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IN THE HIGH COURT OF DELHI AT NEW DELHI

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*Judgement reserved on: 09.05.2024**Judgement pronounced on: 03.07.2024***+ FAO(OS) (COMM) 263/2018 & CMAPPL. 47514/2018****M/S NTPC VIDYUT VYAPAR NIGAM LTD Appellant****Through: Mr Chetan Sharma, ASG, with Mr
Puneet Taneja, Mr Amit Gupta, Mr
Saurabh Tripathi, Mr Manmohan and
Mr Vikramaditya Singh, Advocates.****versus****OSWAL WOOLEN MILLS LTD Respondent****Through: Mr Sanjeev Mahajan, Ms Sarika V.
Mahajan, and Mr Pranjal Tandon,
Advocates.****CORAM:****HON'BLE MR JUSTICE RAJIV SHAKDHER****HON'BLE MR JUSTICE AMIT BANSAL****RAJIV SHAKDHER, J.:****Background**

1. This is an appeal preferred by NTPC Vidyut Vyapar Nigam Ltd. [hereafter referred to as "NTPC"], *inter alia*, under Section 37 of the Arbitration and Conciliation Act, 1996 [hereafter referred to as the "1996 Act"], against the judgment of the Single Judge dated 25.09.2018 [hereafter referred to as, "impugned judgment"].
2. The learned Single Judge, *via* the impugned judgment, reversed two



out of the three claims found in favour of the respondent, i.e., Oswal Woolen Mills Ltd. [hereafter referred to as “Oswal”] by the plurality members of the Arbitral Tribunal (AT) *via* the award dated 08.07.2015.

2.1. NTPC had preferred a petition under Section 34 of the 1996 Act to assail the following three claims, awarded in favour of Oswal:

(i) Reimbursement of the cost incurred by Oswal for laying transmission lines from its solar power project to the 132/33 KV substation located at the State Transmission Utility (STU) grid. In this case, the STU was Rajasthan Rajya Vidyut Prasaran Nigam Ltd [in short, “RRVPN”].

(ii) Recovery of income lost by Oswal due to transmission losses spread over 25 years, i.e., the tenure of the Power Purchase Agreement [PPA] executed between the disputants.

(iii) Refund of Rs. 1,82,63,000/- retained by NTPC by encashing the Performance Bank Guarantee furnished by Oswal on account of delay of less than one day (i.e., fourteen hours) in commissioning the solar power plant.

2.2 Since NTPC succeeded in persuading the learned Single Judge to reverse the decision of the plurality members of the AT insofar as the first two claims are concerned, the instant appeal is confined to the third claim. NTPC is, thus, aggrieved by the view taken by the learned Single Judge that the decision of the AT was neither unreasonable nor perverse, as according to the AT, the "default" was technical and beyond the control of Oswal.

2.3 Significantly, the learned Single Judge's view was pivoted on the AT's finding of fact that the solar power plant was connected to the grid on 09.01.2012 at 11:15 pm, and therefore, in the absence of sunlight, power could be generated only on 10.01.2012, resulting in the commissioning



taking place only at 2:00 pm on 10.01.2012.

2.4 In this context, Oswal flagged the fact that although the commissioning committee constituted for this purpose was instructed by STU to visit the site *via* communication dated 27.12.2011, it chose to carry out the assigned task only on 09.01.2012.

3. Therefore, the moot question which arises for consideration is whether NTPC ought to have retained the monies received upon encashment of 20% of the total value of the Performance Bank Guarantee furnished in exercise of the power vested under Article 4.6 of the PPA.

Prefatory Facts

4. Before we answer the question posed above, it would be relevant to etch out the broad contours of the case.

4.1 The Ministry of Power appointed NTPC as the designated nodal agency to invite proposals for setting up grid-connected solar power projects under the Jawaharlal Nehru National Solar Mission (JNNSM).

4.2 Solar power projects had to progress in phases and batches. As indicated above, the PPAs executed by NTPC were required to have a tenure of 25 years.

4.3 Guidelines for inviting proposals for Batch I projects were issued by the Ministry of New and Renewable Energy (MNRE) in July 2010. Consequent thereto, NTPC, on 18.08.2010, issued a Request for Selection (RfS) inviting bids from interested parties. The bids had to be submitted by 20.10.2010.

4.4 Oswal, amongst other bidders, submitted its RfS. Oswal's RfS proposed a 5 MW solar power project at village Natisara, Tehsil Phalodi, District Jodhpur, Rajasthan. Thereafter, NTPC issued a Request for Proposal



(RfP) based on the discount offered by each of the bidders in paisa and KW/hour on the Central Electricity Regulatory Commission-applicable tariff. The RfP was issued to the bidders on 29.10.2010.

4.5 After evaluation of the RfPs submitted by the bidders, Letters of Intent [hereafter referred to as, “LoI”] were issued to the successful bidders, including Oswal, on 11.12.2010.

4.6 Insofar as Oswal was concerned, it entered into a PPA with NTPC on 10.01.2011. The PPA became effective on that date. Significantly, under the PPA, the Scheduled Commissioning Date (SCD) for the solar power project awarded to Oswal was fixed as 09.01.2012, as noted above.

4.7 The record discloses that the Superintendent Engineer, RRVPN, Jodhpur, wrote to his counterpart in Jaipur on 27.12.2011 that since Oswal’s solar power project was almost complete, it could be commissioned and connected by 30.12.2011. The relevant part of the communication is extracted hereafter:

“ Sub: Connectivity for Solar Power Project at 132 kV GSS, Aau.

