

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

CWP No.1686 of 2016

Date of Decision.09.03.2017

Sasan Power Limited and others

.....Petitioners

Vs

Punjab State Power Corporation Limited and other

.....Respondent

Present: Mr. Akshay Bhan, Senior Advocate with
Mr. Amandeep Singh Talwar, Advocate and
Mr. D.K. Singal, Advocate
for the petitioners.

Mr. Vinod S. Bhardwaj, Advocate
for the respondent.

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

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AMIT RAWAL J.

The petitioners-Sasan Power Limited and others have approached this Court for issuance of writ in the nature of certiorari for quashing the impugned notices dated 11.01.2016 (Annexure P-29) and 25.08.2015 (Annexure P-19) whereby the respondent-Punjab State Power Corporation Limited (hereinafter called as "PSPCL") informed the petitioner that before Performance Bank Guarantee of ₹30 crores valid upto 31.07.2016 is considered for release, an amount of ₹13,26,10,500/- as intimated by the Chief Engineer/PP&R on account of liquidated damages charges for delay in commercial operation of Unit #2&3 (Unit #2-52 days delay and Unit #3-101 days delay) ordered to be deposited, which was increased vide letter dated 11.01.2016 to a sum of ₹16,14,59,100/-.

Mr. Akshay Bhan, learned Senior Counsel assisted by Mr. Amandeep Singh Talwar and Mr. D.K. Singal, Advocates appearing for the petitioners submitted that Sasan Power Limited (hereinafter called as

“SPL”) was incorporated as a 100% subsidiary of Power Financial Corporation Limited (PFC) for the purpose of setting up and developing a 3960 Mega Watt Ultra Mega Power Project i.e. Sasan Ultra Mega power project in Madhya Pradesh. The petitioner No.2 was selected as a successful bidder and entire shareholding of the PFC in petitioner No.1 was transferred to petitioner No.2. Petitioner No.3 is a shareholder of petitioner No.2. The petitioner No.1 supplies power at the most competitive levelized tariff of Rs.1.196 per KWH to 14 distribution companies in 7 States with a population of nearly 42 crores.

Power Purchase Agreement dated 07.08.2007 (hereinafter called as “PPA”) containing various clauses was entered into consisting of following parties:-

“ *SASAN POWER LIMITED*
Power Purchase Agreement
For
Procurement of Power on Long Terms Basis from Power Station to be set up at Sasan, District Sidhi, Madhya Pradesh based on linked captive coal mine
between
Pashchimanchal Vidyut Vitran Nigam Limited (“Procurer 1”)
And
Purvanchal Vidyut Vitran Nigam Limited (“Procurer 2”)
And
Madhyanchal Vidyut Vitran Nigam Limited (“Procurer 3”)
And
Dakshinanchal Vidyut Vitran Nigam Limited (“Procurer 4”)
And
Ajmer Vidyut Vitran Nigam Limited (“Procurer 5”)
And
Jaipur Vidyut Vitran Nigam Limited (“Procurer 6”)
And
Jodhpur Vidyut Vitran Nigam Limited (“Procurer 7”)
And
North Delhi Power Limited (“Procurer 8”)
And
BSES Rajdhani Power Limited (“Procurer 9”)
And
BSES Yamuna Power Limited (“Procurer 10”)
And
Punjab State Electricity Board (“Procurer 11”)
And
Haryana Power Generation Corporation Limited (“Procurer 12”)
And
MP Power Trading Company limited (“Procurer 13”)

And
Uttarakhand Power Corporation Limited (“Procurer 14”)
And
Sasan Power Limited (“Seller”)

As per Article 4.5.1 of the PPA, in case the seller-petitioner No.1 is prevented from commissioning a unit by the stipulated date, due to any procurer event of default, the Scheduled Commercial Operations Date (hereinafter called as “SCOD”) shall be deferred for a reasonable period but not less than day for day basis, till such time the default is rectified by the procurers, subject to the limit of two years.

Similarly, Article 4.6 provided for liquidated damages for delay in providing contracted capacity. For the sake of brevity, Article 4.5.1 and 4.6 are reproduced as under:-

“4.5 Extensions of time

4.5.1 In the event that:

(a) the seller is prevented from performing its obligations under Article 4.1.1 (b) by the stipulated date, due to any Procurer Event of Default; or
(b) a Unit cannot be commissioned by its Scheduled Commercial Operations Date because of Force Majeure Event.
the Scheduled Commercial Operations Date, the Scheduled Connection Date and the Expiry date shall be deferred subject to the limit prescribed in Article 4.5.3 for a reasonable period but not less than 'day for day' basis to permit the Seller through the use of due diligence to overcome the effects of the Force Majeure Events affecting the Seller or in the case of the Procurer's or Procurers' Event of Default, till such time such default is rectified by the Procurer(s).

