Operator will pay 30% of the IP Fees for the remaining of the 5 year Lock In Period.

4. According to the petitioner, the respondent did not adhere to the said agreement for minimum period of five years and committed breach of the lock-in commitment. Therefore, respondent is liable to pay the service charges for the entire lock-in period which comes to Rs. 4,10,71,305/-. The petitioner also claims that there are certain interest payable and in this manner, total amount payable by the respondent company to the petitioner is Rs. 5,98,68,652/-, the details whereof are worked out as under:

(a) Sum of Rs. 92,32,012/- (Rupees Ninety Two Lacs Thirty Two Thousand and Twelve only) towards the outstanding IP Fee payable against several outstanding invoices as detailed in Annexure-P4 (Colly).

(b) Sum of Rs. 50,58,915/- (Rupees Fifty Lacs Fifty Eight Thousand Nine Hundred and Fifteen only) towards outstanding "actual costs" payable by Respondent against several outstanding invoices as detailed in Annexure-P5 (Colly).

(c) Sum of Rs. 45,06,420/- (Rupees Forty Five Lacs Six Thousand Four Hundred and Twenty only), being the contractual interest calculated upto August 31, 2010, at the rate of 19% on the aggregate amount of Rs. 1,42,90,927/- (Rupees One Crore Forty Two Lacs Ninety Thousand Nine Hundred and Twenty Seven only) due and payable by the Respondent to the Petitioner on account of outstanding IP Fees and "actual costs" and further interest at the said contractual rate payable till date of realization.

(d) Sum of Rs. 4,10,71,305/- (Four Crores Ten Lacs Seventy One Thousand Three Hundred and Five only) towards the charges payable for non compliance with the lock-in terms....

5. According to the petitioner, aforesaid amount becomes "debt" payable by the respondent to the petitioner. The petitioner served notices upon the respondent u/s 433 read with 434 of the Companies Act, 1956 calling upon the respondent to pay the same. The respondent, however, refused to pay the same. It is under these circumstances the petitioner filed aforesaid company petition seeking winding up of the respondent company. In this backdrop, question has arisen as to whether the claim for service charges for the lock-in period amounts to "debt" or not.

Co. Pet. 302/2009

6. By and under a Leave and License Agreement dated 18.2.2008 executed between the petitioner and the respondent, the petitioner granted to the respondent on leave and license basis, the use of premises bearing No. K-3, situated at the Food Court Premises of the Mega Mall at Oshiwara, Andheri (West), Mumbai on the terms and conditions specified therein. The petitioner stated that it has duly complied with all its obligations under the said license agreement. The said premises were to be utilized by the respondent for serving "North Indian/Mughlai" cuisines and non-alcoholic beverages under the brand

name "Moti Mahal Deluxe Tandori Trial".

7. As per clause 5 of the said License Agreement, the respondent was required to pay a sum of Rs. 57,225/- (Rupees Fifty Seven Thousand Two Hundred Twenty Five only) per month to the Petitioner as and by way of license fee, in advance, on or before the 10th day of each month. The parties also entered into a Facilities Agreement dated 18.2.2008 as per which the petitioner was to provide various facilities to the respondent and in consideration thereof, the respondent had agreed to pay a sum of Rs. 57,225/- to the petitioner as facilities charges. Under Clause 7 of the Facilities Agreement, the respondent was also required to pay charges @ Rs. 20 per sq.ft. aggregating to a sum of Rs. 15,260/- per month and for delayed payment, interest @ 24% per annum was attracted. These two agreements also had lock-in period clause as per which the respondent was required to pay the license fees as well as facilities charges for a minimum period of 33 months. However, vide e-mail dated 17.12.2008, the respondent informed the petitioner that respondent was shutting down the business from the said premises and asked the petitioner to take possession of the premises. The petitioner claims that still the respondent is liable to pay the license charges and the facilities charges for the lock-in period which amounts to Rs. 30,60,582/- and Rs. 73,472/- respectively. After adjusting the security of Rs. 3,43,350/-, the petitioner claims that a sum of Rs. 29,87,110/- remains due and payable by the respondent. Notice to pay this amount was issued by the petitioner to the respondent u/s 434 read with 433 of the Companies Act, 1956 and as the respondent did not pay the same and disputed the liability, present company petition for winding up of the respondent company is filed. It is on these facts, same question arises viz. whether the amount representing lock-in period can be treated as "debt" for the purposes of company petition.

