

In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)

Appeal No. 145 of 2016

Dated: 3rd July, 2017

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member

In the matter of :-

Rajasthan Renewable Energy Corporation Ltd. (RRECL)
E-166, Yudhisthir Marg, C-Scheme
Jaipur- 302 005

... Appellant

Versus

1. Rajasthan Electricity Regulatory Commission (RERC)
Vidyut Vinyamak Bhawan
Near State Garage Motor, Shankar Marg
Jaipur- 302 005

...Respondent No. 1

2. M/s Energo Engineering Projects Ltd.
E-42/2, Okhla Industrial Area
Phase-2
New Delhi-110 020

...Respondent No. 2

Counsel for the Appellant(s): Ms. Susan Mathew
Mr. D C Gupta

Counsel for the Respondent(s): Mr. R K Mehta
Ms. Himanshi Andley
Mr. E Premjit Singh
Mr. Abhishek Upadhyay for R-1

Mr. Dhruv Dewan
Mr. Kostubh Devnani **for R-2**

JUDGMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

1. The present Appeal is being filed by Rajasthan Renewable Energy Corporation Ltd. (hereinafter referred to as the “**Appellant**”) under Section 111 of the Electricity Act, 2003 challenging the Order dated 16.3.2016 (“**Impugned Order**”) passed by the Rajasthan Electricity Regulatory Commission (hereinafter referred to as the “**State Commission**”), in Petition No. RERC/591 of 2016 regarding disputes between the Appellant and M/s Energo Engineering Projects Ltd. (Respondent No. 2) regarding levy of Liquidated Damages (LD) while granting extension of Scheduled Commercial Operation Date (SCOD) to the Solar Plant of the Respondent No.2.
2. The Appellant, Rajasthan Renewable Energy Corporation Ltd. is a company incorporated under provisions of Companies Act, 1956 having registered office in Jaipur, Rajasthan and is the Procurer of solar power generated from 10 MW Solar Power Plant of the Respondent No. 2.
3. The Respondent No.1, Rajasthan Electricity Regulatory Commission is the Regulatory Commission for the State of Rajasthan, exercising jurisdiction and discharging functions in terms of the Electricity Act, 2003.

4. The Respondent No.2, M/s Energo Engineering Projects Ltd., is a company incorporated under provisions of Companies Act, 1956 and is the Seller of solar power generated from its 10 MW Solar Power Plant being established at Bhadla Solar Park, Rajasthan.

5. **Facts of the present Appeal:**

a) Government of Rajasthan on 15.10.2012 issued directives regarding selection of Solar Photo Voltaic (PV) Projects through competitive bidding process. The Appellant, through this process selected seven nos. of Solar Power Producers (SPP) totalling capacity of 75 MW. The Respondent No. 2 was selected for supply of power to the Appellant by setting up 10 MW Solar PV plant (hereinafter referred as 'Solar Plant') at Solar Park Bhadla, District Jodhpur, Rajasthan. The Appellant and the Respondent No. 2 entered into Power Purchase Agreement (PPA) dated 28.3.2013 for the same at the tariff of Rs. 6.45/kWh. As per PPA, the Financial Closure (FC) of the Solar Plant was to be achieved within 180 days of the signing of the PPA. The scheduled date of commissioning of the Solar Plant was 27.3.2014.

b) As per the provisions of Clause 1.3.1 of the PPA, the land for the Solar Plant was to be allotted by District Collector as per the provisions of Rajasthan Land Revenue (Allotment of Land for setting up of Power Plant based on Renewable Energy Sources) Rules, 2007.

c) Due to delay in the allotment of the land for the Solar Plant, the SCOD for Respondent No. 2 was extended by the Appellant thrice,

first up to 27.9.2014, secondly up to 31.3.2015 and finally up to 30.9.2015. The land was allotted to the Respondent No. 2 on 31.10.2014. Possession of the land was given to the Respondent No. 2 on 7.11.2014 and Lease Deed was executed and registered in the month of January, 2015.