4.5.2 If the parties have not agreed, within thirty (30) days after the affected Party's performance has ceased to be affected by the relevant circumstance, on how long the Scheduled Commercial Operations Date, the Scheduled Connection Date or the Expiry Date should be deferred by, any Party may raise the Dispute to be resolved in accordance with Article 17.

4.5.3 In case of extension occurring due to reasons specified in Article 4.5.1 (a), the original Scheduled Commercial Operations Date of any unit or the original Scheduled Commercial Operations Date of the Power Station as a whole, would not be extended by more than two (2) years or the date on which the Seller elects to terminate this Agreement, whichever is earlier.

As a result of such extension, the date newly determined shall be deemed to be the Scheduled Commercial Operations Date for the purposes of this Agreement.

4.6 Liquidated damages for delay in providing Contracted Capacity

4.6.1 If any Unit is not Commissioned by its Scheduled Commercial Operation Date other than for the reasons specified in Article 4.5.1, the Seller shall pay to each Procurer liquidated damages, proportionate to their then existing Allocated Contracted Capacity, for the delay in such commissioning or making the Unit's Contracted Capacity available for dispatch by such date. The sum total of the liquidated damages payable by the seller to the Procurers for such delayed Unit shall be calculated as follows:-

$SLDb = [CCun \times dn \times DR1]$, if $dn \leq 60$

$SLDb = [CCun \times 60 \times DR1] + [Ckun \times (dn - 60) \times DR2]$, if $dn > 60$

Where:

a) "SLDb" are the liquidated damages payable by the Seller during the period beginning with the day from the Scheduled Commercial Operation Date of a unit up to and including the day on which unit is actually Commissioned;

b) "Ckun" is the Contracted Capacity of Unit "n"

c) "d" is the number of days in the period beginning with the day after the Scheduled Commercial Operation Date of Unit "n" up to and including the day on which such unit is actually Commissioned;

d) "DR1" is Rs.Ten Thousand (10,000) of damages per MW per day of delay in case of "d" is less than 60 days and "DR2" is Rs.Fifteen Thousand (15,000) of damages per MW per day of delay in case "d" is equal to or more than 60 days.

4.6.2 The Seller's maximum liability under this Article 4.6 shall be limited to the amount of liquidated damages calculated in accordance with Article 4.6.1 for and upto twelve (12) months of delay for the Unit. Provided that in case of failure of the Seller to Commission the Unit even after expiry of twelve (12) Month from its Scheduled Commercial Date, the provisions of Article 14 shall apply.

4.6.3 The Seller shall pay the amount calculated pursuant to Article 4.6.1 to the Procurers within ten (10) days of the earlier of:

(a) the date on which the Unit is actually commissioned; or

(b) the date of termination of this Agreement.

If the seller fails to pay the amount of damages within the said period of ten (10) days, the Procurers shall be entitled to recover the said amount of the liquidated damages by invoking the Performance Guarantee. If the then existing Performance Guarantee is for an amount which is less than the amount of the liquidated damages payable by the Seller to the Procurers under this Article 4.6, then the Seller shall be liable to forthwith pay the balance amount."

Before he could argue on the main points, has drawn attention of this Court to PPA containing definition of various nomenclature being used, which are reproduced as under:-

"Agreement" or "Power Purchase Agreement" or "PPA" means this document including its recitals and Schedules;

“Commercial Operation Date” or “COD” means, in relation to a Unit, the date one day after the date when each of the Procurers receives a Final test Certificate of the Independent Engineer as per the provisions of Article 6.3.1 and in relation to the Power Station shall mean the date by which such Final Test Certificates as per Article 6.3.1 are received by the Procurers for all the Units;

“Final Test Certificate” means

- a) a certificate of the Independent Engineer certifying and accepting the results of a Commissioning Test/s in accordance with Article 6.3.1 of this Agreement; or
- b) a certificate of the Independent Engineer certifying the result of a Repeat Performance Tests in accordance with Article 8.2.1 of this Agreement;

“Independent Engineer” means an independent consulting engineering firm or group appointed jointly by all the Procurers (jointly) and the Seller, to carry out the functions in accordance with Article 4.7.1 and Article 6, Article 12 and Article 8 herein.

provided that separate Independent Engineer may be appointed for the purposes of Article 4.7.1, Article 6, Article 12 and Article 8;

provided further that the separate Independent Engineer may be appointed for each financial year for the purposes of Article 8, and in such case, such Independent Engineer shall be appointed at least ninety (90) days prior to the beginning of the financial year.

