

In the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 54 of 2013

Dated: 11th November, 2013

Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Justice Surendra Kumar, Judicial Member

In the matter of:

Gujarat Urja Vikas Nigam Limited
Sardar Patel, Vidyut Bhavan,
Race Course, Vadodara-390007,
Gujarat

.....

Appellant

Versus

1. Gujarat Electricity Regulatory Commission
1st Floor, Neptune Tower, Ashram Road,
Ahmedabad- 380009.
2. M/s. ACME Solar Technologies (Gujarat) Pvt. Ltd.
At Plot No. 48, Sector 5, IMT Manesar,
Gurgaon-122050.
3. Gujarat Energy Transmission Corporation Ltd.
Sardar Patel Vidhyut Bhavan,
Race Course Circle, Vadodara-390007.
4. Gujarat Energy Development Agency (GEDA),
4th Floor, Block No. 114/2, Udyog Bhawan,
Sector -11, Gandhi Nagar-382017.
5. The Principal Secretary,
Energy and Petrochemicals Department,
Government of Jujarat,
Gandhinagar-382010.

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Respondents

Counsel for the Appellant(s) : Ms. Swapna Seshadri
Counsel for the Respondent No.2 : Mr. Buddy A. Ranganadhan

APPEAL UNDER SECTION 111(1) OF THE ELECTRICITY ACT, 2003.

JUDGMENT

HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. This appeal has been filed under Section 111 of the Electricity Act, 2003 (hereinafter called 'The Act') against the Order dated 31.12.2012 passed by the Gujarat Electricity Regulatory Commission (hereinafter called the 'State Commission') in Petition No. 1235 of 2012 filed by Respondent No.2 - Acme Solar Technologies (Gujarat) Pvt. Limited (hereinafter called 'Acme Solar') whereby the State Commission has allowed the Petition filed by Acme Solar and declared that the Solar Power Plant of the Acme Solar was ready for commercial operation in September 2011 and hence the liquidated damages for delay, as per the provisions of the Power Purchase Agreement and amended through Supplemental PPA could only be levied for the period from 29.5.2011 (scheduled commercial operation date, in short 'SCOD') to 30.9.2011 and not beyond that date.

2. The State Commission is Respondent No.1. Respondent No. 2 is Acme Solar, Power Producer or Power Generating Company. Respondent No.3 (in short, 'GETCO') is the Corporation from whom the power producer was to seek approval in respect of inter-connection facilities. Thus, respondent no.3 GETCO is the Corporation whom the power producer was to approach for linkage transmission line from its switchyard to nearest sub-station of GETCO. Respondent no. 4 (GEDA) is the agency which issued certificate of commissioning of solar photovoltaic grid interactive power project of the power producer.

3. The brief facts of the case are as under:-
- A. The Appellant, Gujarat Urja Vikas Nigam Limited, (in short, 'GUVNL') is a Government of Gujarat undertaking and incorporated under the provisions of the Companies Act, 1956, having registered office at Sardar Patel' Vidyut Bhawan, Vadodara, Gujarat - 390007.
 - B. The Appellant has succeeded to the functions of the erstwhile Gujarat Electricity Board, a statutory body constituted under the Electricity (Supply) Act, 1948 as was applicable at the relevant time.
 - C. The Appellant undertakes the purchase of electricity in bulk from the generating companies and others, and supplies electricity in bulk to the distribution companies in the state to enable retail supply of electricity by the distribution companies to the consumers and end users.
 - D. Respondent No. 1- **State Commission** was constituted as the Regulatory Commission for electricity in the State of Gujarat functioning under the provisions of the Electricity Act, 2003.
 - E. The Respondent No. 2, Acme Solar is a company incorporated under the provisions of the Companies Act, 1956 and has set up a 15 MW solar power project in the State of Gujarat.
 - F. The Government of Gujarat issued Solar Power Policy, 2009 dated 06.01.2009 for promotion of solar energy based power generation in the State.
 - G. The State Commission had then initiated a proceeding for determination of tariff for procurement of power by Distribution Licensees from the Solar Energy Projects to be established in the State of Gujarat. The said proceedings were initiated pursuant to the objective of promoting Non-conventional Energy Project as envisaged in Section 86 (1) (e) of the Act.

- H. By Order No. 2 of 2010 dated 29.01.2010 the State Commission determined the tariff and other terms and conditions for purchase of electricity by the Distribution Licensees in the State from the Solar PV and Solar Thermal Projects to be established in the State.
- I. On 31.05.2010, the Appellant entered in to a Power Purchase Agreement (PPA) with Acme Solar in terms of the Order dated 29.01.2010. The relevant clauses of the PPA are as under -

"RECITALS

WHEREAS the Power Producer desires to set-up such Solar Photovoltaic Grid Interactive Power Plant of 15 MW capacity at village Guthwada & Amarnesda Taluka- Kankrej, District Banaskantha using new Solar Photovoltaic Grid Interactive power plants to produce the Electric Energy and exercised the option under aforesaid regulations, for sale of entire electrical energy, so produced, for commercial purposes from such Project to GUVNL.