- d) Four electric poles of 11 kV transmission line (hereinafter referred to as the 'Electric Poles') were passing near the boundary of the allotted land to the Respondent No. 2. The Electric Poles were shifted from the land of the Respondent No. 2 in November, 2015 by the local Discom i.e. Jodhpur Vidyut Vitaran Nigam Ltd. (JdVVNL).
- e) The Respondent No. 2 vide its letter dated 17.11.2015 requested the Appellant to further extend the SCOD from 30.9.2015 to 31.3.2016 since the Electric Poles were shifted in November, 2015 only. The Appellant based on the decision of its Board of Directors, vide letter dated 2.12.2015 granted the extension of SCOD till 31.3.2016 subject to payment of LD by the Respondent No. 2 @ 0.5% per day of total value of the Performance Bank Guarantee (PBG).
- f) Aggrieved by the imposition of LD, the Respondent No. 2 filed Petition No. RERC/ 591 of 2016 on 18.01.2016 with the State Commission. The State Commission vide Impugned Order dated 16.3.2016 held that the the levy of the LD by the Appellant for grant of extension of SCOD for the Solar Pant is not legal and valid.
- g) Aggrieved by the Impugned Order passed by the State Commission, the Appellant has preferred the present appeal.

6. QUESTIONS OF LAW

The Appellant has raised the following questions of law in the present appeal:

- a. Whether the delay in commissioning was due to reasons covered under Clause 4.5.1 (a) of the PPA dated 28.03.2013 as held by the Ld. Commission?**
- b. Whether the appellant is empowered to impose Liquidated Damages in terms of Clause 4.6 of the PPA dated 28.03.2013?**
- c. Whether the appellant is empowered to give extension subject to conditions in terms of Clause 4.5.6 of the PPA dated 28.03.2013?**
- d. Whether the appellant is empowered to invoke Performance Bank Guarantee as per Clause 3.3.3 of the PPA dated 28.03.2013?**
- e. Whether the delay was due to the inaction on the part of the respondent No.2 due to delay in achieving inFinancial Closure?**
- f. Whether there is no other provision in the PPA under which the Appellant can levy liquidated damages and recover the same as held by the Ld. Commission?**
- g. Whether the Ld. Commission can hold that any inaction on the part of STU/Discom's falls within Article 4.5.1(a) in the absence of specific definition to the terms "STU/Discom's event of default"?**

7. We have heard at length the learned counsel for the parties and considered carefully their written submissions, arguments put forth during the hearings etc. Gist of the same is discussed hereunder.
8. The learned counsel for the Appellant has made following arguments/submissions for our consideration on the issues raised by it:
 - a) The Respondent No. 2 after the allotment of the land on 31.10.2014 did not take any steps to mobilise the project or submission of technology or obtaining consents, clearances, permits etc.
 - b) The delay in shifting of the Electric Poles was due to inaction of the Respondent No. 2. The Respondent No. 2 only in April, 2015 vide its letter requested the Appellant to take up with JdVVNL for shifting of the Electric Poles from the land allotted to it. The Appellant vide its letters dated 7.5.2015 and 17.8.2015 had taken up the matter with JdVVNL regarding shifting of the Electric Poles at the earliest. As the Electric Poles were passing parallel to one side of the boundary, the Respondent No. 2 could have erected the structure of its Solar Plant without waiting for the removal of the Electric Poles. The Respondent No. 2 with malafide intention made hue and cry about the existence of the Electric Poles citing them as hindrance and danger to construction activities. The State Commission failed to consider the fact that the other 3 SPPs who were facing the similar problem of removal of the Electric Poles commissioned their projects in time.

- c) Jodhpur Revenue Department vide its letter dated 6.5.2014 addressed to Upniveshan Vibhag, Jaipur in respect of land allotment, pointed out about the Electric Poles passing over the land designated to be allotted to the Respondent No. 2. Thus, even prior to land allotment the Respondent No. 2 was aware of the Electric Poles in its land. The Appellant vide its letter dated 16.12.2014 enquired from the Respondent No. 2 whether any Electric Poles are still passing through its land as some other SPPs were also facing the similar problem.
- d) The actual reason for delay of the project was due to non-achievement of the FC in time. The Respondent No. 2 failed to achieve FC and provide necessary documents to the Appellant within 180 days from the Effective Date in terms of Clause 3.1.1 (e) of the PPA. Even from the date of allotment of the land the Respondent No. 2 was not able to conclude the FC within 180 days. The Respondent No. 2 for the first time vide letter dated 28.9.2015 informed the Appellant that they have obtained sanction of loan from State Bank of Bikaner and Jaipur (SBBJ). The decision of the Appellant regarding encashment of the PBG was well within the scope of Clause 3.1.2 of the PPA. Respondent No. 2 also did not comply with the requirement of sending the monthly progress reports to the Appellant as per PPA and Request for Proposal (RFP) document.
- e) The State Commission had erred in holding that the delay falls under Clause 4.5.1 (a) ("STU/Discom's event of default") of the PPA as the Respondent No. 2 failed to produce any communication with JdVVNL for removal of Electric Poles from its plot. The

