

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

+ **O.M.P. (COMM) 222/2016 & IA 23592/2015**

Reserved on: 28.11.2018

Date of Decision : 15.04.2019

SUNBORNE ENERGY RAJASTHAN SOLAR PVT. LTD

..... Petitioner

Through: Mr.Tarun Johri, Mr.Ankur Gupta
and Mr.Ankit Saini, Advs.

versus

NTPC VIDYUT VYAPAR NIGAM LTD

..... Respondent

Through: Mr.Bharat Sangal and Ms.Babita
Kushwaha, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. The petitioner by way of this present petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenges the majority Arbitral Award dated 27.10.2015 (hereinafter referred to as 'Impugned Award') passed by the Arbitral Tribunal dismissing the claims filed by the petitioner, while holding the respondent as entitled to encash the Bank Guarantee for Rs.2,62,27,000.00 furnished by the petitioner, and also awarding costs of proceedings in favour of the respondent.

2. The disputes in the case are in relation to the Power Purchase Agreement (PPA) dated 27.01.2012 executed between the parties.

3. The Government of India having launched the Jawaharlal Nehru National Solar Mission (JNNSM) to establish India as a global leader in

solar energy, the Respondent was designated as the nodal agency by the Ministry of Power, Government of India.

4. The respondent issued a Request for Selection (RfS) on 24.08.2011 to set up grid connected solar PV Project under Phase-I Batch-II of JNNSM for purchase of power for 25 years.

5. The petitioner being a successful bidder, a Letter of Intent (LOI) was issued in its favour on 28.12.2011, in terms whereof the petitioner was to set up a 5MW solar power project in Jodhpur, Rajasthan for purchase of power by the respondent.

6. In terms of the LOI, the petitioner furnished three Performance Bank Guarantees, including one dated 23.01.2012 for an amount of Rs. 2,62,27,000.00 (representing 20% of the total amount of Performance Bank Guarantee to be submitted).

7. The parties thereafter entered into the PPA dated 27.01.2012.

8. As per Article 1.1 of the PPA, the Scheduled Commissioning Date, i.e. the date from which the solar electric power of 5MW was to be supplied by the petitioner, was 26.02.2013. The project was however actually commissioned on 26.03.2013, i.e. after one month from the stipulated date.

9. On the said date, the petitioner sent a letter seeking extension of time in the commissioning date from 26.02.2013 to 26.03.2013 and requesting the respondent against invocation of the Bank Guarantees

submitted by it. The respondent however, vide letter dated 04.04.2013 rejected the petitioner's request for extension of time.

10. The petitioner filed a petition under Section 9 of the Act, being OMP 338/2013, before this Court, wherein the Court on 11.04.2013, directed that status quo be maintained with respect to the Bank Guarantee dated 23.01.2012.

11. In the meantime, the petitioner invoked the Arbitration Agreement in the PPA for resolution of the disputes culminating in the passing of the Impugned Award.

12. In view of the invocation of arbitration, OMP 338/2013 was finally disposed of by the Court on 22.01.2014 directing that the interim order dated 11.04.2013 is to continue till the same is vacated or modified by the Arbitral Tribunal so appointed.

13. The Arbitral Tribunal thereafter passed the Impugned Award by a majority of 2:1. One of the Arbitrators authored his minority opinion allowing the claims of the petitioner.

14. The disputes between the parties revolve around the non grant of extension of time for the delay of one month in commissioning the project and the necessary consequence of respondent's entitlement to invocation of petitioner's Bank Guarantee in pursuance of levy of liquidated damages for the delay.

15. It may be noted at this point that during the course of hearing, vide order dated 16.12.2016, the Bank Guarantee dated 23.01.2012 for Rs.

2,62,27,000 by HSBC Bank was allowed by this Court to be replaced by a new Bank Guarantee dated 23.11.2016 for an equivalent amount furnished by the petitioner.

