

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 236 & 291 of 2013

Dated 30th November, 2014

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member**

Appeal No. 236 of 2013

In the matter of:

Gujarat Urja Vikas Nigam Limited,
Sardar Patel Vidyut Bhavan,
Race Course, Vadodara-390 007,
Gujarat

Versus

1. Gujarat Electricity Regulatory Commission,
1st Floor, Neptune Tower, Ashram Road,
Ahmedabad- 380 009

2. Azure Power (Gujarat) Private Limited,
403-404, Venus Atlantis, Prahladnagar,
Anandnagar Road,
Ahmedabad-380 015
Gujarat

3. Azure Power India Private Limited,
8, Local Shopping Complex,
Ground Floor, Pusp Vihar,
Madangir, Opp. Birla Vidya Niketan,
New Delhi-110 062

4. The Principal Secretary,
Energy & Petrochemicals,

Government of Gujarat,
Block No. 5, 5th Floor,
Sardar Bhavan, Gandhinagar-382 007 ... Respondents

Counsel for Appellant : Mr. M.G. Ramachandran
Mr. Anand K. Ganesan
Ms. Anushree Bandhai

Counsel for the Respondents: Mr. S.N.Soparkar, Sr. Adv.
Mr. Tejas Karia,
Mr. Ramanuj Kumar,
Mr. Surjendu Sarkar Das,
Mr. Siddharth Agarwal

Appeal No. 291 of 2013

In the matter of:

Azure Power (Gujarat) Private Limited,
403-404, Venus Atlantis, Prahladnagar,
Anandnagar Road,
Ahmedabad-380 015
Gujarat

Versus

1. Gujarat Electricity Regulatory Commission,
6th Floor, GIFT ONE,
Road 5C, Zone 5, GIFT City,
Gandhinagar-382 355,
Gujarat.
2. Gujarat Urja Vikas Nigam Limited,
Sardar Patel Vidyut Bhavan,
Race Course, Vadodara-390 007,
Gujarat
3. Azure Power India Private Limited,
8, Local Shopping Complex,
Ground Floor, Pusp Vihar,
Madangir, Opp. Birla Vidya Niketan,

New Delhi-110 062

4. Department of Energy & Petrochemicals,
Government of Gujarat,
Block No. 5, 5th Floor,
Sardar Bhavan, Gandhinagar-382 007 ... Respondents

Counsel for Appellant : Mr. S.N. Soparkar, Sr. Adv.
Mr. Tejas Karia,
Mr. Ramanuj Kumar,
Mr. Surjendu Sarkar Das,
Mr. Siddharth Agarwal

Counsel for the Respondents: Mr. M.G. Ramachandran,
Mr. Anand K. Ganesan,
Ms. Swagatika Sahoo
Ms. Poorva Saigal
Ms. Anushree Bandhai

J U D G M E N T

MR. RAKESH NATH, TECHNICAL MEMBER

Appeal no. 236 of 2013 has been filed by Gujarat Urja Vikas Nigam Ltd (“GUVNL”) against the order dated 08.08.2013 passed by Gujarat Electricity Regulatory Commission (“State Commission”) in which it held that the Power Purchase Agreement (“PPA”) executed between the GUVNL and Azure Power (Gujarat) Pvt. Ltd, a Solar

Power Developer, is valid and enforceable. Appeal no. 291 of 2013 is the cross Appeal filed by the Azure Power Gujarat Pvt. Ltd (hereinafter referred to as “Azure Gujarat”) against the same order on the interpretation of Article 4.1 (x) of the PPA made by the State Commission.

2. Azure Gujarat has entered into a PPA dated 30.04.2010 with GUVNL for generation and sale of electricity by establishing a 5 MW solar power project on terms and conditions contained in the PPA. Clause 4.1 (x) of the PPA provides for restriction on the transfer of share of the Solar Power Developer and clause 9.2.1 of the PPA provides for breach of Clause 4.1(x) as an Event of Default with consequences. The principal issue to be considered in Appeal no. 236 of 2013 is that the date on which the shares held in Azure Gujarat were transferred by Azure Power India Ltd. to SunEdison Power India Ltd. (hereinafter referred to as SunEdison) by or before

30.04.2010, the date of PPA, as claimed by Azure Gujarat, or after 30.04.2010, as claimed by GUVNL.