It is intimated that 33kV bay work at 132 kV GSS Aau is almost completed and RVPN will be in position to commission and provide the connectivity on 33kV level from this GSS to M/s Oswal Woolen Mills Ltd. By 30.12.11.

Therefore, you are requested to take necessary action for providing the connectivity to the Solar Power Developer.”

4.8 On the same day, i.e., 27.12.2011, the Electrical Inspector, Government of Rajasthan, Jodhpur wrote to Oswal that it had been granted provisional permission to energise the subject installations.

4.9 Importantly, on 29.12.2011, Oswal wrote to the Electrical Inspector, Government of Rajasthan, Jodhpur, that its 5 MW solar power project was complete and ready to be energised. Accordingly, *via* the same letter, Oswal



requested the issuance of a license for energising the power generation system along with associated 33kV and 415-volt equipment. Among other things, Oswal emphasised that since its commissioning date was 09.01.2012, the license should be issued on the same date, i.e., 29.12.2011. Oswal provided the relevant details to the Electrical Inspector *via* the communication mentioned above.

5. The record reveals that in the background of the aforementioned communications emanating from Oswal, the office of the Superintendent Engineer (RDPPC-Jodhpur DISCOM) had taken out an office order dated 03.01.2012, constituting a committee to witness the commissioning of the solar power plant constructed and installed by Oswal.

6. The record shows that in the first instance, Oswal was informed that the solar power plant had been commissioned on the SCD, i.e., 09.01.2012. However, later on, *via* communication dated 28.02.2012, NTPC informed Oswal that it had been told by Rajasthan Renewable Energy Corporation Ltd [hereafter referred to as, "RREC"], *albeit via* letter dated 22.02.2012, that the certificate issued earlier exemplified connectivity of the solar plant with the grid and did not concern itself with completion/commissioning. Accordingly, OSWAL was directed to obtain a commissioning certificate from RREC. The communication dated 28.02.2012 is extracted hereafter:

"Sub:5MW Solar PV Project Under JNNSM, Phase-I, Batch-I

Dear Sir,

This has reference to the certificate issued by State Nodal Agency towards commissioning of your PV Project.

We have been informed by RREC vide their letter dated 22.02.2012 that the certificate earlier issued were towards connectivity with Grid and not towards Completion/Commissioning.



Accordingly you are requested to obtain the commissioning certificate from RREC so as to comply the requirements of Article 4.6.1 of PPA. Above may please be furnished within 7 days from the date of issue of this letter. Non submission of above shall be construed that you have not achieved the above by schedule date of commissioning and NVVN shall be constrained to take action as per provisions of PPA.

This is without prejudice to any provisions of PPA.”

7. To avoid prolixity, one would only notice that there was back and forth on this issue. It was Oswal's stand that commissioning was complete as soon as it was in a position to supply power and thus make contracted capacity available on the SCD, i.e., on 09.01.2012. It was, hence, contended by Oswal that the definition of "commissioning", as per the MNRE guidelines (worked out on 24.02.2012), could apply only to solar power projects which came into existence after 24.02.2012, i.e., new solar power projects. In support of this plea, reference was made to clause 4.6.1 of the PPA, which defined “commissioning” as to commence “supply of power and making the contracted capacity available for dispatch by the scheduled commissioning date.”

7.1 The aforesaid was communicated by Oswal to NTPC via later dated 20.03.2012. Suffice it to state that ultimately, a report was generated by the review committee, the relevant parts of which are extracted hereafter:

“Report of the Committee for ascertaining Commissioning of Grid Connected Solar PV Project under Phase-I Batch-1 of JNN SM in respect of Oswal Woolen Mills Ltd 5MW Solar PV Power Project located at Village Jatisara, Tehsil : Phalodi, Distt. Jodhpur, Rajasthan

Background

In the review meeting taken by Secretary MNRE on commissioning of Solar Power Projects under JNN SM Phase – I on 22nd December 2011; Rajasthan Renewable Energy Corporation Ltd (RREC), the State Nodal Agency was



assigned responsibility for coordinating amongst various agencies like Rajasthan Discoms, Rajasthan State Transmission Utility (RVPNL) and facilitating commissioning of Solar PV Plants in the state of Rajasthan.

MNRE vide letter dated 24th February 2012 (Copy at Annexure-I), provided a definition to commissioning of Solar PV projects. In accordance to MNRE letter a Committee comprising representative from RREC, JdVVNL, RVPNL, NVVN and SPD (Copy at Annexure- II) visited Oswal Woolen Mills Ltd (OWML) on 3rd Mar 2012 at Village : Jatisara, Tehsil :- Phalodi, Distt. Jodhpur for ascertaining the fulfillment of definition of commissioning of projects.

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Subsequent to the visit of Committee, the practical difficulties in ascertaining the commissioning as per definition of MNRE letter dated 24th February 2012, were discussed with MNRE on 19th March 2012. MNRE vide its letter dated 22nd March 2012 (Copy at Annexure-III) has issued clarifications on the definition of commissioning.

According to the definition of commissioning of Solar PV Projects vide MNRE letter dated 24th February 2012 and further clarifications made by MNRE vide letter dated 22nd March 2012, Installation Report and Commissioning Report based on information furnished by OWML has been compiled.