16. It is the case of the petitioner that it had purchased a piece of land measuring 200 bighas ('initial land') in District Jodhpur, Rajasthan on 27.12.2011 itself for the development of the Project. However, the said land being agricultural, the petitioner applied to the competent authorities to change the use of land from Agricultural to Industrial use. The competent authorities did not grant such approval till June 2012. It is further the case of the petitioner that in view of the delay by the competent authorities, the petitioner purchased another piece of land measuring 83 bighas ('project land') on 18.06.2012 to develop the Project, which land was at a distance of about 1 kilometre from the initial land. For the said land, the land use had already been converted from Agricultural to Industrial as on 22/23.05.2012. The petitioner then sought the respondent's approval for the proposed new location of the Project area vide its letter dated 23.08.2012, which the respondent approved vide its letter dated 24.08.2012. The parties thereafter executed an amendment to the PPA incorporating the change in the location on 08.10.2012. The petitioner then claims to have commenced the construction on the Project land in October 2012. On the said basis, among other reasons, including resistance by villagers to development of the Project land, the petitioner sought to justify the delay as a Force Majeure event and its entitlement to an extension of time.

17. The petitioner further attempts to explain its delay on the basis of alleged financial constraints faced due to hurdles in securing a debt disbursement facility. It is contended that the petitioner approached the consortium of banks led by the EXIM Bank and the State Bank of Patiala and was then extended debt facility on the basis of a Facility Agreement dated 14.11.2012. The petitioner having mortgaged 78 bighas of land, the consortium suspended the debt facility in January 2013, while insisting for mortgage of remaining 122 bighas of land out of the 200 bighas initially proposed to be used for the project. The petitioner, allegedly having sold the initial land to one M/s Sunborne Energy Jaipur Solar (P) Ltd. after purchase of the new Project land, repurchased 121 bighas 07 biswas of the land from M/s Sunborne Energy Jaipur Solar (P) Ltd. and mortgaged the same to the consortium lenders on 14.02.2013, leading to recommencement of debt facility. The petitioner claims extension of time due to the alleged aforesaid unforeseen delays.

18. The clauses of the PPA relevant to answer the questions in dispute are reproduced as below:

“2.1 Effective Date

2.1.1 This Agreement shall come into effect from 27th January 2012 and this date shall be referred to as the Effective Date.

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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 210 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 make Project Financing Arrangements and shall provide necessary documents to NVVN in this regard;*
- 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 CTU/STU confining the evacuation and connectivity of the CTU/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 fulfil the technical requirements according to criteria mentioned under Clause 2.5(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 210 days period from the Effective 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 upto the Contracted Capacity to NVVN no later than the Scheduled Commissioning Date and continuance of 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 the Agreement free and clear of encumbrances, except expressly those 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 second Batch projects after commercial Operation Date; and*

g) *fulfilling all obligations under taken by the SPD under this Agreement."*

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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 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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4.5.4 If the Parties have not agreed, within thirty (30) days after the affected Party's performance has ceased to be affected by the relevant circumstance, on the time period by which the Scheduled Commissioning Date or the Expiry Date should be deferred by, any Party may raise this Dispute to be resolved in accordance with Article 16.

4.5.5 As a result of such extension, the Scheduled Commissioning Date and the Expiry Date newly determined shall be deemed to be the Scheduled Commissioning Date and the Expiry Date for the purposes of this Agreement.

4.5.6 Notwithstanding anything to the contrary contained in this Agreement, any extension of the Scheduled Commissioning Date arising due to any reason envisaged in this Agreement shall not be allowed beyond March 31, 2013 or the Date determined pursuant to Article 4.6.3, whichever is later.

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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 unavoidable 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 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.

11.5 Notification of Force Majeure Event

11.5.1 The Affected Party shall give notice to the other Party of any event of Force Majeure as soon as reasonably practicable, but not later than seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. If an event of Force Majeure results in a breakdown of communications rendering it unreasonable to give

notice within the applicable time limits specified herein, then the Party claiming Force Majeure shall give such notice as soon as reasonably practicable after reinstatement of communications, but not later than one (1) day after such reinstatement.

Provided that such notice shall be a pre-condition to the Affected Party's entitlement to claim relief under this Agreement. Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed. The Affected Party shall give the other Party regular (and not less than monthly) reports on the progress of those remedial measures and such other information as the other Party may reasonably request about the Force Majeure Event.

11.5.2 The Affected Party shall give notice to the other Party of (i) the cessation of the relevant event of Force Majeure; and (ii) the cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this Agreement as soon as practicable after becoming aware of each of these cessations."