Co. Pet. 393/2010

8. This petition is filed by two petitioners who claim themselves to be the joint owners of land measuring about 4 acres, 4 canals and 18 marlas situated at revenue estate, village Bhattian, Ludhiana, Punjab. They decided to develop a multiplex-cum-commercial complex on the said land. For this purpose, they approached the respondent company who is in the real estate business. Collaboration agreement dated 28.4.2005 for the construction and development of the said commercial project was entered into between the parties which was followed by a rectification letter dated 12.5.2005 and an addendum to the collaboration agreement which was executed between the parties on 26.10.2005. As per these agreements, the share of the petitioners in the proposed commercial complex was to be 23% and that of respondent company 77% subject to minimum commitment of 80870 sq.ft. of FAR area to the petitioners. The entire commercial project was to be constructed by the respondent at its expense. In terms of clause 6(g), the respondent was to complete the construction of the building of Phase I of the project having an FAR of 125 within a period of 30 months with a reasonable extension up to six months as per the

mutual discussions between the parties from the date of sanction of plans or handing over of the possession of the land to the respondent whichever is later. Phase II of the project to achieve an additional FAR of 50 was to be completed within a period of one year from the completion of Phase I in terms of clause 6(a) of the Collaboration Agreement. The project was deemed to have been completed when the respondent applied for completion certificate to the competent authority. As per the petitioners, the petitioners handed over the possession of the site to the respondent on 10.11.2005 and the building plans were duly sanctioned on 22.2.2006. Accordingly, in terms of the Collaboration Agreement, the respondent was under a contractual obligation to complete the construction of Phase I of the building within a period of thirty months with effect from 22.2.2006 which ought to have been completed by August 2008. The Phase II of the building ought to have been completed by August, 2009.

9. The Collaboration Agreement, vide clause 16(a) and 16(b), provided for damages on account of delay in completion of building beyond 30 months. It was agreed that these damages will be @ Rs. 5 lacs per month for the first six months of delay and @ Rs. 10 lacs per month for any further delay thereafter in respect of Phase I. As far as Phase II is concerned, the damages were payable @ Rs. 2 Lacs per month for the first six months and @ Rs. 4 Lacs for any further delay beyond six months. These clauses read as under:

16(a) That the OMAXE shall pay to the owners of damages @ Rs. Five Lacs per month on account of delay in completion of the buildings beyond 30 months with a reasonable extension upto 6 months period agreed to in the Agreement subject to force majeure circumstances for first 6 months and thereafter, damages @ Rs. Ten Lacs per month shall be payable for any further delay beyond 42 months to the owners by OMAXE. Any liability for delay towards prospective buyer and Government shall be on account of OMAXE. However, if the delay in completion of the said Project by OMAXE is caused due to any court proceedings of hindrance by any third party due to defective title of the said land or hindrance by the Owners, then the owners shall pay to the OMAXE all cost and expenses incurred by the OMAXE for the period of delay.

16(b) That in case the OMAXE fails to achieve additional FAR of 50 as mentioned in Clause 6(a) within a period of one year, then the OMAXE shall pay to the Owners damages calculated on proportionate basis i.e. for first 6 months Rs. 200000/- month and after 6 months Rs. 400000/- month.

10. As per the petitioners, the respondent has failed to achieve the time limits within which the construction was to be completed and is, therefore, liable to pay the damages as per clauses 16(a) and 16(b) of the Collaboration Agreement. The petitioners, thus, sent the notice dated 18.6.2010 u/s 434 of the Companies Act, 1956 calling upon the respondent to pay to the petitioners a sum of Rs. 2,04,00,000/- together with interest on the said outstanding amount calculated up to 22.5.2010. The respondent refuted this liability vide reply dated 15.7.2010 and blamed the petitioners for the delay. According to the petitioners, this stand

taken in the reply is contrary to the respondent's admission in its earlier letter dated 9.2.2010. According to the petitioners, the amount of damages payable under the aforesaid clauses is pre-estimated liquidated damages and is, therefore, "debt" for the purpose of petition u/s 433 and 434 of the Act. On this basis, winding up of the respondent company is prayed for by filing the instant petition.