Oswal Woolen Mills Ltd.

Village: Jatisara, Tehsil:- Phalodi, Distt. Jodhpur

I. Installation Report [in the format provided by MNRE]

A	Capacity of the Plant (MW)	5MW
B	Technology used/ Capacity	Thin Film/133Wp to 150Wp
C	Angle from horizontal at which array is installed	Seasonal Tilt 5, 15 & 35 DEG
D	Number of modules installed of each type	150Wp – 18846 Nos 2.827 MW 133Wp – 4245 Nos 0.565 MW 139Wp – 7965 Nos 1.107 MW 142Wp – 8130 Nos 1.154 MW Total – 39186 Nos 5.653 MW



<i>E</i>	<i>Source(s) of the modules (Name of supplier with address)</i>	<i>Nexpower technology corporation No 2 houke S Rd, houli Township, Taichung County 421, Taiwan Du Pont Apollo (Shenzhen) Limited Du Pont Apollo Hi-Tech Industrial Park, East Guangming Hi-Tech Zone, Guangdong 518107, PRC</i>
<i>F</i>	<i>Number of PCUs installed</i>	<i>10 Nos</i>
<i>G</i>	<i>Source of the PCUs (Name of supplied with address)</i>	<i>Satcon Technology Corporation 25, Drydock Avenue, Boston, MA- 02210, USA</i>
<i>H</i>	<i>*Date of Installation of Full capacity of PV Array PCUs Transformer</i>	<i>9th January 2012 14th December 2011 8th January 2012</i>
<i>I</i>	<i>*Date of interconnection with grid</i>	<i>9th Jan 2012</i>

**Dates as informed by SPD*

II. Commissioning Report [As per MoM dated 19.03.2012 issued by MNRE vide letter 22.03.2012]

a. Copy of Certificate of the Discom/ STU stating that the plant has been synchronised with the grid.

A Commissioning Report dated 9th January 2012 issued by the Commissioning Committee (comprising of RREC, RVPNL, Jodhpur Discom and SPD) and Commissioning Certificate dated 16th January 2012 issued by SE, RDPPC Jodhpur Discom on the basis of commissioning Report dated 9th January 2012, submitted by OWML pertains to connectivity of the plant with grid.

MRI Record forms the basis for ascertaining the synchronisation and first injection of power supply from the Project.

As per the Synchronisation certificate & MRI record (Copy at Annexure-IV) made available by JdVVNL, it is noticed that the connectivity to the station was made at 23:15 Hrs on 9th January 2012 and the first commencement of supply / injection to the grid started on 10th January 2012.

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Commissioning Analysis:

a. As per the affidavit submitted by OWML it is observed that all equipment has been completed on 9th January 2012.

b. The MRI record and certificate issued by STU as mentioned above substantiates that the project has commenced supply into the grid on 10th January 2012.

c. In accordance to clarification issued MNRE dated 22nd March 2012,



the Project will be considered as commissioned if all equipment as per rated project capacity has been installed and energy has flown into grid. d. In view of above the Committee is of the opinion that the Project may be considered commissioned on 10th January 2012.”

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[Emphasis is ours]

7.2 The following note, handwritten on behalf of Oswal, is appended to the report available on record:

“Whereas Oswal is of the opinion that they have obtained a commissioning certificate on 9th Jan 2012 through a process followed and suggested by the Rajasthan State Government under the authority of NVVN and MNRE (as mentioned in this report). The same is duly signed by all government officials. Further this being one of the first projects under Natural Solar Mission, still there was no NVVN or MNRE representative to explain, certify and guide the process of commissioning, inspite of an advance notice. Oswal is being made a scapegoat in a fault done by state officials and lack of awareness in the Central Government.

Further the entire exercise of changing the definition of commissioning and preparing the report is futile because it has happened after the project was commissioned and oswal had completed all its obligations. Hence oswal has the right to challenge this report under the Court of Law.”

7.3 The sustainability of NTPC’s claim rests on this report.

8. As would be evident, the review committee's final analysis was that since the energy flowed into the grid on 10.01.2012, that would be considered the commissioning date. This analysis was based on a clarification issued by MNRE via communication dated 22.03.2012.

9. Since the subject bank guarantee, issued by Allahabad Bank and valued at Rs. 1,82,63,000, had been encashed in the meantime, the parties took this dispute, as indicated above, to the AT for adjudication.

10. The plurality members of the AT, via award dated 08.07.2015, had the following to say in respect of encashment of the subject bank guarantee by NTPC:



“Learned counsel for Claimant has submitted that one day delay in commissioning was adequately covered in the above Article 4.5.1(c) of PPA in the following facts and circumstances on record. He submits that it is admitted position that as per the Synchronization Certificate at page No. 40 with RW1's Affidavit being part of Exhibit RW1/9, connectivity with Claimant's Plant to the grid had been made on 09.01.2012 at 23:15 hrs. (11.15 pm), and commencement of power supply into the grid from Project had started on 10.01.2012 at 14:00 hrs. (2 pm). Connectivity of Claimant's Project to the grid had been made on 09.01.2012 at 11.15 pm by a Committee duly constituted by concerned Superintending Engineer, Jodhpur Discom, Jaipur on 03.01.2012 over which Claimant had no control at all. In fact, 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 too Claimant had no control at all, took some time on their own part and it was thereafter that concerned Superintending Engineer, Jodhpur Discom, Jaipur over whom too Claimant had no control at all, acted only on 03.01.2012 by constituting requisite Committee. And the said committee over which, as already stated, Claimant had no control at all, visited Claimant's Solar Power Project only on 09.01.2012 and completed all formalities of connectivity admittedly at 11.15 pm. RW-1 Sh. Vijay Gulati has admitted in response to Question No. 50 during his Cross-Examination that for synchronisation of system, power has to flow from both ends, i.e., from the Grid as well as from the Project. Learned counsel for Claimant has further submitted that the Tribunal can even take a judicial notice of the fact that no power could have been generated on 09.01.2012 at 11.15 pm i.e. night, as also admitted by RW-1 Sh. Vijay Gulati in response to Question No. 50 during his Cross-Examination, in absence of sunlight and so obviously, power got generated next day, i.e., on 10.01.2012, and only then synchronisation of Project equipments (ten invertors connected to five transformers as a matter of record as admitted by RW-1 Sh. Vijay Gulati in answer to Question No. 55 during his cross-examination) with Grid was done taking minimum possible time, and thereafter the power admittedly started flowing into already connected Grid at 2 pm. RW-1 Sh. Vijay Gulati has further admitted in response to Question No. 56 during his cross-examination at pages 99-101 (marked as Article-1) indicated commissioning procedure. Then in response to Question No. 56 during his Cross-Examination, he has further admitted that it takes time sequentially for testing all the invertors'. Learned counsel for Claimant has drawn our attention to the fact that there were ten invertors as admitted by RW-1 Sh. Vijay Gulati himself in answer to Question No. 55. Learned Counsel for Claimant has



urged the Tribunal to take judicial notice of the fact that taking 5/6 hours time after sun rise on 10.01.2012 for synchronisation of the entire system with the Grid and injecting power therein admittedly at 2 pm (i.e., in the afternoon, the same day), cannot be considered as unusual and hence there was no lapse at all on the part of Claimant.

It was argued by Learned counsel for Claimant that, case of Claimant was thus squarely covered under Article 4.5.1 (c) of PPA, i.e., Force Majeure Events affecting SPD. And since this clause is an inbuilt exception to the applicability of Article 4.6.1 of PPA, Respondent was not justified in invoking 20% PBG valuing Rs. 1,82,63,000/- (One crore eighty two lac and sixty three thousand) vide its letter dated 24.04.2012 (Exhibit-C1/16) on the strength of Article 4.5.1 (a) of PPA as stated in its letter dated 22.05.2012 (Exhibit C1/17j. We tend to agree with his submission.

At this stage Learned counsel for Respondent for the first time submitted that what is Force Majeure has been defined in Article 11.3.1 of PPA itself, and tried to convince us that case of Claimant does not qualify thereunder. This was a new argument sought to be raised for the first time on behalf of Respondent. **Be that as it may, we have perused the said Article and analysed the same with able assistance rendered by Learned counsel for Claimant, and are fully convinced that facts and circumstances of the case of Claimant as borne out from record as detailed above squarely fall within the ambit of Article 11.3.1 (a) &(d). We reject this belated contention of Learned counsel for Respondent, and hold that case of Claimant is squarely covered in Article 4.5.1 (c) of PPA, i.e., the Force Majeure Events affecting SPD.**

Learned counsel for Claimant has further argued that even if for arguments' sake it is presumed that Claimant's case does not fall under exception to Article 4.5.1(c) of PPA for any reason whatsoever, then also Respondent is not entitled to encash 20% of total PBG as Liquidated Damages under Article 4.6.1(a) of PPA. This was his alternative argument. He has placed reliance on the Constitution Bench judgement of Supreme Court entitled Fateh Chand Vs. Balkishan Dass AIR 1963 SC 1405. He has drawn our attention to the two basic principles. One, that even in case of the Liquidated Damages, the court has to decide the reasonable compensation in the proved facts and circumstances of each case subject to the maximum amount stipulated. Second, Section 74 of the Indian Contract Act only dispenses with proof of actual loss or damage, but it does not justify the award of compensation when in consequence of breach no legal injury at all has resulted because compensation for breach of contract can be awarded to make good loss or damage only. **Even judging the case of the parties, on this touchstone, we find that Respondent has not at all pleaded any legal injury or any facts and circumstances**



even remotely indicating that Respondent has suffered any loss at all on account of one day delay in commissioning of Plant by Claimant. It will be apt to put on record that there was not even delay of one full day as plant was admittedly commissioned at 2 pm during-day on 10.01.2012 itself following the scheduled commissioning date, i.e., 09.01.2012. We fervently feel that there was absolutely no justification for forfeiting a huge sum of Rs. 1,82,63,000/- (One crore eighty two lac and sixty three thousand) by Respondent on the basis of only few hours delay. Learned counsel for Respondent has placed reliance on a decision of the Supreme Court (2-Judge Bench) in Civil Appeal Nos. 1140-1441/2015 in support of the forfeiture of the amount by Respondent. On perusal, we find that the said case pertained to situation where contract for constructing a sewage pumping station had been terminated by DDA for non-execution of Project by the contractor, in which circumstances the Hon'ble Court had allowed half of the stipulated amount as a reasonable compensation to DDA. We are of the considered opinion that the said decision has no application to the facts and circumstances of the instant case where there is admittedly only a few hours delay in commissioning of Power Plant by Claimant and admittedly no legal injury or even remote loss whatsoever at all has been pleaded by Respondent on this account nor it has suffered any.

