

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. (COMM) 495/2016**

Reserved on: 5th September, 2018
Date of decision :25th September, 2018

NTPC VIDYUT VYAPAR NIGAM LTD. Petitioner
Through: Mr.Vikas Singh, Sr. Adv. with
Mr.Bharat Sangal, Ms.Babita
Kushwaha, Ms.Deepika Kalia &
Ms.Shristi Banerjee, Advs.

versus

OSWAL WOOLEN MILLS LTD. Respondent
Through: Mr.Sakal Bhushan & Mr.Akash
Jandial, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. By way of the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') the petitioner challenges the Arbitral Award dated 08.07.2015 passed by the Majority of the Arbitral Tribunal adjudicating the disputes that have arisen between the parties in relation to the Power Purchase Agreement (hereinafter referred to as the 'PPA') dated 10.01.2011 executed between the parties.

2. Government of India launched the Jawaharlal Nehru National Solar Mission with an objective to establish India as a global leader in Solar Energy. In pursuit of the above said objective set out by Govt. of India, NTPC Vidyut Vyapar Nigam Ltd. was designated as the nodal agency through the Presidential Directive by the Ministry of Power.

3. Ministry of New and Renewable Energy, Government of India had issued guidelines for selection of grid connected Solar Power Projects in July, 2010, called MNRE guidelines.

4. Clause 2.5(c) of the guidelines is reproduced as under:-

“2.5 Qualification Criteria for Short-Listing of Solar PV Project

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C. Connectivity with the Grid

The plant should be designed for interconnection with the State Transmission Utility (STU) at the voltage level of 33 KV or above. Further the interconnections should be at the substation (substation should be 33kV/132 kV or high voltage levels) and not the distribution substation. The project developers should indicate to the TRANSCO the location (Tehsil, Village and District as applicable) of its proposed project. In this regard, the Project Developer shall submit a letter from the State Transmission Utility (STU), along with the RfS, confirming technical feasibility of the connectivity of the plant to the grid substation. The Solar Power developer would have responsibility for approaching STU and entering into transmission evacuation agreement. The responsibility of constructing the transmission line from power plant upto 132/33 kv substation would be of STU.”

(emphasis supplied)

5. The petitioner had issued a Request for Selection (RfS) on 18.08.2010. Some of the terms of the RfS, relevant for the present adjudication are reproduced hereinunder:-

“1.7 Ministry of New and Renewable Energy has issued guidelines for selection of new grid connected solar power projects of PV and Thermal and are available in the web site of MNRE and NVVN at www.mnre.gov.in and www.nvvn.co.in respectively. These guidelines shall form the basis for selection of new projects under 1st batch of JNNSM. The RfS document has been prepared in line with these guidelines.”

6. Clause 3.6(C), Section 3 of the RfS provides as under:-

“3.6 Qualification Requirements

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C. Connectivity with the Grid

The plant should be designed for interconnection with the nearest substation of STU at the voltage level of 33 kV or above. The Project developer shall be responsible for entering into transmission evacuation agreement with STU. The responsibility of constructing the transmission line from power plant upto 132/33 kv substation would be of STU. In this regard, the Bidder shall submit a letter along with the response to RfS from the STU confirming technical feasibility of the connectivity of the plant to grid substation at the indicated location as per Format-6.8.”

(emphasis supplied)

7. A reading of the above Clause would show that it had clearly been represented to the Bidders that the responsibility of constructing the Transmission Line from Power Plant upto 132/33 KV substation would be of the State Transmission Utility (STU). However, this is where the dispute arises.

8. Alongwith RfS, a copy of the draft Standard PPA was also annexed. In the draft PPA, “Delivery Point” was defined as under:-

“Delivery Point”

shall mean.....which is the commercial metering point at STU pooling station at..... kV [Insert voltage level which is either 33kV or above]”

9. The draft PPA defined “Interconnection Facilities” as under:-

“Interconnection Facilities’

shall mean the facilities on SPD’s side of the Delivery Point for sending and metering the electrical output in accordance with this Agreement and which shall include, without limitation all other

Transmission Lines and associated equipments, transformers, relay and switching equipment and protective devices, safety equipment and subject to Article 7, the Metering System required for supply of power as per the terms of this Agreement.”
(emphasis supplied)

10. Article 3.1(d) of the draft PPA is reproduced as under:-

“3 ARTICLE 3: CONDITIONS SUBSEQUENT

3.1 Satisfaction of conditions subsequent by the SPD.

xxxxxx

d) The SPD shall make adequate arrangements to connect the Power Project switchyard with the Interconnection Facilities at the Delivery Point.”

11. Article 4.1.1 (d) of the draft PPA further provides as under:-

“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:

xxxxxxx

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

12. A reading of the above Clauses would show that it was the responsibility of the SPD to construct the Transmission Lines till the ‘Delivery Point’, which was defined as the commercial metering point at STU pooling station.