communications in this regard were sent by the Appellant to JdVVNL vide letters dated 7.5.2015 & 17.8.2015 on request letter dated April, 2015 received from the Respondent No. 2. JdVVNL on 2.11.2015 removed the poles and shifted the transmission line from the plot allotted to the Respondent No.2. Thus, there is no default on the part of the Discom. This is more so that STU/Discom's event of default is not described comprehensively in the PPA and should not be related to shifting of Electric Poles.

- f) The State Commission failed to appreciate that the decision of the Board of Directors on 23.11.2015 regarding extension in SCOD subject to imposition of LD by the Appellant was on account of delay as a result of delayed Financial Closure. The Appellant vide letter dated 2.12.2015 merely conveyed the decision of the Board of Directors. The State Commission has wrongly decided on the basis of delay in shifting of Electric Poles.
- g) The Respondent No. 2 could have commissioned the project partly as per clause 3.22.3 of the RFP as the Electric Poles were near the boundary of the plot and other area was available with the Respondent No. 2 for carrying out the construction works.
- h) The State Commission erred in holding that the Appellant cannot invoke the provisions of Clause 4.6 of the PPA regarding levy of LD for the delay as the delay did not fall under Clause 4.5.1 (a) of the PPA. The delay was due to the inaction of the Respondent No. 2 as it did not approach JdVVNL and approached the Appellant only in April, 2015 for removal of the Electric Poles from its allotted plot. The State Commission erred in holding that there is no provision in

the PPA under which the Appellant may levy LD and recover the same other than Clause 4.6.1. The Appellant under Clause 4.5.6 of the PPA can invoke levy of LD as per Clause 4.6.1.

- i) The State Commission also erred in holding that the decision of Board of Directors of the Appellant is assailed as the Respondent No. 2 has only challenged the communication dated 2.12.2015.
9. The learned counsel for the Respondent No. 2 has made following arguments/submissions on the issues raised in the present Appeal for our consideration:
- a) The Appellant extended the SCOD of the Solar Project of the Appellant thrice along with other SPPs as the land was not allotted for the Solar Project in time. The SCOD was extended to 30.9.2015 for the third time. The land was allotted to the Respondent No. 2 on 31.10.2014 and the possession of land was handed over to the Respondent No. 2 on 7.11.2014. As per the conditions of the allotment letter no site activities can be initiated until lease deed was executed. The lease deed for the allotted land was executed on 14.1.2015 and was registered on 29.1.2015.
 - b) The Respondent No. 2 could not commission the project in time due to presence of Electric Poles on land allotted to it. The Respondent No. 2 vide its letter dated 17.5.2014 even prior to final allotment of the land requested the Appellant to take necessary action for removal of the Electric Poles from the land designated to be allotted to it. Rajasthan Solar Park Development Company Ltd., subsidiary of the Appellant also wrote letter dated 20.4.2015 which confirms

that Electric Poles were passing from the allotted land of the SPPs. The Respondent No. 2 repeatedly requested the officials of the Appellant and JdVVNL for removal of Electric Poles from the land allotted to it. The Appellant vide letter dated 7.5.2015 requested JdVVNL to take action for shifting of the Electric Poles.