19. It is submitted by the counsel for the petitioner that the delay having occurred due to time spent attempting to change the land use from Agricultural to non-Agricultural, the same necessarily entitles the petitioner to an extension of time. The counsel for the petitioner submits that due to the delay caused by the authorities in allowing change of use of land, the petitioner had to purchase another piece of land to perform the Agreement. He submits that even after purchase of the new land, the petitioner faced hurdles in form of construction of transmission line as well as access road, which was resisted by the local villagers. He contends that the petitioner's officials were threatened and beaten by the local villagers against which the petitioner attempted to register complaints with the police. He submits that it was only in February, 2013

that the petitioner was able to obtain the agreement and cooperation of the local villagers to construct the transmission line and access road to access the Project land from the main road.

20. Counsel for the petitioner also points to the issue of funds the petitioner met with due to suspension of the debt facility by the consortium banks which contributed to the resultant delay in execution of Agreement. Referring to Clause 4.5.6, which stipulates that the extension for the commissioning date granted, if any, shall not be beyond 31.03.2013, he submits that the extension being sought by the petitioner was only till 26.03.2013, which is within the time prescribed by the Agreement, and should have been allowed by the respondent/Arbitral Tribunal.

21. Counsel for the petitioner further submits that upon petitioner's letter seeking approval for the change in the Project location on 23.08.2012, the respondent by accepting the same on 24.08.2012 and signing the amended PPA on 08.10.2012, is deemed to have waived conditions required under Article 3.1 and to have granted an extension of time to the petitioner.

22. The learned counsel for the petitioner further submits that in any case, the respondent was not entitled to encash the Bank Guarantee and levy full liquidated damages as the delay was not only nominal, but no loss was suffered by the respondent due to such delay.

23. On the other hand, it is submitted by the counsel for the respondent that firstly, the grounds taken by the petitioner do not justify interference

under Section 34 of the Act, inasmuch as the Award is not contrary to the Agreement or the law. On the merits of the case, he submits that under Article 4 of the PPA, the petitioner had undertaken to fulfill obligations under Article 4.1.1 at its own cost and risk and even under Article 3.1, the obligations were to be performed solely by the petitioner within 210 days from the date of signing the PPA, excluding any responsibility for the development of the Project on the respondent. In view of the said express clause, the petitioner was liable to bear the cost and risk of performing the activities listed in the clause and thus, the petitioner is not entitled to be excused of its failure to perform the Agreement. The petitioner was, therefore, liable for consequences under Article 3.2 and 4.6.

24. Counsel for the respondent moreover states that the land in question, being the initial land, was chosen by the petitioner only, accordingly, any failure to obtain permission from the State Government in respect thereof cannot amount to Force Majeure. He submits that in any case, such failure does not fall within the ambit of Force Majeure as defined in Article 11 of the PPA. Article 11.4.1(f)(i) and (iii) are clear to state that Force Majeure shall not include non performance by the petitioner due to petitioner's intentional acts/errors/omissions under the PPA.

25. He submits that the extension of time was rightly rejected by the respondent as the same could be provided only in the three circumstances enumerated under Clause 4.5.1 and neither of such circumstances could be said to have occurred in the present case. He contends that the

inability of the petitioner to fulfill its duties under the Project cannot justify the extension of time.

26. Counsel for the respondent further states that time being of the essence of the PPA, the petitioner was bound to supply power to the respondent by the Scheduled Commissioning Date, i.e. by 26.02.2013. He submits that the Agreement between the parties provides for the consequences for the delay in supply of power under Article 4.6 as the levy of Liquidated Damages and this clause must be construed strictly. Under Article 4.6.1, for a delay of one month in supply of power, 20% of the total Performance Bank Guarantee is liable to be encashed by the respondent. Counsel for the respondent submits that the Bank Guarantee having been submitted to guarantee timely commencement of supply of power, which was not so commenced, the respondent was entitled to Liquidated Damages foreseen in the Agreement. He submits that in cases of contracts of public utility such as the present one, delay in construction of the utility is sufficient to levy damages and the respondent is not liable to prove actual loss. The counsel for the respondent submits that the respondent made an investment in the Project to purchase the solar power from the petitioner at the rate mentioned in the RfP for 25 years, without any fluctuation and its responsibility as the nodal agency for supply of solar power to distributors in turn was dependent on the petitioner's due performance of its obligations.