3. Appeal no. 291 of 2013 filed by Azure Guajrat is regarding the interpretation of Article 4.1(x) of the PPA made by the State Commission and finding of the State Commission that the said provision is valid and enforceable in the present case. In Appeal no. 236 of 2013, GUVNL has pointed out discrepancies in the claim made by Azure Gujarat as to the date of transfer of shares and acquisition by SunEdison Energy India Pvt. Ltd. (hereinafter referred to as SunEdison) which is stated to be 28.04.2010. GUVNL has submitted that the transfer of shares to SunEdison was after 30.04.2010, the date on which the PPA was signed and the same was in violation of Clause 4.1(x) read with Clause 9.2.1(g) of the PPA.
4. The brief facts of the case are as under:-

- i) Government of Gujarat on 01.08.2009 approved the proposal of Azure India for allocation of 15 MW of Solar capacity as per its Solar Power Policy of 2009.
- ii) On 26.04.2010, Azure Gujarat was incorporated as a private company under the Companies Act, 1956.
- iii) On 27.04.2010, Azure Power India Pvt. Ltd. (referred to as Azure India) applied to the State Government for splitting the above capacity of 15 MW into 5 MW in the name of Azure Gujarat and 10 MW in the name of Azure Power Haryana Pvt. Ltd.
- iv) Azure Gujarat has claimed transfer of 9999 shares (99.99% of total shares issued, subscribed and paid up capital of Azure Gujarat to SunEdison on 28.04.2010.

- v) On 29.04.2010 the Azure India and Azure Gujarat have claimed to have signed a Share Purchase Agreement (“SPA”). On 30.04.2010, the Government of Gujarat permitted splitting of 15 MW capacity and approved implementation of the 5 MW project through Azure Gujarat and 10 MW through Azure Haryana.
- vi) On 30.04.2010 a PPA was entered into between Azure Gujarat and GUVNL. The PPA was signed by Mr. Wadhwa as Chairman of Azure Gujarat. Article 4.1(x) and 9.2.1 of the PPA provided as under:

“Article 4

4.1 Obligation of the Power Producer:

.....

(x) Power Producer shall continue to hold at least 51% of equity from the date of signing of this agreement up to a period of 2 years after achieving

commercial operation date of project and 26% of equity for a period of 3 years thereafter.

Article 9

Term, Termination and Default:

Event of Default:

9.2.1 Power Producer's Default: The occurrence of any of the following events at any time during the term of this Agreement shall constitute an Event of Default by Power Producer

.....”

g. Disinvestment of equity below minimum percentage holding during lock-in period as mentioned in Article 4”.

vii) On 22.05.2012, GUVNL issued a Default Notice to Azure Gujarat proposing termination of the PPA as the letter failed to satisfy GUVNL on the validity of its claim on the date of transfer of shares.

viii) Azure Gujarat filed a Petition before the State Commission seeking declaration that the Appellant is not entitled to terminate the PPA

challenging the validity and enforceability of Article 4.1(x) of the PPA and also that the share transfer had taken place prior to 30.04.2010.

- ix) The State Commission by the impugned order dated 08.08.2013 decided the Article 4.1(x) and Article 9.2.1 (g) of the PPA are valid and enforceable, rejecting the contention of Azure Gujarat but held that GUVNL has not been able to establish that the transfer of 9999 shares of Azure Gujarat to SunEdison took place only after 30.04.2010.

5. GUVNL has made the following submissions:

- i) The claim made by Azure Gujarat that 9999 equity shares constituting 99.99% of shares in Azure Gujarat were transferred by Azure India to SunEdison on 28.04.2010 or any time before 30.04.2010, the date of signing of the PPA, is contrary to the documents and

evidence on record. Onus of proof lies with Azure Gujarat as they had filed the Petition before the State Commission.

- ii) The State Commission in the impugned order has pointed out deficiencies in the documents in the impugned order and that non-availability of share transfer form creates some doubt. In spite of this, the State Commission has decided that the PPA is valid and binding.
- iii) In terms of Share Purchase Agreement (SPA), the share transfer was envisaged only on the closing date which was to be a date in future and subject to fulfilment of various condition precedents as is evident from Clause 2,3,4 and 6 of the Share Purchase Agreement (“SPA”).
- iv) There is not even a whisper in the SPA of the transaction having already taken place on 28.04.2010.
- v) The plea taken by Azure Gujarat that the condition precedent were waived is preposterous and does not appeal to any common sense.

- vi) There is no reference to share transfer forms being executed on 28.04.2010 in the various e-mails referred to by Azure Gujarat.
- vii) There is no reason for Azure India, Azure Gujarat and SunEdison to execute the SPA on 29.04.2010 if the transaction of sale and purchase of shares have been consummated on 28.04.2010. SPA loses its purpose once the sale transaction is completed. The State Commission has not taken note of the above aspect. The approval of the State Government of splitting 15 MW capacity and vesting of 5 MW capacity with Azure Guajrat was only obtained on 30.04.2010.
- viii) The transaction of sale and purchase of shares was stipulated in the SPA as after the above event as a condition precedent. The share transfer could not have taken place on 28.04.2010 before the approval of the State Government for splitting the capacity of the Solar Plant.