13. Clause 3.17, Section 3 of the RfS informed the Bidders of a Pre Bid meeting to be held on 28.08.2010 and a complete list of the questionnaire raised by the Bidders and petitioner’s response was to be uploaded on the website of the petitioner for information of the Bidders. The Bidders were called upon to remain updated with the website and

warned that no separate reply or communication will be given elsewhere.
Clause 3.17(i) , Section 3 of the RfS is quoted hereinbelow:-

“3.17 Enquiries/Clarifications

(i) Pre Bid Meeting

Clarification / Doubts, if any, on RfS document may be addressed in AGM (C&M) at the address mentioned below on or before 17:00 Hrs on 27.08.2010. NVVN will make all efforts to respond to the same in the Pre Bid Meeting to be held on 28.08.2010 at 10:00 Hrs in SCOPE Complex Auditorium, Core-8, Ground Floor. A compiled list of such questionnaire and NVVN's response will be uploaded in the website of NVVN for information of all concerned i.e. www.nvvn.co.in. All are requested to remain updated with the website. No separate reply/intimation will be given else where.”

14. It is the case of the petitioner that a Pre Bid meeting was held between the petitioner and the prospective Bidders, including the respondent herein, and certain clarifications were issued to the Bidders. It is further the case of the petitioner that in a joint meeting between the Secretary, MNRE and the Secretary, Ministry of Power, approval was granted to such clarifications/elaborations which were going to form a part of the actual Contract between the parties, that is, the PPA. The petitioner further contends that the Clarification was duly issued and uploaded on the website of the petitioner on 11.09.2010. The Clarification, which is relevant for the present adjudication is in Serial No. 20 thereof, which is reproduced hereinbelow:-

“Clarifications issued below are under the provisions of Clause 4.4 of Section 4 of the Guidelines issued by MNRE with the approvals as envisaged therein.

<i>Sl. No.</i>	<i>Concerns Raised</i>	<i>Clarifications</i>
xxxxxx		

20.	<i>What is Delivery Point? Where will the metering be done?</i>	<i>Delivery Point shall be the injection point at which the generator shall deliver the power to the STU. The metering shall be done at this point of Injection. All Charges and losses up to the point of Injection shall be borne by the Solar Power Developer and after the point of injection the Demand Charges and Usage Charges as notified by the STU from time to time shall be payable by NVVN, even if it is paid by SPD which will be recovered from the Buying Utilities. SPD shall interconnect to the Pooling Substation of STU or the STU injection point at its own cost.</i>
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15. The above change in the definition of the “Delivery Point” was a major change from how it was defined in the draft PPA inasmuch as it clearly provided that the “Delivery Point” shall be the Injection Point at which the generator shall deliver the power to the STU and all charges and losses upto the point of injection shall be borne by the SPD. It was further stipulated that the SPD shall interconnect to the pooling substation of STU or STU injection point “at its own cost”.

16. On 20.10.2010 the respondent submitted its RfS for setting up of a 5 MW Solar PV Project at village Natisara, Tehsil Phalodi, Distt. Jodhpur, Rajasthan. The site was selected by the respondent of its own choice and the petitioner had no role to play in the selection of the same.

17. On 29.10.2010, the petitioner issued the Request for Proposal (RfP) to the respondent. The relevant extracts from the RfP are quoted as under:-

“This has reference to your RfS Document, submitted vide Application Receipt Serial No. mentioned above and the Solar PV Projects shortlisted. Since the total capacity of the shortlisted Solar PV Projects are in excess of the approved capacity of 150 MW Solar PV Projects, selection of Projects would now be done as per Clause 3.8.1 of RfS Document through the process of “Request for Proposal” (RfP), where proposals would be submitted by the Bidders offering maximum discount on the CERC Approved Applicable Tariff for Grid connected Solar Power Projects for FY 2010-11 as per the Order dated 26-Apr-2010 under the CERC RE Regulation 2009.”

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Instructions to Bidders

- 1. This document is not transferable.*
- 2. All the terms used in the RfP shall have the meaning as per MNRE “Guidelines for Selection of New Grid Connected Solar Power Projects”, the Request for Selection document (including Power Purchase Agreement i.e. PPA) and subsequent Clarification issued and elaboration of Provisions of MNRE Guidelines (under Section 4.4) uploaded during the process of RfS on NVVN website www.nvvn.co.in. ”*

18. Therefore, attention of the respondent was again drawn to the Clarification issued by the petitioner.

19. The respondent submitted its bid, which was accepted by the petitioner. Petitioner issued a Letter of Intent (LoI) to the respondent on 11.12.2010. Paragraph 1.0(B) of the LoI drew reference of the respondent *inter alia* to the Clarification issued in the following terms:-

“1.0 This has reference to the following:

xxxxxx

(B) The Request for Selection document (including Power Purchase Agreement i.e. PPA) and subsequent Clarifications issued and Elaboration of Provisions of MNRE Guidelines (under Section 4.4) uploaded during the process of RfS on NVVN website www.nvvn.co.in (hereinafter referred to as “RfS”)”
(Emphasis supplied)

20. Clause 2.2 of the LoI further stipulated as under:-

“2.0 NVVN is pleased to accept your RfP bid and confirm its intent to purchase the power from the proposal New Grid Connected Solar PV Power Project Serial No. 72 of 5 MW capacity located at JODHPUR, PHALODI, NATISARA, State; RAJASTHAN under the Jawaharlal Nehru National Solar Mission (JNNSM) Phase/Batch/subject to the following terms and conditions as stated in various documents referred in Para 1.0 above and briefly brought out hereinafter:

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2.2 Acceptance of the Project is subject to terms and conditions of RfS document, clarification on RfS issued by NVVN. Guidelines issued by MNRE Govt. of India, elaborations on Guidelines as per Clause 4.4 of the Guidelines issued by NVVN and the terms and conditions of RfP.”
(Emphasis supplied)

21. On 10.01.2011, the petitioner and the respondent executed the PPA. The PPA was signed by the respondent without any protest or reservation. The PPA defined the term “Delivery Point” in the same manner as was defined in the Clarification dated 11.09.2010 and in the following words:-

“Delivery Point”

Delivery Point shall be the injection point at which the generator shall deliver the power to the STU. The metering shall be done at this point of Injection. All charges and losses up to the point of Injection shall be borne by the Solar Power Developer (SPD) and after the point of Injection the Demand Charges and Usage Charges as notified by the STU from time to time shall be payable

by NVVN, even if it is paid by SPD which will be recovered from the Buying Utilities.