27. He points to the observation of the Arbitral Tribunal noting that the reports of the Patwari produced by the petitioner to explain the delay due to resistance by villagers cannot be relied upon due to the same having

been manufactured by the petitioner to falsely justify the delay. He submits that such documents were never proved in accordance with law by the petitioner.

28. Answering the plea of waiver, the counsel for the respondent submits that the conditions under Article 3.1 could be waived by the respondent in writing only and no such waiver can be imputed to the respondent. He denies that merely by recording a change in the location of the Project, the respondent accepted the occurrence of Force Majeure or waived the conditions stipulated in Article 3.1. He submits that the letter dated 24.08.2012 does not explicitly or impliedly extend the stipulated period of 210 days from the date of the Agreement for accomplishing tasks under Article 3.1.

29. The counsel for the respondent relies upon the finding of the Arbitral Tribunal that the petitioner commenced construction activities on the Project Land only in the month of October, 2012, after being lax for over four months, and submits that the petitioner couldn't complete the work within the time stipulated for lack of its own due diligence. Counsel for the respondent further relies on the Tribunal's finding that financial limitations cannot be accepted as a valid reason for breach of contract as also on the finding that the petitioner did not prove Force Majeure on account of financial stringency.

30. I have considered the submissions made by the learned counsels for the parties and find no merit in the challenge raised in the present petition. At the outset, I would like to quote the relevant findings by the Arbitral Tribunal as under:

On the issue of change of land use and purchase of new Project land

“24. It is admitted that it was the claimant's obligation to procure requisite quantity of land with clear title and possession and to procure all Consents, Clearances and Permits. The 200 bighas of land purchased by the claimant vide sale deeds dated 27.12.2011 (Ann. P 5 pages 59 to 83 of claimant's Vol. II) was agricultural land on which the Project could not be legally set up without getting the land use changed. Under the provisions of Rajasthan Bhu Rajasva (Gramin Kshetron mein akrashit prayojan ke liye samparivartan) Niyam 2007 and Niyam 9 of Adhisoochna dated 16.01.2012 agricultural land could be permitted to be used for non-agricultural purposes. The claimant's case is that it applied for such change but inspite of claimant's best efforts an requests through various letters by the claimant the concerned authorities of the state of Rajasthan did not decide and inform the claimant about their decision (para 23-24 of SOC). There is not an iota of evidence to support this allegation of non-action on the part of the said concerned authority which is the 'Prescribed Authority (Sub Divisional Officer), Phalodi' (see Ann. P 8 pages 136-138 Vol. II) and which is the authority that allowed the land use change of the 83 bighas of land later purchased by the claimant. A bald averment in the SOC and in the affidavit of CWI Sri Gagan Vermani cannot sustain an allegation of mis-conduct on the part of a gazetted officer who permitted the non-agricultural use of the 83 bighas of land with almost supersonic speed. Ann. P 8 (Vol. II) that contains three land use change orders in respect of the three pieces of land admeasuring about 83 bighas shows that the requisite fee for the land use change was deposited on 22.05.2012 and the requisite orders were passed on the very next day i.e. 23.05.2012. How can, therefore, it be believed without cogent evidence that the SDO set put on the applications moved by the claimant and neither allowed them nor rejected them.

25. The claimant has not disclosed the date on which applications for the change of land use of 200 bighas of Land were moved. The copies of such applications maintained in the claimant's records, if any, have not been produced. If no copies

were retained, certified copies could have been obtained from the office of the SDO. The claimant could approach the Collector of the District. The Project was being established under a Central Govt. Sponsored scheme and no officer would take the risk of such alleged inaction.

26. The fact, however, is that no such applications were moved in respect of the 200 bighas of land. Ann. P 3 (pages 172 174) is copy of a document titled 'Memorandum of Entry (mortgage by deposit of title deeds by way of actual delivery) by which about 122 bighas of the land in question (Khasra No.131/17 admeasuring approximately 100 bighas and Khasra No.131/18 admeasuring 21 bighas and 07 biswas) was mortgaged to the lenders. At page 174 is a list of title deeds that were deposited. Item Nos.10 and 11 state that applications requesting grant of NA for conversion of land use from agricultural to industrial for Khasra Nos.131/18 and 131/17 were dated 11.02.2013 and their acknowledged copies were deposited. The claimant's assertion that it applied for change of land use and the concerned authorities did not pass any order allowing the applications or rejecting them compelling the claimant to purchase other pieces of land admeasuring about 83 bighas is disproved by the claimant's own evidence. Accordingly, we hold that the claimant did not make any effort before 11.02.2013 to get the land use changed in respect of the land in question.