- ix) The share transfer form and evidence of payment of stamp duty of Rs. 68,750/- has not been produced.
- x) As per Section 108 of the Companies Act share transfer form is mandatory. Reference has been made to (1977) 2 SCC 424 in the matter of Mannalal Khetan and Others Vs. Kedarnath Khetan and Others to press this point.
- xi) The State Commission has not considered the impact of press release by SunEdison on its website listing acquisition, participation, etc. of SunEdison group from 2006 onwards till July 2010 with no reference to any acquisition of the shares of Azure Gujarat. In the press release it is indicated that as on 14.05.2010 there was a joint venture between Azure Power and SunEdison. The other press release issued by Azure India and SunEdison on 14.05.2010 was to the effect that Azure India and SunEdison have entered into a joint venture/partnership for development of solar power projects in India.

- xii) Out of total consideration for transfer of shares of Rs. 2.75 crores, the initial consideration of only Rs. 1000/- was to be paid on the date of closing. No such amount even the token some of Rs. 1000/- paid on the purported date of transfer on 28.04.2010.
- xiii) The minutes of meeting of Board of Directors of Azure India reference to the date of meeting as 28.04.2010 on the first page but at the second page at bottom it referred to the date as 07.04.2010. The Resolution of Board of Directors of Azure India has Mr. H.S. Wadhwa and Mr. I.S. Wadhwa participating as Directors at a meeting claimed to have been held in Delhi on 28.04.2010. Wadhwas also attended a meeting of Azure Gujarat in Ahmedabad which incidentally was also on 28.04.2010. No air tickets of Wadhawas regarding travel from Delhi to Ahmedabad were produced.
- xiv) There was no change of nomination of Directors of SunEdison on 28.04.2010 and Wadhawas continue as

Chairman and Managing Director without any nominee of SunEdison till 19.05.2010.

- xv) The Resolution of Azure Guajrat speaks of appointment of Mr. Pashupathy Gopalan as Director of Azure Gujarat on 28.04.2010. However, the declaration filed with Registrar of Companies on 31.11.2011 shows Mr. Pashupathy Gupalan and another nominee of SunEdison becoming Directors and Wadhwa ceasing to be Directors on 19.05.2010 and not 28.04.2010.
- xvi) The State Commission has not dealt with 2002(50) Corporate Law Advisor 245 decided by the High Court of Madras which was relied by GUVNL. The State Commission has also not considered the decision of Hon'ble Supreme Court in 1995 (5) SCC 545 in the case of Gujarat Bottling Limited Vs Coca Cola Company Ltd.
- xvii) The affidavits submitted by Azure Gujarat cannot be relied upon as evidence and the facts have to be established by evidence on record.

xviii) The Share Transfer Register of Azure Guajrat has not been signed by Secretary or any other officer of the company.

6. Learned Senior Counsel for Azure Power (Gujarat) Pvt. Ltd.

(“Azure Gujarat”) made the following submissions :

(a) SunEdison commenced legal due diligence and documentation for the acquisition of the entire shareholding of Azure Power India Private Limited in Azure Gujarat on or around 25.04.2010. To assist with such acquisition of shares, the SunEdison availed the services of a reputed law firm. Azure India also utilized the services of a separate legal counsel named Mukherjee, Khandelwal & Associates. Azure Gujarat in the September 5, 2012 Affidavit sworn by Mr. Pashupathy Gopalan (then MD & CFO of the SunEdison) has explained the circumstances in which the SPA came to be executed on 29.04.2010.

(b) As the correspondences annexed to the Affidavit demonstrate, there was intense activity (pertaining to negotiation and documentation) between April 26, 2010 and April 28, 2010. It is to be noted that Azure Power (Gujarat) Pvt. Ltd. was a newly incorporated entity and consequently, there was very little due diligence to be done by the SunEdison and the only agreement that needed to be negotiated and agreed with the SunEdison was the SPA. Given that it was an acquisition of a newly created company and the commercial terms had already been agreed between the Azure India and the SunEdison, it was feasible for the parties to agree on the SPA in a relatively short period of time. As the Gopalan Affidavit demonstrates, by April 28, 2010, the Seller and the Buyer had finalized the SPA. As a result, there was complete meeting of minds between the Azure India and the SunEdison with respect to sale/purchase of shares of Azure Gujarat. The board meeting of Azure Gujarat was held on April 28, 2010 wherein the share transfer to

SunEdison Buyer was approved. No discrepancy or defects has been found by the Commission in this board resolution.