SPD shall interconnect to the Pooling Substation of STU or the STU Injection point at its own cost.”

22. “Interconnection Facilities” was defined in the same terms as under:-

“Interconnection Facilities”

shall mean the facilities on SPD’s side of the Delivery Point for sending and metering the electrical output in accordance with this Agreement and which shall include, without limitation all other transmission lines and associated equipments, transformers, relay and switching equipment and protective devices, safety equipment and subject to Article 7 the Metering System required for supply of power as per the terms of this Agreement.”

23. Clause 3.1(d) of the PPA stipulated as under:-

“3 ARTICLE 3 : CONDITIONS SUBSEQUENT

3.1 Satisfaction of conditions subsequent by the SPD

xxxxxxx

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

24. Clause 4.1.1 (d) provides for SPD’s obligations as under:-

“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:

xxxxxxx

d) connecting the Power Project switchyard with the Interconnection Facilities at the Delivery Point;”

25. A reading of the above provisions of the PPA would show that in all aspects so far as is relevant for the present petition, except the

definition of “Delivery Point”, the terms of the draft PPA and the final PPA remain the same.

26. Though the PPA was signed without any protest by the respondent, it wrote a fax dated 10.01.2011 to the petitioner regarding the definition of “Delivery Point”. This fax was not placed before the Arbitral Tribunal or before this Court and, therefore, it is not possible to make any comment regarding its contents. However, vide communication dated 28.02.2011, the petitioner responded to the same in the following words:-

*“Kindly refer to your Fax dt. 10th Jan., 2011, regarding “Delivery Point”. In this regard we would like to bring to your notice that definition of “Delivery Point” was explained at Point no.20 in clarifications issued under provision of Clause 4.4 of Section of Section 4 of Guidelines issued by MNRE. Elaboration of provisions of MNRE Guidelines (under Section 4.4) part-I was Uploaded on NVVN website on 11.09.2010 and are still available for your reference.
Definition of “Delivery Point” in the PPA is in line with the above Clarification therefore no further change is required.”*

27. The respondent has not stated about any response being given by it to the above communication. Therefore, the assertion of the petitioner that a Clarification was issued changing the definition of “Delivery Point” and that the same was uploaded on petitioner’s website before the submission of the bid by the respondent, was not contemporaneously challenged by the respondent.

28. On 12.05.2011, the respondent addressed a communication to the Secretary, Ministry of Renewable Energy making reference to a review meeting held on 02.05.2011 and submitting that the delivery point was understood to be at the “developer’s switchyard” and therefore, the cost

of Transmission Lines was not taken into account while calculating the rate of return on the Solar PV Project by respondent. The communication addressed an appeal that MNRE may issue appropriate directions to the State Transmission Line Utility to install the Transmission Lines from grid to the 5 MW Solar PV Project of the respondent to enable the respondent to inject the power generated at the “delivery point of Developer’s switchyard at the Solar PV Project.”

29. A reading of the above representation would show that the respondent made no protest against the definition of “Delivery Point” being amended in the final PPA or the same being contrary to MNRE guidelines or not being binding on the respondent, in fact, a case contrary to even the draft PPA was sought to be setup, that the “Delivery Point” was to be at “Developer’s Switchyard at the Solar Power Project.”

30. Respondent on 09.07.2011 addressed another representation to the Secretary, MNRE *inter alia* stating that the point of injection/ delivery point was understood by the respondent to be at the developer’s switchyard and as the Rajasthan Renewable Energy Corporation Ltd., that is, the State nodal agency was insisting that the cost of installing Transmission Lines is in the scope of the SPD and also that the transmission losses ex developer’s switchyard to the delivery point at the grid shall be in the account of the SPD, the same would result in an increase in the cost of the project. The respondent, therefore, requested the MNRE to issue direction to the STU to lay out the Transmission Lines from the SPD switchyard to the 33KV grid at its own cost and that the delivery point should be considered at the developer’s switchyard to avoid the loss of revenue due to loss in transmission. Importantly, this

representation does not make any grievance regarding the change in definition of “Delivery Point” in the Clarification and final PPA or the same having been signed under coercion.

31. MNRE vide its communication dated 21.07.2011 rejected the representation of the respondent observing as under:-

“.....The issues which were raised in your letter, were addressed by NVVN much before the bidding process started, therefore, any intervention in these projects at this stage is not possible.”