AND, WHEREAS, the power producer has taken responsibility to deliver power at dead end tower in the switchyard of the Solar Photovoltaic based power project and also approached Gujarat Energy Transmission Corporation Limited (GETCO) for arranging for transmission system for evacuation of power from the project at appropriate voltage level as requirement of the system.

.....

"Commercial Operation Date" with respect to the Project shall mean the date on which the Solar Photovoltaic Grid Interactive power plant is available for commercial operation (certified by GEDA) and such date as specified in a written notice given at least ten days in advance by the Power Producer to GUVNL.

"Scheduled COD" or "Scheduled Commercial Operation Date" means 29th May 2011.

.....

3.1 The Power Producer shall complete the Construction of the project on or before the Scheduled Commercial Operate date.

.....

4.1 *Obligations of the Power Producer:*

- (i) *The Power Producer shall obtain all statutory approvals, clearances and permits necessary for the Project at his cost in addition to those Approvals as listed in Schedule 3.*
- (ii) *The Power Producer shall construct, operate and maintain the Project during the term of PPA at his cost and risk including the Interconnection Facilities.*
- (iii) *The Power Producer shall sell all available capacity from identified Solar Photovoltaic Grid Interactive Power Plants to the extent of contracted capacity on first priority basis to GUVNL and not to sell to any third party.*
- (iv) *The Power Producer shall seek approval of GETCO in respect of Interconnection Facilities.*
- (v) *The Power Producer shall approach GETCO for laying transmission line from its switchyard to nearest substation of GETCO. Further, Power Producer shall ensure the injection of power at not lower than 66 KV level. Power Producer shall also install RTUs to enable SLDC to monitor the injection of power.*
- (vi) *The Power Producer shall undertake at its own cost maintenance of the Interconnection Facilities as per the specifications and requirements of GETCO, as notified to the Power Producer, in accordance with Prudent Utility Practices.*
- (vii) *The Power Producer shall operate and maintain the Project in accordance with Prudent Utility Practices. Further, power producer shall submit forecast for availability of power to SLDC as per Regulation of Hon'ble GERC/CERC*

4.3 *Liquidated damages for delay in Commissioning the Project / Solar Photovoltaic Grid Interactive Power Plant beyond Scheduled Commercial Operation date*

If the project is not commissioned by its Scheduled Commercial Operation Date other than the reasons mentioned below, the Power Producer shall pay to the GUVNL liquidated damages for delay at the rate of Rs. 10000 (Rupees Ten thousand) per day per MW for delay of first 60 days and Rs 15000 (Rupees Fifteen thousand) per day per MW thereafter. Liquidated damage is payable up to delay period of 1 year from Scheduled Commercial Operation Date. If the Power Producer fails to make payment of the liquidated damages for a period exceeding 30 days, GUVNL shall be entitled to invoke the Bank Guarantee to recover the liquidated damages amount. In case of delay more than 1 year, GUVNL assumes no obligation and has right to terminate the Power Purchase Agreement by giving 1 month Termination notice.

- 1. The project cannot be Commissioned by Scheduled Commercial Operation Date because of Force Majeure event; or*
- 2. The Power Producer is prevented from performing its obligations because of material default on part of GUVNL.*

3. *Power Producer is unable to achieve commercial operation on Scheduled Commercial Operation Date because of delay in transmission facilities/ evacuation system for reasons solely attributable to the GETCO.*

.....”

- J. In terms of the PPA dated 31.5.2010, the Schedule Commercial Operation Date of the solar power project of Acme Solar was 29th May 2011. Further, in terms of Power Purchase Agreement, it was the responsibility of Acme Solar to deal with the Gujarat Energy Transmission Corporation Limited (GETCO) and other agencies in regard to timely establishment of evacuation facilities for conveyance of power from the Solar Power Project and commissioning of solar power project on or before Schedule Commercial Operation Date (SCOD).
- K. Thus the ACME Solar had executed a Power Purchase Agreement with Gujarat Urja Vikas Nlgam Ltd. on the 31st May, 2010 for supplying the electricity generated from its 15 MW Solar Photovoltaic Power Plant. According to the PPA, the Scheduled Commercial Operation Date of the plant was 29th May, 2011. Upon installation of the Power Plant, it was obligatory for the power producer / ACME Solar to supply such electricity at the dead end tower in the switchyard of the power plant. It was also agreed between the parties that it is the obligation of the GETCO to lay down the transmission lines and provide for an interconnection between the switchyard of the power producer's and the nearest sub-station of GETCO.
- L. Under the PPA dated 31.05.2010, it was also agreed between the parties, namely, the appellant and respondent no.2 that if the power project was not commissioned by its Scheduled Commercial Operation Date of 29.05.2011, the appellant was entitled to levy liquidated damages in terms of Clause 4.3 of the PPA, with the stipulation that such liquidated damages would, *inter alia*, not be leviable if the

power producer was unable to achieve commercial operation by the Scheduled Commercial Operation Date (SCOD) due to delay in providing transmission facilities/evacuation system by GETCO.