- c) The Respondent No. 2 vide its letter dated 5.8.2015 requested the Appellant to grant extension of SCOD till 28.2.2016 and also requested for early shifting of the Electric Poles. The Appellant on 17.8.2015 again wrote to JdVVNL to shift the Electric Poles at earliest so that the Solar Project is set up in time. The Respondent No. 2 constantly followed up with the Appellant for removal of the Electric Poles. Further, the Respondent No. 2 vide its letters dated 28.09.2015 and 30.09.2015, requested the Appellant for extension of the SCOD till 31.03.2016. The Appellant in response informed that such extension will be subject to payment of LD by the Respondent No. 2 and advised to apply accordingly. The Appellant again on 10.11.2015 wrote to JdVVNL for shifting of the Electric Poles. The Electric Poles were shifted only on or around 21.11.2015. JdVVNL also took long time (more than 6 months from 7.5.2015 i.e. the time when communication was sent by the Appellant) for removal of the Electric Poles from the allotted land of Respondent No. 2. The Respondent No. 2 denied the contention of the Appellant that the Electric Poles were removed on 2.11.2015. This was clear from the letter dated 10.11.2015 of the Appellant addressed to JdVVNL for early action regarding shifting of Electric Poles.
- d) It was not possible for the Respondent No. 2 to carry out the works at the site due to the presence of the Electric Poles. The contention

of the Appellant that the Respondent No. 2 did not take any action for shifting of the Electric Poles is misconceived. It was the responsibility of the Appellant to provide land free from any encumbrances. The Appellant arranged to remove the Electric Poles from the allotted land to other SPPs in the months of December' 2014 and January' 2015 and their lease deeds were also executed much before that of the Respondent No.2. Accordingly, those projects were commissioned in time.

- e) The contention of the Appellant that the Respondent No. 2 could not achieve the FC of the Solar Project is denied. This contention of the Appellant is after thought and this is not the reason to issue the letter dated 2.12.2015. The Appellant has never raised this issue with Respondent No. 2. The Appellant had not responded to the correspondences of the Respondent No. 2 regarding shifting of the Electric Poles. The Respondent No. 2 obtained loan sanction from IREDA on 31.3.2015 and from SBBJ on 10.8.2015. The loan sanction from SBBJ was obtained in view of lengthy disbursal process of IREDA. The Respondent No. 2 also informed the Appellant vide its letter dated 21.4.2015 regarding placement of EPC contract to M/s L&T Ltd. on 2.4.2015. This shows that the Respondent No. 2 was eager to complete the project and took appropriate steps in that direction. The Respondent No. 2 had also made investments in the project from time to time and could not commission it only due to delay in shifting of the Electric Poles.
- f) The Respondent No. 2 vide its letter dated 17.11.2015 again requested the Appellant for extension of SCOD from 30.9.2015 to 31.3.2016 unconditionally on the ground that Electric Poles were yet

to be shifted and the delay in commissioning of the Solar Project is beyond its control. However, the Appellant vide letter dated 2.12.2015 granted extension of SCOD till 31.3.2016 along with levy of penalty of Rs. 9.52 Cr. which was to be deposited by 15.12.2015. The Respondent No. 2 vide letter dated 11.12.2015 requested the Appellant to reconsider its decision of imposing the penalty. The Appellant vide letter dated 17.12.2015 re-iterated its stand in letter dated 2.12.2015. The Respondent No. 2 filed petition with the State Commission on 18.1.2016. On 21.1.2016 the State Commission stayed the encashment of the PBG of the Respondent No. 2 by the Appellant. On 16.3.2016 vide the Impugned Order the State Commission has rightly set aside the letter dated 2.12.2015 of the Appellant by holding that the delay was due to reason attributable to the Discom (JdVVNL) and fall under Clause 4.5.1 (a) of the PPA and accordingly the the application of Clause 4.6 of the PPA gets excluded. Further there is no other provision in the PPA under which LD can be imposed. The action of the Appellant is also contrary to the Section 74 of the Contracts Act 1872.

- g) The State Commission has also rightly held that non-achievement of FC leading to levy of LD was not correct. This reason i.e. FC was not communicated to the Respondent No. 2 vide letter dated 2.12.2015. This reason was no longer valid as the Respondent No. 2 obtained sanction of loan for the Solar Project from IREDA and SBBJ on 31.3.2015 and 10.8.2015 respectively.
10. The learned counsel for the State Commission defended the impugned findings of the State Commission.