In the ultimate analysis we declare that the invocation of Performance Bank Guarantee by Respondent was not justifiable in the facts and circumstances of the present case on both the above grounds of facts and law, and consequently we direct-Respondent to refund Rs. 1,82,63,000/- to Claimant."

[Emphasis is ours]

11. As alluded to hereinabove, the Single Judge, *via* the impugned judgment, sustained the view taken by the plurality members of the AT on this aspect of the matter. In other words, the stand taken by Oswal that the subject bank guarantee had been wrongly encashed and, therefore, the amount in issue should be refunded with interest was accepted by both the AT and the Single Judge.

12. NTPC, being aggrieved, has preferred the instant appeal.



Submissions by counsel

13. Against this backdrop, Mr Chetan Sharma, learned ASG, advanced arguments on behalf of NTPC, assisted by Mr Puneet Taneja, Advocate. Insofar as Oswal was concerned, Mr Sanjeev Mahajan made submissions.

14. The submissions made by Mr Sharma can broadly be paraphrased as follows:

14.1 The stand taken by Oswal that the delay in connecting Oswal's power plant to the grid was an aspect over which it had no control is contrary to clauses 3.1 and 4.1.1(a) of the PPA. As per the said clauses, all consents, clearances and permits required for the supply of contracted power had to be obtained by Oswal at its own cost and risk. Therefore, the onus for delay in connecting Oswal's solar power plant to the grid could not be placed on NTPC.

14.2 Under the PPA, Oswal was required to obtain necessary approvals and acknowledgements so that commissioning was completed on the SCD given in the PPA, i.e., 09.01.2012.

14.3 The stand taken by Oswal that the delayed inspection by the committee ought to be construed as a reason beyond its control or should be categorised as a force majeure event, as defined in Article 11 of the PPA, is misconceived. Delay due to acts of the commissioning committee falls outside the ambit of clause (a) to (d) of Article 11.3.1. Clause (d) of Article 11.3.1 adverts to a force majeure event under the Power Sale Agreement (PSA) entered into between NTPC and the concerned DISCOM. The delay caused by the conduct of the commissioning committee is not covered by Article 11.3.1 clause (d).

14.4 Without prejudice to what is submitted above, Article 11.4 of the PPA



provides for exclusion to the force majeure event. Clause (f) (iii) of Article 11.4.1 excludes any breach or default under the PPA as a force majeure event. Since Oswal's failure to obtain acknowledgement/approval of a certificate of readiness to commission the solar power plant by the given SCD would constitute a breach of the mandatory conditions provided under Articles 3.1 and 4.1, it could not be categorised as a force majeure event.

14.5 The commissioning of a solar power project involves energy being supplied to the grid and the discharge of energy. Although the commissioning committee acknowledged that Oswal achieved connectivity with the grid on 09.01.2012 at 11:15 p.m., the supply of power commenced only on 10.01.2012 at 2:00 p.m. Therefore, Oswal clearly delayed commissioning the solar power plant.

14.6 As per Article 4.1.1 (c) of the PPA, the obligation cast on Oswal was to supply power up to the contracted capacity, not later than the SCD. Therefore, Oswal need not have waited till commissioning and thus, could have discharged energy earlier, which would have ensured that commissioning occurred on the SCD, i.e., 09.01.2012.

14.7 Therefore, as per clause (f)(iii) of Article 11.4.1 of the PPA, the delay in commissioning due to the acts of Oswal would stand excluded from force majeure events.

14.8 The AT committed an error in holding that the delay in commissioning did not cause any loss to NTPC. NTPC is a public utility and thus, it is difficult, rather impossible, for it to compute the actual loss caused by the delay in the commissioning of the subject solar power plant. Therefore, pre-estimated liquidated damages provided in the PPA formed the correct basis for awarding damages in case of breach [See *NTPC Vidyut*



Vyapar Nigam Ltd. v Saisudhir Energy Ltd., 2018 SCC Online Del 13477].

14.9 Clause (a) of Article 4.6.1 stipulates the imposition of damages at the rate of 20% of the total value of the performance bank guarantee furnished by the contractor where the delay in commissioning does not exceed one month. Thus, merely because the delay in commissioning was one day, damages that were otherwise a genuine pre-estimate of loss likely to be caused to NTPC upon breach by Oswal could not be waived. Therefore, Oswal cannot argue that the encashment of the subject performance bank guarantee was not in line with the terms of the agreement executed between the disputants.

15. In response, Mr Sanjeev Mahajan primarily relied upon the findings returned by the AT and the observations made by the Single Judge. In particular, it was highlighted by Mr Mahajan that although Superintendent Engineer, Jodhpur had written to his counterpart in Jaipur on 27.12.2011 to take necessary steps for providing connectivity, the committee was constituted by RRVPN only on 03.01.2012. Furthermore, the commissioning committee over which Oswal had no control visited the subject solar power plant only on 09.01.2012. Since the commissioning committee undertook the inspection and completed connectivity-related formalities only at 11:15 pm on 09.01.2012, power could flow into the grid only the following day. The events mentioned above were clearly beyond Oswal's control, and thus, Oswal could not be blamed for what was a mere technical default.

