IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO.114 OF 2015 &
IA No.1310 OF 2024

Dated: 12.02.2025

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Smt. Seema Gupta, Technical Member (Electricity)

In the matter of:

GUJARAT URJA VIKAS NIGAM LIMITED
Sardar Patel Vidyut Bhavan,
Race Court Circle,
Vadodara – 390007 (Gujarat) … Appellant(s)

VERSUS

1. **TAXUS INFRASTRUCTURE & POWER PROJECTS LTD**
804 – A Arcadia, South City – II
Gurgaon – 122018 (Haryana) ... Respondent No.1

2. **GURAJAT ENERGY DEVELOPMENT AGENCY**
4th Floor, Block No. 11 & 12
Udhyog Bhavan, Sector 11
Gandhinagar – 382017 (Gujarat) ... Respondent No.2

3. **GUJARAT ELECTRICITY TRANSMISSION CORPORATION LIMITED**
Sardar Patel Vidyut Bhavan
Race Court Circle
Vadodara – 390007 (Gujarat) ... Respondent No.3

4. **CHIEF ELECTRICAL INSPECTOR**
6th Floor, Block 18, Udhyog Bhavan
Sector 11, Gandhinagar – 382 017
(Gujarat) ... Respondent No.4

5. **STATE LOAD DESPATCH CENTRE**
132 kV Gotri Sub Station Compound
Gotri Road, Near TB Hospital
Vadodara – 390021 ... Respondent No.5

6. **GUJARAT ELECTRICITY REGULATORY COMMISSION**
6th Floor GIFT ONE
Road 5-C Zone 5, GIFT CITY
Gandhinagar – 382 355 (Gujarat) ... Respondent No.6

Counsel on record for the Appellant(s)	:	Anand K. Ganesan Swapna Seshadri Ranjitha Ramachandran Arvind Kumar Dubey for App. 1
Counsel on record for the Respondent(s)	:	Inder Paul Singh Oberoi R. K. Srivastava for Res. 1 Suparna Srivastava for Res. 6

JUDGMENT

(PER HON'BLE MRS. SEEMA GUPTA, TECHNICAL MEMBER)

1. The instant appeal is preferred challenging the order dated 30.03.2015 passed by the Gujrat Electricity Regulatory Commission **(for short "GERC/State Commission")** in Petition No. 1364 of 2013, whereby the State Commission has held that the Solar PV Power plant of the Respondent No. 1 is deemed to be commissioned on 31.03.2013, therefore, Respondent No. 1 is entitled to raise the bills for the energy injected into the grid w.e.f. 01.04.2013 at the tariff rate applicable for the tariff year 01.04.2012 to 31.03.2013. The State Commission has further held that the delay in commissioning of the plant

to the extent of 402 days is due to the force majeure events and, therefore, the Respondent No. 1 is not liable to pay liquidated damages for the said delay.

This appeal has chequered history, the details of which in brief, are stated as under:

2. The instant appeal and Appeal No. 131 of 2015 were filed before this Tribunal by GUVNL and Taxus, respectively, aggrieved by the order passed by GERC on 30.03.2015. This Tribunal, vide its common order dated 04.07.2018, disposed of both the appeals, whereby Appeal No. 114 of 2015 was partly allowed and Appeal No. 131 of 2015 was dismissed.

3. Aggrieved by the afore-mentioned order of this Tribunal dated 04.07.2018, GUVNL, the Appellant in the instant appeal, had filed the review petition under R.P. No. 8 of 2018 before this Tribunal. Aggrieved by the very same order dated 04.07.2018 of this Tribunal, both GUVNL and Taxus (Appellants in Appeal No. 114 of 2015 and 131 of 2015) have filed appeals before the Supreme Court in Civil Appeal Diary No. 33187 of 2018 and 4323 of 2019, respectively. The Supreme Court vide its order dated 01.03.2019 directed that the said appeals be listed after the decision in the review petition pending before this Tribunal.

4. This Tribunal, after elaborate hearing, has disposed of the Review Petition No. 8 of 2018 by setting aside the earlier judgment passed by this Tribunal dated 04.07.2018 in the instant appeal i.e., Appeal No. 114 of 2015 vide its order dated 27.05.2024 to the limited extent, the relevant portion of which is extracted here-in-below:

" In the light of what has been observed hereinabove, the order passed by this Tribunal, in Appeal No. 114 of 2015 dated 04.07.2018, is set aside to the limited extent of (a) non-consideration of issues raised by the Review Petitioner with respect to the two force majeure events ie (i) denial by the Government of Gujarat to implement the project through a Special Purpose Vehicle and (ii) delay in registration of sale deeds; (b) non-consideration of the 2010 Regulations, the relevant clauses of the PPA, and the judgement of the Supreme Court with respect to the Certificate of Chief Electrical Inspector, and the certificate of GEDA; and (c) failure to consider the contentions raised by the review petitioner regarding the undertaking dated 27.03.2013 furnished by Respondent No.1, and application of the principles of Res Judicata.

The order under review is set aside, and Appeal No. 114 of 2015 shall stand restored to file, to the limited extent indicated hereinabove. It is made clear that we have neither interfered with the findings recorded and the conclusions arrived at in the order under review on all other aspects, nor have we expressed any opinion on the merits of the contentions urged on behalf of the review petitioner. The order under review has been set aside only on grounds that (i) the relevant contractual and statutory provisions, and the judgment of the Supreme Court, have not been considered, and (ii) the order under review has failed to consider and deal with the certain other aspects as indicated hereinabove.

The appeal, on its being restored to file, shall be examined on its merits without being influenced by any observations made in this order. The review petition stands disposed of accordingly."