11. **After having a careful examination of all the aspects brought before us on the issues raised in Appeal and submissions made by the Appellant and the Respondents for our consideration, our observations are as follows:-**

- a. The present case pertains to decision of the State Commission vide its Impugned Order setting aside the letter date 2.12.2015 of the Appellant regarding levy of LD on Respondent No. 2 while granting extension of SCOD till 31.3.2016.
- b. **On Question No. 6. a. i.e. Whether the delay in commissioning was due to reasons covered under Clause 4.5.1 (a) of the PPA dated 28.03.2013 as held by the State Commission? and on Question no. 6. g. i.e. Whether the Ld. Commission can hold that any inaction on the part of STU/Discom's falls within Article 4.5.1(a) in the absence of specific definition to the terms "STU/Discom's event of default"?, we decide as follows:**
 - i. First we examine the relevant provisions of PPA. The Clause 4.5.1 (a) of the PPA is reproduced below:

"4.5. Extension of Time

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

- a) any STU/Discom(s)/Procurement Event of Default; or*
- b) Force Majeure Events affecting STU/Discom(s)/Procurement; or*
- c) Force Majeure Events affecting the SPP,*

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 SPP or STU/Discom(s)/Procurer through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPP or Procurer, or till such time such Event of Default is rectified by STU/Discom(s)/Procurer.”

The relevant provisions on SPP’s Obligations under Clause 4.1 of the PPA is reproduced below:

“4.1 SPP’s Obligations

4.1.1 The SPP undertakes to be responsible, at SPP’s own cost and risk, for:

.....

b) designing, constructing, erecting, commissioning, completing and testing the Power Project in accordance with the applicable Law, the State Grid Code, the terms and conditions of this Agreement and Prudent Utility Practices.

c) the commencement of supply of power up to the Contracted Capacity to Procurer not later than the Scheduled Commissioning Date; and continuance of supply of Power throughout the term of agreement; and

d) connecting the power project switchyard with the STU/Discom (s) Transmission Lines at the outgoing terminal bay of the Power project switchyard (Delivery Point); and

.....”

From the above, it can be seen that if the Respondent No. 2 is prevented from performing its obligations under Article 4.1 of the PPA by the Scheduled Commissioning Date/ SCOD, the extension of time can be granted to the Respondent No. 2 apart from Force Majeure conditions, if there is any STU/Discom(s)/Procurer Event of Default. The obligations of the Respondent No. 2 as brought out above were hampered due to delay in shifting of Electric Poles by the Discom (JdVVNL) from the allotted land to it. The PPA also does not define comprehensively STU/Discom(s) Event of Default.

- ii. Now let us see the analysis of the State Commission as given in the Impugned Order and the relevant extract is reproduced below:

“13.We observe that this case is similar to M/s Arjun Green Power Pvt. Ltd. (petition no. 586/15) and a similar relief was claimed. Counsels appearing for the parties also submitted that the case is similar to M/s Arjun Green Power Pvt. Ltd. Commission after considering the facts in the petition of M/s Arjun Green Power Pvt. Ltd., vide its order dated 15.03.2016, has held that:

“23.It is the case of Petitioner that there was an 11kV transmission line cutting across the land allotted to it for setting up of the plant and unless it was removed it was not in a position to build the plant. Therefore, it had made a request to the concerned Discom for shifting of line which was not done timely. This also was within the knowledge of Respondent and Respondent in fact had written to Discom for shifting of

line. Despite the request of Petitioner and Respondent, the line was not removed by Discom. Therefore, Respondent cannot find fault with the Petitioner for not fulfilling the obligation undertaken by it under Article 4.1 of PPA for commissioning the plant as per SCOD and impose liquidated damages on the Petitioner on this account.”

.....

.....

28.As per Article 4.1 (c) of the PPA, the Petitioner has to commence supply of electricity to the Respondent not later than scheduled commissioning date and continue to supply power through the term of the agreement. The term “Force Majeure” used in the above clause 4.5.1 is explained in the Article 11 of the PPA. The term ‘Procurer Event of Default’ used has also been explained in Article 13.2 of the PPA. However, the STU/Discom’s event of default has not been defined anywhere in the PPA. In the absence of the specific explanation of STU/Discom’s event of default as given for “Force Majeure Event”, any inaction on the part of STU/Discom(s), in our view shall fall within Article 4.5.1(a). Once there is non-action on the part of STU/Discoms, the same shall be considered as an event of default within the meaning of Article 4.5.1, and accordingly, application of Article 4.6 gets excluded in view of the wordings of Article 4.6.1. Once Article 4.6.1 is not applicable, there is no other

provision in the PPA under which Respondent may levy liquidated damages and recover the same.””