32. Therefore, even MNRE drew attention of the respondent to the clarification issued by the petitioner before the submission of its bid by the respondent and stated that in light thereof, the representation of the respondent for a direction to the STU to lay down the transmission lines cannot be accepted. The respondent neither challenged the above nor took any legal recourse against such communication. On the other hand, the respondent executed the Transmission Agreement dated 6th July, 2011 with the Rajasthan Rajya Vidyut Prasaran Nigam Ltd. (RRVPL) undertaking to make arrangements to connect the power project switchyard with the interconnection facilities at the delivery point at the Grid. In the Agreement, it was further stipulated that the STU shall construct the 132/33 KV transmission line ‘if desired by SPD as deposit work’. Therefore, even in this Agreement the obligation for construction of the transmission lines till the delivery point was at the cost of the respondent.

33. The dispute between the parties arose with the encashment of the bank guarantee by the petitioner on account of alleged delay in commissioning of the project by the respondent.

34. It was only on 11.09.2012 that the respondent invoked the Arbitration Agreement between the parties by nominating its Arbitrator.

35. Even in the Statement of Claim filed before the Arbitral Tribunal, as far as the change of definition of 'Delivery Point' and alleged coercion in execution of the PPA, only the following assertion can be found:

“11. It was only after receipt of the bid bond that PPA had been signed and as stated hereinabove Claimant had no other option but to sign and execute the said PPA. It was surprising for Claimant to note that the definition of the delivery point had been changed substantial in the following terms:

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“15. Subsequent to the said exchange of communications, wherein Respondent wrongly and in violation of the RERC Tariff Order dated 25th May 2010 exerted pressure on to Claimant to proceed further in the Project. It is stated that Claimant being under duress, both economical and otherwise had no other choice but to proceed with project. By this time, Respondent had already taken delivery of PBGs worth 9,13,15,000 from Claimant.”

xxxxxxx

“22. Since as stated herein above, Claimant was under the duress it had no other option but to accept the arbitrariness of Respondent and utilized all its resources in order to meet its obligations under the PPA.”

36. In the Statement of Claim the respondent raised the following three claims:-

(a) Reimbursement of the cost incurred by the respondent on laying the Transmission Lines from the respondent's Solar Power Project to the 132/33 KV Substation at the grid of State Transmission Utility (STU),

which in the present case was the Rajasthan Rajya Vidyut Prasaran Nigam Ltd. (RRVPNL/RVPN).

(b) Recovery of loss of income suffered by the respondent due to transmission losses spread over 25 years period of the Contract.

(c) Refund of Rs. 1,82,63,000/- to the respondent on account of the Performance Bank Guarantee having been wrongly invoked by the petitioner for late commissioning of the Solar Power Plant by one day.

37. In the Statement of Defence filed by the petitioner, though it made reference to the pre-bid meeting on 28.08.2010 and the Clarifications being uploaded on its website on 11.09.2010, the said documents were not filed before the Arbitral Tribunal. It seems that only at the stage of final arguments that the petitioner sought to place the same before the Arbitral Tribunal by way of an application. The said application was, however, dismissed by the Arbitral Tribunal vide its order dated 29.12.2014/30.11.2014 on the ground of delay. In the said order, however, the Arbitral Tribunal also made comments on the relevance and authenticity of these documents in the following words:

“The documents which the Respondent wants to place on record and prove, undoubtedly relate to the period August/September, 2010 and are to the effect that the Secretary, MNRE and the Secretary, Ministry of Power had granted approval to some elaborations/clarifications in a joint meeting allegedly held on 10.09.2010 and also that a Pre-Bid meeting had allegedly taken place on 28.08.2010, wherein also the elaborations/clarifications had been made. Admittedly as per the respondent's own case the facts alleged had happened in August/September, 2010 much before the filing of the pleadings by the respondent, and in any case much much before the filing of the documents by the respondent and admittedly long long before the respondent led its

evidence in the case. It is not the respondent's case before us that, these documents were not in existence in August/September, 2010 or that it had any difficulty or problem in obtaining the same. Our attention has been drawn by the learned counsel for the Claimant specifically to the Issues Nos. 4(b) and 6; and we are in total agreement with him that in view of these categorical issues it was incumbent upon the Respondent to have filed these documents on record, if not earlier, then even with its affidavit in evidence at the most, and also that having failed to do so at the appropriate stage without any justifiable explanation and having suffered the further proceedings till final arguments, the Respondent cannot be now permitted to reopen the whole proceedings once again from the very initial stage and that too for filling in the lacunae therein and delay the proceedings and to build up a defence in its favour at this belated stage of the case.

We are further of the considered view that, even if the instant Application filed by the Respondent is allowed and the documents taken on record, apart from delaying the proceedings and putting the clock back to two years in the past, no useful purpose is otherwise going to be served and it will be a merely an otiose exercise. The Claimant has candidly explained in detail in para 4 of its reply the futility of bringing on record the documents annexed with the respondent's application. It is not in dispute that for the instant case the alleged clarification (11) (Delivery Point) only is relevant; and we are in complete agreement with the learned counsel for the Respondent that, it is quite intriguing to observe that whereas all the alleged clarifications made vide Annexure RA-1 are preceded by the "concern raised", there is no "concern raised" shown in the alleged clarification (11), and therefore prima facie the Respondent's own document (Annexure RA-1) clearly reflects that, there was admittedly no such concern raised at all regarding the aspect of Delivery Point, and as such there could not have been any occasion at all to issue such an alleged clarification to this effect; besides this, we have also noticed that prima facie no 'approval' of the concerned Secretaries of MNRE and the Ministry of Power appears to have been granted to the alleged elaborations/clarifications as the learned counsel for the respondent has failed to point out from the said document itself

that any approval had been specifically granted therein by the concerned Secretaries. Moreover, the said document (Annexure RA-1) also belies any joint meeting having been ever held between these two Secretaries as per the mundane requirement of Clause 4.4 of the MNRE Guidelines.

