

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. (COMM) 481/2016**

Reserved on: 27.11.2018
Date of decision : 18.12.2018

NTPC VIDYUT VYAPAR NIGAM LTD. Petitioner
Through: Mr.Vikas Singh, Sr. Adv. with
Mr.Bharat Sangal, Ms.Isha Gupta, Ms.Babita
Kushwah, Ms.Srishti Banerjee, Advs.

versus

PRECISION TECHNIK PVT. LTD. Respondent
Through: Mr.Sandeep Sethi, Sr. Adv. with
Ms.Kavita Jha, Ms.Devika Jain, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 08.05.2015 passed by the Arbitral Tribunal adjudicating the disputes that have arisen between the parties in relation to the Power Purchase Agreement (PPA) dated 10.01.2011 executed between the parties.

2. The dispute between the parties is on the encashment of the Performance Bank Guarantee by the petitioner, which the petitioner has encashed in part, relying upon Article 4.6.1 of the PPA and seeks the encashment of further amount on the ground of purported delay of the respondent in achieving the commencement of supply of contracted

capacity of the power within the Scheduled Commissioning Date, that is, 09.01.2012.

3. The parties, as noted above, had entered into a PPA on 10.01.2011. In terms of Article 3.1 of the PPA, the respondent was to complete the activities mentioned therein within 180 days from the Effective date of the PPA, which in terms of Article 2.1.1 of the PPA was the date of execution of the PPA, that is, 10.01.2011.

4. In terms of Article 4.1 of the PPA, the respondent was to commence supply of power upto the Contracted Capacity to the petitioner no later than the Scheduled Commissioning Date, which was prescribed in the PPA as 09.01.2012.

5. While the respondent claimed the actual Commissioning Date as 08.02.2012, when the Commissioning Certificate was issued by the Jodhpur Discom in its favour, the Arbitral Tribunal has held the same to be 21.02.2012, when the respondent injected 58 units of electricity from its Power Plant to the Grid.

6. Learned senior counsel for the petitioner submits that the Arbitral Tribunal has erred in considering 21.02.2012 to be the Commissioning Date inasmuch as the respondent was to inject power on a rated capacity; mere 58 units of electricity cannot be considered as a due compliance with the contractual condition and therefore, 21.02.2012 cannot be taken as the commissioning date. In his submission, the Commissioning Date has to be taken as 22.03.2012, when the Review Committee recorded a

finding that the respondent had installed the complete equipments for its project.

7. I am unable to agree with the said submission of the learned senior counsel for the petitioner. The Arbitral Tribunal has held that on a combined reading of various terms of the PPA, it is apparent that the date of first injection of power is the relevant date for ascertaining commissioning of the Power Project. It has further held that the installation of equipment comes prior to injection or flow of power into the grid. As far as the issue of rated capacity to be supplied for considering the Commissioning Date, the Arbitral Tribunal has held that installation of all equipment and discharge/flowing of energy is *sine qua non* for commissioning of the project. Once full equipment has been installed and the energy has flowed to the Grid, the project will be deemed to have been commissioned. This in my view is the correct conclusion to be drawn from the reading of various terms of the PPA and cannot be faulted.

8. On facts, the Arbitral Tribunal found that the report dated 08.02.2012 relied upon by the respondent was only showing that the equipment installed by the respondent was synchronized/connected to the grid. Relying upon the affidavit filed by the respondent before the Review Committee, which the Arbitral Tribunal found to be truthful, the Arbitral Tribunal found that the respondent had installed the equipment at its full capacity and synchronized to the grid on 08.02.2012. From the MRI Data, the Arbitral Tribunal concluded that the first injection of power to the grid was on 21.02.2012. The Tribunal, therefore, held that

the commissioning date was 21.02.2012 and, therefore, there was a delay of 43 days from the Scheduled Commissioning Date.

9. The above findings of the Arbitral Tribunal cannot be faulted.

10. The learned senior counsel for the petitioner has further submitted that in terms of Article 1.1 and Article 3.1 of the PPA, it was the obligation of the respondent to have obtained all consents, clearance and permits within 180 days from the Effective Date. He submits that the Arbitral Tribunal has erred in holding that the time for obtaining such consents, clearance and permits would start only after the Financial Closure is achieved by the respondent. He submits that achieving Financial Closure was a condition which was to be concurrently achieved along with obtaining the other consents, clearances and permits and not before.

11. He further submits that the respondent applied to the Rajasthan Renewable Energy Corporation Ltd. (RRECL) for permission to complete the transmission line only on 26.09.2011, that is, much beyond the period of 180 days prescribed in Article 3.1 of the PPA. Thereafter, some time was taken by the RRECL to grant such approval, however, the same cannot extend the Scheduled Commissioning Date. The Arbitral Tribunal has, therefore, erred in treating the same to be a *force majeure* condition, entitling the respondent to an extension of the Scheduled Commissioning Date and holding that there was no delay in the commissioning of the project by the respondent and that the petitioner was not entitled to encash the Bank Guarantees.

12. On the other hand, the learned senior counsel for the respondent submits that the respondent could have applied for requisite permission for laying the transmission line only after achieving the Financial Closure. The Arbitral Tribunal has found that the petitioner did not delay in making such application and infact, the delay was on part of RRECL in forwarding the same to the Energy Department of the Government of Rajasthan and thereafter conveying the approval granted by the Government of Rajasthan to the respondent. The Arbitral Tribunal found that the delay being caused by the Government instrumentalities on which the respondent had no control, amounted to a *force majeure* condition. The Arbitral Tribunal further found that delay was caused due to wrong demarcation of plot done by the Patwari, as also due to the failure of the District Collector, Jaisalmer, to grant the permission to the respondent to construct the approach road.