The State Commission in the Impugned Order has held that although no details of event of default by Discom is defined in the PPA, inaction on the part of Discom shall be considered as an event of default within the meaning of Article 4.5.1. This has been concluded by the State Commission after applying prudence check on the sequence of events which took place after the award of the Solar Project to the Respondent No. 2.

From the above discussions and submissions made by the parties it can be seen that there was delay in shifting of Electric Poles by the Discom i.e. JdVVNL and the Appellant was also aware of the same. It was the duty of the Appellant to facilitate the early removal of the Electric Poles from the land allotted to the Respondent No. 2. PPA does not define the Discom Event of Default. The Electric Poles could not be removed by any body else except the Discom. In our opinion the State Commission has rightly held the delay in shifting of Electric Poles as Discom Event of Default.

We are in agreement with the findings of the State Commission that the Respondent No. 2 was prevented from discharging its obligations due to inaction of the JdVVNL causing delay in shifting of the Electric Poles from the allotted land to it.

- iii. In view of the above, the issues raised in Question Nos. 6. a. and 6. g. are decided against the Appellant.

c. **On Question No. 6. b. i.e. Whether the appellant is empowered to impose Liquidated Damages in terms of Clause 4.6 of the PPA dated 28.03.2013?, we decide as follows:**

i. Let us examine the Clause 4.6 of the PPA which deals with the provisions of Liquidated Damages and the relevant extract is reproduced below;

“4.6 Liquidated Damages for delay in commencement of supply of power to Procurer

*4.6.1 If the SPP is unable to commence supply of power to **Procurer** by the Scheduled Commissioning Date other than for the reasons specified in Article 4.5.1, the SPP shall pay to **Procurer**, 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 following:*

a. Delay up to 200 days - CMD, RREC will encash 0.5% per day of the total Performance Bank Guarantee.

b. Delay beyond 200 days from scheduled commissioning, PPA may be terminated. However, in exceptional cases, SLSC may consider to grant extension in the Scheduled Commissioning of project with a penalty @ 1% per day of the total Performance Bank Guarantee.

c. If the SPP fails to pay the amount of liquidated damages within the period of ten (10) days as specified in Article 4.6.1, RREC shall be entitled to recover the said amount of the Liquidated damages by invoking the Performance Bank Guarantee. If the then existing Total Performance Bank

Guarantee is for an amount which is less than the amount of the liquidated damages payable by the SPP to RREC under this Article 4.6, then the SPP shall be liable to forthwith pay the balance amount within ten (10) days of the invocation of the Total Performance Bank Guarantee by RREC.”

From the plain reading of the above provisions of the PPA it can be inferred that for the reasons other than that mentioned in the Clause 4.5.1 of the PPA, the SPP is liable to pay LD for delay period of up to 200 days and for delay more than 200 days as enumerated above.

In case extension in SCOD is granted by SLSC, the SPP is liable to pay the Procurer a penalty of 1% per day of total PBG for delay beyond 200 days from SCOD. For delay upto 200 days CMD, RREC (i.e. Appellant) is entitled to encash 0.5% per day of the total PBG. However, if the above provisions are read with 4.6.1 c. it is clear that the LD is to be paid by the SPP within the period 10 days failing which, the Appellant can recover the amount by invoking the PBG.

From the above it is clear that the Appellant is empowered to impose LD as per Clause 4.6 of the PPA subject to the conditions mentioned therein. In present case as discussed at 11. b. above it has been held that the reason for delay was covered under Clause 4.5.1 (a) of the PPA i.e. Discom event of Default. Hence, in the present case the Appellant cannot impose LD on the Respondent No. 2.

- ii. This issue is decided accordingly.

- d. **On Question No.6. c. i.e. Whether the appellant is empowered to give extension subject to conditions in terms of Clause 4.5.6 of the PPA dated 28.03.2013?, we decide as follows:**

- i. Let us examine the Clause 4.5.6 of the PPA which is reproduced below:

“4.5.6 Notwithstanding anything to the contrary contained in this Agreement, subject to force majeure, any extension of the Scheduled Commissioning Date arising due to any reason envisaged in this Agreement shall be governed by clause 4.6.”

This provision, subject to force majeure, allows extension of SCOD due to any reason in the PPA. Such extension of time is to be governed by Clause 4.6 of the PPA. Further, imposition of LD under Clause 4.6 is subjected to the conditions provided under it which we have discussed at 11. c. above.