Regarding the other documents (Annexures RA-2 to RA-5) also, we find that the factum of a Pre-Bid meeting allegedly having taken place on 28.08.2010, sought to be proved through these documents, in itself leads us nowhere. According to the learned counsel for the respondent, in the said Pre-Bid meeting held on 28.08.2010 it had been clarified that, the responsibility of constructing the transmission line from Project to STU delivery point would be of the Claimant only and none else. In response the learned counsel for the Claimant has convincingly argued that no such clarification can be expressly found in the document (Annexure RA-1) wherein the alleged elaborations/clarifications had been issued. We find weight in his further submission that, how can a clarification which was allegedly issued on 10.09.2010 as per para 4(i) of the Respondent's Application and allegedly uploaded on 11.09.2010 as per para 4 of the Respondent's Reply filed to the Statement Of Claims, be conveyed to the interested bidders on 28.08.2010 as alleged when that was admittedly not in existence. The learned counsel for the Claimant has argued that this aspect goes to the root of the case and tears apart all the defences which are being sought to be forged at this belated stage, and we tend to agree with him.

A last attempt was made by the learned counsel for the Respondent to convince us that, though the formal clarifications had been issued only on 10.09.2010 vide Annexure RA-1, the same had been otherwise explained to the intended bidders on 28.08.2010 during the alleged pre-bid meeting. But here also he could not convince us as the learned counsel for the Claimant immediately drew our attention to the preamble of the document Annexure RA-1 itself, wherein it has been clearly recorded that certain queries had been raised by some developers on 28.08.2010 and therefore the clarifications were being issued on 10.09.2010 vide document Annexure RA-1; no clarifications were stated therein to have been

made even informally on 28.08.2010 during the Pre-Bid meeting as is being alleged by the Respondent. Therefore, this argument made by the learned counsel by the Respondent appears to have been made as one last attempt in despair to convince us, in which too, he could not succeed for the reason that, his argument was found against his own record as discussed above. The learned counsel has argued that, his Application may be allowed in the interest of justice. We observed that, the 'interests of justice' is a subjective concept and cannot be divorced from facts of a particular case, so as to apply it as an abstract proposition. We do not find that, any interest of justice will be served by allowing the Respondent's Application; rather it will be other way round."

38. This order was not passed unanimously but by the majority of 2:1 of the Arbitral Tribunal.

39. The Arbitral Tribunal thereafter proceeded to pass the Impugned Award again, not unanimously, but with the majority of two Arbitrators. One Arbitrator wrote his minority opinion rejecting the claims of the respondent.

40. As noted above, Claim nos.(a) and (b) raised by the respondent are in a manner interconnected with each other as they are dependent on the issue as to whether it was the responsibility of the respondent or the STU to lay down the transmission lines from the respondent's Solar Power Project to the 132/33 KV Substation at the grid of STU and also as to who was to bear the transmission loss. The Majority Tribunal notes the dispute between the parties in the following words:

"But the real contentious issue in this case is the alleged issuance, on 10.09.2010 and alleged uploading on Respondent's website on 11.09.2010 of some clarifications in the MNRE Guidelines

regarding “Delivery Point” which has been vehemently disputed by Claimant, and which ‘if proved’ and also ‘if held applicable’ will have an adverse effect on the above-indicated two claims of Claimant, other than the one arising out of the invocation of the Performance Bank Guarantee to the tune of Rs.1,82,63,000/- (One crore eighty two lac and sixty three thousand). ”

41. As far as the claim of the respondent regarding recovery of the cost incurred by it for laying the transmission lines is concerned, the Majority of the Arbitral Tribunal records the submissions made by the counsel for the petitioner and the respondent in detail and thereafter gives the finding as under:

“We find substance in the above submissions made by the Learned Counsel for Claimant. We feel that no useful purpose will be served by merely repeating the said submissions as our findings on this claim has already attained finality. We further hold that Letter of Intent in this case had all the trappings of a valid contract and thus constituted a binding and concluded contract between the parties, considering all the facts and circumstances on record. And we further agree with the submission of Learned counsel for Claimant that even if Letter of Intent is not treated as binding contract for the arguments’ sake, documents referred to in it are nonetheless to be seen for the purposes of explaining any ambiguity in the formal PPA on the issue of ‘the construction of the transmission line and circumstances leading to financial duress during execution of the project for the claim of the costs of laying the transmission line.

We accordingly hold that responsibility of laying of transmission line from Claimant’s Power Plant to the Grid was wrongly shifted by Respondent to Claimant, during execution of the project, and therefore Claimant is entitled to recover a sum of Rs.4,33,94,373/- from Respondent on account of costs incurred by it on this count. We accordingly award the aforesaid amount in favor of Claimant and against the Respondents.”