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28. Lastly in terms of Article 11.4.1 f i, the act of the claimant buying agricultural land for use for industrial purposes is a negligent and erroneous act and is specifically excluded from Force Majeure event. In doing that the claimant cannot be said to have been duly diligent and to have complied with Prudent Utility Services. A prudent buyer of land for industrial purposes would, if the land proposed to be bought is agricultural land, before finalising the purchase ensure that the land use is changed as the claimant did while purchasing the 83 bighas of land.

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30. *Having heard the learned counsel for the parties and having considered the evidence on record, we hold:*

i. *The claimant did not want to establish the Solar Power Project on the 200 bighas of agricultural land at village Gadhna.*

ii. *The claimant did not apply to the concerned authority i.e. The Prescribed Authority (Sub Divisional Officer), Phalodi, Distt: Jodhpur, to permit the said land to be used for non-agricultural i.e. industrial purposes prior to 11.02.2013.*

iii. *In the absence of application/s for land use change, there was no occasion for the Prescribed Authority to allow or reject non-existent application/s*

iv. *There was no Force Majeure event in respect of the said 200 bighas of land that could or did delay the establishment of Solar Power Project by the Claimant.”*

On the issue of resistance by villagers

“32. The above averments show that the troubles, if any, were of the claimant's own making in as much as it acquired land for which there was no access road as required by it. The sale deed (zerox copy) by which 83.14 bighas of land was purchased on 18.06.2012 is Ann. P7 pages 116-135 of Vol. II of the claimant.....Paragraph E (page 120) states that all of them purchased the respective portions of the agricultural land by sale deeds dated 17.05.2012. The land use change orders show that the above named three persons were the applicants for change of land use and they belonged to Scheduled Caste/Scheduled Tribe. At the hearing it was admitted that it is the claimant, who provided money for depositing the land use change charges @ Rs.5.00 per Square Meter. These charges amounted to Rs.2,21,768.00, Rs.2,33,908.00 and Rs.2,21,768.00 respectively for the three lands mentioned above. This shows how fast was the process of land use change. It took only six days. Prior to the sales in question the whole land belonged to one Mangnaram s/o Panaram (see para E page 120). This shows that although the sale deed in favour of the claimant was executed on 18.06.2012 the negotiations therefore must have started much earlier. Paragraph 10 (i) of the sale deed

dated 18.06.2012 states that the “land is not land locked and has separate exclusive access thereto (as shown on the site plan attached thereto) (emphasis supplied). This statement in the sale deed makes the claimant's story of lack of accessibility to the Project Land highly unreliable.

33. A person who intends to purchase immovable property inspects that property to apprise himself of its plus and negative points. Access to that property is the most important aspect of such inspection. The access has to be unhindered and sufficient for the purpose for which the land or house is to be used. In this case the claimant wanted the land for setting up a Power Project. The land must have a proper access road and the claimant would have ensured that it is there and that is why it is so specifically mentioned in the sale deed.

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35. In para 41 of the SOC the claimant has stated that it made various complaints in the office of the Patwari(emphasis supplied). A partwari is the lowest official in the hierarchy and has no office of his own. It has been stated that those complaints are the five documents said to be Annexure P-11. As stated earlier none of those documents is a complaint made by the claimant to anyone. They are notes of the Patwari who is said to have visited the site on various dates. In the affidavit of Sri Gagan Vermani also Ann. P 11 is mentioned as complaints made in the office of the Patwari.(see para 34). In the affidavit of admission/denial of documents the respondent AGM Sri P.K. Gupta has denied these documents described as Ann. P 11 or Ext. PW 1/11. The result is that these documents are not legally on record and have not been proved because the claimant has nowhere stated that the Patwari visited the Project Site and prepared these documents. They, therefore, cannot be used against the respondent.