5. The present Judgement pertains to the issue crystallised in this Tribunal's Order dated 27.05.2024 in RP 8 of 2018 and for the sake of convenience major facts in APL 114 of 2015 are reiterated as under :

The Appellant is the Gujarat Urja Vikas Nigam Limited **("GUVNL")** which is engaged in procurement of power in bulk on behalf of the distribution licensees in the State of Gujarat. The Respondent No. 1 - Taxus Infrastructure & Power

Projects Pvt Ltd is a generating company and had set up its 5 MW Solar Photo Voltaic (PV) Power Project at Village Rapar Khokhara, Taluka Anjar, Dist. Kutch, Gujarat. The Respondent No. 2- Gujarat Energy Development Agency (**GEDA**) is the Nodal Agency for the promotion of renewable energy based generation in the State of Gujarat. The Respondent No. 3 - Gujarat Electricity Transmission Corporation Limited is the transmission licensee in the State of Gujarat. Respondent No. 4, the Chief Electrical Inspector is the authority designated for issuing certificate under the Central Electricity Authority (Measures relating to Safety and Electric Supply) Regulations, 2010 to the effect that the electrical installation fulfills the safety requirements and are ready for energization. The Respondent No. 5 - State Load Despatch Centre **("SLDC")** is the State Body to ensure integrated operation of the power system in the State of Gujarat. The Respondent No. 6 is the Gujarat Electricity Regulatory Commission **("State Commission / GERC").**

6. On 29.01.2010, the State Commission determined the tariff for Solar PV Power Projects commissioned within the control period of two years, up to 28.01.2012. Respondent No. 1 was allocated 5 MW of solar capacity by Government of Gujarat, in line with guidelines issued by Gujarat Energy Development Agency **("GEDA"**) for allocation of solar power capacity (Phase II) and on 08.12.2010, the Appellant entered into a Power Purchase Agreement ("PPA") with Respondent No. 1 for the supply of electricity generated from its 5 MW solar power project. The scheduled commissioning date of the project as per PPA worked out as 31.12.2011.

7. The Appellants have claimed that COD of the project should be considered as 08.08.2013, when certification of GEDA was issued and

contented that the State commission in the Impugned order has wrongly allowed COD of 31.03.2013, ignoring the submission/undertaking made by Appellant/Respondent as well as provisions of PPA.

8. Learned counsel for the Appellant has stated that State Commission in the Impugned order has condoned the delay of 402 days on account of Force majeure, non-considering the issues raised by the Appellant with respect to two Force majeure events i.e non-grant of permission for Implementing the project by SPV and delay in registration of sale deeds.

9. Heard Ms. Ranjita Ramchandran, the learned counsel for the Appellant, and Mr. Amit Kapoor, learned counsel for the Respondent; the rival contentions and issues emerged therein are deliberated below under various heads:

Issue No 1: Raising of Force Majeure issue, barred due to res judicata

Submissions by the Appellant

10. Learned Counsel for Appellant submitted that Article 4.3 of the PPA provides imposition of LD in the event of delay in commissioning. GERC, in the Impugned order, while holding three events as Force Majeure event (402 days), held Taxus was liable to pay liquidated damages only for the remaining period of delay. Learned counsel submitted that Taxus has filed Petition No. 1145 of 2011 before GERC, for extension of Control period (as defined by the GERC through its tariff order dated 29.01.2010 passed in Order 2 of 2010), which was rejected by GERC by its order dated 27.01.2012. This was challenged by Respondent-Taxus before Hon'ble High Court, and the matter was settled with liberty to Respondent-Taxus to

approach this Tribunal vide Order dated 26.02.2014, however, Respondent-Taxus did not do so, therefore, GERC order attained finality. When the said order attained finality, the Taxus by way of new Petition before this Tribunal cannot claim any relief on same aspects, which could have been raised, or for any relief, which could have been claimed, but was not. Admittedly, due to the delays in land issues, jantri rate revisions, Respondent-Taxus sought for extension of SCOD and requested for non-levy of LD. However, GERC rejected the petition holding that several projects were commissioned within the control period, and that no liberty was granted to Taxus. Learned counsel submitted that, since the order dated 27.01.2012, though common in similar petitions, was passed by GERC, the principle of *res judicata* shall apply as Petition No. 1145 of 2011 was decided and rejected. GERC erroneously held that *res judicata* applies only if the prayers are similar, contrary to the provisions of CPC. This finding contradicts other observations made by GERC as it acknowledged that the grounds in the said Petition such as jantri rates and non-registration of land are the same as those in the present case. Furthermore, the reliefs sought in both the petitions are similar, as Petition No. 1145 of 2011 also requested for an extension of SCOD and non-levy of LD. If Taxus did not raise the Force Majeure claim in Petition No. 1145 of 2011 on the same facts, it is legally barred from doing so in the current petition ("***Rakha Singh v. Amrit Lal (AIR 1984 P&H 47)***,". Taxus could have raised the Force Majeure plea in the earlier petition but did not do so, and is thus precluded from raising it in the present petition.

Submissions by Respondent - Taxus

11. Regarding the contention of the Appellant that Respondent has raised the same issues in Petition No.1145 of 2011, which was rejected by GERC by its order dated 27.01.2012, learned counsel submitted that Respondent-

Taxus was one amongst a group of 37 Petitioners seeking extension of control period of GERC order No 2 of 2010 dated 29.01.2010. In the said petition, Taxus has raised various issues like i) Billing disputes, ii) Liquidated damages disputes, iii) Commissioning date of the project, iv) Tariff receivable by Taxus etc. The pleadings in Petition No. 1145 of 2011 and that in Taxus petition under Impugned order are distinct from each other. Since the batch of matters were disposed of by GERC by common order, the actual facts pleaded by the Appellant in the said petition were not considered. The Order was based on common facts and issues and common prayer ignoring the specific issues pleaded by Taxus with relevant to supplementary documents. As such, the principle of *res-judicata* is not applicable in the present case.