“Performance Guarantee” means the irrevocable unconditional bank guarantee, submitted and to be submitted by the Seller or by the Selected Bidder on behalf of the Seller to the Procurers from a bank mentioned in Annexure 12 of the RFP, in the form attached hereto as Schedule 15, in accordance with Article 3 of this Agreement and which shall include the additional bank guarantee furnished by the Seller under this agreement.

“Performance Test” means the test carried out in accordance with Article 1.1 of Schedule 5 of this Agreement;

“Scheduled COD” or “Scheduled Commercial Operation Date” means (i) for the first Unit, May 7, 2013; (ii) for the second Unit, December 7, 2013; (iii) for the third unit, July 7, 2014; (iv) for the fourth unit, February 7, 2015; (v) for the fifth Unit, September 7, 2015 and (vi) for the sixth unit, April 7, 2016 or such other dates from time to time, specified in accordance with the provisions of this Agreement.”

Thereafter, he has referred to various Articles of terms and conditions of the Agreement and as per Article 2.5, the Lead Procurer means as under:-

“2.5 Lead Procurer

2.5.1 The Procurers hereby appoint and authorize MP Power Trading Company Ltd. (hereinafter referred to as the “Lead Procurer” to represent all the procurers for discharging the rights and obligations of the Procurers, which are required to be undertaken by the Procurers jointly as mentioned in Schedule 12 of this Agreement. Accordingly, all

the Procurer shall follow and be bound by the decisions of the Lead Procurer on all such matters. Each Procurer agrees that any decision, communication, notice, action or inaction of the Lead Procurer on such matters shall be deemed to have been on its/his behalf and shall be binding on each of the Procurers. The Seller shall be entitled to rely upon any such action, decision or communication from the Lead Procurer. It is clarified that this Article 2.5 is not intended to and shall not render the Lead Procurer liable to discharge individual Tarrif payments of the other Procurers.

The Procurers hereby also appoint and authorize “Purvanchal Vidyut Vitran Limited” (hereinafter referred to as the “Alternate Lead Procurer”, to act as Lead Procurer as per the provisions of this Article 2.5.1, on the occurrence of any Event of Default specified in Article 14.2 by the Lead Procurer. In such an event, the Seller may, at its option, within a period of fifteen (15) days from the date of issue of the Preliminary Default Notice referred to in Article 14.4.2 and if the said default by the Lead Procurer subsists, specify in writing to all the Procurers that the Alternate Lead Procurer shall thereafter act as the Lead Procurer. In such a case, if the Seller so notifies, the Alternate Lead Procurer shall, thereafter, act as Lead Procurer for the purposes of this Agreement, and the Lead Procurer earlier appointed under this Article 2.5.1 shall automatically cease to be the Lead Procurer. It is clarified that all decisions taken by the “MP Power Trading Company Limited” in its capacity as Lead Procurer before such change, shall continue to be valid, in accordance with this agreement.

In the event of “Purvanchal Vidyut Vitran Limited” becoming the Lead Procurer as per this Article, all the Procurers shall also appoint any of Procurers, other than “MP Power Trading Company Limited”, as an Alternate Lead Procurer and thereafter the provisions of this Article 2.5.1 shall be applicable.

2.5.2 Notwithstanding anything contained above, any decision which is required to be taken by the Procurers jointly under the provisions of Article 14 shall be taken by all the Procurers and in case of difference amongst the Procurers, the said decision shall be taken by the Majority Procurers as defined in Article 2.5.3 below.”

Article 3.4 deals with reduction in the amount of performance guarantee, which reads as under:-

“3.4 Reduction in the amount of Performance Guarantee

3.4.1 On the due fulfilment by the seller of all the conditions specified under Article 3.1.2 and investment by the Seller of at least twenty five percent (25%) of the total equity required for the Project as certified by the lead lender of the Seller, the Performance Guarantee then existing shall be reduced by an aggregate amount of Rupees One Hundred Crores (Rs.100,00,00,000) and such reduced Performance Guarantee/s shall be provided separately to each of the Procurers in the ratio of their then respective Allocated Contracted Capacities [and rounded off to the nearest Rupees One Lakh (Rs.1,00,000) with the principle that amounts below Rupees Fifty Thousand (Rs.50,000) shall be rounded down and amounts of Rupees Fifty Thousand (Rs.50,000) and above shall be rounded up] and for the period specified in Article 3.4.2.