35. Further these documents have no stamp of veracity thereon. They are zerox copies of alleged reports of the Patwari and not certified copies thereof. The report dated 08.10.2012 at page 153 states that the Patwari reached the spot in compliance with the orders of the Tehsildar to demarcate the 'katan marg'. This could

not be done as there were crops in the fields and the katan mark was not clear. The villagers asked that measurements be done one month later after the crops have been harvested. This report is not witnessed by any one. If the Patwari went there under the orders of the Tehsildar, the village Pradhan should have been present at the spot. A copy of the Tehsildars order and of the complaint, if any, on which such order was passed should have been produced. At page 154 is a similar report dated 20.11.2012. This time the 'katan marg' is stated to have been demarcated and its boundaries fixed by digging pits and fixing stones. It is stated that Moosa Ram and Shiv Lal demanded that wax paper map be called from Jodhpur and measurement be done again. This report also does not bear the signatures of any person as a witness. They also do not show that the reports dated 08.10.2012 and 20.11.2012 or the other three reports were put up before the Tehsildar under whose orders the Patwari is stated to have been working. It is to be noted that on 20.11.2012 the extent of the rasta is stated to have been settled. Therefore, the grievance of the claimant, if any, got relieved. Then there is the third report dated 05.12.2012 in which it is stated that measurement was done with the help of wax map. It states that the villagers were satisfied and assured not to obstruct the works of the present claimant. It further states that the villagers expressed their agreement on the Gram Panchayat making a gravel road there. The fourth report (page 156 Vol. II) is dated 01.02.2013 i.e. after a gap of 57 days. It states that on the complaint of the villagers claimant's poles of transmission line are being fixed in their lands the Patwari again reached the spot. It is stated that the villagers had got the claimant's work of fixing poles of transmission line and other works of the plant had been got stopped by the villagers who alleged that the poles were being fixed in their lands. On measurements the Patwari did not find it to be true. He found that the poles were within the rasta and gravel road and not in the land of any farmer. It states that the villagers insisted that measurements be done again by a team of partwris. The Patwari states that he decided to make a report in Tehsil Bap and measurements be got done with R.I. Sahib Bap and a team of other Patwaris. No order of the Tehsildar Bap is produced. Lastly there is the report of Patwari dated 19.02.2013. It states on

19.02.2013 the Patwari reached the spot with a group of Patwaris and the staff of Police Station Bap. The report does not name any one of them nor does it state who ordered the Patwari's to form a group and to the policemen of P.S. Bap to render police help to the Patwari. It states that measurements were done in the presence of Sarpanch Gram Panchayat and Gram Sewak and respectable villagers. Momla Ram and Shiv Ram Meghwal had taken the claimants poles in their wire fencing which was got removed and transmission line of the claimant was drawn in the presence of police. This report is also not witnessed by any person. Though the Patwari pretends to have settled the matter he did not prepare any map of the site to depict the rasta about which the dispute was alleged. In our view these reports are not reliable and have been manufactured to help the claimant to explain delay. This is apart from the fact that they are not legally on record and have not been proved.

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39. In view of the above discussion we hold that it is not proved that there were any obstacles in the setting up of the project as alleged in para 37 and 38 of the statement of claim. The question of the occurrence of any Force Majeure event as defined in the PPA, therefore, does not arise.”

On the issue of debt facility suspension

“41. Financial stringency/constraints has never been accepted as a excusable cause for breach of contract. Further it is specifically excluded from a Force Majeure event by Article 11.4.1 e which refers to 'Insufficiency of finances or funds.....Therefore, the alleged suspension of debt facility cannot be pleaded as Force Majeure event.

42. Further there is no adequate evidence of alleged suspension of debt facility except the interested statement of CW 1 Sri Gagan Vermani. No supporting evidence has been led. The alleged suspension, according to claimant's own showing remained in force for about 3 weeks. The claimant has not led any evidence to show how it impacted the progress of the Project. The claimant

could arrange the debt facility as late as 14.11.2012 and it was operative for about 8 weeks. The claimant has not filed a copy of the bank account relating to the debt facility to show how much credit was availed before the alleged suspension and how much was availed thereafter to complete the Project. The claimant could have avoided such a situation, if any, if it had been diligent enough and had arranged the credit facility soon after the execution of PPA on 27.01.2012 and had not reduced the bank's security by mortgaging only 78 bighas of land as against 200 bighas of land on the basis of which Financial Review was procured. There is no evidence on record to show that the contractor which was a company of the same group and was awarded the contract on EPC basis (Erection, Procurement and Commissioning) stopped the works for want of payment.