13. Relying upon the judgment of the Supreme Court in ***Dhanrajmal Gobindram v. Shamji Kalidas and Co.***, AIR 1961 SC 1285, order dated 04.02.2014 of the Appellate Tribunal for Electricity, New Delhi passed in Department Appeal No. 123 of 2012 and IA No. 396 of 2012 titled ***Gujarat Urja Vikas Nigam Limited v. Gujarat Electricity Regulatory Commission, Gujarat Energy Development Agency and the Principal Secretary, Energy and Petrochemicals***, and the order dated 30.05.2014 of the Uttar Pradesh Electricity Regulatory Commission in Petition No. 903 of 2013 titled ***Essar Power (Jharkhand) Limited (EPJL) v. Noida Power Company Limited***, he submits that the above circumstances have

been rightly held by the Arbitral Tribunal to constitute *force majeure* conditions.

14. He submits that Article 11.3.1 of the PPA includes “event” and “circumstances” that may constitute *force majeure*. He submits that “circumstances” is a broader term than “events” and, therefore, has to be expansively construed, including circumstances that have occurred in the present case and as enumerated above.

15. He further submits that the Arbitral Tribunal having interpreted the terms of the PPA, this Court cannot set aside the Award merely because it does not agree with such interpretation. He places reliance on the judgments of the Supreme Court in *Sudarsan Trading Co. v. Government of Kerala & Anr.*, AIR 1989 SC 890; *Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Limited*, (2009) 10 SCC 63 and *Associate Builders vs. DDA*, (2015) 3 SCC 49, in support of this contention.

16. Learned senior counsel for the respondent further submitted that time was not the essence of the contract as there was a provision for levy of liquidated damages in case of delay in the respondent making the contractual supply within the Scheduled Commissioning Date. He places reliance on the judgment of the Supreme Court in *M/s Hind Construction contractors v. State of Maharastra*, (1979) 2 SCC 70.

17. Learned senior counsel for the respondent further submitted that even assuming that there was delay on part of the respondent in making the supply of power within the Scheduled Commissioning Date, the

petitioner was not entitled to retain the amount of the Bank Guarantee encashed by it. Placing reliance on Article 4.4.1 of the PPA, he submits that the damages suffered by the petitioner due to failure of the respondent to make the supply were ascertainable and the petitioner, at best, could have retained only such amount and not the full amount that had been received by it through the encashment of the Bank Guarantee. He places reliance on the judgment of the Supreme Court in *M/s Kailash Nath Associates v. DDA & Anr.* 2015 (1) SCALE 230.

18. I have considered the submissions made by the learned counsels for the parties. To answer the same a few clauses of the PPA need to be referred and are reproduced hereinbelow.

“1. ARTICLE 1 : [DEFINITION AND INTERPRETATION]

1.1 Definitions

“Commercial Operation Date”

Shall mean the actual commissioning date of respective units of the Power Project where upon the SPD starts injecting power from the Power Project to the Delivery Point;

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“Consents, Clearances and Permits”

shall mean all authorizations, licenses, approvals, registrations, permits, waivers, privileges, acknowledgements, agreements, or concessions required to be obtained from or provided by any concerned authority for the purpose of setting up of the generation facilities and/ or supply of power;

xxx

“Effective Date”

shall have the meaning ascribed thereto in Article 2.1 of this Agreement.

xxx

“Financial Closure”

shall mean the execution of all the Financing Agreements required for the Power Project and fulfillment of conditions precedent and waiver, if any, of any of the conditions precedent for the initial draw down of funds there under;

“Financing Agreements”

shall mean the agreements pursuant to which the SPD has sought financing for the Power Project including the loan agreements, security documents, notes, indentures, security agreements, letters of credit and other documents, as may be amended, modified, or replaced from time to time, but without in anyway increasing the liabilities of NVVN;

“Force majeure” of “Force majeure Event”

shall have the meaning ascribed thereto in Article 11 of this Agreement;

xxx

“Scheduled Commissioning Date”

shall mean 09th January, 2012;

xxx

2.1 Effective Date.

2.1.1 This Agreement shall come into effect from the date of its execution by both the Parties and such date shall be referred to as the Effective Date;

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3 ARTICLE 3 : CONDITIONS SUBSEQUENT

3.1 Satisfaction of conditions subsequent by the SPD

The SPD agrees and undertakes to duly perform and complete all of the following activities at the SPD's own cost and risk within 180 days from the Effective Date, unless such completion is affected by any Force majeure event, or if any of the activities is specifically waived in writing by NVVN;

a) The SPD shall obtain all Consents, Clearances and Permits required for supply of power to NVVN as per the terms of this Agreement;

b) The SPD shall achieve Financial Closure and shall provide a certificate to NVVN from the lead banker to this effect;

c) The SPD shall make adequate arrangements to connect the Power Project switchyard with the Interconnection Facilities at the Delivery Point;

d) The SPD shall sign a Transmission Agreement with STU confirming the evacuation and connectivity of the STU system upto the delivery point of SPD by the Scheduled Commissioning Date;

e) The SPD shall produce the documentary evidence of the clear title and possession of the acquired land @ 2 hectare/MW in the name of SPD;

f) The SPD shall fulfill the technical requirements according to criteria mentioned under Clause 2.5(B) &

3.5(B) of JNNSM guidelines for selection of new projects and produce the documentary evidence of the same.

g) The SPD shall submit to NVVN the relevant documents as stated above, complying with the Conditions Subsequent, within 15 days of completion of the 180 days period.