42. The learned senior counsel for the petitioner submits that the Arbitral Tribunal has completely ignored the clarification issued by the petitioner as also the effect of the change of the definition of 'Delivery Point' in the final PPA executed between the parties. He submits that a reading of the definition of the 'Delivery Point' along with the definition of 'Interconnection Facilities' as also clauses 3.1(d) and 4.1.1 (d) of the PPA would clearly show that the responsibility of laying down the transmission lines from the switchyard of the respondent till the STU's sub-station at the grid was the responsibility of the respondent. The respondent had sought to represent against the same, however, the said representation was rejected by the MNRE based on the above clarification. The respondent accepted this position and raised its claim only as an afterthought once the Performance Bank Guarantee submitted by it was encashed by the petitioner due to its default in commissioning the project in time.

43. On the other hand, counsel for the respondent submits that the purported clarification issued by the petitioner had not been proved on record. It was in any case, contrary to the terms of the MNRE guidelines and, therefore, could not be given effect to. He further submits that the PPA had been signed by the respondent under coercion as by that time the respondent had already submitted bank guarantees to the tune of Rs.9,13,15,000/-. Even the transmission lines had to be laid down by the respondent under financial duress.

44. I have considered the submissions made by the parties. A reading of the above findings of the Majority Arbitral Tribunal would show that the Arbitral Tribunal has expressed its agreement with the submissions made by the counsel for the respondent and has stated that no useful purpose would be served merely by repeating the said submissions, however, a reading of the submissions of the respondent as recorded by the Arbitral Tribunal would show that there were various submissions made in alternative to each other and, therefore, it cannot be deciphered which of these alternative submissions have been accepted by the Arbitral Tribunal for passing of the Impugned Award or are all accepted.

45. Section 31(3) of the Act reads as follows:

“31. Form and contents of arbitral award.

(1) xxxxxxxx

(2) xxxxxxxx

(3) *The arbitral award shall state the reasons upon which it is based, unless—*

(a) the parties have agreed that no reasons are to be given, or

(b) the award is an arbitral award on agreed terms under section 30.”

46. In ***Som Datt Builders Ltd. vs. State of Kerala***, (2009) 10 SCC 259, the Supreme Court has held as under:-

“25. The requirement of reasons in support of the award under Section 31(3) is not an empty formality. It guarantees fair and legitimate consideration of the controversy by the Arbitral Tribunal. It is true that the Arbitral Tribunal is not expected to write a judgment like a court nor is it expected to give elaborate and detailed reasons in support of its finding(s) but mere noticing the submissions of the parties or reference to documents is no

substitute for reasons which the Arbitral Tribunal is obliged to give. Howsoever brief these may be, reasons must be indicated in the award as that would reflect the thought process leading to a particular conclusion. To satisfy the requirement of Section 31(3), the reasons must be stated by the Arbitral Tribunal upon which the award is based; want of reasons would make such award legally flawed.”

47. In ***MKU Ltd. vs. Union of India*** MANU/DE/2510/2017, this Court, after considering various judgments of the Supreme Court on this issue, has held that a mere recital of the pleadings, evidence or arguments do not constitute reasons and in the absence of the same, the Award, being contrary to Section 31(3) of the Act, shall stand vitiated.

48. Even otherwise, a perusal of the above findings of the Arbitral Tribunal clearly show that though the Arbitral Tribunal has held that the LoI had all the trappings of a valid contract, and noted that even if it is not treated as a binding contract, documents referred to in it are nonetheless to be seen for the purpose of explaining any ambiguity in the formal PPA, it has failed to consider that the LoI itself drew reference to the Clarification issued by the petitioner and therefore, formed part of the contract between the parties even as per the Arbitral Tribunal. The Arbitral Tribunal further failed to appreciate the effect of the change in the definition of ‘Delivery Point through the Clarification as also the final PPA. The final PPA was not in challenge before the Arbitral Tribunal. It clearly made it an obligation of the respondent to connect the switchyard at its plant with the pooling sub-station of STU or the STU Injection point ‘at its own cost’. Clause 3.1(d) and 4.1.1 (d) were also to the same effect. In the presence of such clear expressed terms in the

Agreement, there was no scope of inferring any ambiguity in the same. The Arbitral Tribunal has not even attempted to interpret the said terms of the PPA. It has further failed to appreciate that on a representation being made by the respondent, the petitioner vide its communication dated 28.02.2011, and the MNRE vide its communication dated 21.07.2011 while making reference to the Clarification issued by the petitioner, rejected such representations. The respondent thereafter, laid down the transmission lines without any further protest at its own cost and therefore, could not have been allowed the claim of recovery of such cost in such arbitration proceedings. In any case, the Arbitral Tribunal has noted fact of undertaking annexed with the RfP to be submitted by respondent which contained the following clause 9:

“We have submitted our response to RfP strictly as per provisions, terms and conditions of MNRE “Guidelines for Selection of New Grid Connected Solar Power Projects”, the RfS document (including PPA), subsequent Clarifications issued and Elaboration of Provisions of MNRE Guidelines (under Section 4.4) uploaded during the process of RfS on NVVN website www.nvvn.co.in and the RfP document, without any deviations, conditions and without mentioning any assumptions or notes.”

49. The said undertaking points to the respondent's knowledge of the Clarifications issued and uploaded during the process of selection of bidders on petitioner's website.

50. Though I am conscious of the limitations of exercise of jurisdiction under Section 34 of the Act, however, in the present case, as the Arbitral Tribunal has ignored vital evidence in arriving at its decision, the Impugned Award in so far as it relates to claim (a) cannot be sustained.