- (c) While the SPA remained to be formally executed by the Seller and the Buyer, since all the key terms of the transaction had already been agreed between the parties, the parties presented the duly executed and stamped share transfer form along with the relevant share certificates to the board of Azure Gujarat for approving and recording the share transfer in favour of SunEdison India. The actions of the Azure India and the board of Azure Gujarat demonstrates the high level of confidence and comfort Azure India enjoyed with the SunEdison that on April 28, 2010, the parties completed all corporate actions required to complete the transfer of shares from the Seller to the Buyer. Signing of the SPA on April 29, 2010 was a mere formalization of their agreement into a written document. The SPA or for that

matter, any written agreement is not a pre-requisite to complete transfer of shares from the Seller to the Buyer.

- (d) Reliance by the Appellant on the provisions of the SPA to contend that the share transfer could not have occurred prior to the PPA date is wholly irrelevant and extraneous for determination of the date of share transfer. It is submitted that the Azure India and the SunEdison intended to execute the SPA on April 28, 2010, i.e. the same day it was finalized (this is evidenced by the emails produced by and the share transfer was approved by the board of Azure Gujarat. However, since stamp paper could be procured in time on April 28, 2010, the SPA (finalized on April 28, 2010) came to be executed in the same form the next day, i.e. on April 29, 2010. Incorporating the fact of transfer having occurred on 28.04.2010 would have required significant drafting changes to the SPA and since the parties were in full agreement as to the terms and conditions of share transfer and the transfer was a contemporaneous event,

they did not find it necessary to amend the SPA on 29.04.2010. It is significant to note that the Appellant contends that the SPA would have been worded differently if the parties intended to complete the share transfer on 28.04.2010. As against this bare allegation or conjecture of the Appellant, Azure Gujarat has produced the following documents which unequivocally establish that the Azure India, SunEdison and Azure India intended to complete and completed the share transfer on 28.04.2010.

- (i) Copy of email dated April 26, 2010 at 11.29 AM, Mr. Pashupathy Gopalan informed SunEdison India team of the proposed acquisition of a 5 MW Gujarat solar project.
- (ii) Copy of email dated April 26, 2010 at 12.31 PM, Mr. Pashupathy Gopalan informed Dhananjay Kumar (lawyer from Amarchand Mangaldas) of the points to be incorporated in the SPA.

- (iii) Copy of email dated April 28, 2010 at 12.02 AM, (April 27th midnight), Dhananjay Kumar wrote to Mr. Inderpreet Wadhwa and Mr. Pashupathy Gopalan attaching a revised draft of the SPA following comments and discussions between the parties. Mr. Dhananjay Kumar stressed that the draft was being circulated to all parties in the interest of time.
- (iv) Letter dated April 27, 2010 written by Azure Gujarat to the Principal Secretary, Energy & Petrochemicals Department of State Government (the letter was received on 28.04.2010) wherein Azure Gujarat stated that SunEdison India will inter alia invest in equity of Azure Gujaraat and sought approval to split the PPAs into 5 MW and 10 MW capacity. The noting of the Principal Secretary made on 28.04.2010 on the said letter is as follows:

“We may agree provided they execute PPA with GUVNL by 30th April 2010”.

- (v) Note of the Under Secretary (NCE), Energy & Petrochemicals Department (EPD), GoG dated April 29, 2010 and handwritten notings made by the Principal Secretary, EPD thereon.
- (vi) Letter no. SLR-11-2009-536734-(2)-8 dated April 30, 2010 by which the State Government communicated its approval (which was granted on April 28, 2010) for split of 15MW Project into 5MW and 10MW to be executed respectively by Azure Power Gujarat Private Limited and Azure Power Haryana Private Limited.
- (vii) Minutes of board meeting of the Azure India held at the residence of the directors on April 28, 2010 authorizing the sale of 9,999 shares to SunEdison India and execution of a share purchase agreement in relation thereto.