- M. Thereafter, through the Supplemental Power Purchase Agreement executed on 11th October, 2010, the name of the power producer was agreed to be changed from ACME Tele Power to ACME Solar Technologies (Gujarat) Private Limited.
- N. At the time of entering into the PPA dated 31.05.2010, necessary approvals for setting up the project at Village Guthwada & Amarnesda, Taluka Kankrej, District Banaskantha was obtained by the respondent no.2- power generator who had thereafter commenced purchasing and acquiring the land in the said villages. The land was subsequently found to be not suitable for the project due to various reasons. Further, in view of certain Governmental actions regarding change in Jantri/Katha rates and subsequent non-registration of sale deeds as well as agitation by farmers /land owners etc., acquisition and completion of sale of the said land had become impossible. The power generator - respondent no.2 had, therefore, been compelled to identify a fresh site for the power project by October/November, 2010. Upon obtaining necessary clearances from all concerned authorities, the site for the power plant was changed by the respondent no. 2 to Village Wadgam, Taluka Khambhat, District Anand, in November, 2010.
- O. Till November, 2010, when the respondent no.2 had changed the site for establishing its power plant from Kankrej to Khambhat, GETCO had not taken any steps whatsoever to either earmark the site of the switchyard or to commence laying down of the transmission lines at the earlier site at Village Guthwada & Amarnesda, Taluka Kankrej to its nearest sub-station. Thus, GETCO had not moved even a step

towards the work of link transmission lines, although the original PPA had been entered into in May 2010.

- P. The respondent no.2, besides obtaining prior approvals from the appellant- GUVNL, GETCO had also been formally informed about the change of site from Kankrej to Khambhat in November, 2010 itself by the respondent no.2 through its letter of November, 2010 by which letter respondent no.2 had informed GETCO that transmission lines from the new site could be conveniently connected to either of the two nearest 66 sub-stations- one of which was at Khambhat 18 Kms away from the project site and the other sub-station was at Neja which is 15 Kms away from the project site.
- Q. The appellant/GUVNL had accorded its approval for change of site from Village Guthwada, District Banaskantha to Village Wadgam, Khambhat, District Anand in November, 2010 and it was thereafter that Supplemental Power Purchase Agreement on the 24th March, 2011 in order to incorporate the change in the particulars of land for establishing the power plant was entered into between the appellant and respondent no.2. Thereafter, the respondent no.2 had written letters dated 18.10.2011, 18.05.2011, 01.06.2011 besides personal follow up requesting GETCO to expedite the process of laying down the transmission line and award of tender as the plant was likely to be ready for commissioning by September, 2011.
- R. That the Transmission Licensee, GETCO would require time to make arrangement for laying down transmission lines from the place chosen by Acme Solar for establishing the power project till the inter connection to the existing transmission network of GETCO.
- S. However, Acme Solar in the month of March 2011 (after 10 months from signing of PPA and just 2 months prior to the stipulated time for completion of the project in May 2011 proposed/ decided to change the

location of the solar power project from Village: Guthawada Dist: Banaskantha to Village: Wadgam, Dist: Anand and approached the Appellant for amendment of project site in the PPA. There was no time for GETCO to plan & lay down the transmission line from the new location since the laying down of the transmission line would take reasonable time, namely, beyond the Scheduled Commercial Operation Date of May 2011 stipulated in the PPA. In the circumstances, the Appellant had agreed to consider the change in location subject specifically to the condition that non-availability of transmission lines will not affect the levy of liquidated damages. This was duly agreed to by Acme Solar.

- T. Accordingly, Supplemental PPA dated 24.3.2011 was executed between the Appellant and Acme Solar to effect change of location of the power project with a specific stipulation as under -

"2.3 As per the PPA dated 31st May 2010, Scheduled Commercial Operation Date of Solar Power Project is 29th May 2011. Since M/s. ASTGPL has changed the location of the Solar Power Project after lapse of significant time, non-availability of Transmission system shall not be considered as a ground for non-levy of Liquidated Damages. M/s. ASTGPL shall pay Liquidated Damages even in case of non-availability of transmission system for evacuation of power by Schedule Commercial Operation Date."

- U. In December 2011, Acme Solar filed Petition No. 1147 of 2011 praying for extension of Control Period of the Tariff Order dated 29.1.2010 with a number of prayers including non-payment of liquidated damages in terms of Article 4.3 of the PPA. The specific prayer made by Acme Solar is extracted hereunder-

"(iv) Pass necessary orders recommending waiver of the Liquidated Damages as per Article 4.3 of the PPA."