43. For the above reasons we are unable to agree with the submission of the learned counsel for the claimant that there was a Force Majeure event regarding the finances. Having heard the learned counsel for the parties and having considered the evidence and circumstances of the case we hold (i) that it is not established that the banks suspended the credit facility; ii) the alleged suspension of credit facility, if at all was there, it was for a very small period; (iii) it is not proved that the alleged suspension of credit facility adversely impacted the progress of the Project; and (iv) there was lack of due care and caution on the part of the claimant who knew that delay in the commissioning of the Project would lead to a substantial financial burden in the form of liquidated damages and consequential encashment of Bank Guarantee. We, therefore, hold that the suspension of credit facility is not established on record and there was no Force Majeure event in this regard. The issue is answered accordingly against the claimant.”

On the issue of waiver; factual delay after purchase of new Project land and lack of force majeure notice

“44.....The claimant's letter dated 23.08.2012 (zerox copy) is at page 27 of the respondent's statement of defence and the relevant portion thereof has been reproduced at page 15 hereof. This letter shows that the change was proposed from the site at village

Bhadla to the site at village Gadhna and not from one site in village Gadhna to another site in the same village. The 200 bighas piece of land was not proposed to the respondent as the site of the Project. The last date for compliance of Conditions Subsequent (Article 3) was 24.08.2012. There was, therefore, no occasion on 23.08.2012 for a request to waive any default as there was none. We have already held that it is not proved that the claimant applied for change of land use of the 200 bighas of land prior to 11.02.2013 and neglect on the part of the Prescribed Authority to dispose of that application. We, therefore, answer this issue in the negative i.e. against the claimant.

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46.....We have, on hearing the learned counsel for the parties and on a careful consideration of the evidence and material on record, held that there was no Force Majeure Event that prevented the claimant from completing its part of the contract by the Scheduled Commissioning Date. Therefore, the Claimant was not entitled, as a contractual right, to extension of time for the performance of its obligations as envisaged by Article 4.5 of the Power Purchase Agreement. Issue answered accordingly i.e. against the claimant.

47.....Article 11.5 has been reproduced at page 5 (supra). It requires the affected party to give notice to the other party of any event of Force Majeure as soon as reasonably practicable. The proviso thereto says that such notice shall be a precondition to the Affected Party's entitlement to claim relief under this Agreement.....

.....The claimant's reply to paragraph 29A of the SOC is contained in the corresponding paragraph 29A of the Claimant's rejoinder in which the Claimant is absolutely silent about the requirement of notice. Further, no evidence has been led to prove that any notice was given to comply with the requirements of Article 11.5 of the PPA. Therefore, even if any Force Majeure event had occurred, the Claimant would not be entitled to any relief. We, therefore, hold that the Claimant did not notify the occurrence of any event of Force Majeure to the

respondent as envisaged by Article 11.5 of the PPA. The effect of this omission is that no relief could be claimed under Article 11.5 even if there had been a Force Majeure event. Issue No. 8a is answered accordingly i.e. against the claimant.”

31. A reading of the above Award would show that after appreciation of evidence, the Arbitral Tribunal has found that the petitioner has been unable to make out any case for invoking the Force Majeure Clause. This being a finding of fact arrived at by the Tribunal on appreciation of evidence led before it, and in no manner found to be perverse or unreasonable, cannot be interfered with.

32. In ***NTPC Vidvut Vyapar Nigam Ltd. v. Precision Technik Pvt. Ltd.*** 2018 SCC OnLine Del 13102, this Court noted that in view of Article 3.1 and 4.1.1 of the PPA, the Solar Power Developer (SPD) should be well aware of all the permissions that would be required to be taken for ensuring commencement of supply of power by the Scheduled Commissioning Date and that it could not pass off its burden to NVVN due to mismanagement of its own affairs. The Court held that such delays arising while dealing with governmental and public sector authorities being normal and foreseeable, cannot amount to a Force Majeure event.

33. In ***Pasitheia Infrastructure Ltd. v. Solar Energy Corporation of India & Anr.*** 2017 SCC Online Del 12562, this Court 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 justifying its failure.”

34. Force Majeure clauses are to be construed strictly. The Arbitral Tribunal having rightly come to a finding that the delay was caused due to lack of reasonable care by the petitioner, the same does not constitute a Force Majeure event justifying grant of extension of time to the petitioner.