51. As far as claim (b) is concerned, the Arbitral Tribunal, after recording submissions made by the parties, while allowing the same partially gives the following reasons:

“We agree with the reasoning given by Learned Counsel for Claimant for allowing this claim. However we are not inclined to award entire sum of Rs.3,02,95,577 (Three crore two lac ninety five thousand five hundred seventy seven) for entire 25 years contract period, which admittedly includes a considerable amount on account of future losses as well. Till now approximately only 3 years 3 months have elapsed w.e.f. 10.01.2012, the date when the Plant was actually commissioned. We cannot persuade ourselves to award in one go, for what Claimant is entitled to, during rest of 21 years and 9 months period of the contract out of the total 25 years w.e.f. 10.01.2012 as stated above. It is true that Learned counsel for Respondent has not argued on this aspect of the matter but it is our duty to assess genuine amount to be paid to Claimant at this stage, and also assess the amount to which Claimant is entitled to for the rest of the 21 years and 9 months. As already pointed out the details of calculations have been proved as Exhibits. CW2/22 to CW2/46. And there is no cross examination by Respondent on the aspect of this quantification. As per Exhibit. CW2/23, there is a transmission loss of 95044.95 Units per annum (i.e., 7920.41 Units per month) to which no challenge has been thrown either in the pleadings or cross-examination or even during arguments by Respondent. Otherwise also this transmission loss comes to only 0.95% for about 22 kms. distance which is not excessive in any manner and is admitted position.

We further hold that that Letter of Intent in this case had all the trappings of a valid contract and thus constituted a binding contract between the parties considering all the facts and circumstances on record. And we further agree with the submission of Learned counsel for Claimant that even if Letter of Intent is not treated as the binding contract for the arguments' sake, the documents referred in it are nonetheless to be seen for purpose of explaining any circumstances leading to financial

duress at the time of the signing of the formal PPA for the claim of loss of income due to the transmission losses.

Therefore we award only Rs. 39,38,389/- (Thirty nine lac thirty eight thousand three hundred and eighty nine) for three years three months period w.e.f. 10.01.2012 to 09.04.2015. And we further hold that for the remaining period of twenty one years and nine months, Claimant shall be entitled to a sum of Rs.1,00,985/- (One lac nine hundred and eighty five) per month to be paid to it for transmission loss of 792041 Units per month. We further hold that if Respondent in its own discretion and wisdom opts at this stage to do metering at STU Pooling Station at the SPDs Plant where a Standby Meter already exists, then it shall not be liable to pay this sum of Rs. 1,00,985/- (One lac nine hundred and eighty five) on account of transmission loss and would pay as per Standby Meter only at contracted rate of Rs. 12.75 per Unit for remaining period of the contract.”

52. The above finding of the Arbitral Tribunal would again suffer from violation of the mandate of Section 31(3) of the Act as no reasons have been given by the Arbitral Tribunal for agreeing with the submissions made by the counsel for the respondent.

53. As noted above, this issue was also dependent on the validity and effect of the change in definition of the ‘Delivery Point’ made by way of the Clarification as also the final PPA.

54. The definition of the ‘Delivery Point’ in the Clarification and the final PPA stated that all losses up to point of Injection shall be borne by the Solar Power Developers. In light of such clear stipulation, claim of the respondent towards transmission losses up to the point of Injection could not have been granted, the same being contrary to the terms of the Agreement itself.

55. The Arbitral Tribunal has made a reference to the alleged ‘financial duress at the time of signing of the formal PPA for the claim of loss of income due to the transmission losses’.

56. I have reproduced the above the vague allegations of economic duress contained in the Statement of Claim.

57. As noted above, there was no challenge made by the respondent to the final PPA. Even after the petitioner as also the MNRE had referred to the changed definition of ‘Delivery Point’ while rejecting the representations of the respondent, the respondent did not challenge the same by invoking Arbitration or otherwise. It quietly accepted the said position. After having done so, it was not entitled to challenge the terms of the PPA. The finding of the Arbitral Tribunal with regard to economic duress is therefore, not only in the face of absence of proper pleading to that effect, but also in absence of any evidence in support of the same being placed on record by the respondent and cannot be sustained.

58. It is no longer *res integra* that a bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up such a plea, must establish the same by placing evidence in this regard.

Reference:

1. ***New India Assurance Company Ltd. v. Genus Power Infrastructure Ltd.***, (2015) 2 SCC 424;
2. ***ONGC Mangalore Petrochemicals Ltd v. ANS Constructions Ltd & Anr.***, (2018) 3 SCC 373;
3. ***Union of India and Ors. v. Master Construction Company***,

(2011) 12 SCC 349

59. In any case, this Court in *M/s Classic Motors Ltd. v Maruti Udyog Ltd.*, (1997) 65 DLT 166, relying upon the judgment of *North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd.* 1978 (3) All. E.R.170, has held that if the party complaining of an unfair contract does not do anything to avoid it and accepts it, then the complaining party cannot make a grievance of the contract. The present case shall clearly fall in this exception.

60. Even otherwise, the Arbitral Tribunal in its direction has held that if the petitioner opts at this stage to do metering at 'STU Pooling Station at the SPD's Plant where a standby meter already exists,' it shall not be liable to pay a sum of Rs.1,00,985/- on account of transmission loss and would pay as per standby meter at contracted rate of Rs.12.75 per unit for remaining period of contract. The condition that STU pooling station has to be at SPD's Plant, that is respondent's Plant, is not borne out even from the draft PPA that was circulated by the petitioner with the RfS. Even the counsel for the respondent could not show any clause or term of MNRE guidelines or the RfS or other documents in support of such condition.