3.2 Consequences of non-fulfillment of conditions subsequent

3.2.1 In case of a failure to submit the documents as above, NVVN shall have the right to terminate this Agreement by giving a Termination Notice to the SPD in writing of at least seven (7) days. The termination of the Agreement shall take effect upon the expiry of the 7th day of the Notice.

3.2.2 NVVN shall be entitled to encash all the Bank Guarantees submitted by the SPD.

3.2.3 For the avoidance of doubt, it is clarified that this Article shall survive the termination of this Agreement.

3.2.4 In case of inability of the SPD to fulfill any one or more of the conditions specified in Article 3.1 due to any Force majeure event, the time period for fulfillment of the Conditions Subsequent as mentioned in Article 3.1, shall be extended for the period of such Force majeure event

3.2.5 Provided that due to the provisions of this Article 3.2, any increase in the time period for completion of condition subsequent mentioned under Article 3.1, shall also lead to an equal extension in the Scheduled Commissioning Date.

3.3 Performance Bank Guarantee

3.3.1 The Performance Bank Guarantee to be furnished under this Agreement shall be for guaranteeing the commencement of the supply of power up to the

Contracted Capacity within the time specified in this Agreement as per the format provided in Schedule 1.

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3.3.3 If the SPD fails to commence supply of power from the Scheduled Commissioning Date specified in this Agreement, subject to conditions mentioned in Article 4.5, NVVN shall have the right to encash the Performance Bank Guarantee without prejudice to the other rights of NVVN under this Agreement.

3.4 Return of Performance Bank Guarantee

3.4.1 Subject to Article 3.3, NVVN shall return/release the Performance Bank Guarantee three (3) months after the Commercial Operation Date.

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4 ARTICLE 4: CONSTRUCTION & DEVELOPMENT OF THE PROJECT

4.1 SPD's Obligations

4.1.1 The SPD undertakes to be responsible, at SPD's own cost and risk, for:

- a). Obtaining all Consents, Clearances and Permits other than those obtained under Article 3.1 and maintaining all Consents, Clearances and Permits in full force and effect during the Term of this Agreement; and*
- b) Designing, constructing, erecting, commissioning, completing and testing the Power Project in accordance with the applicable Law, the Grid Code, the terms and conditions of this Agreement and Prudent Utility Practices.*
- c) The commencement of supply of power up to the Contracted Capacity to NVVN no later than the Scheduled Commissioning Date and continuance of the*

*supply of power throughout the term of the Agreement;
and*

d) Connecting the Power Project switchyard with the Interconnection Facilities at the Delivery Point; and

e) Owning the Power Project throughout the Term of Agreement free and clear of encumbrances, except those expressly permitted under Article 15;

f) Maintaining its controlling shareholding prevalent at the time of signing of PPA upto a period of one (1) year for new projects after Commercial Operation Date; and

g) Fulfilling all obligations undertaken by the SPD under this Agreement.

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4.4 Right to Contracted Capacity & Energy

4.4.1 NVVN, at any time during a Contract Year, shall not be obliged to purchase any additional energy from the SPD beyond 9.198 Million kWh (MU). If for any Contract Year, it is found that the SPD has not been able to generate minimum energy of 5.256 Million KWH (MU) on account of reasons solely attributable to the SPD, the non-compliance by SPD shall make SPD liable to pay the compensation provided in the PSA as payable to Discoms and shall duly pay such compensation to NVVN to enable NVVN to remit the amount to Discoms. This compensation shall be applied to the amount of shortfall in generation during the Contract Year. The amount of compensation shall be computed at the rate equal to the compensation payable by the Discoms towards non-meeting of RPOs subject to a minimum of 25% of the applicable tariff.

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4.5 Extensions of Time

4.5.1 In the event that the SPD is prevented from performing its obligations under Article 4.1 by the Scheduled Commissioning Date due to:

- a) any NVVN event of Default; or*
- b) Force majeure Events affecting NVVN; or*
- c) Force majeure Events affecting the SPD, the Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the limit prescribed in Article 4.5.2, for a reasonable period but not less than 'day for day' basis, to permit the SPD or NVVN through the use of due diligence, to overcome the effects of the Force majeure Events affecting the SPD or NVVN, or till such time such Event of Default is rectified by NVVN.*

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

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

- a. Delay upto one (1) month - NVVN will encash 20% of total Performance Bank Guarantee;*
- b. Delay of more than one (1) month and upto two months - NVVN will encash another 40% of the total Performance Bank Guarantee;*
- c. Delay of more than two and upto three months - NVVN will encash the remaining Performance Bank Guarantee.*

4.6.2 In case the commissioning of Power Project is delayed beyond three (3) months, the SPD shall pay to NVVN, the Liquidated Damages at the rate of Rs.1,00,000/- per MW per day of delay for the delay in such commissioning. Provided that the SPD shall be required to make such payments to NVVN in advance on a week to week basis for the period of delay.

4.6.3 The maximum time period allowed for commissioning of the Power Project with encashment of Performance Bank Guarantee and payment of Liquidated Damages shall be limited to eighteen (18) months from the date of signing of this Agreement. In case, the commissioning of the Power Project is delayed beyond eighteen (18) months from the date of signing of this Agreement, it shall be considered as an SPD Event of Default and provisions of Article 13 shall apply and the Power Project shall be removed from the list of selected projects in the event of termination of this Agreement.