Issue No 1: Discussion & Analysis

12. It is a settled law, governed by Section 11 of the Code of Civil Procedure, that *res judicata*, is a doctrine that prohibits a court from re-examining a case that has already been conclusively decided by the same court, involving the same parties, subject matter, and under the same title as reproduced here under:

> *"11. Res judicata.—No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.*
>
> *"Explanation IV.— Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in such suit."*

13. From a bare reading of the section, it is evident that a decision of a Court is final not only if it has been decided in an earlier suit between the same parties but also if the matter might or ought to have been made ground of defence or attack in the former suit. The principle underlying the Explanation is that if a party had an opportunity to raise a matter in a suit that should be considered to have been raised and decided. The object of the principle is to cut short litigation between the parties so that a person may not be vexed again and again with regard to the same matter ("**Rakha Singh v. Amrit Lal (AIR 1984 P&H 47)**.

14. To deliberate on the applicability of *res judicata* for condoning the delay on account of Jantri rates and finalization of SPV under force majeure, let us examine the plea taken by Respondent -Taxus in petition 1145 of 2011 and the State commission order dated 27.01.2012 in the batch of appeals including the said petition of Respondent, having attained finality in the absence of challenge subsequent to High Court order and other related facts.

15. It is noted that the State Commission vide its order No 2 of 2010 dated 29.01.2010 has issued comprehensive tariff order on Solar Energy for procurement of power by distribution Licensee and other from solar energy projects in the State of Gujarat, subsequent to Solar Energy Policy 2009 announced by Govt of Gujarat, to be applicable to solar projects commissioned during the control period of two years ending 28.01.2012; thus once a project qualifies for the tariff as determined in the order, same tariff is to be applicable for the entire life of the project.

16. Various solar power project developers including Respondent - Taxus (vide petition No 1145 of 2011) have approached the State Commission for

extension of the control period, from one month to six months, implying that tariff so notified to be applicable for further period beyond 28.01.2012. It is a fact that the Respondent Taxus in its petition No 1145 of 2011 has cited the delay of about four months from the date of submission of conveyance deed for registration from 04.06.2011 till land registration on 04.10.2011 on account of Jantri rates which is beyond their control, as well as denial for SPV permission and sought extension of Control Period as defined in order dated 29.01.2010 by four months as well as control period in the PPA to be considered as 28.01.2012 instead of 31.12.2011.

17. The State Commission in its order noted that though various petitioners (developers) have requested for extension of SCOD, non-levy of liquidated damages in addition to extension of control period, however, none of the petitioners have given any specific data and they have also clarified that the petitions do not relate to any dispute in the context of the PPA and they are not asking for adjudication of any dispute under Section 86 (1)(f) of the Electricity Act 2003. We also note from the Petition No.1145 of 2011 of the Respondent -Taxus, the waiver of liquidated damages was not sought, rather it pleaded that in the event of non-extension of Control period, it will be penalized twice for the same delay, even non-attributable to it i.e revised tariff as well as payment of liquidated damages in terms of PPA. The State Commission treated all the Petitions as Petitions seeking extension of the control period and not for adjudication of dispute under PPA and the State commission vide its order dated 27.01.2012 dismissed all the Petitions, extract from the order is reproduced below:

> *5.2 The above petition is similar to other petitioners which have asked for extension of the control period. Though, unlike other petitioners, he has mentioned adjudication of dispute under the PPA. Some other*

petitioners such as those in Petition Nos. 1145, 1146, 1147, 1148, 1164, 1169, 1171, 1179 and 1182 of 2011 and 1186 of 2012 have requested for extension of the SCOD and non-levy of liquidated damages, in addition to extension of control period. However, none of these petitioners has provided any information as to whether he has taken recourse to resolution of disputes in accordance with the provisions of the PPA before approaching the Commission. During the hearing also the petitioners, did not furnish any such detail. In view of this, we treat these petitions as petitions seeking extension of the control period and not for adjudication of disputes under the PPA.

11.3 It can be seen from the above that the reasons put forward by the petitioners for extension of control period - though some common factors are there are project specific. In some cases, there could have been delay due to change of project site. In some cases, there may be delay because of more time taken to obtain NA permission, or permission under the Tenancy Act. In some cases, the project construction could have been affected for a few days because of water logging due to excessive rains. However, one cannot infer that because of these and some of the other factors, most of the projects were affected. If there is an event which is known to have statewide and large-scale ramifications, then only there could be a case for issue of a general order to extend the control period. In fact, the issues raised by the petitioners, as rightly pointed out by the learned Advocate for the respondents, indirectly imply existence of Force Majeure conditions, which can be addressed only within the framework of PPA. There is no justification to issue a general order extending the control period determined in the tariff order of 29 January 2010. In fact, extending the control period will mean an amendment to the above order of the Commission which will require a different procedure and cannot be done based on individual petitions referring to individual project specific problems and issues. In fact, the extensions asked for range from one month to six months. There are also other aspects such as progress of the project and size of the project which vary widely. On the other hand, a number of projects as discussed in the following paragraphs, have already been commissioned or are likely to be commissioned. Hence, it is evident that the petitioners have not been able to establish that the reasons put forward by them can justify an extension of the control period which is a modification of the Tariff Order of 29 January 2010,

especially when a discussion paper has already been issued for determining the tariff for the next control period.

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.

18. Thus, the Petitions filed by the developers including that of Respondent No1- Taxus was for the general Extension of control period of the Tariff so determined by the State Commission, vide its order dated 29.01.2010, and not that of specific events with time lines for condonation of delay on account of Force Majeure events. The Petitions by the developers including Respondent-Taxus, which culminated in passing of the order dated 27.01.2012 by the State Commission was for invoking the inherent power of the State commission to extend control period determined by it in the order No 2 of 2010 dated 29.01.2010.