- V. The Appellant in its reply dated 5.01.2012 with regard to Prayer (iv), specifically stated that Acme Solar had executed a Supplemental PPA

dated 24.03.2011 and agreed that since Acme solar has changed the location of the Solar Power Project after lapse of significant time, the non-availability of Transmission system shall not be considered as a ground for non-levy of Liquidated Damages. Acme Solar is liable to pay Liquidated Damages even in case of non-availability of transmission system for evacuation of power by Scheduled Commercial Operation Date.

- W. The petition No. 1147 of 2011 filed by Acme Solar and number of others was heard and dismissed by the State Commission by its Order dated 27.1.2012 holding as under-

"[16] In view of the above analysis, we decide that the petitioners have not succeeded in making out a case for invoking the inherent power of the Commission to extend the control period determined by the Commission in its Order No. 2 of 2010 dated 29 January 2010. Though they have put forward a number of reasons for the relief they have sought, none of the petitioners including the Association of Solar Power Developers, which has filed a separate petition, has indicated any ground whatsoever which is of universal application either in the State of Gujarat or a major part thereof by which all the projects are affected by such factors. Several projects have been or are likely to be commissioned during the control period itself. The reasons indicated by the petitioners appear to be in the manner of indirectly invoking the Force Majeure clause specified in the PPA, which cannot be addressed by a general order. Hence, all the petitions are dismissed."

- X. In terms of the definition of Commercial Operation Date in the PPA, the parties had duly agreed that the Commercial operation is to be certified by the Gujarat Energy Development Authority (GEDA). The certificate of readiness for commissioning of solar power project pending transmission line and actual commercial operation / commissioning was issued by the Gujarat Energy Development Agency to Acme Solar on 17.3.2012 stating as under -

'The plant was ready for generation as on 31/12/2011, but for 66 KV transmission line.'

Y. On 20.07.2012 Acme Solar filed Petition No. 1235 of 2012 before the State Commission praying as under -

- I. *An ad-interim direction to GUVNL, to release and pay full amounts of the tariff invoices raised by the petitioner for energy supplied and certified by SLDC in accordance with terms of Power Purchase Agreement (PPA) dated 31st May 2010 executed between the petitioner and GUVNL.*
- II. *Direction to GUVNL to continue to release and pay full and complete amounts of all the tariff invoices that may be raised by the petitioner for energy supplied and certified by SLDC in accordance with terms of PPA dated 31st May 2010.*
- III. *Direction to GUVNL to pay interest on all delayed payments as per Article 6.3 of PPA dated 31st May 2010.*
- IV. *Direction to GUVNL to forthwith establish and maintain an irrevocable and unconditional revolving Letter of Credit in favour of the petitioner in terms of Clause 6.5 of PPA dated 31st May 2010 to secure the timely payment of the tariff invoices of the petitioner.*
- V. *Direction to GUVNL to refrain from withholding or deducting any amounts which are not otherwise deductible under the terms of PPA dated 31st May 2010.*
- VI. *Direction to GUVNL to refrain from deducting or withholding any amounts payable against invoices raised by the petitioner towards recovery/adjustment of any alleged Liquidated Damages*
- VII. *Direction to GUVNL to not levy any Liquidated Damages on the petitioner either under PPA dated 31st May 2010 and Supplemental PPA dated 24th March 2011 in peculiar facts and circumstances of the case.*
- VIII. *In the alternative, to refer the disputes arising under the present petition for adjudication through arbitration in accordance with section 158 of the Electricity Act, 2003."*

Z. By Order dated 31.12.2012, the State Commission has allowed the Petition No. 1235 of 2011 and held as under-

"5.4.4.1 GEDA certificate does mention that the plant was ready for generation on 31.12.2011. This, however, needs to be looked at with the background of several petitions which were filed with the Commission a few months before the end of the control period of the Commission's solar tariff for extension of the same. In many cases, the power project developers had requested for extension on various grounds such as heavy rainfall, non

availability of transmission evacuation facility etc. The Commission decided not to give any extension of the control period. During the hearing Shri M.G. Ramchandran on behalf of GUVNL had assured that those projects ready for commissioning but not commissioned due to non-availability of evacuation system could be entitled to the existing tariff. In the order of the Commission dated 27.1.2011, the following details are recorded:

"..... as regards the non-availability of evacuation facility by GETCO, learned advocate Shri M.G. Ramchandran, on behalf of the respondent, assured during the hearing on 30.9.2011 that if any solar project is ready for commissioning, but could not be commissioned due to non-availability of evacuation system, it shall be entitled to the tariff determined by the Commission in its order No.2 of 2010 dated 29.1.2010. However, such tariff shall be applicable to only those projects that have applied to GETCO for construction of evacuation system and the evacuation facility is not made ready by GETCO. This shall also be available to such projects who have been asked to create evacuation system by GETCO, but could not complete the same due to reasons not attributed to the project developers. He suggested that such developers should contact GEDA for completion certificate."