3.4.2 The Performance of Guarantee specified in Article 3.4.1 hereof shall be in substitution of the earlier Performance Guarantee furnished

under Article 3.1.1.

The Performance Guarantee furnished under this Article shall be initially valid till three (3) months after the Scheduled COD of the Power Station and which shall be extended from time to time to be valid upto three (3) months after the actual COD of the Power Station.

3.4.3 The Performance Guarantee furnished under Article 3.1, 3.3 and 3.4 shall be for guaranteeing the due and timely completion of the Project and achievement of Scheduled Commercial Operation date of each Unit within the time specified in this Agreement.

3.4.4 The failure on the part of the Seller to furnish and maintain the Performance Guarantee as mentioned above shall be a material breach of the term of this Agreement on the part of the Seller.

3.4.5 If the Seller fails to achieve COD of each of the Units on their respective Scheduled Commercial Operation Date specified in this Agreement, subject to conditions mentioned in Article 4.5.1, the Procurers jointly shall have the right to encash the Performance Guarantee and appropriate in their favour as liquidated damages an amount specified in Article 4.6.1 without prejudice to the other rights of the Procurers under this Agreement.”

Article 3.5 deals with Return of Performance Guarantee which reads as under:-

“3.5.1 The Performance Guarantee as submitted by Seller in accordance with Article 3.4 shall be released by the Procurers within three (3) months from the actual Commercial Operation Date of the Power Station. In the event of delay in achieving Scheduled COD of any of the Units by the Seller (otherwise than due to the Procurers' inability to complete the activities mentioned in Article 3.1.2A or Force Majeure event) and consequent part invocation of the Performance Guarantee by the Procurers, the Procurers shall release the Performance Guarantee, if any, remaining unadjusted under Article 3.4, after the satisfactory completion by the Seller of all the requirements regarding achieving the Scheduled Commercial Operation Date of the remaining Units of the Power Station. It is clarified that the Procurers shall also return/release the Performance Guarantee in the event of (i) applicability of Article 3.3.2 to the extent the Performance Guarantee is valid for an amount in excess of Rupees Four Hundred (400) crores, or (ii) termination of this Agreement by any party under Article 3.3.3 or Article 3.3.3A of this agreement.

3.5.2 The release of the Performance Guarantee shall be without prejudice to other rights of the Procurers under this Agreement.”

He has also drawn attention of this Court to Clause 4.5 dealing with extension of time, which has already been extracted above.

On reading of the aforementioned clauses, he submitted that in terms of Article 3.1.1 of the PPA *ibid*, petitioner No.2 had submitted

on behalf of petitioner No.1 to the Procurers in proportion to their contracted capacity and on fulfillment of the conditions specified in Article 3.1.2 of the PPA, PBGs were reduced to ₹200 crores in the same proportion. Annexure P-3 is to the same effect.

By virtue of Article 3.5.1 extracted above, the Procurers are obligated to release the balance PBG within three months from the Actual Commercial Operation Date (ACOD) of the Power Station which means the date by which each Procurer received Final Test Certificates of the independent engineer for all the units. The Final Test Certificate for the last Unit (Unit #6) was issued on 26.03.2015 (Annexure P-5). For the sake of brevity, the Final Test Certificate reads under:-

“Final Test Certificate of the Independent Engineer (IE)

Final Test Certificate on the Performance Test pursuant to Article 6 of PPA of the Sixth Unit (Unit-6 of 660 MW) of SASAN ULTRA MEGA POWER PROJECT (6x660 MW), conducted from 1300 hrs on 23rd March 2015 to 1800 hrs on 26th March 2015.

This Final Test Certificate is issued by IE for Unit-6 of Sasan UMPP with reference to Article 6 of PPA executed on 7th August 2007 between Sasan Power Limited (SPL, the Seller) and the Power of Procurers. Based on the Performance Test witnessed by IE from 23rd March, 2015 to 26th March 2015 and review of the Performance Test Results provided by the Seller, it is certified that:

- 1. The Test was witnessed by Lahmeyer International (India) Pvt. Ltd. (Independent Engineer-IE) in the presence of the representative of MPPMCL (Lead Procurer).*
- 2. The Performance Test of Seventy Two (72) hour for Unit-6 of Sasan UMPP commenced at 13:00 hrs on 23rd March, 2015 and was completed at 13:00 hrs on 26th March 2015. The above test was followed by the Ramp Up and Ramp Down Test which was completed at 18:00 hrs on 26th March 2015.*
- 3. The results of the Performance Test show that during the Performance Test of Seventy Two (72) hours, the Unit operated at or above 617.80 MW Ex-bus (which is more than 95% of the contracted capacity (589.38 MW). During the above stated period of continuous 72(seventy two) consecutive hours, the performance of the unit, in reference to the Electrical Limits of the Functional Specifications in accordance with Schedule-4 of PPA, is indicated below:*