19. In the petition (No 1364/2013 dated 30.03.2015) filed by Respondent No 1-Taxus before the State Commission, which resulted in passing of the impugned order dated 30.03.2015, where the plea of Force Majeure was taken and have sought for the following specific relief:

i) To quash and set aside the certificate of commissioning issued by Respondent No. 1, GEDA on 17.08.2013 stating the date of

commissioning with effect from 08.08.2013 onwards and to declare that the solar power plant was commissioned on or before 31.03.2013 and direct GEDA to issue the certificate of commissioning with effect from 31.03.2013.

ii) To declare that the Petitioner is entitled for the payment of tariff for the energy generated and injected into the grid from 31.03.2013 to 8.8.2013 which is recorded in the energy meter and received by the Respondent No. 2.

iii) Pending adjudication and disposal of this Petition the Commission may direct the Respondent No. 2 to immediately pay to the Petitioner all outstanding bills towards supply made with interest at the rate of 18% per year,

iv) To declare that GUVNL is not entitled to claim for any liquidated damages from the Petitioner by virtue of the PPA Agreement and such claim of GUVNL is illegal, void and not maintainable and as such the Petitioner is entitled to get refund of Rs. 4.5 Crores including the amount of bank guarantee furnished by the Petitioner which is held by GUVNL wrongfully;

v)To declare that GUVNL is bound to return the bank guarantee of Rs.2.5 Crores submitted on behalf of the Petitioner by it banker towards commissioning of the power plant, as the power plant has been duly commissioned and hence the purpose of bank guarantee has lost its force;

vi) To direct GUVNL to pay interest at the rate of 18% p.a. over and above the invoice amount in respect of supplies made and enjoyed by GUVNL for not making payment within 30 days from the date of submission of invoices as per terms of PPA Agreement;

vii) To declare that the Petitioner is entitled to get all the benefits of the original commissioning date as the Petitioner is not responsible in any manner for delay in commissioning of the project as stipulated to be commissioned on or before 31.12.2011 as the same was occasioned due to force majeure circumstances exempted under the PPA agreement,

viii) To direct GUVNL to pay the full amount of the invoices received for the supplies made from the period of 1.4.2013 till 7.8.2013 which has been wrongfully withheld by GUVNL in breach of the contract;

ix) To direct GUVNL to pay additional compensation for its wrongful actions in not making payment of the invoices raised with effect from 1.4.2013 till date by way of other consequential losses suffered by the Petitioner:

x) To condone the delay of commissioning and making available the power plant on 31.03.2013 instead of 31.12.2011 in view of the facts and circumstances which were beyond the control of the Petitioner and are covered under the force majeure clause of the PPA and Grant all consequential reliefs in fixing the rates of supplies and pass appropriate orders on GUVNL.

20. The scheduled COD of the project as per PPA was 28.12.2011, and at the time of instituting the Petition No.1145 of 2011 i.e. on 06.12.2011 before State Commission, project of the Respondent was not even commissioned, so liability of liquidated damages could not have been crystalised and the Respondent – Taxus could not have been in a position to plead their case for invoking Force Majeure clause with exact timelines in Petition No. 1145 of 2010. We take note that the Respondent has neither raised the issue of non-levy of LD on account of Force Majeure events and nor it could have raised such a plea, to be covered under the ambit of Explanation IV of Section 11 of Code of civil Procedure, therefore, we do not find merit in the submission of Appellant that Respondent -Taxus is barred from raising Force Majeure issue under *res judicata* as per Section 11 of Code of Civil Procedure.

Issue No 2: Condonation of Delay on account of Force Majeure; Applicability of Liquidated Damages (LD)

Submissions by the Appellant

21. Learned counsel for the Appellant contended that Respondent No 1-Taxus bears the responsibility for obtaining all necessary approvals including arrangement for land as mentioned in Article 2.1 and 3 of the PPA. Article 8.1 provides for *Force-Majeure* in case of failures in meeting milestones are due to specified events, and relief under Article 8.2 is available only if performance obligations are genuinely prevented or delayed due to *Force-majeure*. The High Court in "***Halliburton Offshore Services v. Vedanta Limited"* (2020) 3 Arb LR 113** noted that while COVID-19 qualifies as *Force-Majeure*, its actual impact on non-performance must be assessed. Not every instance of non-performance can be justified through *Force-majeure* invocation; the facts must establish that genuine prevention occurred due to *Force-majeure*, which should be interpreted narrowly. This principle was reiterated in "***MSEDCL v. MERC" (2022) 4 SCC 657.*** In ***NVVN v. Precision Technik 2018 (SCC Online Del 13102)"*** it was held that the generator must secure approvals, and delays attributable to normal regulatory processes do not constitute as *Force-Majeure*. It was also observed that the Arbitral Tribunal based its findings on mere surmises. Exact effect has to be taken into consideration for time extension and to construe *Force-majeure* clause. In light of these principles, it must be determined whether any claimed event qualifies as *Force-Majeure* and whether it substantively impacted the project timeline. If the project delays arise from unrelated causes, *Force-Majeure* claims cannot be substantiated. GERC failed to adequately examine these facts and proceeded based on assumptions. As per facts on record, alleged

events did not materially affect the project's timeline and project was delayed due to other reasons.

21. Learned counsel for the Appellant contended that after obtaining land allotment on 14.10.2010 and signing the PPA on 08.12.2010, Taxus sought permission to assign the project to an SPV on 10.01.2011; which was rejected by the state Government on 01.04.2011. GERC has allowed entire period as *Force-Majeure*, but it was Taxus' choice to undertake the project through SPV causing delay, and as such, time taken by the Government was reasonable; the *Force-majeure* claim fails because implementing the project through an SPV was not required for project construction. Taxus, as the party to the PPA, could have proceeded with the project without the SPV. The decision to use an SPV was a commercial choice, and the Allotment Policy disallowed changes in shareholding, while the PPA required GUVNL's consent for assignment (Article 12.9), which could be refused. Therefore, the delay was due to Taxus' actions and is to be excluded from *Force-majeure* as per Article 8.1(b)(6) of PPA. Financing issues cannot be considered as *Force-majeure*, especially when Taxus sought cheaper financing despite the Tariff Orders already considered prevailing interest rates.