Thus, there was an issue of non-availability of evacuation system and there were other cases similar to the case of present petitioner. In some cases, even though the projects were completed or were about to be completed they were apprehending not to be able to commence commercial production by the end of the control period because of nonavailability of evacuation facility. Hence, they had applied for extension of the control period. In view of this, one cannot presume that simply because the present petitioner had filed a petition for extension of control period its plant was not ready. The only question is whether the plant was ready by September 2011 as claimed by the petitioner or by 31.12.2011 as mentioned in the certificate of GEDA. In this connection, it is worthwhile to note that the petitioner has placed on record several letters addressed to GETCO, GUVNL, and Government of Gujarat informing that the power plant would be ready for commissioning by September 2011. Subsequently, the petitioner vide letters dated 23.9.2011, 14.10.2011 and 21.10.2011 informed Government of Gujarat regarding completion of the power plant in September 2011 and requested to intervene so as to expedite the transmission work by GETCO. Further, ACME had written several letters e.g. those dated 14.9.2011, 23.9.2011 and 12.10.2011 requesting GETCO to expedite the process of creating evacuation facility. On 12.10.2011, the petitioner wrote a letter to the Director, GEDA informing that he had completed 15 MW solar PV project and was awaiting transmission line from GETCO. The petitioner enclosed documents, necessary test certificates etc. as per the guidelines, and checklist for issue of necessary certificate. In

view of all these it would be reasonable to accept that the project was ready for commissioning by the end of September 2011.

5.4.4.2 The petitioner had contended that in view of the clarification given by Shri M.G. Ramchandran during the hearing of the petition No. 1147 of 2011, he was not liable to pay Liquidated Damages as the plant was ready except of transmission facility by GETCO. This contention is not valid because the issue involved in that petition was only the extension of the control period for the purpose of tariff and nothing to do with Liquidated Damages. The above petition and similar other petitions relating to extension of control period did not involve any dispute between the parties regarding the provisions of PPA.

5.4.4.3 As discussed earlier, we cannot accept the argument of the petitioner that article 2.3 of the supplemental PPA is not valid because it was signed through coercion. The supplemental PPA read with original PPA has to be kept in view in deciding the issue involved in the present petition. As provided in article 2.3 of the supplemental PPA non-availability of transmission system could not be considered as ground for non-levy of Liquidated Damages. However, as we have mentioned in para 5.4.2.2, the article 2.3 of the Supplemental PPA appears somewhat arbitrary and inequitable. The SCOD could have been reasonably modified the timeframe given to the petitioner and GETCO could have been reworked in a fair, realistic, and reasonable manner. Hence, even though the petitioner is liable to pay Liquidated Damages from the date of SCOD (i.e. 29.5.2011), it would be fair and reasonable to hold that such Liquidated Damages shall be leviable only up to end of September 2011 when the plant was ready for commissioning.

5.5. In view of the above discussions, we hold that the petitioner is liable to pay Liquidated Damages from 29.5.2011 to 30.9.2011 and not beyond that date."

4. Regarding the issue of coercion raised on behalf of the petitioner, the learned State Commission has observed that the petitioner has not placed any direct evidence to show that he was actually compelled to agree to Article 2.3 of the supplemental PPA which he has signed. The learned State Commission has further observed that there is no mention of coercion or compulsion in the original petition, however, the Article appears somewhat strange, inequitable and arbitrary. The supplemental PPA was executed on 24.03.2011 and by virtue of Article 2.3 of the same it was stipulated that ACME Solar will pay liquidated damages even if transmission system of GETCO is not available from original SCOD, namely, 29.05.2011, which was just two months from the date of signing of the supplemental PPA.

The likely time of completion of the Solar Power Project of ACME and that of evacuation system could and must have been broadly assessed by 24.03.2011 and the SCOD could have been reasonably modified and the time frame given to the petitioner and to GETCO could have been reworked in a fair realistic and reasonable manner. The view of the State Commission is that at least a time frame could have been given to GETCO instead of delinking imposition of liquidated damages from availability of transmission system for evacuation altogether, unlike in case of original provisions of the PPA. The provision of supplemental PPA has delinked the issue of liquidated damages from the completion of the evacuation facility by the GETCO. The learned State Commission rejected the contention of the petitioner that the liquidated damages should be recovered from the GETCO observing that the PPA is between the petitioner (ACME) and respondent no.2 (GUVNL). Though GETCO has certain obligations but one cannot expect GETCO to finalize a contract for the evacuation work unless the new site of the project is formally incorporated in the PPA.