What is "debt": The legal position

11. We have already extracted the order dated 31.10.2011 vide which reference was made to the Division Bench in Co. Pet. 458/2010. That order takes note of the judgment of another learned Single Judge in Manju Bagai (supra) and reason for referring the matter to Division Bench was that vide reference order, the Company Judge raised some doubts about the legal position formulated therein, though while doing so, no reasons because of which doubts are nurtured have been given in the reference order. In this scenario, it would be appropriate to first look into the *raison d'être* of Manju Bagai (supra). That was a case where petitioner had filed winding up petition u/s 433(e) of the Act on the ground that the respondent company therein had taken on rent certain premises from the petitioner. The rent was fixed at Rs. 1,29,580/- excluding water and electricity charges. The company started paying rent with effect from 1.11.2006 and paid rent till February, 2007. It did not pay rent for the months of March, April and May, 2007 and handed over the possession of the premises on 31.5.2007. Thus, rent for March, 2007 to May, 2007 amounting to Rs. 3,88,740/- was admittedly due which the company was to pay. However, as per the petitioner, agreement to lease entered into between the parties contained a clause to the effect that this agreement shall not be cancelled before the lock-in period of three years. Since the premises were vacated after seven months, according to the petitioner, the company was also liable to pay rent for the remaining period of 29 months because of the aforesaid clause containing lock-in period of three years. The said rent for unexpired period was claimed as liquidated damages in the sum of Rs. 37,57,820/-. The petitioner made a total claim of Rs. 41,46,560/- as well as interest and since the respondent company failed to pay the same, company petition for winding up was filed on that basis claiming that the aforesaid amount was debt payable. It was on these facts the question arose as to whether liquidated damages for the remaining lock-in period could be treated as "debt" entitling the petitioner to maintain petition for winding up of the respondent company. Though the learned Single Judge noted that agreement to lease in question was an unregistered document and could not be relied upon for making the claim, even on merits, the Court took the view that the claim for "liquidated damages" was not sustainable. In the opinion of the Court:

10.The distinction between "liquidated" and "un-liquidated" damages is well settled. Mere use of the term "liquidated" damages in a document cannot be the criteria to determine and decide whether the amount specified in the agreement is towards "liquidated" damages or "un-liquidated" damages. Amount specified

in an agreement is liquidated damages; if the sum specified by the parties is a proper estimate of damages to be anticipated in the event of breach. It represents genuine covenanted pre-estimate of damages. On the other hand "un-liquidated" damages or penalty is the amount stipulated in terrorem. The expression "penalty" is an elastic term but means a sum of money which is promised to be paid but is manifestly intended to be in excess of the amount which would fully compensate the other party for the loss sustained in consequence of the breach. Whether a clause is a penalty clause or a clause for payment of liquidated damages has to be judged in the facts of the each case and in the background of the relevant factors which are case specific. Looking at the nature of the Clause and even the pleadings made by the petitioner, I am not inclined to accept the contention of the petitioner that Clause 5 imposes liquidated damages and is not a penalty clause. No facts and circumstances have been pleaded to show that Clause 5 relating to lock-in-period was a genuine pre-estimate of damages which by the petitioner would have suffered in case the respondent company had vacated the premises. No such special circumstances have been highlighted and pointed out.

11. The decision in the case of Food Corporation of India and Others (supra) is distinguishable. In the said case a civil suit was filed and there was evidence to show that the plaintiff therein had performed his part of the contract and altered his position, having constructed the plinths according to specifications of the defendant i.e. FCI. The defendant had promised to plaintiff that on completion of the construction, they would hire the premises for a period of three years but later on backed out. The trial court and the finding of the Supreme Court was that the construction was made in accordance with the design and specification prescribed by the defendant. Therefore, it was held that the defendant cannot back out from the promise held out and escape from the liability.

12. It may be also noted that the Doctrine of Unavoidable Consequence or Mitigation of Damages is applicable in cases of un-liquidated damages....

13. A person therefore, must take reasonable steps to minimize the loss and refrain from taking unreasonable steps which would increase the loss. Defence cannot be held liable to pay a loss which the claimant could have avoided or which arises due to the neglect and failure of the claimant to take such reasonable steps. Damages is compensation for the wrong suffered by the claimant and the loss incurred by him but this is subject to the rule that the claimant must take reasonable steps to avoid their avoidable accumulation. It is difficult to accept that the petitioner was unable to rent out the premises for the lock-in-period of three years despite the highly commercially viable location of the premises. Decline in the rate of rent is not pleaded. The onus in this regard is on the petitioner and no evidence and material has been placed on record to show that the premises could not be rented out. Even the date on which the premises was subsequently rented out has not been stated.

12. The aforequoted reasoning demonstrates the following factors which

influenced the Court not to treat the amount of unexpired lock-in period as debt or liquidated damages:

(i) Whether a particular clause about pre-determined liquidated damages represents genuine covenanted pre-estimate of damages or it is in the nature of penalty has to be judged in the facts of each case and in the background of relevant factors which are case specific. In that case, no facts and circumstances were pleaded to show that clause relating to lock-in period was a genuine pre-estimate of damages which the petitioner would have suffered in case the respondent company vacated the premises before the expiry of lock-in period.

(ii) In order to prove that amount mentioned as payable for the lock-in period is genuine pre-estimate of damages, proper evidence is required of specific nature, namely, the landlord had altered its position by making the premises available to the tenant keeping in view the tenants' requirements and spending thereupon. Certain expenditure was incurred on infrastructure specifically provided to the tenant as per tenant's requirements; certain other expenditure incurred on whitewashing, fixtures and fittings and the landlord was forced to incur such expenditure again before giving the premises to new tenant and, therefore, lock-in period was treated as reasonable period to avoid duplication of such expenditure, etc.