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11.3 Force majeure

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

- a) Act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the site), earthquake, volcanic, eruption, landslide, flood, cyclone, typhoon or tornado;*
- b) Any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or*
- c) radio active contamination or ionizing radiation originating from a source in India or resulting from another Force majeure Event mentioned above excluding*

circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the Power Project by the Affected Party or those employed or engaged by the Affected Party;

d) An event of Force majeure identified under NVVN Discom PSA, thereby affecting delivery of power from SPD to Discom.

11.4 Force majeure Exclusions

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

a. Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts or consumables for the Power Project;

b. Delay in the performance of any contractor, sub-contractor or their agents;

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

d. Strikes at the facilities of the Affected Party;

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

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

i. Negligent or intentional acts, errors or omissions;

ii. Failure to comply with an Indian Law; or

iii. Breach of, or default under this Agreement.”

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11.7 Available Relief for a Force majeure Event

11.7.1 Subject to this Article 11:

(a) no Party shall be in breach of its obligations pursuant to this Agreement except to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force majeure Event;

(b) every Party shall be entitled to claim relief in relation to a Force majeure Event in regard to its obligations, including but not limited to those specified under Article 4.5;

(c) For avoidance of doubt, neither Party's obligation to make payments of money due and payable prior to occurrence of Force majeure events under this Agreement shall be suspended or excused due to the occurrence of a Force majeure Event in respect of such party.

(d) Provided that no payments shall be made by either Party affected by a Force majeure Event for the period of such event on account of its inability to perform its obligations due to such Force majeure Event."

19. A reading of clause 3.1 and 4.1 of the PPA would show that it was the obligation of the respondent to have obtained all consents, clearances and permits required for the supply of power to the petitioner as per the terms of the PPA. The respondent was further under an obligation to commence the supply of power upto the contracted capacity to the petitioner no later than the Scheduled Commissioning Date.

20. There is some dispute whether the respondent was to obtain the approval required under Section 68 of the Electricity Act, 2003 (hereinafter referred to as the 'Electricity Act') within 180 days from the Effective Date in terms of Article 3.1 of the PPA or whether such approval would fall under Article 4.1 of the PPA and, therefore, could be obtained before the Scheduled Commissioning Date. This question has

gained significance because the Arbitral Tribunal in the Impugned Award has held that it is only on achieving the Financial Closure that the respondent could have applied for the approval under Section 68 of the Electricity Act.

21. In my view, the above issue is not relevant for the purpose of the present adjudication in as much as the respondent has not encashed the Bank Guarantees of the petitioner due to its failure to fulfil its obligation under Article 3.1 of the PPA, but on account of the respondent not being able to make the supply of power on the Scheduled Commissioning Date.

22. It cannot be disputed that under Article 3.1(a) or Article 4.1.1 (a), it was the obligation of the respondent to obtain all consents, clearances and permits. In terms of Article 4.1.1 (c), it was the obligation of the respondent to commence the supply of power no later than the Scheduled Commissioning Date. It was also the obligation of the respondent to connect the Power Project Switchyard with the Interconnection Facilities at the Delivery Point in terms of Article 4.1.1(d) of the PPA. The respondent, therefore, was aware of all permissions that would be required to be taken by it for ensuring the connectivity of the Power Project Switchyard with the Interconnection Facilities to the Delivery Point as also for ensuring the commencement of supply of power by the Scheduled Commissioning Date. Even assuming that the permission under Section 68 of the Electricity Act does not fall within the ambit of Article 3.1(a) of the PPA, it was for the petitioner to have managed its affairs and obtain all requisite consents and approvals within such time as would have enabled it to make the supply of power within the Scheduled

Commissioning Date. It cannot pass off this burden to the petitioner or claim any benefit out of mismanagement of its own affairs.

23. In the present case, the Arbitral Tribunal has held that “taking a practical view of a commercial transaction” all other steps for consents and approvals could be taken by the respondent only on achieving the Financial Closure. The Financial Closure was achieved by the respondent by 07.07.2011. Thereafter, it commenced the Route Survey which was necessary as it was a condition precedent for obtaining permission under Section 68 of the Electricity Act for laying transmission line. It has further been held that the respondent took time to convince the villagers and negotiate with them and with the Panchayat to lay the overhead transmission line through their lands. This took a substantial amount of time from 15.7.2011 to 26.09.2011 despite respondent’s best efforts.

24. I do not concur with the view that the respondent was entitled to any benefit for the time taken by it for completing the Route Survey. As observed above, it was upon the respondent to have obtained all necessary consents and approvals. The respondent does not plead and infact cannot plead that it was not aware that for obtaining permission under Section 68 of the Electricity Act for laying transmission line the Route Survey was a condition precedent. Even assuming that Article 3.1(a) did not mandate the respondent to have obtained such consent within 180 days of the Effective Date of the PPA, there was no embargo on the respondent to have started the Route Survey immediately with the execution of the PPA and simultaneously with its efforts to obtain

Financial Closure. In the absence of any such embargo, it was the unilateral decision of the respondent to wait for the Financial Closure before commencing the Route Survey. The respondent, therefore, cannot claim any extension of time for the period taken by it for the completion of such Route Survey.