5. The following contentions/submissions have been made by the learned counsel for the appellant:-

- (a) That the State Commission has not properly construed the provisions of the PPA dated 31.05.2010 and the supplemental PPA dated 24.03.2011 entered into between the appellant and the ACME Solar in pursuance of the order dated 29.01.2010 passed by the State Commission.
- (b) That ACME Solar had decided to change the location of Solar Power Project to village Khambhat Wadgam, District Anand in the month of March, 2011 (after 10 months from signing of PPA and two months prior to the stipulated date for completion). ACME Solar signed the supplemental PPA on 24.03.2011 and specifically agreed with regard to applicability of liquidated damages even in the absence of the availability of the transmission line. In this way the State Commission has ignored the express provision in the supplemental PPA dated 24.03.2011 entered into between the parties and without appreciating that the supplemental PPA was signed by ACME Solar voluntarily and without any coercion. In the proceedings, the State Commission was not exercising its plenary power of tariff determination but was performing the adjudicatory functions under Section 86 (1) (f) of the Electricity Act, 2003, in exercise of which powers the State Commission was bound by the express terms of the Agreements between the parties. The State Commission can interpret the terms of the Agreement but cannot choose to ignore the specific terms thereof.

- (c) That the finding of the State Commission in the contention of the ACME Solar that power plant of ACME Solar was ready in September, 2011 is wrong and contrary to record. The certificate of readiness for commissioning of the Solar Power Project pending transmission line and actual commercial operation/commercial commissioning was issued by the Gujarat Energy Development Agency to the ACME Solar on 17.03.2012 stating that the plant was ready for generation as on 31.12.2011 but for 66 KV transmission line.

Learned counsel further goes on to say that as per certificate issued by the nodal agency (GEDA), the project of the ACME Solar was ready by 31.12.2011 and not by 30.09.2011 as claimed by the ACME Solar and accepted by the State Commission. In the circumstances, it was wrong on the part of the State Commission to assume that the project was ready in all respects by September, 2011 as this finding is against the provisions of the PPA which provides that COD has to be certified by the GEDA. The State Commission has not dealt with Article 1.1 defining the commercial operation date with respect to GEDA certificate of the PPA and the GEDA certificate which stated that the plant was ready for commercial operation on 31st December, 2011.

- (d) That the ACME Solar, in fact is misleading this Tribunal by contending that GETCO was obliged to provide for the transmission line in November, 2010 itself. ACME Solar itself submitted before the State Commission the documents related to land at new location site showing that revised land was acquired by ACME Solar in the month of March, 2011 only. Thereafter, ACME Solar signed the supplemental PPA dated 24.03.2011 for effecting the change in location of the project site. Since ACME Solar acquired the project land in the month of February-March, 2011 and signed supplemental PPA on 24.03.2011, it is not appropriate to allege that GETCO had not taken effective steps for arrangement of evacuation line prior to acquisition of project land. GETCO can plan evacuation system only after acquisition of land by the ACME Solar and signing of the supplemental PPA with the appellant. Otherwise, if GETCO simply starts constructing evacuation systems and lines without there being a proper location and agreement to that effect, GETCO will not be able to recover the same by way of tariff. Hence in the present case, it was not possible for GETCO to get ready the evacuation system within two months after the signing of the supplemental PPA. In the facts and circumstances of the case, the non-availability of the evacuation system to be constructed by GETCO by the time when the power project was ready, was clearly due to the reason that ACME Solar had changed the location and entered into a supplemental agreement as late as on 24.03.2011. Since the supplemental agreement clearly envisaged the non-availability of transmission system and the unconditional acceptance on the part of the ACME Solar, the same would not be considered as a ground for non-levy of liquidated damages.

- (e) That the transmission line of GETCO for evacuation of power of 15 MW Solar Power Project of the ACME Solar was ready by March, 2012. Accordingly, the appellant

becomes entitled to liquidated damages from ACME Solar for delay in commissioning of the project for the period from SCOD i.e. 09.05.2011 till 13th March, 2012 as per the terms of the PPA dated 31.05.2010 as amended by the supplemental agreement dated 24.03.2011. The learned State Commission is completely wrong in placing reliance upon the statement recorded by the learned counsel for the GUVNL to conclude that the plant was ready in September, 2011. The learned counsel's statement was in context of Solar Power Plant's eligibility for getting higher tariff of the earlier tariff order dated 29.01.2010 due to delay in commissioning of project on account of various reasons since the developers had filed objections for extension of the control period. The said statement of the learned counsel was not in context to levy / exemption of liquidated damages.

(f) That it is also incorrect that the ACME Solar had obtained approvals from the appellant about the change of site in the month of November, 2010. In fact ACME Solar had submitted the documents related to land of new location in March, 2011 only.