- (viii) Minutes of the board meeting of R-2 held on April 28,2010 approving the transfer of 9,999 shares representing 99.99% of the share capital of R-2 from the Azure India to the SunEdison.
- (ix) Share certificates endorsed in the SunEdison's name with date of transfer recorded as 28.04.2010, copy of the Register of Members, and copy of Register of Share Transfers recording the share transfer date as 28.04.2010.
- (x) Affidavit dated July 18,2012 sworn by Mr. Vinay Bhatia.
- (xi) Affidavit dated September 05, 2012 sworn by Mr. Pashupathy Gopalan. These two affidavits deal with the complete chain of events leading to the share transfer on April 28, 2010.
- (xii) Notes of Accounts forming part of the Balance Sheet of R-2 for the financial year ended March 31, 2011, which clearly shows that SunEdison

India has been the holding company of Azure Gujarat since April 28, 2010.

(xiii) Copy of email communications listed in the List of Dates and Events in Azure Gujarat's reply to the Appeal.

(e) In addition, the GUVNL's contention that the share transfer could not have been completed on April 28, 2010 because the SPA was signed on April 29, 2010 proceeds on the erroneous assumption that a share purchase agreement or, a written contract in a pre-requisite to achieve transfer of shares from the seller or the buyer. In law, so long as there is meeting of minds between the seller and the buyer and the necessary corporate documents are executed and approved by the board of the company whose shares are being transferred, as happened in this case, no written contract is necessary to complete the transfer of shares and therefore, characterizing the date of signing of the SPA as being a discrepancy in the documents produced by

Azure Gujarat is wholly mischievous and unsustainable. Date of share transfer can only be determined by the corporate records of the company whose shares were transferred and not by any contract between the Seller and the Buyer. In any event, the SPA does not specify any date for the share transfer.

- (f) GUVNL vehemently contended that the share transfer could not have happened on April 28, 2010 because the conditions precedent contained in Section 3.1 of the SPA were not satisfied. The contention is completely misplaced for two reasons: firstly, the closing conditions in the SPA were inserted for the benefit of the Buyer (SunEdison) alone and Section 3.2 of the SPA expressly states that the Buyer may, at its discretion, waive any or all of the conditions precedent and proceed to closing.
7. As regards Appeal no. 291 of 2013 filed by Azure Gujarat, they also gave detailed submissions regarding validity of Clause 4.1(x) of the PPA which we have already dealt with

this issue in our judgment in appeal no. 290 of 2013 in details.

8. On the above issues we have heard Shri M.G. Ramachandran, Learned Counsel for GUVNL and Mr. S.N. Soparkar, Learned Senior Counsel for Azure Gujarat and they have made very elaborate submissions. On the basis of the rival contentions of the parties, the following issues arise for our consideration:

- i) **Whether there is adequate reason to accept GUVNL's contention that 99.99% of the Azure Gujarat were transferred to SunEdison after the date of the signing of the PPA?**
- ii) **Whether Article 4.1(x) of the PPA read with Article 9.2.1 is valid and enforceable.**

9. Let us take up the first issue regarding date of transfer of shares to SunEdison.

10. We find that the State Commission has deliberated in details on the issue of transfer of equity shares to SunEdison. The relevant findings are as under:

“8.5 The Petitioner admits that there are procedural deficiencies in maintaining the Register of Members and other documents. The issue is whether it is significant or serious enough to affect the validity of the relevant entries in the documents such as Register of Members. A basic question is whether the documents such as Minutes of the Board Meetings, Register of Members etc submitted by the Petitioner can be accepted as evidence of transfer of shares having taken place on 28 April 2010. A related aspect is whether the Respondent has been able to prove his allegation that the documents produced by the Petitioner are manipulated/fabricated. It is important to keep in mind some of the authorities/decisions cited by the

parties in the context of the relevant provisions of the Companies Act, 1956.

8.5.1 *In M.S. Madhusoodhanan and Anr. v. Kerala Kaumudi Pvt Ld & Ors. (2004) 9 SCC 204, (hereinafter M.S. Madhusoodhanan), one of the parties Mr. Mani, had sought to set aside transfer of 390 shares in favour of Mr. Madhusoodhanan on, inter alia, the following grounds:*

(1) The consideration for the transfer had not been agreed upon and no consideration had in fact been paid

(ii) Proper documents had not been executed to effect the transfer.

(iii) Section 108 of the Companies Act, 1956 had not been complied with in respect of the transfers.”