25. The Arbitral Tribunal has further observed that after the completion of the Route Survey, the respondent wrote to RRECL on 26.09.2011 requesting it to arrange for permission under Section 68 of the Electricity Act and for the Gazette notification of the approval for laying of transmission line from the project site to the pooling sub-station. RRECL forwarded the respondent's request for approval to the Energy Department of the Government of Rajasthan only on 19.10.2011, that is, after a delay of 20 days. The respondent sent reminders to RRECL on 05.11.2011, 21.11.2011 and 08.12.2011 for expediting the approval. The Energy Department of the Government of Rajasthan finally granted the approval on 20.12.2011 and the said approval was conveyed by RRECL to the respondent only on 27.12.2011. As the whole process took 90 days, out of which 25 days were wasted by RRECL while forwarding the application of the respondent to the Government of Rajasthan and another 4 days for conveying the approval to the respondent, the respondent had no control over the same and has held such delay to be a *force majeure* condition entitling the respondent to an extension of time of the Scheduled Commissioning Date.

26. I am unable to agree with the finding of the Arbitral Tribunal. Apart from the fact that such delays are foreseeable and infact normal

while dealing with governmental and public sector authorities and can therefore, never be a *force majeure* event, the Arbitral Tribunal has also not considered what would have been a reasonable time for RRECL to forward the application of the respondent to the Energy Department of the Government of Rajasthan and of the approval received from the Energy Department to the respondent. Surely, the respondent could not have been granted the benefit of extension of time for the period that reasonably could have been contemplated by the parties for the grant of such approval.

27. The Arbitral Tribunal has further observed that the respondent wrote to RRECL on 10.10.2011 requesting it to take steps and advise the appropriate authority to grant permission to construct the approach road from the project site at khasra no.1990 passing through khasras Nos.1993 and 1994. Though the said letter was forwarded by RRECL to the District Collector Jaisalmer, RRECL took 21 days in forwarding the same. In spite of reminders dated 27.10.2012 and 27.12.2011, no permission / approval for construction of the approach road was given. For want of the construction of the approach road, the Arbitral Tribunal felt that the respondent would have faced tremendous difficulty in transporting the equipment and other materials to the project site, contributing to the delay of commissioning of the project by the Scheduled Commissioning Date.

28. I again cannot agree with the reasoning of the learned Arbitral Tribunal. The Arbitral Tribunal does not give reference to any clause of the PPA which would require RRECL to obtain such permission. In any

case, the above finding would be contrary to Article 3.1(a), 3.1 (c) and 4.1.1(a) of the PPA which obliges the respondent to obtain all consents, clearances and permits required for the supply of power as also for making all arrangements to connect the Power Project Switchyard with the Interconnection Facilities at the Delivery Point.

29. The Arbitral Tribunal further observes that though the possession of the project site was given to the respondent on 25.05.2011, the demarcation of the plot was done wrongly by the Patwari. Once the respondent had done substantial civil construction work on the land after taking possession, the land was demarcated afresh by the Patwari on 11.11.2011, resulting in the delay in the implementation of the project.

30. Here again I am unable to agree with the Arbitral Tribunal. The Arbitral Tribunal has based its findings on mere conjectures and surmises. It has not discussed or even noted the exact nature of the re-demarcation exercise done by the Patwari and its effect on the work already done by the respondent on the project site. The exact effect of such fresh demarcation exercise had to be shown by the respondent for seeking extension of time. In any case, in terms of Article 3.1(e) of the PPA, it was the obligation of the respondent to have clear title and possession of the land and therefore, the petitioner cannot be denied its contractual rights due to the above reason.

31. The Arbitral Tribunal has held that the above events would constitute *force majeure* in terms of Article 11.3 of the PPA. It has held that Article 11.3.1 lists out the *force majeure* events illustratively. Article 11.4 read with Article 11.7 further allows circumstances, other

than those provided in Article 11.3.1, to be included as *force majeure* events. The Tribunal, therefore, holds that as the respondent could not commission the Power Project on the Scheduled Commissioning Date because of delay in grant of permission, sanction and approval for laying the transmission line by the governmental instrumentalities, that is, RRECL and the Energy Department of the Government of Rajasthan, on which the respondent had no control directly or indirectly, the same amounted to a *force majeure* event and the respondent was entitled to extension of time.

32. I am unable to agree with the above finding of the Arbitral Tribunal. Article 11.3.1 uses the word ‘means’ while enumerating the events or circumstances or combination of events stated therein as consisting *force majeure*. It is a settled law that the use of the word ‘means’ indicates that ‘definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in the definition’ (*P Kasilingam & Ors. vs. P.S.G. College of Technology & Ors.* 1995 Supp (2) SCC 348 and *Bharat Co-Operative Bank (Mumbai) Ltd. vs. Co-Operative Bank Employees Union*, (2007) 4 SCC 685).

33. In any case, it is trite law that the *force majeure* clauses are to be narrowly construed. The events or circumstances must not only cause unavoidable delay in the performance of the obligations under the agreement, but also must be such that could not have been avoided even if the affected party had taken reasonable care or complied with the ‘Prudent Utility Practices’.

34. In the present case, the respondent itself having delayed initiating and completing the Route Survey and applying for permission to construct the approach road, it certainly has not acted with reasonable care or complied with the Prudent Utility Practices. Further, the time taken by RRECL and the Government of Rajasthan to grant permission cannot come to any avail of the respondent, as the respondent would have been well aware of the bureaucratic delays while dealing with governmental and public sector authorities. Such delays being completely foreseeable, cannot amount to a *force majeure* condition.