6. In reply, the learned counsel for the respondent no.2 -ACME Solar taking us through the records of this matter and through the contents and findings of the impugned order has contended that clause 2.3 of the amended PPA only means that if the generator's plant is not ready by Scheduled Commercial Operation date, the generator is liable to pay liquidated damages even if the transmission evacuation facility (to be built by GETCO) is not ready. This clause 2.3 does not mean that even if the generator's plant is ready by the SCOD, the generator is still liable to pay liquidated damages simply because the transmission facilities are not ready. The said clause does not mean that if the generator's plant is made ready and available at later date (the Commercial Operation Date), the generator will continue to pay liquidated damages indefinitely till the transmission line is made available by GETCO. The only test, therefore, for the levy of liquidated damages is whether the generator's plant was ready or not. If the generator's plant was ready, there could not, either in law, equity or contract, be a levy of liquidated damages on the generator thenceforth.

The learned counsel for the respondent no.2 has strenuously argued that clause 2.3 of supplemental PPA has been held by the State Commission to be arbitrary and inequitable. This is because of the appellant's interpretation of the said clause 2.3 to mean that even if the generator's plant is ready, the generator would still have to pay liquidated damages even if the transmission line is not ready. This is the reason why the learned State Commission in the impugned order has upheld the levy of

liquidated damages from 29.05.2011 (Scheduled Commercial Operation Date) to September, 2011 (when the plant was ready). The Commission has rightly disallowed levy of liquidated damages from October, 2011 to March, 2012 during which period the plant was ready but the transmission facilities to be constructed by GETCO were not ready.

The learned counsel for the respondent no.2 citing the provisions of Electricity Act, 2003 has submitted that under Section 86 (1) (b) of the Electricity Act, the Commission is empowered to even re-open or modify the terms of the PPA but has, in fact, applied the terms of the PPA in a reasonable, sound and equitable manner. It is, in fact, respondent no. 2 who has suffered financially due to the fact that its investment in the plant was lying idle from October, 2011 to March, 2012 on account of GETCO's failure to set up the transmission facilities. The appellant has for the period October, 2011 to March, 2012 not suffered any losses during the period when there was no transmission facility to evacuate the power. If the appellant is unable to purchase /off take the power because of the fault of GETCO in not constructing the transmission lines, it cannot make the generator liable for GETCO's fault.

The learned counsel for the respondent no.2 in reply to the aforesaid submissions raised on behalf of the appellant referring to Section 74 of the Contract Act has meekly submitted that when a contract provides for payment of liquidated damages in the event of breach, the complaining party is only entitled to reasonable compensation for the loss caused to it upto the maximum amount which is the quantum of the liquidated damages specified on the contract. Simply because an amount has been mentioned in a contract as liquidated damages, the entire amount is not automatically payable to the complaining party because of breach of the contract. Since the appellant has not suffered any loss during the period of October, 2011 to March, 2012 there has been no breach of contract on the part of the generator at all. The generator cannot be ordered to pay any liquidated damages after September, 2011 and onwards as rightly directed by the learned State Commission. The learned counsel for the respondent no.2 has also stated that what the respondent no.2 could do, he did running from pillar to post and also approached the highest authority of the State throughout requesting to direct GETCO to construct transmission facility immediately and expedite the matter. The learned counsel for the respondent no.2 has also submitted that

respondent no.2 had even arranged to disperse the energy produced from the solar cells into a huge resistive load of one MW range and these facts had been communicated even in early November, 2011. The arrangement of resistive load was necessitated at extra cost, basically for testing of individual solar modules and subsequently for dissipation of solar energy generated from the modules, till the transmission line was made available in order to avoid degradation of the modules. These facts on record establish beyond doubt that the 15 MW capacity Solar generating plant of respondent no.2 at Wadgaon, Khambhat, Distt. Anand was ready and available for generation of power w.e.f. end September, 2011.

Learned counsel for the respondent no.2 in the end has submitted that the respondent by independent evidence has proved to the satisfaction of the learned Commission that the plant was ready in September, 2011, namely, before 31st December, 2011 and the appellant could not under the law, namely, Section 171 of the Contract Act straightway adjust amounts from the energy bills towards its claim for liquidated damages. Thus, learned counsel for the respondent no.2 has vindicated /defended the conclusions and directions made by the learned State Commission in the impugned order.

7. It is admitted fact as made clear by learned counsel for both the sides that the respondent no.2 ACME Solar (petitioner before the State Commission) has not challenged the findings recorded in the impugned order dated 31.12.2012. Thus, the findings of the State Commission given in the impugned order are admitted to the respondent no.2 ACME Solar. The Power Purchase Agreement (PPA) dated 31.05.2010 had in clause 4.3 a very important provision to the effect that the power producer shall pay to the GUVNL (appellant), liquidated damages for the delay at the rate mentioned therein if the project is not commissioned by its scheduled commercial operation date except when the delay is due to the three reasons, namely, *force majeure* event or power producer is prevented from performing its obligation because of material default on the part of GUVNL or the power producer is unable to achieve the commercial operation of plant on scheduled commercial operation date (SCOD) because of delay in transmission facilities/evacuation system for reason solely attributable to the GETCO. Thus, according to the original PPA dated 31.05.2010, there was a specific provision by virtue of clause 4.3 that if power producer remains unable to achieve commercial operation on scheduled commercial operation date