22. GERC, in the Impugned order erroneously held that Taxus could not proceed with the implementation of the project pending application, despite no evidence or specific claims of its impact. Further it is also contrary to the facts, as MOUs with the farmers for land was executed by Taxus from 25-29.03.2011, prior to the decision; therefore, delay, if any, was due to Taxus land identification process and not due to pendency of the application. Taxus itself acknowledged that land procurement takes time. Although GERC noted the MOU date, it wrongly concluded that pendency of application caused land uncertainty.

23. Further, claim of Taxus that it could not register sale deeds due to the pending revision of jantri rates is also not correct as sale deeds were submitted on 06.06.2011 and received on 22/28.11.2011. GERC considered the period starting from 01.04.2011, though Taxus was not ready before 06.06.2011 since the sale deed itself was submitted by Taxus on 06.06.2011. The claim that landowners refused to sign the sale deeds due to jantri rate revisions is incorrect, as the sale deeds were signed on 06.06.2011 without any revision. Furthermore, a provisional mechanism for sale deeds had been in place since 11.05.2011. The sale deeds were registered, pending verification by the Industry Inspector, and there was no valid reason for not proceeding with the project. Other projects were commissioned during this period, as shown in evidence presented to GERC and noted in its earlier order dated 27.01.2012, confirming that jantri rate revisions did not prevent construction.

24. Learned counsel for the Appellant stated that Taxus claimed that fund disbursement was delayed due to the inability to mortgage land, but no evidence supported this claim. Financing issues were excluded from *Force-Majeure* as held in the order dated 04.07.2018. Moreover, the facts shows that the delay was not caused due to pendency of registration of sale deed, as loan was sanctioned on 29.07.2011, and the loan agreement was signed on 21.11.2011, while the sale deed was registered on 22/28.11.2011. Therefore, registration was not a pre-condition for sanction of the loan. The actual delay was due to arranging finances by Taxus and not due to the registration of sale deed.

25. The loan agreement, signed before the sale deed registration, had no provision requiring the sale deed to be registered before hand. The letter dated 29.07.2011 by the Appellant should not be introduced for the first time at the

stage of appeal. As such, Clause 8 of the Security provision does not require security before the loan agreement but refers to future security. In fact, clause 9 of the loan agreement did not mandate sale deed registration before signing of loan agreement. Even Clause 2.3 of loan Agreement allows for interim loans against BG, which Taxus could have availed, if necessary. Nonetheless, the facts show that the delay was only due to arranging finances by Taxus and not because of registration of sale deed.

Submissions by Respondent No 1 - Taxus

26. Learned Counsel for the Respondent submitted that after execution of the PPA on 02.12.2010, Taxus approached the Energy and Petrochemicals Department, Gujarat Government, seeking permission to set up the Project through SPV on 10.01.2011, which was primarily to arrange cheaper finance from international lenders; however the same was denied by letter dated 01.04.2011 without assigning any reasons, during which period, Respondent was unable to take steps for implementation of the project, as it was to be done in the name of the project company; proposed SPV or Taxus. The learned counsel asserted that other similar developers were allowed to execute the project through SPV. Thus, the delay on this account cannot be attributed to Taxus, and to be treated as *Force-Majeure* Event.

27**.** Regarding the delay in implementation of the project due to delay in signing of sale deed, learned counsel submitted that after the MOU was signed by Taxus on 25/29.03.2011 with the farmers for the procurement of agricultural land for establishing the Project, sale/conveyance deeds could not be registered, also acknowledged by Sub-Registrar, Anjar in its letter dated 26.07.2011 due to following facts:

a) Government of Gujarat issued a GR dated 31.03.2011 and revised the Jantri rate for the procurement/sale of agricultural land, however the GR was silent on Jantri Rates for non-agricultural land; since the Jantri rate revised for agricultural land was too high, led to agitation across the State.

(b) On 18.04.2011, the Jantri Rates were reduced, however the new GR also did not notify Jantri Rates for non-agriculture land.

(c) On 29.07.2011, IREDA sanctioned the term loan of Rs. 44,30,00,000/- in favor of Taxus for development of the Project. The terms and conditions of loan stipulated the requirement to disclose land/title deeds. Even the agreement for term loan executed between Taxus and IREDA stipulates such requirements

(d) Since the land purchased by the Taxus was non-agriculture land, it was not allowed to be registered in the name of Taxus. Taxus vide its letter dated 16.08.2011 took up the matter with Deputy Commissioner, Revenue, Bhuj, Gujarat stating its inability to get the sale deeds executed in the absence of a new Jantri rate which would affect the execution of the Project.

(e) After resolution of Jantri rate issue, the sale deed was registered on 28.11.2011

(f) On 18.02.2012, Dy. Collector granted approval to Taxus to purchase the agriculture land for the project. The sanctioned term loan was not released by IREDA due to the non-availability of land for the Project.

28. The changed rates of Jantri as well as uncertainty over Jantri rates for non-agricultural land created a situation which was beyond the reasonable control of Respondent No.1- Taxus.