15.1 NTPC had not pleaded legal injury. There was no averment made by NTPC that it has suffered a loss on account of less than a day's delay. Despite this, NTPC imposed liquidated damages at the rate of 20%, although



clause (a) of Article 4.6.1 of the PPA covered delay up to a maximum of one month.

15.2 NTPC has neither pleaded nor shown that the award was patently illegal regarding the issue at hand. The scope of appeal under Section 37 is narrow and does not entail a review on merits [See *MMTC Ltd. v Vedanta Ltd.*, (2019) 4 SCC 133 and *Ssangyong Engineering v NHAI*, (2019) 15 SCC 131].

15.3 NTPC's reliance on the judgment of the Supreme Court in *ONGC v Saw Pipes* (2003) 5 SCC 705 is misconceived as Article 4.6 of the PPA does not state that the damages sought to be imposed are a genuine pre-estimate. Likewise, reliance on the judgment of the Supreme Court in *Kailash Nath Associates v DDA* (2015) 4 SCC 136 is misplaced. Paragraphs 43-44 of the judgment in *Kailash Nath* states in no uncertain terms that damages, which are a genuine pre-estimate, can be granted only if there is a breach and the aggrieved party suffers a loss; both conditions must be fulfilled.

Reasons and Analysis

16. Having heard the learned counsel for parties and perused the record, what has emerged, about which there can be no dispute, are the following facts and circumstances:

- (i) Oswal, after being declared a successful bidder, was issued a LoI dated 11.12.2010. Via the said LoI, NTPC expressed its intent to purchase power from the proposed new grid connected to Oswal's power plant.
- (ii) In line with the LoI, NTPC and Oswal executed a PPA on 10.01.2011, which, among other things provided under Article 1.1, stated that the SCD for Oswal's power plant would be 09.01.2012.
- (iii) On 29.12.2011, Oswal indicated to the Electrical Inspector, Jodhpur,



that the subject power plant was complete and ready to be energised. In particular, the said communication emphasised that a license should be issued on that date itself, as the SCD fixed as per the contract was 09.01.2012. A copy of this communication was, *inter alia*, marked to NTPC.

(iv) Via office order dated 03.01.2012, the Superintendent Discom, Jaipur constituted a commissioning committee. The commissioning committee visited the site for the first time on 09.01.2012.

(v) In the interregnum, the commissioning committee, constituted via order dated 03.01.2012, rendered a report, which was the outcome of a meeting held on 09.01.2012. This report/minutes of the meeting, *inter alia*, adverted to the following details regarding commissioning:

“This is in compliance to the office order of the Superintending Engineer (RDPPC), Jodhpur Discom, Jaipur issued vide office order No. SE/RDPPC/XEN(C&R)/D-1763 Dt.3-1-2012, the committee constituted vide said order completed the work for commissioning of 33KV Bay & Metering Equipment to Interconnect the 5MW Solar Power Jalisara, Tehsil Phalodi, District – Jodhpur on 9th Jan 2012.

The details of Solar Power Plant are as under:

<i>S/N</i>	<i>Name of Solar Power Developer & Location</i>	<i>Capacity Mentioned in Agreement</i>	<i>Connectivity</i>	<i>Details of Solar Power Plant (Transformer, Inverter, Modules, Switchgear)</i>
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1	M/s Oswal Wollen Mills Ltd., Village Jatisara, Tehsil — Phalodi, District — Jodhpur	50MW	RRVPNL's 132 KV GSS, RVPNL, Aau. (Jodhpur) Metering Equipments installed of Delivery Point <u>S.No. of 33 KV CT 3 nos.</u> 1. R Phase – F9863 2. Y Phase – F9862 3. B Phase – F9866 <u>S.No. of 33 KV PT 3 Nos.</u> 1. R Phase – G3632 2. Y Phase – G3633 3. B Phase – G3634 <u>S.No. of Main ABT Meter:</u> 11071566 <u>S.No. of Check ABT Meter:</u> 11071567 Metering Equipments installed of SPD premises (Standby Meters) <u>S.No. of 33 KV CT 3 nos.</u> 1. R Phase – F9864 2. Y Phase – F9865 3. B Phase – F9861 <u>S.No. of 33 KV PT 3 Nos.</u> 1. R Phase – G3635 2. Y Phase – G3631 3. B Phase – G3630 <u>S.No. of Standby ABT Meter:</u> 11071565	A) <u>Transformer</u> 5x 1250 KVA, 265V/33KV 1x100KVA, 433V/33KV Sr.No. 1. D-10723 2. D-10724 3. D-10725 4. D-10726 5. D-10727 6. 66758 B) <u>Inverters</u> Make/Type: SATCON Total: 10(500 KW each) SNo.SKEFM1300B, SKEFM2400C SKEFM2400F, SKEFM2400G, SKEFM2400M, SKEFM2400P, SKEFM2400Q, SKEFM13007, SKEFM24001, SKEFM24007 C) <u>Modules</u> Make: NEX POWER, Taiwan Total: 18846 NOs Rating :150 Wp each Make : DUPIONT, China, Total : 20340 NOs Rating : 133 Wp (4245 nos.) 139 Wp (7965 nos.) 142 Wp (8130 nos.) D) <u>Switgear Panels</u> Make: SCHNEIDER (AREVA) Protection Provided: Under/Over voltage, Over current & Earth fault.
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The details of commissioning is as under

- (i) Line Bay at 132KV GSS, Aau commissioned on 25.12.2011.
- (ii) Main, Check and Standby Metering equipments commissioned at 132KV GSS, Aau and SPD premises on dt. 09.1.2012.
- (iii) 33KV line charged on dt. 09.01.2012.
- (iv) Complete system commissioned on dt. 09.01.2012.