“8.5.2 In Vasudev Rachandra Shelat v. Pranlal Jayanand Thakar, [1975] Comp Cas. 43 (SC), the donor gifted certain shares in various companies to her brother,

the appellant, by a registered gift deed. She also signed several blank transfer forms to enable the donor to obtain the transfer of donated shares in the register of companies and share certificates in his own name. The shares could not, however, be transferred in the registers of various companies before the donor's death. The nephew of the donor disputed the claim of appellant to the donated shares. On these facts, the Hon'ble Supreme Court considered two aspects of share transfer –the transfer inter se the transferor and the transferee (the title to get on the register) and the transfer vis-à-vis the company (the full property in the shares of a company) and held as follows:

“We think that, on these facts, the donation of the right to get share certificates made out in the name of the donee became irrevocable by registration as well as by delivery. The donation of such a right, as a form of property, was shown to be complete so that nothing was left to be done so far as the vesting of such a right in the donee is

concerned. The actual transfers in the registers of the companies concerned were to constitute mere enforcements of this right. They were necessary to enable the donee to exercise the rights of the shareholder. The mere fact that such transfers had to be recorded in accordance with the Company law did not detract from the completeness of what was donated...

We think the learned Counsel for the appellant rightly contended that, even in the absence of registration of the gift deed, the delivery of the documents mentioned above to the donee, with the clear intention to donate, would be enough to confer upon the donee a complete and irrevocable right, of the kind indicated above, in what is movable property.

8.5.3 In the case of Life Insurance Corporation of India vs. Escorts Limited, AIR 1986 1 SCC 264, the Hon'ble Supreme Court in para 84 of its order reached the following conclusion:

“A share is transferable but while a transfer may be effective between transferor and transferee from the date of transfer, the transfer is truly complete and the transferee becomes a shareholder in the true and full sense of the term, with all the Rights of a shareholder, only when the transfer is registered in the company’s register. A transfer effective between the transferor and the transferee is not effective as against the company and person without notice of the transfer until the transfer is registered in the company’s register. Indeed until the transfer is registered in the books of the Company the person whose name is found in the register alone is entitled to receive the dividends, notwithstanding that he has already parted with his interest in the shares”

8.5.4 In Prafulla Kumar Rout v. Orient Engineering Works Pvt Ltd, [1986] CompCas 65 (Orissa), Hon’ble Orissa High Court was to decide whether the petitioner had transferred his shares in the company in favour of opposite party no. 2.

On the strength of entries in the Register of Members of the Company and the Board resolution approving the transfer, it was held:”

“8.6 In the case of M.S Madhusoodhanan the Hon’ble Supreme Court relied on the prima-facie evidence created by the relevant documents in support of its decision to uphold the share transfer in favour of the appellant. In the present case, the Petitioner has produced a copy of the minutes of the meeting of the Board of Directors of the Petitioner company held on 28 April 2010 as Annexure-E to the petition. The Minutes record that duly executed and stamped transfer deeds and share certificates were received by the company, that the Board accorded approval for transfer of 9,999 shares to the Buyer and resolved that consequent to the said transfer, all references to the Seller as a Member of the company be deleted from the Register of Members. As the Petitioner submitted, the minutes have been kept in accordance with section 193

and if the validity of the minutes or statement contained therein is to be challenged, section 195 places the burden on the Respondent to prove to the contrary. In M.S. Madhusoodhanan, Hon'ble Supreme Court, in para 47 of the judgment, after referring to sections 193, 194 and 195 of the Companies Act, 1956 categorically held that the onus was on the party questioning the transfer to prove that the transfer had not taken place as recorded in the minutes of the Board meeting.

8.6.1 *In the court decisions cited by both the parties the dispute is between the parties involved in the transfer of shares. In the present case the transferor, the transferee and the company whose share transfer is in question have no dispute. All the three of them contend that the transfer of shares took place on 28 April 2010. In various cases cited above, one of the parties has questioned documents such as minutes of the meeting. Yet the court has accepted the*

minutes and other relevant documents relating to transfer of shares as prima-facie evidence of such transfer.

8.6.2 In the present case the Respondent has, as discussed above, pointed out some discrepancies in the documents such as the minutes of the Board meeting of Azure India etc. Having considered the arguments put forward by the parties and keeping in view the provisions of law and court decisions, we are of the view that the Respondent has not been able to prove that the documents are manipulated and cannot be relied upon. None of the parties involved in the transfer of shares has questioned the documents. The Seller has confirmed the sale, the Buyer has the same view and the company whose shares were transferred has produced the relevant Board resolution approving such transfer. Hence, we hold that the documents can be relied upon; the discrepancies pointed out by the Respondent are of minor nature and not enough to show that the documents are fabricated.”

.....

“9.3.2 Let us examine the contention that a contract can be made orally so long as there is meeting of mind between the parties, and that since shares are goods, the provisions of Sale of Goods Act, 1930 applies.

.....