Issue No 2 : Discussion and Analysis

29. We take note that Guidelines for allocation of Solar Power Capacity Phase II) by Gujarat Energy Development Agency, under which the subject project has been allocated, stipulates that Applicant shall provide the information about the promoters and their shareholding and no change in shareholding shall be permitted for a period of 5 years once the allotment is made, relevant extract from the Guidelines is reproduced below:

> ***5. Minimum Equity to be held by the Applicant Company:***
> *The applicant Company shall provide, with the application form, the information about the Promoters and their share holding in the applicant company indicating the controlling interest. No change in the shareholding pattern of the Applicant Company shall be permitted for a period of 5 (five) years once the allotment is made. However, the applicant, with the prior approval of Government of Gujarat, may bring in Technical Partners who will contribute in the Equity. In such cases, the share holding patterns declared shall not go below 51%.*

30. The Respondent No 1-Taxus has applied for the allocation of 5 MW solar capacity under the above guidelines, which was granted by Govt. of Gujarat on 14.10.2010 and also entered into PPA with the Appellant on 08.12.2010. It was only on 10.01.2011, i.e. almost after 3 months of allocation of project, Respondent Taxus approached EPD, Govt of Gujarat, who had issued LOI to the Respondent –Taxus, for permission for setting up the project through SPV, which was denied by Govt. of Gujarat on 01.04.2011. The Respondents were aware that though the guidelines prohibits such a change in shareholding but approached the Govt. for such an approval as per their commercial interest or any other obligation. Though it is contended by the Respondent- Taxus that such a permission has been granted by the Govt. of Gujarat for other developers, however, in our view, such an approval, which will have change in

shareholding pattern from that given along with application, is at the discretion of Govt., as it is not available as a matter of right, and time taken in grant of approval or denial cannot be considered as Force-majeure. Therefore, in our view, Respondent - Taxus are not justified in claiming the time taken by Govt. of Gujarat in denial of the permission to set up the project as a SPV to be covered under *Force-majeure,* and we find force in the submission of the Appellant on this account. We are of the view that the State commission has erred in granting the period up to 01.04.2011 i.e. denial of permission for setting up the project through SPV under Force-majeure.

31. The Respondent -Taxus has signed the MOU with the farmers for the procurement of land for establishing the project from 25/29.03.2011and the main purpose of MOU seems to enable the Respondent -Taxus to apply for all types of local and State Govt. authority approvals for setting of the solar Power Project of 5 MW on the land and as per the provisions of the MOU, the price for purchase of the land is to be mutually decided. Immediately thereafter on 31.03.2021, Govt. of Gujarat vide its GR dated 31.03.2011revised Jantri rated for sale and purchase of Agricultural land, which was quite high but the GR was silent about non-agricultural land, which lead to agitation. These Jantri rates for agriculture land was reduced vide GR dated 18.04.2011 but still jantri rates for non-agricultural land were not notified . As noted from the letter dated 26.07.2011 of the Sub-Registrar, though the property documents for registration were acknowledged but were kept pending. The Respondent - Taxus, on 16.08.2011 also took up the matter with Deputy Commissioner (Revenue), Bhuj Gujarat for resolving the issue of Jantri rates so that land can be registered as it was a great deterrent for project progress. It was only on 28.11.2011, the sale deed were registered after resolving of Jantri rate issue.

We also note from the Loan sanction letter dated 29.07.2011 (though submitted first time before this Tribunal) from Indian Renewable Energy Development Agency Limited **("IREDA")** that the sanction loan is subject to fulfillment of certain conditions, which amongst other included "Equitable mortgage by Deposit of Title Deeds of All Immovable Properties/Assets pertaining to 5 MW grid connected solar PV power plant". The other formalities to be completed for execution of loan documents included "***Certificate from an Advocate that the borrower has acquired the land and it has prima facie good and marketable title"*** and requirement for completion of security included Copy(ies) of property papers and Investigation of Title of Project properties. The loan agreement also was signed on 21.11.2011. Regarding the contention of the Appellant that sale deeds were signed on 06.06.2011, we do not find merit in the submission of the Appellants that since sale deeds were signed on 06.06.2011 and Loan agreement got signed on 21.11.2011 registration of land cannot be a pre-condition for loan signing and the delay is on account of arrangement of funds which is not covered under *Force-majeure*. In our view, the title for the land gets registered in the name of Respondent -Taxus only subsequent to the registration of land deed, which is a condition under loan sanction letter for creating security as well as under loan agreement. Thus, it cannot be considered as simply a question of fund arrangement, as the Respondent No1 – Taxus has got the sanction letter on 29.07.2011, subsequent to signing of MOU and signing of sale deed, the loan agreement could be signed on 21.11.2011, probably when clarity about registration of sale deed emerged as the registration of sale deed was done immediately thereafter, on 22.11.2011/28.11.2011. Thus, the delay in loan signing and arrangement of funds is mainly on account of delay in registration of sale deeds. Thus, the delay from 01.04.2011- 22.11.2011/28/11.2011 in registering the sale

deed is on account of issuance of Jantri rates and to be considered as Force majeure.

Meaning of word " Without Prejudice" inscribed on the Undertaking dated 28.03.2013 provided by Respondent Taxus and accepted by the Appellant

32. Learned counsel for the Appellant contended that the GUVNL had the right to terminate the PPA if the project was delayed beyond one year from the SCOD as per Article 4.3 of the PPA. However, GUVNL agreed not to terminate the PPA on the condition that Taxus would pay LD. Taxus, in an undertaking dated 28.03.2013, agreed to pay LD for the extended period to be granted by GUVNL. While GERC acknowledged this undertaking for tariff purposes, it did not address LD liability. The words "without prejudice" in the heading applies only to the revised tariff, not for LD. In the case in "***Oberoi Constructions v Worli Shivshahi Co-op Hsg Society Ltd."* (2008) 5 BomCR 855,** it was held that it is without prejudice if terms are not accepted but if terms are accepted, a complete contract is established and letter although written without prejudice operates to alter the state of things. Since GUVNL agreed and Taxus accepted, Taxus' liability to pay LD remains operational.

33. Per Contra, Learned Counsel for the Respondent No.1 asserted that the reliance placed upon a purported undertaking dated 28.03.2013 stating that the agreed tariff would be of Rs. 9.98/- per unit for the first 12 years from the date of commissioning of the project and Rs. 7 per unit for 13 years, and they shall pay LD is erroneous, since the Respondent has inscribed the word '*without prejudice*' at the top of the undertaking, therefore the said

undertaking was without prejudice to the rights and contentions of Respondent No.1-Taxus.