This provision does not mean applying LD for granting extension in SCOD on any context without referring to the concerned provisions of the PPA under which extension in SCOD may arise. In the present case, the State Commission has clearly held that LD cannot be applied on the Respondent No. 2 as Clause 4.6 cannot be applied due to applicability of the Clause 4.5.1 (a) (Discom event of default) of the PPA and no other reason under PPA can be applied to the present case. The Appellant is empowered to

give extension but it depends upon the reason necessitating the extension of SCOD. In the present case, the main issue causing the delay is on account of delayed removal of Electric Poles from the land allotted to the Respondent No. 2 which was the responsibility of the JdVVNL.

- ii. Hence, this issue is decided accordingly.

- e. **On Question No. 6. d. i.e. Whether the appellant is empowered to invoke Performance Bank Guarantee as per Clause 3.3.3 of the PPA dated 28.03.2013?, we decide as follows:**
 - i. Now let us examine the Clause 3.3.3 of the PPA which is reproduced below:

“3.3.3 If the SPP fails to commence supply of power from the Scheduled Commissioning Date specified in this Agreement, subject to conditions mentioned in Article 4.5, Procurer shall have the right to encash the Total Performance Bank Guarantee in accordance with Article 4.6 without prejudice to the other rights of RREC under this Agreement.”

According to the above provision, subject to the conditions of Clause 4.5 of the PPA, the Appellant is empowered to invoke PBG in accordance with Clause 4.6 of the PPA.

In the present case the State Commission has held that LD cannot be applied on the Respondent No. 2 as Clause 4.6 cannot be

applied due to applicability of the Clause 4.5.1 (a) (Discom event of default) of the PPA.

At para 11. b. above we have already decided that the delay in achieving SCOD by the Respondent No. 2 is due to delayed action of the Discom in shifting of the Electric Poles and is covered under Clause 4.5.1 (a) of the PPA. Thus the provisions of Clause 4.6 do not apply to the Respondent No. 2.

- ii. Hence, this issue is also decided accordingly.

- f. **On Question No. 6. e. i.e. Whether the delay in commissioning of the project was due to the inaction on the part of the Respondent No.2 for a considerably long time since they could not achieve Financial Closure in a reasonable time and therefore falls within Clause 4.6 of the PPA dated 28.03.2013?, we decide as follows:**
 - i. This question in the present case is to be seen in the facts and circumstances leading to delay in SCOD. Let us now examine the impugned findings on this issue. The State Commission in the Impugned Order on this issue has held as below:

“13.We observe that this case is similar to M/s Arjun Green Power Pvt. Ltd. (petition no. 586/15) and a similar relief was claimed. Counsels appearing for the parties also submitted that the case is similar to M/s Arjun Green Power Pvt. Ltd. Commission after considering the facts in the petition of M/s Arjun Green Power Pvt. Ltd., vide its order dated 15.03.2016, has held that:

“25. Further, the learned Counsel appearing for Respondent, during the course of arguments, defended the action taken by the Respondent also by producing some additional documents. Of these, two of the additional documents produced are related to the agenda placed before the BoD and the decision taken by the Board on it.

26. Relying on these two documents, the Ld. Counsel contended that the Petitioner committed default in completing the project due to non achievement of financial closure and the plea that non-shifting of transmission line was not the real reason and therefore, action taken is in accordance with the PPA.

27. While appreciating the efforts of the Respondent in defending its action, we are unable to accept the defense put forward. On the first count, the reason now being cited on behalf of Respondent for levying penalty is not the reason which is communicated to the Petitioner on dt. 2.12.2015. The second is that the said ground of non-achievement of financial closure was not sustainable on the day on which decision was taken by the Board of RREC. As pointed out by the Petitioner’s Counsel, the Petitioner vide its letter dt. 21.08.2015 (para 2) had already informed the Respondent that they have achieved the financial closure with PTC Financial Services Ltd. and loan disbursement is expected to be done in one or two weeks in September, 2015. Once financial closure was stated to

have been achieved by the Petitioner before action is taken, the said ground was no longer available to the Respondent to state that the condition of PPA is violated.”