(iii) The doctrine of mitigation of damages may also apply in such cases and even if the tenant had committed breach by leaving the premises before the expiry of lock-in period, it was for the landlord to prove that he had taken reasonable steps to minimize the loss, but could not award the loss to the extent mentioned in the clause and, therefore, the same is to be treated as genuine pre-estimation of the loss.

On this reasoning, in that case, winding up petition was dismissed.

13. As pointed out above, in the reference order, the learned Company Judge has expressed some reservations about the aforesaid ratio from which we infer that the learned Company Judge has hinted that the amount of unexpired lock-in period can be treated as debt though no specific reasons are given in the reference order.

14. Before we give our final comments, we would like to traverse through the statutory provisions as well as some case law on the subject cited before us during the arguments by counsel for the parties.

15. Consequences for breach of the contract are provided in Chapter VI of the Contract Act which contains three sections, namely, Section 73 to Section 75. As per Section 73 of the Contract Act, the party who suffers by the breach of contract is entitled to receive from the defaulting party, compensation for any loss or damage caused to him by such breach, which naturally arose in usual course of things from such breach, or which the two parties knew when they make the contract to be likely the result of the breach of contract. This provision

makes it clear that such compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach. The underlying principle enshrined in this Section is that a mere breach of contract by a defaulting party would not entitle other side to claim damages unless the said party has in fact suffered damages because of such breach. Loss or damage which is actually suffered as a result of breach has to be proved and the plaintiff is to be compensated to the extent of actual loss or damage suffered. When there is a breach of contract, the party who commits the breach does not eo instant i.e. at the instant incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. No pecuniary liability thus arises till the Court has determined that the party complaining of the breach is entitled to damages. The Court in the first place must decide that the defendant is liable and then it should proceed to assess what the liability is. But, till that determination, there is no liability at all upon the defendant. Courts will give damages for breach of contract only by way of compensation for loss suffered and not by way of punishment. The rule applicable for determining the amount of damages for the breach of contract to perform a specified work is that the damages are to be "assessed at the pecuniary amount of difference between the state of the plaintiff upon the breach of the contract and what it would have been if the contract had been performed and not the sum which it would cost to perform the contract, though in particular cases the result of either mode of calculation may be the same. The measure of compensation depends upon the circumstances of the case. The complained loss or claimed damage must be fairly attributed to the breach as a natural result or consequence of the same. The loss must be a real loss or actual damage and not merely a probable or a possible one. When it is not possible to calculate accurately or in a reasonable manner, the actual amount of loss incurred or when the plaintiff has not been able to prove the actual loss suffered, he will be, all the same, entitled to recover nominal damages for breach of contract. Where nominal damages only are to be awarded, the extent of the same should be estimated with reference to the facts and circumstances involved. The general principle to be borne in mind is that the injured party may be put in the same position as that he would have been if he had not sustained the wrong.

16. In *Murlidhar Chiranjilal Vs. Harishchandra Dwarkadas and Another*, , the Supreme Court highlighted two principles which follow from the reading of Section 73 of the Contract Act. The first principle on which damages in cases of breach of contract are calculated is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damages which is due to his neglect to

take such steps.

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

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

9. Having discussed the proper interpretation of Clause 18, we may now turn to consider what is the real nature of the claim for recovery of which the appellant is seeking to appropriate the sums due to the respondent under other contracts. The claim is admittedly one for damages for breach of the contract between the parties. Now, it is true that the damages which are claimed are liquidated damages under Clause 14, but so far as the law in India is concerned, there is no qualitative difference in the nature of the claim whether it be for liquidated damages or for unliquidated damages. Section 74 of the Indian Contract Act eliminates the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties : a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty, and according to this principle, even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him, the stipulated

amount being merely the outside limit. It, therefore makes no difference in the present case that the claim of the appellant is for liquidated damages. It stands on the same footing as a claim for unliquidated damages. Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instant incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due From the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not an actionable claim and this position is made amply clear by the amendment in Section 6(e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred. This has always been the law in England and as far back as 1858 we find it stated by Wightman, J., in *Jones v. Thompson* [1858] 27 L.J.Q.B. 234 "Exparte Charles and several other cases decide that the amount of a verdict in an action for unliquidated damages is not a debt till judgment has been signed". It was held in this case that a claim for damages does not become a debt even after the jury has returned a verdict in favour of the plaintiff till the judgment is actually delivered. So also in *O'Driscoll v. Manchester Insurance Committee* [1915] 3 K.B. 499, Swinfen Eady, L.J., said in reference to cases where the claim was for unliquidated damages : "... in such cases there is no debt at all until the verdict of the jury is pronounced assessing the damages and judgment is given". The same view has also been taken consistently by different High Courts in India. We may mention only a few of the decisions, namely, *Jabed Sheikh v. Taher Mallik* 45 Cal. Weekly Notes, 519, *S. Malkha Singh v. N.K. Gopala Krishna Mudaliar* AIR 1956 Pun. 174 and *Iron and Hardware (India) Co. Vs. Firm Shamlal and Bros., . Chagla, C.J.* in the last mentioned case, stated the law in these terms:

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

As already stated, the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant.