34. The Contents of the notarized undertaking dated 28.03.2013, provided by Respondent – Taxus to Appellant is reproduced below:

> ***"Subject: Undertaking, without prejudice by M/s. Taxus Infrastructure and Power Projects Pvt Ltd for revised tariff of solar power project as per GERC Order dated 27.1.2012***
> *On behalf of M/s. Taxus Infrastructure and Power Projects Pvt Ltd, I am submitting the Undertaking that we agree to supply power to GUVNL from our 5 MW solar Power project at Village: Rapar-Khokhara Tal Anjar Dist: Kutchh at the tariff of Rs. 9.98/Unit for first 12 years from the date of commissioning of the project and Rs. 7.00/Unit for 13 years thereafter as determined by Gujarat Electricity Regulatory Commission through Solar Tariff Order dated 27.1.2012.*
>
> *Further, we agree that we shall pay liquidated damages from Scheduled Commercial Operation Date agreed in the PPA dated 8 December 2010 up to date of commissioning of the solar project in lieu of period extended by GUVNL as a special case."*

35. Though the word, "without prejudice "is written at the top, however, the undertaking is notarized and clearly states that Respondent -Taxus has agreed to pay liquidated damages from the scheduled commercial operation date agreed in the PPA in lieu of the period extended by GUVNL as well as agreed for a tariff of Rs 9.98/unit for first 12 years after commissioning of the project and Rs 7/ unit for 13 years thereafter. As contended by the Appellant, the undertaking was in lieu of not exercising the right of termination of PPA under Article 4.3 by the Appellant, as there was delay in commissioning of project by Respondent –Taxus by more than a year. <u>According to the Black's Law Dictionary, "without prejudice" means without loss of any rights or in a way that</u>

does not harm or cancel the legal rights or privileges of a party. The phrase "without prejudice" generally means that a statement, offer, or action cannot be used as evidence in later legal proceedings. It is often used in negotiations, settlement and legal correspondence to ensure that parties can discuss potential resolutions without the risk of those discussions being used against them. If an offer is made "without prejudice" it means that if the offer is rejected, it cannot be presented as evidence of liability or an admission in the court. In the present case, undertaking has been given by the Respondent Taxus, in lieu of extension in time as special case so as not to get the PPA terminated. It is a fact that the Appellant did not terminate the PPA, based on the undertaking given by the Respondent –Taxus, as contended by the Appellant. The Bombay High Court in the judgement in "***Oberoi Constructions v Worli Shivshahi Co-op Hsg Society Ltd."*** **(2008) 5 BomCR 855,** has referred to the definition of "without prejudice" contained in the judgement of **Lindley, L J, in walker v Wilsher** ; (1970)1 SCC 186: AIR 1970 SC 1059, is as given hereunder:

> ***15.*** *The next legal contention was advanced is as to what will be the effect of the words "without prejudice". On behalf of the appellants the learned Counsel has drawn our attention to the judgment of the Supreme Court in the case of (Chairman and MD, NTPC Ltd. v. Reshmi Constructions, Builders and Contractors)[3], reported in 2004 DGLS 339 (soft): (2004) 2 S.C.C. 663 : A.I.R. 2004 S.C. 1330. The Apex Court noted that even correspondence marked as "without prejudice" may have to be interpreted differently in different situations. The interpretation would be based amongst others according to usage in the profession and that no issue of public policy is involved. The Supreme Court quoted with approval the judgment in (Rush & Tompkins Ltd. v. Greater London Council)[4], All. E.R. PP. 551g-552b. It was held that "the rule which gives the protection of privilege to "without prejudice" correspondence depends partly on public policy, namely the need to facilitate compromise and partly an implied agreement. In the same judgment the exposition of definition of "without prejudice" contained in the judgment*

of Lindley, L.J., in (Walker v. Wilsher)[5], 12 Q.B.D. 337 was set out, which reads as under.

"What is the meaning of the words "without prejudice"? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in letter are accepted a complete contract is established and the letter although written without prejudice, operates to alter the old stage of things and to establish a new one."

The referred judgement held as under

***"17.** It would thus, be clear that the expression "without prejudice" is to be understood on the fact situation. When parties agree to a set of things then merely marking on the document without prejudice would be of no consequence. However, if the material indicates that the negotiations are still in progress and there is no finality on what was contained in the document marked 'without prejudice' then the document marked 'without prejudice' cannot be considered without the consent of both the parties."*

In Wharton's Law Lexicon, the author while interpreting the term *"without prejudice" observed as under (Ref.* the supreme Court Judgement in the "Superintendent (Tech I) Central Exercise, I.D.D Jabalpur and Others Vs Pratap Rai **(1978) 3 SCC 113**):

Similarly, in Wharton's Law Lexicon the author while interpreting the term "without prejudice" observed as follows:

"The words import an understanding that if the negotiation fails, nothing that has passed shall be taken advantage of thereafter; so, if a defendant offers, 'without prejudice', to pay half the claim, the plaintiff must not only rely on the offer as an admission of his having a right to some payment.

The rule is that nothing written or said 'without prejudice' can be considered at the trial without the consent of both parties—not even by a Judge in determining whether or not there is good cause for depriving a successful litigant of costs.... The word is also frequently used without the foregoing implications in statutes and inter partes to exclude or save transactions, acts and rights from the consequences of a stated proposition and so as to mean 'not affecting', 'saving' or excepting."

36. Therefore, the undertaking furnished by the Respondent-Taxus 'without prejudice' would mean that they can go back on their undertaking if terms are not accepted but if terms are accepted, a complete contract is established. In our view, the Respondent-taxus having avoided the termination of agreement based on undertaking given by them and accepted by the Appellant, cannot now turn around and wish away their liability of payment of LD as well as tariff offered in the undertaking, by referring to the word " without prejudice" inscribed on top of the undertaking.