- i) The Unit operated within the voltage range of +_%of 22 kV (as per Manufacturer's design parameters), which meets the requirement of the functional specifications.*

- ii) *The Unit operated with a lagging power factor, varying between 0.98 to 1.0, which is within the power factor range described in the functional specifications.*
 - iii) *The grid voltage at the interconnection point was recorded to be within the limits specified in the functional specifications.*
4. *The unit demonstrated the Ramp-Up and Ramp-Down Rates above 50% of the rated load in accordance with Schedule 4 of PPA. The Ramp-Up Rate of 1.10% per minute and Ramp-Down Rate of 1.61% per minute was demonstrated which meets the requirement of Schedule 4 of PPA.*
 5. *The Unit demonstrated the Supercritical Technology Parameters at the steam turbine inlet, which as per the PPA are the following:-*
 - i) *Main Steam Pressure: 247 kg/cm² (abs).*
 - ii) *Main Steam Temperature: 535 deg C.*
 - iii) *Reheat Temperature: 565 deg C.*
 6. *The unit demonstrated a gross generation of 693.98 MW (more than 105% of MCR) for a short duration on 26th March 2015.*
 7. *All the systems and equipment of the unit have been commissioned and are operational.*
 8. *Conclusion:*
 - a. *The Performance Test has been carried out in accordance with Schedule 5 of PPA and the results are acceptable to the IE.*
 - b. *The result of the Performance Test show that the Unit's Tested Capacity is not less than ninety five (95) per cent of its contracted capacity as existing on the Effective Date."*

He further submitted that by virtue of judgment dated 31.03.2016 passed by the Appellate Tribunal for Electricity in Appeal No.233 of 2014, the date of COD of First Unit had been taken as 31.03.2013. During the interregnum, dispute with regard to fixing of the commission of the unit arose, as the date of commissioning of the First Unit was fixed under the PPA as 07.05.2013, however, under Schedule 11, the date was preponed to 27.11.2012 and ultimately, various memos in this regard were also exchanged. According to the petitioner, they were ready to deliver the electricity on 31.03.2013 by 95% of the contracted capacity of 620 MW of the unit but WRLDC did not give them the necessary green signal to go ahead and relied upon the independent engineer's test certificate dated 30.03.2013 to show that Commercial Operation Date took place on the follow day. However, the matter reached upto the Hon'ble Supreme

consumers were liable to pay an amount of more than ₹1000 crores. COD was fixed as 16.08.2013 instead of 31.03.2013 but thereafter certificate extracted above dated 26.03.2015, leaves no manner of doubt that performance test conducted as per Article 6 of the PPA showed that unit test capacity was not less than 95% of its contracted capacity as existing on the effective date.

Repeated requests made to the PSPCL for release of the bank guarantee as reflected in Annexures P-6 and P-7, did not yield any fruitful result and till December, 2015, petitioner had supplied 38,547 MWs of power to the Procurers who had been benefitted by ₹15,128 crores in comparison to the recent tariff discovery of ₹5.2/KWh in long term case-1 bids for Andhra Pradesh. As per clause 2.5 reproduced above, the Procurers had appointed MP Power Trading Company Limited as Lead Procurer (hereinafter called as MPPTCL). In this regard, he has drawn the attention of this Court to letter dated 14.08.2015 written by the MPPMCL, Lead Procurer, to the petitioner for realizing the performance bank guarantee of ₹75 crores in original on the premise that the power station performance test was conducted from 20.04.2015 to 21.04.2015 and Independent Engineer thereafter had also submitted a test certificate dated 22.04.2015 and as well as letters Annexure P-13 and P-14 whereby the other performance bank guarantees submitted to the Procurers i.e. UP Power Corporation Ltd. and Tata Power-DDL have also been released.

He further submitted that a meeting between the petitioner and the Procurers of different Units was held on 03.08.2015 which was chaired by the Chairman, MPPMCL, and Principal Secretary, Energy, Government of Madhya Pradesh in which all the Procurers including the respondent as

per Annexure A-1 participated and it was opined that MPPMCL had approved the PBG and had further stated that there should not be any issue with respect to release of PBG and in this regard, sought views of other Procurers and all the Procurers agreed as CODs be accepted and supported for release of PBG. Despite the aforementioned fact, within few days vide Annexure P-19 dated 25.08.2015 issued a show cause notice demanding ₹13,26,10,500/- which was converted to ₹16,14,59,100/- vide Annexure P-29 dated 11.01.2016.