because of delay in transmission facilities etc. for the reasons solely attributable to the GETCO, the producer shall not pay the liquidated damages for the delay caused in commissioning the project. This very important clause was deleted or done away with in the supplemental PPA dated 24.03.2011, by virtue of clause 2.3 of which the power developer was made liable to pay liquidated damages for the delay caused in commissioning of the project on the scheduled commercial operation date even if the GETCO failed to construct the transmission system or the evacuation system. Thus, the very important clause which was existing in original PPA was removed merely because the power developer respondent no.-2 had to change the original location of the project, because of certain governmental actions regarding change in Janti/Katha rates, non-registration of sale deeds as well as agitation by farmers, land owners etc., the factors which were beyond the control of the power generator/developer-(respondent no.2 herein). Since there was agitation of the farmers etc., and there was change in the Katha rates of the land to be acquired and due to certain impediments in the land acquisition, the project developer had no option but to change the site of the project and hence he ultimately changed the site. Since the site had to be changed by the project developer, he was bound to enter into supplemental PPA on 24.03.2011 whereby he had no option but to sign the said supplemental PPA in which there was specific clause 2.3 making the generator liable to pay liquidated damages even in case of non-availability of transmission system for evacuation of power by scheduled commercial operation date by GETCO. Since the respondent no. 2 has not challenged the impugned order in this Tribunal, he appears to be satisfied. Hence this is not the occasion for this Tribunal to go into the legality, reasonableness or validity of clause 2.3 of supplemental PPA dated 24.03.2011. Respondent no.2 has accepted all the findings recorded in the impugned order passed by the learned State Commission. The learned counsel for the appellant has not pointed out or shown any evidence to establish that Solar Power Plant was not ready in September, 2011 and it could be ready only by March, 2012 or alternatively as pleaded by the learned counsel for the appellant in December, 2011. The evidence on record makes it clearly evident that the plant was ready for commissioning by September, 2011, namely, on 30.09.2011. The finding in this regard made by the learned State Commission is based on correct and proper analysis and appreciation of the material on record to which we fully agree and there is no cogent and sufficient reason to deviate from the finding recorded by the learned State Commission in the impugned order. So far as issue regarding

implication of supplemental PPA dated 24.02.2011 in regard to liability of the developer - respondent no. 2 to pay liquidated damages vis-à-vis the availability of transmission of GETCO is concerned, we also agree to the finding recorded by the learned State Commission in the impugned order because respondent no.2- developer did whatever he could do within his control and ran from pillar to post requesting the highest authorities of the Energy Department of the State to direct GETCO to construct transmission facility without any further delay and if GETCO could not perform its obligation, the generator respondent no. 2 cannot be held liable for that after September, 2011.

8. Learned counsel for the appellant Ms. Swapna Seshadri in support of her contention has cited the case of S.K. Jain Vs. State of Haryana & Anr (2009) 4 SCC 357 wherein it was observed that the concept of bargaining power has no application in case of commercial contracts.

Learned counsel for the appellant has placed reliance on the case of Central Bank of India Ltd. Vs. Hartford Fire Insurance Co. Ltd. reported in AIR 1965 SC 1288 wherein it was observed that it is the Court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing, the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly.

Learned counsel for the appellant has further cited the case of General Assurance Society Ltd. Vs. Chandmull Jain recorded in AIR 1966 SC 1644 wherein it was observed that a contract of insurance is a species of commercial transactions.

Regarding Section 56 of the Contract Act, 1872, the learned counsel for the appellant has cited the cases of Alopi Parshad V. Union of India (1960) 2 SCR 793 and Travancore Devaswom Board V. Thanth International, (2004) 13 SCC 44. None of the above rulings/case laws cited by the learned counsel for the appellant is of any help to the submissions raised by her during arguments.

9. Learned counsel for the respondent no.2 Shr. Buddy. A. Ranganadhan has placed reliance on the case of Maula Bux Vs. Union of India 1969(2) Supreme Court Cases 554 which relates to deposit of money for due performance of contract where the deposit amount was forfeited . Hence, this case law is not applicable to the case in hand.

Learned counsel for the respondent no. 2 has also cited the case of Fateh Chand Vs. Balkishan Das (1963) 1SCR 515 wherein it was held that the measure of damages in the case of breach of a stipulation by way of penalty is by S. 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damages"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract to be likely to result from the breach.

10. In the result, this appeal fails as it has no merits and is liable to be dismissed. No order as to costs.

Pronounced in the open Court on this day of 11th day of November, 2013

(Justice Surendra Kumar)
Judicial Member

(Rakesh Nath)
Technical Member

Reportable/Non-reportable.