9.3.4 Thus, Section 5 of the Sale of Goods Act, 1930 read with Section 46(1)(b) of the Companies Act, 1956 enables a company to enter into parol or oral agreements. Section 5 clearly contemplates that a contract may also be implied from the conduct of parties. In the present case, the circumstances surrounding the share transfer were as follows:

(a) By 28 April 2010 the parties had substantially agreed on the key terms of the transfer, including the number of shares to be transferred, the price to be paid for such shares and a scheduled for payment of purchase consideration;

(b) Share certificates were endorsed in the name of the Buyer; and the Board of Directors of Azure India, the Seller had approved the transaction and the Petitioner company had approved the transaction and the Petitioner company had approved the entry of SunEdison as a Member of the Petitioner company.

9.3.5 The above facts indicates that while a formal agreement was yet to be entered into by the parties, an oral or an implied contract came in to existence between the Seller and Buyer and the parties completed the transfer of shares prior to execution of the formal contract.

.....

9.3.7 In view of the above, one cannot infer that the share transfer could not have been completed prior to the date of the SPA. Such transfer could be completed pursuant to an oral or implied agreement between two parties. Hon'ble Supreme Court of India and other courts

have held that even without a formal agreement, an oral or implied contract can come into existence between a seller and a buyer. This is also evident from the provisions of law cited above. The other question which has been raised by the Respondent is that if share transfer was already completed, there was no need to sign the SPA. We accept the argument of the Petitioner that the SPA was still relevant because it has milestones for payment and other provisions for future action. Thus, even though the expressions of several provisions of the SPA appear anomalous – and, as mentioned later, amount to indifferent and incompetent documentation – in the context of the claim of the Petitioner of having completed the share transfer and imply that such transfer would take place only in the future, we are inclined to hold that the signing of the SPA on 29 April 2010 does not establish that the share transfer could have taken place only on a future date after 29 April 2010 and not on the previous day.

.....

10.2.4 *In the present case, the SPA signed on 29 April 2010 specifically provides for purchase consideration to be paid by the Seller upon achievement of certain milestones prescribed in clause 4 thereof, but there is no provision to the effect that non-payment of purchase consideration would allow the Seller to rescind the sale of shares. Hence, the argument of the Respondent that the transfer of shares should be held invalid for non-payment of any amount agreed to be paid to the Seller cannot be accepted.*

10.2.5 *In the affidavit of Shri Pashupathy Gopalan, the following details regarding payment of consideration are given in para 27 and 28:*

.....

10.2.6 *In view of the above, we hold that payment of consideration was not a prerequisite for completing the transfer of shares.*

11.1 As regards the non-submission of the share transfer form, the Petitioner argued that it has no relevance and does not impact the position because share transfer has already been registered. The Board's resolution dated 28 April 2010 of the Petitioner company records that duly executed and stamped transfer deeds were received by the Company and following such receipt, the Board accorded its approval for transfer of 9,999 shares to the Buyer. When the share transfer has already been approved and registered in the statutory register of the company, the share transfer form has no further relevant.

.....

11.2 It is very unusual that the Petitioner was not able to submit the share transfer form. The argument that it could have been lost in the process of handing over of all documents relating to the project by Azure India to SunEdison does not appear convincing. In the context of errors and discrepancies in respect of documents such as minutes of the meeting of Board of Directors of Azure India

etc. the non-availability of the share transfer form can certainly create some doubt as has been forcefully argued- and rightly so - by the learned counsel for GUVNL.

.....However, as discussed earlier, we have, based on the relevant facts and case laws, reached the conclusion that a presumption can be drawn from the minutes of the meeting of Board of Directors of the Petitioner company which records that duly executed and stamped transfer deeds were received, following which the Board accorded its approval to transfer of the share to the buyer. Further, none of the parties involved in the transfer of shares has raised any objection or dispute relating to the claim of the Petitioner that the share transfer took place on 28 April 2010.

.....

12.4 As regards Mr. H.S. Wadhwa signing the PPA, we accept the clarification of the Petitioner that there was nothing wrong in his signing the PPA as authorized by the

Petitioner company. So far as the press release is concerned, non-inclusion of an event in the same does not necessarily prove that an event had not taken place.

.....

15.8 The basic issue is whether the errors and discrepancies are so serious as to affect the validity of the documents.

15.8.1 As mentioned earlier, our finding is that the discrepancies pointed out by the Respondent are not enough to show that the documents such as minutes of the Board meetings, the register of members and register of share transfers etc. are fabricated.

.....

Consequently, our answer to the second issue is in the negative. In other words, we hold that the Respondent GUVNL has not been able to establish that the transfer of shares in question took place after 30 April 2010 and

consequently there was violation of Articles 4.1(x) and 9.2.1(g) of the PPA.”