35. Having held the above, the question would still remain on the right of the respondent to encash the Bank Guarantee and appropriate the proceeds thereof towards the liquidated damages.

36. Some of the Clauses of the PPA, relevant to the above issue are reproduced hereinunder:

“3.2 Consequences of non-fulfilment 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 fulfil any one or more of the conditions specified in Article 3.1 due to any Force Majeure event, the time period for fulfilment 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 conditions 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 format provided in Schedule I.

xxxxx

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.

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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 proportionate to the Capacity not commissioned.

b. Delay of more than one (1) month and upto two months – NVVN will encash 40% of the total Performance Bank Guarantee proportionate to the Capacity not commissioned.

c. Delay of more than two and upto three months – NVVN will encash the remaining Performance Bank Guarantee proportionate to the Capacity not commissioned.

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

4.6.3 The maximum time period allowed for commissioning of the full Project Capacity with encashment of Performance Bank Guarantee and payment of Liquidated Damages shall be limited to eighteen (18) months from the Effective Date. In case, the commissioning of the Power Project is delayed beyond eighteen (18) months from the Effective Date, it shall be considered as an SPD Event of Default and provisions of Article 13 shall apply and the Contracted Capacity shall stand reduced/amended to the Project Capacity Commissioned within 18 months of the Effective Date and the PPA for the balance Capacity will stand terminated.

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

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“9. ARTICLE 9: APPLICABLE TARIFF

9.1 The SPD shall be entitled to receive the Tariff of Rs.8.99/ kWh with effect from the Scheduled Date of Commissioning.

9.2 Provided further that if as a consequence of delay in Commissioning of the Unit(s) beyond the scheduled commissioning date, subject to Article 4, there is a change in CERC Applicable Tariff, the changed Applicable Tariff for the Unit(s) not be commissioned shall be the lower of the following:

- (a) Tariff at 9.1 above*
- (b) CERC Applicable Tariff as on the Commissioning Date of the balance Unit(s)*

9.3 In the event of change in tariff due to delay in commissioning of Unit(s), the Weighted Average Tariff for the Contracted capacity shall be applied considering Capacity of Units commissioned before and after the Scheduled Commissioning Date within 18 months but after changed tariff period, as Weights for determination of Weighted Average Tariff for the period when both the tariffs are applicable.”

37. Counsel for the petitioner submits that the respondent was to pay a fixed rate of tariff with effect from the scheduled date of commissioning to the petitioner. As the electricity was to be supplied to the Discom at the known tariff, damages were easily ascertainable for the respondent. The respondent, however, led no evidence in support of such damages. He further submits that in terms of Article 9.2 of the PPA, the petitioner would have also suffered a consequence of reduction in tariff for its failure to meet the scheduled commissioning date. Therefore, there was no reason for the petitioner to have intentionally caused such delay and the petitioner cannot be penalized by forfeiting the amount of Performance Bank Guarantee and by imposition of liquidated damages on it.

38. I have considered the submissions made by the counsels for the parties. Article 4.6.1 of the PPA provides for a graded imposition of liquidated damages depending upon the period of the delay. Article 9.2 provides for a separate consequence of delay where the applicable tariff changes during the period of the delay. The Agreement having itself provided for consequence of the delay and that too in a graded manner depending upon the time of such delay, has to be enforced. It is further to be noted that the object and purpose of the JNNSM was to promote Equitable 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 was entered into for social and larger objective and purpose. It would therefore, be difficult, if not impossible, to prove the actual damage or loss to the society by such delay and therefore, the parties stipulated liquidated damages as a consequence of any delay caused in commissioning the project. The parties at the time of entering into of the Agreement were also aware of the difference between the tariff that the respondent can claim from the Discoms and the tariff that is paid by it to the petitioner, however, still stipulated liquidated damages for the delay in commissioning of the project and that too depending on the period of the delay. Such damages, therefore, cannot be said to be unreasonable. In any case, no such plea seems to have been taken by the petitioner before the Arbitral Tribunal.

39. As far as the issue of costs of Rs.10,00,000/- awarded by the Arbitral Tribunal as costs of proceedings incurred in favour of respondent

is concerned, I do not find any reason to interfere with the discretion exercised by the Tribunal.

40. In view of the above, I find no merit in the present petition and the same along with pending application is dismissed with no order as to costs.

APRIL 15, 2019
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NAVIN CHAWLA, J