Further, the Clause 3.1.1 e/3.1.2 of the PPA provide as below:

“3.1.1 The SPP agrees and undertakes to duly perform and complete all of the following activities at the SPP’s own cost and risk within 180 days from the Effective Date, unless such completion is affected by any Force Majeure event, or if any of the activities as specifically waived in writing by RREC:

e) The SPP shall make Project Financial Agreements and shall provide necessary documents;

3.1.2 Failure or delay on part of seller in achieving the above conditions shall constitute sufficient grounds for encashment of the Performance Bank Guarantee.”

The State Commission in its Impugned Order concluded that the reason for imposition of LD was not mentioned in the letter dated 2.12.2015 of the Appellant to the Respondent No. 2 and the ground of non-achievement of financial closure was not sustainable on the day on which decision was taken by the Board of the Appellant. Further, the Respondent No. 2 had already got sanction of loan from IREDA in March’ 2015 and from SBBJ in August’ 2015. The issue of shifting of the Electric Poles was also going on between the parties at that point of time.

From the records made available by the parties, it can be seen that 180 days completed in July, 2015 even after signing of the lease deed/registration of the allotted land in January, 2015. If the Appellant was so convinced about the non-achievement of the FC by the Respondent No.2 as the sole reason for imposition of LD, it ought to have taken the steps to comply with the provisions of the PPA relating to invoking of PBG at that time only and should not have waited till November, 2015 (i.e. almost 4 months after July, 2015).

In view of the facts and circumstances of the case as detailed out above, we are in agreement with findings of the State Commission.

- ii. Accordingly, this issue is decided against the Appellant.

- g. On Question No. 6. f. i.e. Whether there is no other provision in the PPA under which the Appellant can levy liquidated damages and recover the same as held by the Ld. Commission?, we decide as follows:**

- i. The State Commission in the Impugned Order on this issue has held as below:

“13.We observe that this case is similar to M/s Arjun Green Power Pvt. Ltd. (petition no. 586/15) and a similar relief was claimed. Counsels appearing for the parties also submitted that the case is similar to M/s Arjun Green Power Pvt. Ltd. Commission after considering the facts in the petition of M/s

Arjun Green Power Pvt. Ltd., vide its order dated 15.03.2016, has held that:

“28.As per Article 4.1 (c) of the PPA, the Petitioner has to commence supply of electricity to the Respondent not later than scheduled commissioning date and continue to supply power through the term of the agreement. The term “Force Majeure” used in the above clause 4.5.1 is explained in the Article 11 of the PPA. The term ‘Procurer Event of Default’ used has also been explained in Article 13.2 of the PPA. However, the STU/Discom’s event of default has not been defined anywhere in the PPA. In the absence of the specific explanation of STU/Discom’s event of default as given for “Force Majeure Event”, any inaction on the part of STU/Discom(s), in our view shall fall within Article 4.5.1(a). Once there is non-action on the part of STU/Discoms, the same shall be considered as an event of default within the meaning of Article 4.5.1, and accordingly, application of Article 4.6 gets excluded in view of the wordings of Article 4.6.1. Once Article 4.6.1 is not applicable, there is no other provision in the PPA under which Respondent may levy liquidated damages and recover the same.”

- ii. Clause 4.6.1 of the PPA produced at 11. c. i. above, clearly brings out that subject to the conditions of Clause 4.5.1, LD for delay is payable by the Seller to the Procurer. The State Commission in view of facts and circumstances of the case has held that once Article 4.6.1 is not applicable, there is no other provision in the

PPA under which the Appellant may levy liquidated damages and recover the same.

On perusal of the PPA, we find that there is no other clause in the PPA which deals with LD. The clause 3.1.2 and 3.3.3 deal with encashment of total PBG based on certain terms and conditions of the PPA. Accordingly, the State Commission has rightly held that once Article 4.6.1 is not applicable, there is no other provision in the PPA under which the Appellant may levy liquidated damages and recover the same.

iii. Hence, this issue is decided against the Appellant.

ORDER

We are of the considered opinion that the issues raised in the present appeal have no merit as discussed above. The Appeal is hereby dismissed.

The Impugned Order dated 16.3.2016 passed by the State Commission is hereby upheld.

No order as to costs.

Pronounced in the Open Court on this **3rd day of July, 2017.**

(I.J. Kapoor)
Technical Member

✓

REPORTABLE/NON-REPORTABLE

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(Mrs. Justice Ranjana P. Desai)
Chairperson