35. In ***Pasitheia Infrastructure Ltd. vs. Solar Energy Corporation of India & Anr.*** 2017 SCC OnLine Del 12562, this Court has held as under:-

“24. I am afraid that the above submission of learned counsel for the petitioner cannot be accepted. As noted above, the RFS and the letter(s) of Allocation clearly cast an obligation on the bidder, the petitioner herein, to identify the roof tops and also obtain the necessary clearances/permissions etc. for the execution of the work. The force majeure event is one which is beyond the control of the contractor and is “not foreseeable”. Before invoking the doctrine of Frustration/Force majeure, it must be shown that the event, which has produced the frustration was one which the party to the contract did not foresee and could not, with the reasonable diligence, have foreseen. In the present case, the respondent had taken upon itself the obligation for not only identifying the roof tops but also to obtain permissions. It could have certainly foreseen that some permission may get delayed or even rejected by the Government Departments. It cannot, therefore, plead force majeure to justify its failure.”

36. In ***Energy Watchdog vs. Central Electricity Regulatory Commission & Ors.*** (2017) 14 SCC 80, the Supreme Court has

considered the law relating *force majeure* in detail and has held as under:-

“34. “Force majeure” is governed by the Contract Act, 1872. Insofar as it is relatable to an express or implied clause in a contract, such as the PPAs before us, it is governed by Chapter III dealing with the contingent contracts, and more particularly, Section 32 thereof. Insofar as a force majeure event occurs dehors the contract, it is dealt with by a rule of positive law under Section 56 of the Contract Act.”

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“36. The law in India has been laid down in the seminal decision of Satyabrata Ghose v. Mugneeram Bangur & Co. [Satyabrata Ghose v. Mugneeram Bangur & Co., 1954 SCR 310 : AIR 1954 SC 44] The second paragraph of Section 56 has been adverted to, and it was stated that this is exhaustive of the law as it stands in India. What was held was that the word “impossible” has not been used in the section in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose of the parties. If an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered their agreement, it can be said that the promisor finds it impossible to do the act which he had promised to do. It was further held that where the Court finds that the contract itself either impliedly or expressly contains a term, according to which performance would stand discharged under certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be dealt with under Section 32 of the Act. If, however, frustration is to take place dehors the contract, it will be governed by Section 56.

37. In Alopi Parshad & Sons Ltd. v. Union of India [Alopi Parshad & Sons Ltd. v. Union of India, (1960) 2 SCR 793 : AIR 1960 SC 588] , this Court, after setting out Section 56 of the Contract Act, held that the Act does not enable a party to a

contract to ignore the express covenants thereof and to claim payment of consideration, for performance of the contract at rates different from the stipulated rates, on a vague plea of equity. Parties to an executable contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, for example, a wholly abnormal rise or fall in prices which is an unexpected obstacle to execution. This does not in itself get rid of the bargain they have made. It is only when a consideration of the terms of the contract, in the light of the circumstances existing when it was made, showed that they never agreed to be bound in a fundamentally different situation which had unexpectedly emerged, that the contract ceases to bind. It was further held that the performance of a contract is never discharged merely because it may become onerous to one of the parties.

38. *Similarly, in Naihati Jute Mills Ltd. v. Khyaliram Jagannath [Naihati Jute Mills Ltd. v. Khyaliram Jagannath, (1968) 1 SCR 821 : AIR 1968 SC 522] , this Court went into the English law on frustration in some detail, and then cited the celebrated judgment of Satyabrata Ghose v. Mugneeram Bangur & Co. [Satyabrata Ghose v. Mugneeram Bangur & Co., 1954 SCR 310 : AIR 1954 SC 44] Ultimately, this Court concluded that a contract is not frustrated merely because the circumstances in which it was made are altered. The courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events.*

39. *It has also been held that applying the doctrine of frustration must always be within narrow limits. In an instructive English judgment, namely, Tsakiroglou & Co. Ltd. v. Noblee Thorl GmbH [Tsakiroglou & Co. Ltd. v. Noblee Thorl GmbH, 1962 AC 93 : (1961) 2 WLR 633 : (1961) 2 All ER 179 (HL)] , despite the closure of the Suez Canal, and despite the fact that the customary route for shipping the goods was only through the Suez Canal, it was held that the contract of sale of groundnuts in that case was not frustrated, even though it would have to be performed by an alternative mode of performance which was much more expensive, namely, that the ship would now have to go around the Cape of*

Good Hope, which is three times the distance from Hamburg to Port Sudan. The freight for such journey was also double. Despite this, the House of Lords held that even though the contract had become more onerous to perform, it was not fundamentally altered. Where performance is otherwise possible, it is clear that a mere rise in freight price would not allow one of the parties to say that the contract was discharged by impossibility of performance.

40. This view of the law has been echoed in *Chitty on Contracts*, 31st Edn. In Para 14-151 a rise in cost or expense has been stated not to frustrate a contract. Similarly, in *Treitel on Frustration and Force majeure*, 3rd Edn., the learned author has opined, at Para 12-034, that the cases provide many illustrations of the principle that a force majeure clause will not normally be construed to apply where the contract provides for an alternative mode of performance. It is clear that a more onerous method of performance by itself would not amount to a frustrating event. The same learned author also states that a mere rise in price rendering the contract more expensive to perform does not constitute frustration.