According to him, Article 17 of the Agreement contained arbitration clause i.e. dispute resolution. In respect of Articles 4.7.1, 13.2, 18.1 or clause 10.0.3 of Schedule 17, the matter is required to be referred to Appropriate Commission i.e. Central Electricity Regulatory Commission (hereinafter called as "CERC") but in respect of other disputes not covered under Article 17.3.1 had been agreed to be resolved by arbitration under the Indian Arbitration and Conciliation Act, 1996. He says that there is no dispute on behalf of the petitioner, much less, respondents in view of the letter dated 14.08.2015 as well as minutes of meeting dated 03.08.2015 whereby all other procurers have released the performance bank guarantee on the basis of Final Test Certificate dated 26.03.2015 and subsequent dated 22.04.2015 as referred to in the letter dated 14.08.2015 (Annexure P-12), thus, PSPCL could not ask for liquidated damages. If at all, there was any dispute, it is the PSPCL, who has to seek resolution of dispute through arbitration with other Procurers. In support of his contention, he relied upon the judgment of Hon'ble Supreme Court in **Union of India and others Vs. Tania Construction Private Limited (2011) 5 SCC 697** to contend that the arbitration clause is not a bar for invoking the writ jurisdiction when

apparently injustice is caused and rule of law is violated. On similar line, relied upon the judgment rendered by Hon'ble Supreme Court in **ABL International Ltd. and another Vs. Export Credit Guarantee Corporation of India Ltd. and others (2004) 3 SCC 553.**

On the contrary, Mr. Vinod S. Bhardwaj, learned counsel appearing for the respondents submitted that different bank guarantees had been submitted in respect of different procurers which fact is evident from the reading of the clauses referred to above and PSPCL was within its domain to ask for liquidated damages as per Article 4.6 extracted supra, for, the unit was not commissioned by its Scheduled Commercial Operate Date (SCOD) and therefore, the seller is liable to pay to each Procurer liquidated damages proportionate to their then existing allocated contracted capacity in the manner and mode indicated in Article 4.6.1 i.e. calculation given therein. As per the Article 4.6.3, the seller shall pay the amount calculated pursuant to Article 4.6.1 to the Procurers within ten days of the earlier of the date on which the Unit is actually commissioned or the date of termination of the agreement.

He raised objection qua maintainability of the writ petition on the premise that Article 17.3 is a separate mechanism i.e. resolution of dispute and therefore, the CERC shall have jurisdiction to adjudicate the dispute, owing to the fact that the sale and purchase of power involves a composite scheme of sale of power by a generating company to licensees in multiple States.

As regards the encashment of the bank guarantee, he submitted that this Court vide order dated 29.01.2016 read with order dated 26.05.2016 directed the petitioner to furnish the FDR for an amount of

₹16,14,59,100/- and the petitioner has furnish the FDR of the aforementioned amount which has been maintained as bank guarantee. The petitioner has also maintained a bank guarantee of ₹13,85,40,900/- in addition of the FDR. The claim of the respondent is secured by the FDR and the bank guarantee and therefore, the petitioner can be directed to file appropriate proceedings before the CERC for adjudication of the dispute while maintaining the FDR and the bank guarantee, till final decision taken by the Forum constituted under the Electricity Act.

The minutes of the meeting dated 03.08.2015 forwarded by the Lead Procurer on 09.09.2015 are the final minutes stating that the issue of delay would be dealt with separately. Despite, the return of the bank guarantee by some of the Procurers, the issue of delay was specifically kept open, thus, allowed conditional acceptance. Such conditional acceptance cannot be considered as accepted by the Lead Procurer. He further submitted that the respondent was not present at the meeting and had not been in any manner agreed that there was no delay in commissioning attributed to petitioner no.1. The recovery of liquidated damages is not an action to be jointly undertaken by the Procurers as Article 4.6 does not fall under Schedule 12 of PPA. There cannot be a waiver of the liquidated damages by the Lead Procurer on behalf of the other Procurers. In this regard, he has drawn attention of this Court to Article 18.3 of PPA that a valid waiver by a party has to be in writing. These are factual disputes which are required to be adjudicated upon in appropriate proceedings and not in writ jurisdiction.