This statement in our view represents the correct legal position and has our full concurrence. A claim for damages for breach of contract is, therefore, not a claim for a sum presently due and payable and the purchaser is not entitled, in exercise of the right conferred upon it under Clause 18, to recover the amount of such claim by appropriating other sums due to the contractor. On this view, it is not necessary for us to consider the other contention raised on behalf of the respondent, namely, that on a proper construction of Clause 18, the purchaser is entitled to exercise the right conferred under that clause only where the claim for payment of a sum of money is either admitted by the contractor, or in case of dispute, adjudicated upon by a court or other adjudicatory authority. We must, therefore, hold that the appellant had no right or authority under Clause 18 to appropriate the amount of other pending bills of the respondent in or towards satisfaction of its claim for damages against the respondent and the learned Judge was justified in issuing an interim injunction restraining the appellant from doing so.

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

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

6. The first thing that strikes one on looking at Clause 18 is its heading which reads: "Recovery of Sums Due". It is true that a heading cannot control the interpretation of a clause if its meaning is otherwise plain and unambiguous, but it can certainly be referred to as indicating the general drift of the clauses and affording a key to a better understanding of its meaning. The heading of Clause 18 clearly suggests that this clause is intended to deal with the subject of recovery of sum due. Now a sum would be due to the purchaser when there is an

existing obligation to pay it in present. It would be profitable in this connection to refer to the concept of a "debt", for a sum due is the same thing as a debt due. The classical definition of "debt" is to be found in Webb v. Stenton [1883] 11 Q.B.D. 518 where Lindley, L.J., said : "... a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation". There must be debitum in praesenti; solvendum may be in praesenti or in future—that is immaterial. There must be an existing obligation to pay a sum of money now or in future. The following passage from the judgment of the Supreme Court of California in People v. Arguello [1869] 37 Cal 524 which was approved by this Court in Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, (Central) Calcutta, clearly brings out the essential characteristics of a debt:

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

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

Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This Section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia [relevant for the present case] provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach, therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach....

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

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

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

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

24. At this juncture, we would like to refer to the judgment of Bombay High Court in the case of E-City Media Private Limited a Private Limited Company Vs. Sadhrta Retail Limited a Public Limited Company, (rendered by Single Judge). In this case also, winding up petition was filed on account of alleged dues stipulated in the contract in case of breach. Facts of the case disclose that the petitioner had appointed the respondent as an exclusive agent for designated branding sites situated within the premises of a shopping mall. The petitioner had permitted the respondent to display advertisements at the Mall, in a theatre and upon ticket jackets. The contract was to commence on 22.5.2008 and was to conclude on 31.7.2009. This term was extended by a formal amendment till September, 2009. The agreement also provided that in the event respondent fail to make payment for a period of one month, during the term of the agreement, the petitioner would be at liberty to terminate the agreement with notice of seven days. In that event, respondent was obliged to make good losses and damages which may be suffered by the petitioner. The respondent was liable to pay entire royalty/minimum guaranteed amount mentioned in the agreement with interest @ 18% per annum on alleged breach committed by the respondent. The petitioner terminated the contract and demanded the entire amount of royalty/minimum guaranteed amount. On the respondents failure to pay, winding up petition was filed. The Court dismissed the said petition holding that it was not maintainable upon a claim for damages which could not be treated as debt. It was held that damages become payable only when they are crystallized upon

adjudication. Until and unless an adjudication takes place with a resultant decree for damages, there is no debt due and payable. Damages require adjudication. Until then, the liability of a party in alleged breach of a contract does not become crystallized. In support of this view, the Court referred to a Division Bench judgment of Karnataka High Court in Greenhills Exports (Private) Limited, Mangalore and Others Vs. Coffee Board, Bangalore, in the following words:

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

(i) A "Debt" is a sum of money which is now payable or will become payable in future by reason of a present obligation. The existing obligation to pay a sum of money is the sine qua non of a debt.

"Damages" is money claimed by, or ordered to be paid to; a person as compensation for loss or injury. It merely remains a claim till adjudication by a court and becomes a "debt" when a court awards it.