41. Indeed, in England, in the celebrated *Sea Angel* case [*Edwinton Commercial Corpn. v. Tsavlis Russ (Worldwide Salvage & Towage) Ltd. (The Sea Angel)*, 2007 EWCA Civ 547 : (2007) 2 Lloyd's Rep 517 (CA)] , the modern approach to frustration is well put, and the same reads as under:

“111. In my judgment, the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances. Since the subject-matter of the doctrine of frustration is contract, and contracts are

about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as “the contemplation of the parties”, the application of the doctrine can often be a difficult one. In such circumstances, the test of “radically different” is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances.” (emphasis in original)

42. It is clear from the above that the doctrine of frustration cannot apply to these cases as the fundamental basis of the PPAs remains unaltered. Nowhere do the PPAs state that coal is to be procured only from Indonesia at a particular price. In fact, it is clear on a reading of the PPA as a whole that the price payable for the supply of coal is entirely for the person who sets up the power plant to bear. The fact that the fuel supply agreement has to be appended to the PPA is only to indicate that the raw material for the working of the plant is there and is in order. It is clear that an unexpected rise in the price of coal will not absolve the generating companies from performing their part of the contract for the very good reason that when they submitted their bids, this was a risk they knowingly took. We are of the view that the mere fact that the bid may be non-escalable does not mean that the respondents are precluded from raising the plea of frustration, if otherwise it is available in law and can be pleaded by them. But the fact that a non-escalable tariff has been paid for, for example, in the Adani case, is a factor which may be taken into account only to show that the risk of supplying electricity at the tariff indicated was upon the generating company.”

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“45. First and foremost, the respondents are correct in stating that the force majeure clause does not exhaust the possibility of

unforeseen events occurring outside natural and/or non-natural events. But the thrust of their argument was really that so long as their performance is hindered by an unforeseen event, the clause applies. Chitty on Contracts, 31st Edn. at Para 14-151 cites a number of judgments for the proposition that the expression “hindered” must be construed with regard to words which precede and follow it, and also with regard to the nature and general terms of the contract. Given the fact that the PPA must be read as a whole, and that Clauses 12.3 and 12.7(a) are a part of the same scheme of force majeure under the contract, it is clear that the expression “hindered” in Clause 12.7(a) really goes with the expression “partly prevents” in Clause 12.3. Force majeure clauses are to be narrowly construed, and obviously the expression “prevents” in Clause 12.3 is spoken of also in Clause 12.7(a). When “prevent” is preceded by the expression “wholly or partly”, it is reasonable to assume that the expression “prevented” in Clause 12.7(a) goes with the expression “wholly” in Clause 12.3 and the expression “hindered” in Clause 12.7(a) goes with the expression “partly”. This being so, it is clear that there must be something which partly prevents the performance of the obligation under the agreement. Also, Treitel on Frustration and Force majeure, 3rd Edn., in Para 15-158 cites the English judgment of Tennants (Lancashire) Ltd. v. C.S. Wilson and Co. Ltd. [Tennants (Lancashire) Ltd. v. C.S. Wilson & Co. Ltd., 1917 AC 495 (HL)] for the proposition that a mere rise in price rendering the contract more expensive to perform will not constitute “hindrance”. This is echoed in the celebrated judgment of Peter Dixon & Sons Ltd. v. Henderson, Craig & Co. Ltd. [Peter Dixon & Sons Ltd. v. Henderson, Craig & Co. Ltd., (1919) 2 KB 778 (CA)] in which it was held that the expression “hinders the delivery” in a contract would only be attracted if there was not merely a question of rise in price, but a serious hindrance in performance of the contract as a whole. At the beginning of the First World War, British ships were no longer available, and although foreign shipping could be obtained at an increased freight, such foreign ships were liable to be captured by the enemy and destroyed through mines or submarines, and could be detained by British or allied warships. In the circumstances, the Tennants (Lancashire) Ltd. [Tennants

(Lancashire) Ltd. v. C.S. Wilson & Co. Ltd., 1917 AC 495 (HL)] judgment was applied, and the Court of Appeals held: (Peter Dixon case [Peter Dixon & Sons Ltd. v. Henderson, Craig & Co. Ltd., (1919) 2 KB 778 (CA)] , KB p. 784)

*“... Under the circumstances, can it be said that the sellers were not “hindered or prevented” within the meaning of the contract? It is not a question of price, merely an increase of freight. Tonnage had to be obtained to bring the pulp in Scandinavian ships, and although the difficulty in obtaining tonnage may be reflected in the increase of freight, it was not a mere matter of increase of freight; if so, there were standing contracts that ought to have been fulfilled. Counsel for the respondents urged that certain shipowners, for reasons of their own, chose not to fulfil standing contracts. It was not only shipowners but pulp buyers and sellers. The whole trade was dislocated, by reason of the difficulty that had arisen in tonnage. It seems to me that the language of Lord Dunedin in *Tennants (Lancashire) Ltd. v. C.S. Wilson & Co. Ltd.* [*Tennants (Lancashire) Ltd. v. C.S. Wilson & Co. Ltd., 1917 AC 495 (HL)*] is applicable to the present case: (AC p. 516)*

‘... Where I think, with deference to the learned Judges, the majority of the court below have gone wrong is that they have seemingly assumed that price was the only drawback. I do not think that price as price has anything to do with it. Price may be evidence, but it is only one of many kinds of evidence as to shortage. If the appellants had alleged nothing but advanced price they would have failed. But they have shown much more.’

That is exactly so here. Price, as price only, would not have affected it. They were all standing contracts, but the position has so changed by reason of the war that buyers and sellers and the whole trade were hindered or prevented from carrying out those contracts.”