11. We find from the minutes of the Board of Azure Gujarat held on 28.04.2010 that the following resolutions were passed

“3. Approval to transfer of 9,999 (nine thousand nine hundred and ninety nine) equity shares held by Azure Power India Private Limited (“APIPL”) in the Company to SunEdison Energy India Private Limited”.

“The Chairman informed the Board that APIPL, holding 9,999 (nine thousand nine hundred and ninety nine only) equity shares of face value of Rs. 10/- (Rupees Ten only) representing 99.99% of the share capital of the Company, intends to transfer [9,999 (nine thousand nine hundred and ninety nine only)] equity shares to SunEdison Energy India Private Limited (“SunEdison”).

“The Board considered the same and noted that the Company had received the duly executed and stamped transfer deeds along with the shares certificates from APIPL for the above transfer. The Board discussed the same and it was therefore: RESOLVED THAT the consent of the Board of Directors of the Company be and hereby is accorded to the transfer of 9,999 (nine thousand nine hundred and ninety nine only) equity shares of the Company by APIPL as detailed below:

<i>Sr. No.</i>	<i>Name of the Transferor</i>	<i>Name of the Transferee</i>	<i>No. of shares transferred</i>	<i>Distinctive No.</i>	<i>Share Certificate No.</i>
1.	<i>Azure Power India Private Limited</i>	<i>SunEdison Energy India Private Limited</i>	9,999	1[2]9999	AZG001

.....

RESOLVED FURTHER THAT consequent to the above transfers, all references to APIPL as a member of the

Company in relation to the shares transferred to SunEdison be deleted from the Register of Members of the Company”.

12. The law relating to share transfer under Section 108 of the companies Act and the requirement of payment of full consideration at the time of transfer have been dealt by us in Appeal no. 234 of 2013. The same will apply in the present case. Therefore, we do not accept the contention of GUVNL that the share transfer would take place only when the full amount of consideration is transferred by the buyer to the seller, in this case by SunEdison to Azure India. We also find that in the present case, the Board of Azure Guajrat in its meeting held prior to the date of PPA has recorded the duly executed and stamped transfer form along with share certificates were received. Therefore, no adverse inference can be drawn against Azure Gujarat.
13. We find that GUVNL had not raised any query regarding the share holding of Azure Gujarat at the time of signing of the PPA on 30.04.2010. GUVNL issued a Default Notice

only on 22.05.2012 when the Solar project was nearing completion or completed. On a query made by us it was informed that the Solar project has already been commissioned and supplying energy to GUVNL.

14. We have examined the voluminous documents submitted by both the parties and we have come to the conclusion that the State Commission has correctly held that it could not be established that the share transfer of Azure Guajrat had taken place after to the date of signing of the PPA.
15. We also feel that the rulings of Hon'ble Supreme Court in Madhusoodhanan case referred to by the State Commission would be applicable to the present case, wherein the Hon'ble Supreme Court relied on various minutes of the meetings and resolutions to ascertain the intention of the parties and upheld the transfer of shares in favour of Mr. Madhusoodhanan.
16. GUVNL has relied on the decision in Micromeritics Engineers in support of its contentions under Section 164 and 195 of the Companies Act. It is evident from this

judgment that in order to dislodge the presumption created by Sections 164 and 195, the onus lies on the party who challenges the presumption ought to be dispensed within in a particular case. The Appellant has submitted that the share transfer register was not maintained. We find that the original registers were produced by the company before the State Commission and the State Commission has not considered sufficient or necessary to dislodge the presumption created by Section 164 and 195 of the Companies Act, 1956. The present case is also distinguishable on the facts from the case considered in the *Micromeritics*.

17. Similarly the findings in the *Gujarat Bottling Co.* quoted by Learned Counsel for GUVNL will not be applicable to the present case. Azure Gujarat's contention in the present approach is not that express contractual stipulations prohibiting transfer of shares are not binding or such provisions cannot be enforced.

18. On the second issue regarding validity of Article 4.1.(x) of the PPA raised in Appeal no. 291 of 2013, we have given a finding in Appeal no. 290 of 2013 as against the Appellant. Accordingly this issue is decided against Azure Gujarat.

19. Summary of our findings

i) We are in agreement with the findings of the State Commission that it could not be established that the transfer of shares of Azure Gujarat to SunEdison had taken place after the date of signing of the PPA.

ii) Article 4.1 (x) is valid and enforceable.

20. In view of the above, both the Appeals are dismissed. No order as to costs.

21. Pronounced in the open court on this **30th day of November, 2014.**

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

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REPORTABLE/NON-REPORTABLE

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