(ii) In regard to a claim for damages (whether liquidated or unliquidated), there is no "existing obligation" to pay any amount. No pecuniary liability in regard to a claim for damages, arises till a court adjudicates upon the claim for damages and holds that the defendant has committed breach and has incurred a liability to compensate the plaintiff for the loss and then assesses the quantum of such liability. An alleged default or breach gives rise only to a right to sue for damages and not to claim any "debt". A claim for damages becomes a "debt due", not when the loss is quantified by the party complaining of breach, but when a competent court holds on enquiry, that the person against whom the claim for damages is made, has committed breach and incurred a pecuniary liability towards the party complaining of breach and assesses the quantum of loss and awards damages. Damages are payable on account of a fiat of the court and not on account of quantification by the person alleging breach.

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

(iv)...

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

25. Reading of the aforesaid judgments and the ratio laid down therein would

amply demonstrate that the legal position propounded by learned Single Judge in Manju Bagai (supra) is the correct legal position of law and we agree with the same. We now proceed to apply this legal principle to each of the cases before us.

Co. Pet. 458/2010

26. In this case, as already noted above, the petitioner is claiming payment on the basis of lock-in period mentioned in the MSA with respect to the sites procured by the respondent from the petitioner. Winding up petition is filed on that basis. The defence of the respondent is that it does not own any definite or certain amount to the petitioner and there is no admitted debt. It is also mentioned that respondent has already tendered an amount of Rs. 1.13 Crores to the petitioner and, therefore, the petition has become infructuous. It is also stated that the respondent is willing to pay the rightful claim of the petitioner and has repeatedly sought reconciliation of accounts but the petitioner has deliberately refused to do so. According to the respondent, no further amount is payable and claim of the petitioner is in dispute. We also find that in the agreement entered into between the parties, there is an arbitration clause. There are thus genuine disputes and from the facts of this case, applying the position of law discussed above, we are of the opinion that in praesenti, no "debt" has crystallized. This petition is accordingly dismissed.

Co. Pet. 302/2009

27. This is a case where the premises were given by the petitioner to the respondent on license basis vide lease and license agreement dated 18.2.2008. Lock-in period of 33 months was prescribed and the entire amount is claimed on account of premature termination of agreement by the respondent. The petitioner is claiming total amount of the lock-in period. It is nowhere stated as to how it has suffered any loss on this account and whether the liquidated damages stipulated in the agreement are genuine pre-estimate damages. Once we have accepted the judgment in Manju Bagai (supra) and we are also in agreement with the view taken by the Bombay High Court in E-City Media Private Limited (supra), the consequence of that would be to dismiss this petition as well.

Co. Pet. 393/2010

28. We have already narrated the facts of this petition. Here, the Collaboration Agreement was entered into between the parties as per which, obligation of the respondent company was to complete the construction and project in two phases within a time bound period. Clause 16(a) and 16(b) provide for damages for delay in construction. Project has been delayed and there is no dispute about this. The petitioner had sent legal notice dated 14.12.2009 claiming damages on account of delay in construction as provided in clause 16(a) and 16(b). The respondent sent reply dated 9.2.2010. In this reply, reason for delay given by the respondent was lack of inflow of funds. This was stated so in para 2 of the reply as under:

It is a matter of common knowledge that the project of such magnitude as of ours, are usually financed from funds provided by the builder from their own sources, funds made available by the Banks/Financial Institutions as loans and money collected/realized from the intending Purchasers on the booking/sale of spaces/areas in the proposed project.

29. From para 3 onwards, the respondent stressed the fact that such projects are usually financed not only from the funds provided by the builder from its own sources but also made available by the banks/financial institutions due to non-availability of title deeds of the project lands to be deposited with the bank for creating equitable mortgage on the said property etc. It was also mentioned that respondent had spent a sum of approximately Rs. 30 Crores on the project. Further, there were no sufficient bookings/sale of spaces/areas of the project as there were no willing buyers in the market. As against saleable area of approximately 3,25,000 sq.ft., only an area of 5175 sq.ft. had been sold which was of the value of Rs. 2.95 Crores and out of this, only a sum of Rs. 2.80 Crores had been received. As per the respondent, therefore, the delay, if any, in completion of the project was neither willful nor deliberate but due to the aforesaid reasons and not only this project, but projects of all other major players in Ludhiana in realty business were behind schedule. At the end, respondent assured that it had always been and was still willing to complete the project. On the basis of the aforesaid, the contention of the of the counsel for the petitioner is that the fact of not completing the project in time on the part of the respondent is duly established and in fact admitted and the respondent has accepted the same and from the aforesaid notice, it is also clear that it is entirely attributable to the respondent. It was argued that it was for the respondent to arrange funds and if respondent was not able to arrange loans from the banks, that was a matter with which the petitioner was not concerned and petitioner became entitled to the damages. It was further argued that in the facts of this case, these were pre-estimated reasonable damages inasmuch as the petitioner was deprived of a reasonable amount of area which should have been made available to the petitioner by August, 2008 (Phase-I) and August, 2009 (Phase-II) respectively. It was the submission of the learned counsel that had this area been available, the petitioner would have made use thereof and earned the money. The parties, at the time of entering into agreement, accepted that if the aforesaid area is not handed over to the petitioner by the stipulated date, it would result in the loss to the extent stipulated in clause 16(a) and 16(b). Learned counsel for the petitioner relied upon the judgment of the Apex Court Kesoram Industries (supra) and specifically referred to the following passage therefrom:

Counsel for the Company claims that in determining liability for wealth-tax income tax which would become payable on the income, profits or gains for the assessment year may be deemed a debt owed in the previous year, and liable to be adjusted in determining the aggregate value of debts for the purpose of s. 2(m). The expression "debt" is a sum of money due from one person to another :

it involves an obligation to satisfy liability to pay a sum of money. The liability must be an existing liability but not necessarily enforceable in presenti : an existing liability to pay a sum of money even in future is a debt, but the expression does not include liability to pay unliquidated damages nor obligations which are inchoate or contingent. Lord Justice Lindley in Webb v. Stenton [1883] 11 Q.B.D. 518 observed that

a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation". That definition for the purpose of the Wealth Tax Act correctly describes the concept of debt. A debt, therefore, involves a present obligation incurred by the debtor and a liability to pay a sum of money in present or in future. The liability must however be to pay a sum of money, i.e., to pay an amount which is determined or determinable in the light of factors existing at the date when the nature of the liability has to be ascertained.

30. Learned counsel also relied upon Division Bench judgment of Karnataka High Court in the case of Kudremukh Iron Ore Co. Ltd. Vs. Kooky Roadways P. Ltd., . That was a case where there was short delivery of goods entrusted to the respondent company for carriage which fact was acknowledged by the respondent company and it took time to make good the short delivery. However, it could deliver miniscule of the short delivery leaving a net shortage of substantial material to be delivered. For undelivered material, the petitioner called upon the respondent company to pay the amount of the cost of that material. Then notice u/s 433 read with 438 of the Act was issued and company petition filed. In this backdrop, question arose as to whether the liability of the respondent company to the petitioner arisen on account of short delivery of goods entrusted to it for carriage could be regarded as a "debt" within the meaning of Section 433(e) of the Companies Act, 1956. The Court took note of the expression "debt" as defined in various judgments of English Courts as well as Indian Courts and held that the amount payable could be regarded as "debt" because of the following circumstances:

18. u/s 8 of the Carriers Act, the liability of a common carrier to the owner for the loss of the goods entrusted for carriage is fastened whenever the goods remain undelivered or short delivered to the owner. Though no exact amount may be claimed by the owner as the liability of the common carrier- towards the undelivered goods or short-delivered goods, the liability to pay the amount arises on the date when short delivery or non-delivery is found. The fact that the exact amount of the liability of the common carrier to the owner arising u/s 8 of the Carriers Act has to be ascertained or determined or quantified, does not make such liability any the less a debt since the "debt" takes within its ambit the existing liability of a person to pay a sum of money to be ascertained or determined or quantified subsequently as held by the Supreme Court in Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, (Central) Calcutta, . From this, it follows that the liability of the respondent-company to the petitioner arising on account of short delivery of goods entrusted to it for

carriage could be regarded as a "debt" within the meaning of clause (e) of section 433 of the Act. As the meaning we have ascribed to the word "debt" in clause (e) of section 433 of the Act takes within its ambit the existing liability of a company, though the amount of such liability has yet to be ascertained, determined or quantified, we find it difficult to subscribe to the view expressed by the learned single judge in his order under appeal that the liability of the respondent-company to the petitioner for short-delivered goods cannot become a debt unless the amount of such liability is ascertained in a suit to be filed by the petitioner in that regard.