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47. We are, therefore, of the view that neither was the fundamental basis of the contract dislodged nor was any

frustrating event, except for a rise in the price of coal, excluded by Clause 12.4, pointed out. Alternative modes of performance were available, albeit at a higher price. This does not lead to the contract, as a whole, being frustrated. Consequently, we are of the view that neither Clause 12.3 nor 12.7, referable to Section 32 of the Contract Act, will apply so as to enable the grant of compensatory tariff to the respondents. Dr Singhvi, however, argued that even if Clause 12 is held inapplicable, the law laid down on frustration under Section 56 will apply so as to give the respondents the necessary relief on the ground of force majeure. Having once held that Clause 12.4 applies as a result of which rise in the price of fuel cannot be regarded as a force majeure event contractually, it is difficult to appreciate a submission that in the alternative Section 56 will apply. As has been held in particular, in Satyabrata Ghose case [Satyabrata Ghose v. Mugneeram Bangur & Co., 1954 SCR 310 : AIR 1954 SC 44], when a contract contains a force majeure clause which on construction by the Court is held attracted to the facts of the case, Section 56 can have no application. On this short ground, this alternative submission stands disposed of.”

37. Applying the ratio of the above judgment, the finding of the Arbitral Tribunal that the respondent was entitled to the grant of extension of time of the Scheduled Commissioning Date cannot be sustained.

38. In ***Dhanrajmal Gobindram*** (supra), the Supreme Court was considering whether the *force majeure* clause contained in the Agreement therein was void because of vagueness and uncertainty. The Supreme Court negated the said argument. The said judgment, therefore, has no application to the facts of the present case.

39. In ***Gujarat Urja Vikas Nigam Limited*** (supra), Clause 8.1 of the PPA therein itself included the inability, despite complying with all legal

requirements, to obtain, renew or maintain required licences or legal approvals to be a *force majeure* event.

40. In ***Essar Power*** (supra), the Uttar Pradesh Electricity Regulatory Commission, infact, held that delays caused due to non-availability of statutory clearances within due time line do not constitute *force majeure* conditions under the PPA.

41. I am conscious of the limitations on the powers of this Court while exercising jurisdiction under Section 34 of the Act, however, in view of the specific clauses of the PPA and the law enunciated by the Supreme Court on the *force majeure* conditions, the findings of the Arbitral Tribunal cannot be sustained and are liable to be set aside.

42. As the Arbitral Tribunal found the respondent to be entitled to an extension of time of the Scheduled Commissioning Date, it consequently directed the petitioner to return the amount of Rs.1,82,13,000/- received by the petitioner through the encashment of the Performance Bank Guarantee to the respondent along with interest @ 10% per annum from the date of the Award till realization. In view of the finding above, this direction cannot be sustained and is liable to be set aside.

43. Learned senior counsel for the respondent, relying upon the judgment of the Supreme Court in ***Kailash Nath Associates*** (supra) has contended that the petitioner has failed to prove any damages suffered by it due to the delay in the supply of power by the respondent. Further, relying upon Clause 4.4.1 of the PPA, he submits that the petitioner would at best be entitled to receive from the respondent such

compensation computed at the rate equal to the compensation payable by the Discoms towards non-meeting of RPOs, subject to a minimum of 25% of the applicable tariff.

44. I am unable to agree with the submission of the leaned senior counsel for the respondent.

45. This Court in ***NTPC Vidyut Vyapar Nigam Ltd. vs. Saisudhir Energy Ltd.*** MANU/DE/1718/2018, while considering similar contentions has held as under:

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

aforestated decisions, as elucidated, support the view taken by the Single Judge, and in fact negates the legal position adopted by the majority Arbitrators, which we would observe was contradictory.

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

46. As far as Article 4.4.1 is concerned, it applies only where the project has already been commissioned and thereafter the Solar Power Developer is unable to generate the minimum amount of energy in a contract year. Per contra, Article 4.6.1 of the PPA provides for imposition of liquidated damages on the SPD for being unable to commence the supply of power by the Scheduled Commissioning Date. The two provisions, therefore, apply in separate spheres and cannot control the operation of each other in their own sphere. There is no allegation that the liquidated damages mentioned in Article 4.6.1 amount to a penalty. Therefore, there is no reason to limit its effect and scope by invoking Article 4.4.1.

47. In ***Sai Sudhir Energy Ltd.*** (supra), the Division Bench of this Court, having upheld the right of the petitioner to seek liquidated damages, has further considered the question relating to reasonableness and quantum of damages. In the facts of that case, it directed the SPD therein to pay damages at the rate of Rs.1 lac per Mega Watt per day. In

the present case, the petitioner has already encashed the Performance Bank Guarantee for a sum of Rs.1,82,13,000/- for the delay till 08.02.2012. Though, I am unable to agree with the finding of the Arbitral Tribunal that the circumstances mentioned hereinabove amounted to *force majeure* conditions, the circumstances relied upon by the respondent, certainly show that it was not as if the respondent was not serious about completion of the project on time or was intentionally or negligently delaying the performance of its obligations.

48. In my view, therefore, the claim of the petitioner that it should be allowed to encash the Bank Guarantee for the further period of delay between 8.2.2012 to 21.2.2012 by the respondent cannot be sustained. Interest of justice would be met if the petitioner is allowed to retain the amount of Rs.1,82,13,000/- obtained by it from the encashment of the Performance Bank Guarantee.

49. In view of the above, the Award in so far as it directs the petitioner to refund the amount of Rs.1,82,13,000/- along with interest at the rate of 10% per annum from the date of the Award till realization is set aside, leaving the parties to bear their own costs of the petition.

NAVIN CHAWLA, J

DECEMBER 18, 2018
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