The petitioners could not commission the unit on time despite the alleged *force majeure* events and events of default. The petitioner had

never sought any extension of SCOD as late as February, 2013, therefore, cannot claim now that the delay was due to *force majeure* events or events of default.

The Minutes of meeting is not only a decision but a satisfaction. PPSCL is entitled to claim liquidated damages against the performance bank guarantee as the waiver of rights would have an impact on the consumers. The terms and conditions of the contract are sacrosanct and have to be read in its letter and spirit. There is no challenge to the same, much less, the writ court cannot be a forum for challenging terms and conditions as the parties to the agreement cannot be allowed to approbate and reprobate. The bank guarantee is a security, thus, urges this Court for dismissal of the writ petition by relegating the parties to avail the remedy under Article 17.3.

I have heard learned counsel for the parties, appraised the paper book as well as the Articles/clauses extracted supra. Before, I could deal with arguments of either parties, I deem it appropriate to extract the contents of letter dated 14.08.2015 (Annexure P-12) written by the Lead Procurer i.e. MPPMCL for releasing the performance bank guarantee, which reads as under:-

“As per Article 3.1.1 of the PPA, Reliance Power Ltd., as selected bidder, had furnished Performance Bank Guarantee (PBG) of Rs.300 crores on behalf of Sasan Power Ltd. (SPL) to Procurers in proportion to their Contracted Capacity. Accordingly, RPL submitted Rs.112.5 Cr. to MPPMCL as per its share of power.

Further on fulfilment of conditions specified under Article 3.1.2 of the PPA, the PBG was reduced from Rs.300 crore to Rs.200 crore in proportion to Procurers respective Contracted Capacity.

Accordingly, the Performance Bank Guarantee (PBG) No.0999507BG0001166 submitted to MPPMCL (erstwhile MP Tradeco) was reduced from originally submitted Rs.112.5 Cr to now Rs.75 Cr with validity upto 31.7.2016.

As per Article 3.5.1, the Performance Guarantee as submitted by Seller in accordance with Article 3.4 shall be released by the Procurers within three (3) months from the actual Commercial Operation Date of the Power Station. The power station performance test was also conducted from 20.4.2015 to 21.4.2015 and Independent Engineer submitted test certificate on 22.4.2015.

Accordingly, the Performance Bank Guarantee (PBG) No.0999507B0001166 of Rs.75 Cr is returned herewith in original.”

The aforementioned letter came to be released only in terms of the Minutes of meeting dated 03.08.2015. Clauses 3.1 to 3.4 of the same are relevant for adjudication of the *lis*, which are reproduced hereinbelow:-

“3.1 On the above items, Chairman informed that the Lead procurer will extend support to SPL in resolving the issues with concerned authorities. It was further stated that such issues need not be discussed in Procurers meeting as they are not concerned with all the procurers and not part of PPA. SPL agreed to Chairman's suggestion. All the Procurers accepted and confirmed that requisite action pertaining to them will be taken at their end to resolve the issue.

3.2 It was informed that MPPMCL board has approved release of PBG. He further stated that there should not be any issue w.e.f. release of PBG and sought views of other Procurers. All Procurers agreed as actual CODs be accepted and supported for release of PBG. MPPMCL shall take action for release of PBG shortly and intimate all procurers.

3.3 All the procurers desired that SPL would operate all the units of SASAN UMPP at optimum load. SPL assured that they will operate all the units at optimum load.

3.4 The meetings ended with a vote of thanks to the Chairman.”

A cumulative reading of the aforementioned clauses, leaves no manner of doubt that all the Procurers had agreed as actual CODs be accepted on the ground of delay by both procurers and SPL, though it would

be dealt separately but supported for release of the performance bank guarantee, in essence, as far as the point of releasing of the performance bank guarantee is concerned, there was a unison approach. The aforementioned meeting was attended by all the Procurers, which fact is evident from the list of participants attached as Annexure-1. The relevant portion indicating the factum of the aforementioned observation reads as under:-

“Record Notes of meeting Sasan Power Limited and Procurers of Sasan UMPP held on 03.08.2015 at MPPMCL Office, Bhopal.

List of participants is attached at Annex-I.”

It is settled law that writ court would have jurisdiction despite there being an arbitration clause but the fact remains whether in the facts and circumstances of the present case, much less, contentions and rival contentions of the parties to the *lis*, whether any dispute has arisen or not. The answer is that till date there is no such dispute. Had it been so, either of the parties would have sought the invocation of the arbitration clause by seeking appointment of the Arbitral Tribunal. It is settled law that all executive action of the State are amenable to judicial review, in case, on examination, it is found that it is an exercise of unbridled and unfettered powers. The Constitution does not envisage or permit unfairness or unreasonableness in the State actions.