The Joint Inspection Report of metering arrangement & copy of permission of Electrical Inspector is enclosed herewith. ”

[Emphasis is ours]

(vi) Based on the aforesaid report/minutes of the meeting dated 09.01.2012, Oswal was issued a commissioning certificate dated 16.01.2012. The certificate, amongst other things, adverted to the following:

**“SOLAR PV POWER GENERATION PROJECT-COMMISSIONING
CERTIFICATE**

This is to certify that M/s Oswal Woollen Mills Ltd, having its registered office at Oswal Woollen Mills Ltd., G.T. Road, Sherpur Ludhiana (India), has successfully commissioned 01 No. X-05 MW Solar PV Power Generation Project having THINFILM TECHNOLOGY at Village-Jatisara, Tehsil-Phalodi and District- Jodhpur on dated 9th Jan 2012.

XXX

XXX

XXXX

The above mentioned Solar PV Power Generation Project at the site Village Jatisara Tehsil Phalodi and District Jodhpur is connected to newly installed metering arrangement on 33KV Line at 132 KV GSS, Aau.

The commissioning certificate is issued on the basis of the minutes of the meeting dated 9th Jan '2012.”

[Emphasis is ours]

(vii) It appears, thereafter, MNRE constituted a review committee to discuss the issue concerning the commissioning of solar plants to the grid under Phase 1 of the JNNSM programme. In brief, what was sought to be addressed by the review committee was when would a solar power plant be considered as commissioned, having regard to the definition of



commissioning given in the guidelines issued by MNRE. This aspect emerges upon perusal of the communication dated 24.02.2012, addressed by MNRE to NTPC.

(viii) It is in this context that NTPC on 28.02.2012 wrote to Oswal that it had received a communication dated 22.02.2012 from RREC that the earlier certificate issued to it concerned connectivity with the grid and not commissioning of the solar power plant. Accordingly, NTPC was requested to obtain a commercial certificate from RREC in terms of Article 4.6.1¹ of the PPA.

(ix) The record discloses that there was back and forth (*via* communications exchanged between the disputants) on the issue concerning the commissioning date, which concluded with the report of the review commissioning committee. In this report, the review commissioning committee opined that the subject power plant was commissioned on 10.01.2012. Pertinently, this opinion was based on the clarification issued by MNRE *via* communication dated 22.03.2012.

17. Given this backdrop, the AT accepted the submission advanced on behalf of the respondent that levy of liquidated damages, as per Article

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

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



4.6.1(a) of the PPA, was, among other things, subject to the exception found in clause (c) of Article 4.5.1². In other words, the exception to levy of liquidated damages as stipulated in clause (a) of Article 4.6.1 of the PPA was force majeure events affecting the Solar Power Developer [hereinafter referred to as, “SPD”], in this case, Oswal.

17.1 The AT accepted the submission made on behalf of Oswal that although the concerned officials had decided on 27.12.2011 to take necessary steps for providing connectivity, the committee which was to oversee this aspect of the matter was constituted only on 03.01.2012—something over which Oswal had no control.

17.2 The AT also noted the submission made on behalf of Oswal that the commissioning committee visited the site where the solar power project plant was located on 09.01.2012. Admittedly, the formalities concerning connectivity concluded on that date only at 11:15 p.m.

17.3 The AT also adverted to the submission made on behalf of Oswal that for synchronisation of the system, power has to flow from both ends, i.e., the grid as well as the solar power plant, and since connectivity occurred only at night on 09.01.2012, when the sun had set, Oswal could have generated power from the plant only on the following day, i.e., 10.01.2012. The fact

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

- a) any NVVN Event of Default; or
- b) Force Majeure Events affecting NVVN, or
- c) Force Majeure Events affecting the SPD,

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



that synchronisation of the entire system takes about five to six hours after sunrise, as all inverters have to be sequentially tested, was an aspect that was emphasised on behalf of Oswal and noticed by the AT.

18. The AT, based on the evidence and submissions advanced on behalf of Oswal, concluded that a force majeure event affecting the SPD/Oswal had occurred, and therefore, liquidated damages could not have been levied.

19. As regards the argument advanced by NTPC based on the definition of force majeure event outlined in Article 11.3.1³, the AT highlighted that this argument was raised for the first time, despite which it proceeded to examine the tenability of the submission. *Qua* this Article, the AT held that the facts and circumstances obtaining in the matter were covered by clauses (a) and (d) of Article 11.3.1. In this context, it is required to be noted that clause (a) of Article 11.3.1 adverts to an Act of God, while clause (d) alludes

³ 11.3.1 A 'Force Majeure' means any event or circumstance or combination of events those stated below what 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.



to a force majeure event identified under the NTPC-DISCOM PSA, which affects the delivery of power from the SPD to the DISCOM. In other words, AT concluded that the force majeure events referred to above would fall within clause (c) of Article 4.5.1.