Re. Point (ii).- An application to the court for winding up of a company shall be by a petition presented under sub-section (1) of section 439 of the Act, among others, by any creditor as is specified in clause (e) thereof. According to the learned single judge, the petitioner could not have filed the petition for winding up of the respondent-company since it could not be a creditor within the meaning of the word "creditor" in section 439 of the Act. But, we find it difficult to agree with the view expressed by the learned single judge in the matter. The general meaning of the word "creditor" is, as found in the third edition of Stroud's Judicial Dictionary, volume I, at page 680, a person to whom a debt is payable. The word "creditor" in clause (b) of sub-section (1) of section 439 of the Act, could, therefore, be understood as a person to whom a debt is payable inasmuch as there is nothing in the context of the word "creditor" used in clause (b) of sub-section (1) of section 439 of the Act which requires the word "creditor" to be understood differently. While dealing with point (i), we have held that the liability of the respondent-company to the petitioner arising on account of short delivery of goods entrusted to it for carriage, could be regarded as a "debt" within the meaning of the word "debt" in clause (e) of section 439 of the Act. It is, therefore, a "debt" payable by the respondent-company to the petitioner. This situation makes the petitioner a "creditor" of the respondent-company. Hence, we are of the considered view that the petitioner, who had entrusted the goods to the respondent-company for carriage, becomes a "creditor" of the latter for short-delivered goods within the meaning of the word "creditor" in the section 439 of the Act. When the petitioner is a "creditor", the petition for winding up presented by it against the respondent-company becomes maintainable. Thus, our answer to point (ii) is in the affirmative.

31. Another judgment of the Single Judge of this Court in *European Metal Recycling Ltd. v. Blue Engineering P. Ltd.*, [2010] 156 Comp Cas 35 was also pressed into service. That was a case where the respondent company had failed to take possession of contracted goods and when it did not take the delivery, the petitioner sold those goods to mitigate loss. Thereafter, petitioner lodged claim with the respondent company for difference between contracted price and sale price. No notice was issued by the petitioner before re-sale. The Court held that such claim was not "debt" for purposes of winding up proceedings and was to be decided by Civil Court and the petition u/s 433 was dismissed as not maintainable. However, this judgment was referred to for the purpose of

discussion on the meaning of "debt".

32. In the reply filed by the respondent, the liability is denied and the respondent has gone to the extent of alleging that petitioners have committed fraud with the respondent company as the petitioners have granted limited license to have access from National Highway to the land in question but has also caused irreparable loss and damage to the respondent. The respondent has also alleged that delay is not attributable to it. It is further submitted that on the basis of clause of "liquidated damages", the petitioners cannot maintain company petition unless "actual loss" is proved. It is further submitted that in view of the Division Bench judgment of this Court in BSNL v. BWL Ltd., [FAO (OS) 457/2010 decided on 19.04.2011], it is imperative on the part of the petitioners to prove "some loss" even if breach is to be attributed to the respondent and this exercise of proving some loss requires trial. Following observations from the said judgment are relied upon:

9. We are, therefore, unable to affirm, in toto, the decision in Union of India v. Daulat Ram 2009 (2) Arb. L.R. 327 (Del) wherein the learned Single Judge may have been right in coming to a particular conclusion which cannot ubiquitously apply to all situations. This very question came up for consideration in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., and their Lordships formulated the controversy to be-"Whether the claim of refund of the amount deducted by the Appellant from the bills is disputed or undisputed claim?" The discussion is perspicuous and is available in paragraphs 70-72. The conclusion was that the "arbitrators were required to decide by considering the facts and the law applicable whether the deduction was justified or not". These decisions are an enunciation of the legal position that (a) liquidated damages cannot be punitive in nature and (b) that the actual loss need not be proved in order to sustain the claim for liquidated damages. This, however, does not mean that merely because a contract contains a liquidated damages clause, these damages could be claimed even where no loss has-been sustained; even where delay has not actually occurred; and where delay is a consequence of the action of the claimant.

33. From the aforesaid, it is clear that no doubt the respondent had, to some extent, accepted its fault and also stated in reply dated 9.2.2010 that delay for completion of the project was result of lack of inflow of funds. However, on reading of reply dated 9.2.2010, one cannot say that the respondent had accepted its fault in entirety. Para 5 indicates that loans from banks/financial institutions could not be raised due to non-availability of title deeds of the project land which was to be deposited with the bank for creating equitable mortgage etc. Moreover, even if breach is accepted and the clause relating to liquidated damages gets triggered, still the obligation of the petitioners to prove that because of non-completion of the project in time, it has suffered some loss though proof of actual loss may not be required. In the communication dated 9.2.2010 itself, the respondent highlighted that there were no willing buyers in

the market. Therefore, it cannot be said that even if this area in constructing form was made available to the petitioner, it could have been able to sell the same. We are, therefore, of the opinion that at present, having regard to the legal position explained above, "debt" has not got crystallized and the matter needs evidence. Thus, we dismiss this petition as well.

34. We make it clear that in all the three cases, we have not gone into the strength of the petitioners' claims or the merits of the respondents' defence. When the matter is adjudicated upon either before the Civil Court or before the arbitral tribunal, it would be for the said forums to deal with the claim of the petitioners based upon evidence produced by the parties. As a result, all these company petitions seeking winding up of the respondent companies, are dismissed as not maintainable leaving the parties to bear their own costs.