In my view, the demand of liquidated damages for the time being, as the facts noticed above, does not stand on the touchstone of reasonableness, much less, fairness. The impact of every such action is also on public interest. This view of mine is being supported and reiterated from the findings rendered in the judgments referred to above.

The test certificate dated 26.03.2015 (Annexure P-5) extracted above, leaves no manner of doubt that 95% work has already been done. The finding of the Appellate Tribunal set aside by the Hon'ble Supreme Court was in respect of waiver and determination of COD, which has been determined as 16.08.2013 instead of 31.03.2013. Irrespective of the change of the date of COD, the fact remains that the letter dated 26.03.2015 i.e. the Final Test Certificate has been issued much later in point of time and the same was in existence at the time when the Hon'ble Supreme Court decided the matter on 08.12.2016.

On going through the judgment of Hon'ble Sureme Court, it surfaces that there is no reference to the aforementioned Final Test Certificate whereas it only mentions about the former Test Certificate dated 30.03.2013. Various other Procurers have also released the Performance Bank Guarantee i.e. UP Power Corporation Ltd., Tata Power-DDL etc. This fact would have been denied by Mr. Vinod Bhardwaj, during the course of hearing, which admittedly has not been denied.

Though the method of calculation prescribed for raising the demand under the nomenclature of liquidated damages, I am of the view that the PSPCL-respondent without establishing the delay on the part of petitioner cannot on the drop of hat raise such demand. It has to be determined in an adjudicatory Forum as prescribed in the contract at the instance of either party. But for the time being, the question arose for adjudication is whether in the facts and circumstances indicated above, particularly, the Test Certificate as well as other Procurers being released their Performance Bank Guarantee, the demand of liquidated damages of ₹16,14,59,100/- from the pending amount of ₹30 crores is justified or not.

The answer would be 'not'.

I would refrain myself from delving upon such issue as it would seriously prejudice the right of parties, in case they choose to take any of the appropriate measures in law. The respondent-PSPCL had not been coherent and inconsistent in raising the demand of liquidated damages. Both its letters indicated different amounts i.e. ₹13,26,10,500/- in letter dated 25.08.2015 (Annexure P-19) and ₹16,14,59,100/- vide letter dated 11.01.2016 (Annexure P-29). The factum of MPPMCL being appointed as Lead Procurer is also not in dispute.

As per Article 3.5.1 of PPA extracted supra, the Procurers are obligated to release the balance Performance Bank Guarantee within three months from the Actual Commercial Operation Date (ACOD) of the power station. Final Test Certificate leaves no manner of doubt that actual commercial operation had already commenced, thus, in my view the alleged demand notices for the time being cannot be said to be legal, rationale and sustainable, therefore, cannot come in the way of petitioners to stake their claim for release of Performance Bank Guarantee.

As an upshot of my finding given here-in-above, the impugned notices dated 25.08.2015 (Annexure P-19) and 11.01.2016 (Annexure P-29) are hereby quashed. The respondent is directed to release the Performance Bank Guarantee No.999507BG0001165.

However, this Court vide order dated 29.01.2016 while issuing the notice of motion, passed the following interim order:-

“In the meantime, if the respondent-Corporation encashes the performance bank guarantee, the same shall not be disbursed to it and the same will be kept in fixed deposit fetching the highest rate of interest by the State Bank of India and it will be

disbursed only on further orders by this Court.

The aforementioned interim order was modified by this Court vide order dated 26.05.2016, which reads as under:-

“Be that as it may, the order dated 29.01.2016 is hereby modified to the extent that the FDR submitted by the petitioners of the amount of ₹16,14,59,100/- shall serve the purpose of the respondent towards performance bank guarantee of that amount which shall not be withdrawn by the petitioners without the permission of the Court and the respondent shall return to the petitioner the bank guarantee of the aforesaid amount only and shall keep the performance bank guarantee of the remaining amount. It is also made clear that lien of the respondent shall be there on the amount of the FDR which has been deposited on 30.01.2016.”

On joint reading of both the orders, it is made clear that lien of the respondent was kept on the amount of the FDR, which has been ordered to be deposited on 30.01.2016. The entire performance bank guarantee of the amount which has been ordered to be deposited in the FDR and interest accrued thereon is ordered to be released forthwith.

(AMIT RAWAL)
JUDGE

March 09, 2017
Pankaj*

Whether speaking/reasoned Yes

Whether reportable Yes