20. Furthermore, the AT also accepted the alternate argument advanced on behalf of Oswal that even where parties have agreed to the levy of liquidated damages on the party in breach of its contractual obligations, the aggrieved party can be accorded only reasonable compensation for injury suffered, subject to the maximum amount stipulated under the contract. The AT, having accepted the formulation of this principle put forth on behalf of Oswal, returned a finding of fact that NTPC had neither averred that it had suffered a legal injury nor did the facts and circumstances even remotely indicate that it had suffered a loss on account of delay in commissioning. The AT also found that the delay was less than "one full day", as Oswal's solar power plant was commissioned at 2:00 pm on 10.01.2012. Therefore, the AT found no justification in NTPC being allowed to forfeit a considerable sum, i.e., Rs. 1,82,62,000/-, for the delay of merely a few hours.

21. Based on this rationale, the AT distinguished the judgment rendered by the Supreme Court in *Construction and Design Services v Delhi Development Authority* (2015) 14 SCC 263. The AT noted that in *Construction and Design Services*, Delhi Development Authority [in short, "DDA"], which had terminated a contract given for constructing a sewage pumping station, on account of non-execution of the project, was awarded 50% of the stipulated liquidated damages because it was a public utility. The AT distinguished the judgment on two grounds: Firstly, there was a delay of



only a couple of hours in Oswal's case, and secondly, as noted above, NTPC had not averred that it had suffered legal injury. The fact that sufferance of legal injury was the edifice for claiming damages, whether or not they are liquidated, i.e., fixed, was pivoted on the judgment rendered by the Supreme Court in *Fatehchand v BalKrishan Das*, 1963 AIR SCC 145.

22. Thus, having regard to the discussion above and the undisputed facts and circumstances obtaining in the case, it is pretty clear that the point of inflection between the disputants was the scope and ambit of the expression "commissioning". That there was a lack of clarity in the minds of the officials who formed part of the commissioning committee is evident from the report/minutes of the meeting dated 09.01.2012, wherein it was observed that Oswal had commissioned the solar power plant on that very date, i.e., 09.01.2012.

22.1 The formation of a review commissioning committee by MNRE led to the date of commissioning being shifted to 10.01.2012. The earlier date, i.e., 09.01.2012, was treated as the date on which the Oswal's solar power plant stood connected to the grid.

22.2 The AT, as alluded to above, took note of the fact that despite an inter-departmental official communication of 27.12.2011 to progress the project's last mile logistics, the commissioning committee was constituted only on 03.01.2012, which, in turn, visited the site where Oswal solar power plant was located only on 09.01.2012.

22.3 Therefore, according to the AT, the formalities concerning the connectivity of the Oswal solar power plant and the grid were completed at 11:15 pm on 09.01.2012.

22.4 The AT accepted, based on the testimony of a witness(es), that



synchronisation of the solar power plant and the grid takes 5-6 hours.

23. Appreciation of evidence and material placed on the record by the disputants in the course of arbitral proceedings falls within the domain of the AT. Given the occurrence of the above-mentioned events, the delay in constituting the commissioning committee and its visit to the subject site had a cascading effect. Therefore, the connectivity to the grid could only happen late at night on 09.01.2012, by which time the sun had already set.

23.1 Thus, the successful flow of energy into the grid, which, according to NTPC, would be a marker by which the factum of commissioning could be ascertained, could not have happened earlier than 10.01.2012, after the sun had risen.

24. Bearing this factual and legal conspectus in mind, we are of the opinion that the AT was correct in concluding that a force majeure event, i.e., Act of God, had caused commissioning to be delayed up until 10.01.2012 for reasons which were beyond the control of Oswal. As rightly submitted on behalf of Oswal, liquidated damages under Article 4.6.1 could be levied for reasons other than those specified in 4.5.1(c) read with Article 11.3.1(a).

24.1 Although both AT and Oswal have also referred to clause (d) of Article 11.3.1, i.e., the clause that identifies a force majeure event as one mentioned in the force majeure clause of the NTPC-DISCOM PSA which affects the delivery of power from the SPD to the DISCOM, we need not advert to it as there is no reference to the specific clauses of the NTPC-DISCOM PSA dealing with force majeure in the AT's award.

25. There is, however, to our minds, weight in the AT's reasoning and conclusion that NTPC could not have retained monies recovered through



encashment of Performance Bank Guarantee on account of liquidated damages without having averred that it had suffered legal injury on account of the delay in commissioning, which was only a couple of hours.

25.1 That such an assertion, even for a public utility such as NTPC, is a *sine qua non* for claiming and being awarded liquidated damages [See *Kailash Nath Associates v DDA*, 2015 4 SCC 136, *Indian Oil Corporation v Lloyds Steel Industries Ltd.* (2007) SCCOnline Del 1169 and *Bharat Heavy Electricals Ltd. v Kanohar Electricals Ltd.*, 2024:DHC:1663-DB].

25.2 We may also note that Article 4.6.1 does not state that the measure of damages referred to therein is a genuine or reasonable pre-estimate. The NTPC's pleadings filed before the AT also make no such assertion. The law requires the aggrieved party to make such averments in its pleadings [See *Geo Pictures Ltd v Neelakandaru Gopalkrishnar and Ors*, AIR 1971 Kerala 274].

26. Thus, for the foregoing reasons, we find no good reason to interfere with the impugned judgment. Accordingly, the appeal is dismissed. There shall, however, be no order as to costs.

(RAJIV SHAKDHER)
JUDGE

(AMIT BANSAL)
JUDGE

JULY 3, 2024 / tr