61 In view of the above, the Award of claim No.(b) also cannot be sustained.

62. Claim (c) of the respondent was with respect to the refund of Rs.1,82,63,000/- on account of encashment of the Performance Bank Guarantee by the petitioner due to the late commissioning of the Solar Power Project Plant by the respondent by one day from the scheduled

date. It is not disputed that in terms of the PPA the commissioning of the Power Plant had to take place by 09.01.2012. It was also not in dispute that the connectivity to the grid was made at 23:15 hours on 09.01.2012 and the supply of power/ejection in the grid started on 10.01.2012 at 14:00 hours (2.00 p.m.). The petitioner claiming that there was one day delay in commencement of supply of power from the scheduled commissioning date, levied liquidated damages to the tune of 20% of the total Performance Bank Guarantee and recovered the said amount by way of encashment. The claim of the respondent was for the refund of the said amount. For the purpose of considering this claim the following provision of the PPA would be relevant:

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 format provided in Schedule 1.

xxxx

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.

xxxx

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 of NVVN or till such time such Event of Default is rectified by NVVN.

4.5.2 Subject to Article 4.5.6, in case of extension occurring due to reason specified in Article 4.5.1(a), any of the dates specified therein can be extended, subject to the condition that the Scheduled Commissioning Date would not be extended by more than six (6) months.

xxxx

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.

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“11. ARTICLE 11: FORCE MAJEURE

xxxx

11.3 Force Majeure

11.3.1 A 'Force Majeure' means any event or circumstance 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 ionising 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.

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.”*

63. The Arbitral Tribunal while allowing the claim of the respondent has held that the connectivity of the respondent's project to the grid had been made on 09.01.2012 at 11.15 p.m. by a committee duly constituted by the concerned Superintending Engineer, Jodhpur Discom, Jaipur on 03.01.2012 over which the respondent had no control at all. The Arbitral Tribunal further took note of the fact that Superintending Engineer, RVPNL, Jodhpur had written to the Superintending Engineer, RVPN, Jaipur much in advance on 27.12.2011 itself for taking necessary action for providing connectivity, but officials over whom the respondent had no control at all, took some time on their own and it was thereafter that the concerned Superintending Engineer, Jodhpur Discom, Jaipur, over whom also the respondent had no control at all, acted only on 03.01.2012 by constituting requisite committee. The said committee, over which again the respondent had no control, visited the respondent's Solar Power Project only on 09.01.2012 and completed all the formalities of connectivity admittedly at 11:15 p.m. As by that time, due to absence of sunlight the power could not be generated, the same was generated on the next day, that is, on 10.01.2012 and only then synchronization of project equipments with the grid was done and the commissioning was finally done by 2.00 p.m. on 10.01.2012. The Arbitral Tribunal, therefore, has held that the technical delay of one day in commencement of supply was

within the ambit of Article 11.3.1(a) and (d) and Article 4.5.1(c) of the PPA.

64. The learned senior counsel for the petitioner has not disputed any of the abovementioned dates, however, submits that as the fact that no sunlight would be available at midnight is common knowledge, the respondent could not contend any *Force Majeure* event to justify the delay of one day.

65. I am unable to agree with the submission made by the learned senior counsel for the petitioner. It was not for the default of the respondent that the formalities for the connectivity were completed in the night at 23:15 hours. It was due to delay on part of the RVPNL and RVPN in constituting the requisite committee for inspection and the committee finally undertaking the exercise of such inspection, that the successful report of connectivity was generated at 11:15 p.m. by which time there was no sunlight for actual transmission of power so as to generate the commissioning report. This clearly was beyond the control of the respondent and the respondent, cannot be blamed for such technical default.

66. In addition to the above, the Arbitral Tribunal has further noted that the petitioner had not pleaded any legal injury or any facts and circumstances even remotely indicating that it had suffered any loss at all on account of one day delay in commissioning of plant by the respondent. In fact, the delay was not even of one full day as admittedly, the plant had been commissioned at 2.00 p.m. during the day on 10.01.2012 itself.

67. Learned senior counsel for the petitioner submits that the right of the petitioner to claim liquidated damages due to delay in commissioning of supply of power beyond the commissioning date has been upheld by this Court as in such contract actual damage or loss is difficult or impossible to prove.

68. I have considered the submission made by the learned senior counsel for the petitioner. While there is no dispute on the legal proposition being canvassed by the learned senior counsel for the petitioner, at the same time, in the peculiar facts of the present case where the default is technical in nature and has been found to be for the reason beyond the control of the respondent and is not even of one full complete day, leave alone a month or part thereof as stipulated in Clause 4.6.1 of the PPA, the finding of the Arbitral Tribunal cannot be said to be unreasonable or perverse so as to warrant any interference from this Court.

69. In view of the above, the challenge of the petitioner to the award of refund of Rs.1,82,63,000/- cannot be sustained.

70. In view of the above discussion, while setting aside the Award of Claim (a) and (b) in the Impugned Award passed by the Majority Arbitral Tribunal, the Award of Claim (c) is sustained.

71. The petition is partially allowed in the above terms, with no order as to cost.

NAVIN CHAWLA, J

SEPTEMBER 25, 2018/rv/RN/vp