37. In view of the above deliberation, though we have come to the conclusion that the Appellant should be entitled for the relief from payment of LD, for the delay for the period from 01.04.2011 to 21.11.2011in registering the sale deed and consequently the signing of loan agreement for loan disbursal on account of issue of Jantri rates, being *force Majeure* event, but we are unable to concur with the view of the State Commission in Impugned order, in view of undertaking given by the Respondent –Taxus for payment of LD in lieu of period extended by GUVNL as a special case so as to avoid termination of PPA as per the provisions contained therein.

Issue No 3 : Commissioning Date (COD) of Solar Project of Respondent – Taxus

Submissions by the Appellant

38. Learned counsel for the Appellant submitted that as per Article 2 and Article 3 of PPA, all necessary approvals are required to be taken by the Respondent No 1 for declaring COD which includes certification by GEDA as per definition of COD under Article 1.1 and Chief Electrical Inspector

certificate (CEI certificate) under the Central Electricity Authority (Measures relating to Safety and Electric Supply) Regulations, 2010. GERC has erroneously considered the COD as 31.03.2013 without these approvals as CEI certificate is dated 03.04.2013 while GEDA has certified COD as 08.08.2013 vide its letter dated 17.08.2013.

39. Learned counsel for the Appellant submitted that based on similar PPA, in "***GUVNL v. Acme Solar Technologies (Gujarat) Pvt Ltd, (2017) 11* SCC 801**," the Hon'ble Supreme Court held that CEI approval and GEDA certification are mandatory under the said PPA, and had considered the project readiness date for LD based on these certificates. In the present case, the CEI certificate is dated 03.04.2013, and GEDA certified COD as 08.08.2013, without both these approvals, the project cannot be deemed to be commissioned on 31.03.2013.

40. Learned counsel for the Appellant further contended that unlike in Acme, where the GEDA certificate confirmed that the plant was ready except for the transmission line, the GEDA certificate dated 17.08.2013 in respect of Taxus made no such certification. Thus, the Taxus' contention of readiness of the project as on 31.03.2013 (which was accepted by GERC), pending GETCO's line, is not certified by GEDA and is contrary to the PPA. In fact, GETCO's line was ready on 30.03.2013, when it was charged and stood ok as per letter dated 30.03.2013 from Executive Engineer (Const), GETCO Anjar to the Superintending Engineer Circle Office GETCO, Anjar, as extracted in the Impugned order, therefore finding of line's non-readiness is also contrary to record. Further, Taxus' reliance on readiness of transmission line to claim readiness of plant cannot be accepted as the meeting held on 30.03.2013 and the letter dated 30.03.2013 pertain only to GETCO's line and does not denote the Appellant plant's readiness. A

transmission line can be ready without the power plant being operational. As per the PPA, only the GEDA certificate confirms COD.

41. Under Article 3.7, Taxus must comply with applicable law. Regulation 43 of CEA (Measures relating to Safety and Electric Supply) Regulations 2010 mandates that electricity supply can only commence after obtaining written approval from the Electrical Inspector. The CEI certificate dated 03.04.2013 granted permission to energize, making any operation before this date becomes unlawful. COD requires the plant to be available for commercial operation, which is impossible without CEI approval. Therefore, the COD of 31.03.2013, which is prior to CEI written approval is contrary to Regulations. Only an inspection date is insufficient since the law requires written approval. The quantum of power injection from 01.04.2013 was of negligible amount, probably for testing, not the supply under PPA.

42. The Taxus is responsible to get necessary approvals on time and it has to bear the consequences for any delay on its part in obtaining such approvals and that it cannot pass on the burden to GUVNL for such delay "***(NVVN v. Precision Technik 2018 SCC Online Del 13102)"***. Even otherwise, Taxus failed to complete the legal formalities. It submitted the cheque for inspection fees only on 30.03.2013 (Saturday) and obviously could not be deposited before 01.04.2013. As seen from the conduct of GETCO, it had paid inspection fees in advance, indicating that the delay until 03.04.2013 was due to Taxus. GEDA could not have certified readiness prior to CEI's written approval and as such Taxus did not take any steps immediately and waited till 10.05.2013 to write to GEDA, which demonstrates lack of diligence on its part.

43. Learned counsel for the Appellant submitted that the principle of Section 50 of the Contract Act applies specifically in the context of Commissioning/COD of power project. In the judgement of this Tribunal in ***TSPL v. PSPCL (Appeal No. 97 of 2016)*** dated 03.06.2016, upheld by the Hon'ble Supreme Court in (CA No. 12344 of 2016 dated 22.11.2017), which states that when contract provides that a particular thing relating to a contract has to be done in a particular manner, it has to be done in that manner and not in any other manner. Contention of substantial compliance and implied terms were rejected. Therefore, if the PPA requires readiness to be certified by GEDA, Taxus cannot assert readiness through other means. In ***"Sasan Power Ltd, (2017) 1 SCC 487,"*** the Supreme Court rejected the claim of commissioning on 31.03.2013, holding that it contradicted the PPA, as the COD affects tariff, thereby impacting consumer/public interest. Similarly, in this case, declaring COD on 31.03.2013 (FY 2012-13) instead of 08.08.2013 (FY 2013-14) affects the applicable tariff, and the consumer interest, and there cannot be any alleged concession/waiver by GUVNL or GEDA or even GERC on PPA requirements.

44. Further, in ***"GUVNL v. Solar Semiconductor Power Company (India) Pvt Ltd"*** (2017)16 SCC 498, it was held that commissioning is act performed in terms of obligation under PPA & between producer and purchaser & Court cannot assume to itself powers not otherwise conferred. Court should be careful in dealing with matters when consumer interest is at stake. By accepting COD as 31.03.2013, GERC has disadvantaged consumers with higher tariff & decided on commissioning contrary to terms of PPA.

45. In "***HPPC v. Sasan Power Ltd.,"*** (2024) 1 SCC 247, the Supreme Court held that it cannot make a new bargain or disregard express provisions

of contract on basis of loss to contractor/ change in circumstances. Similarly, this Tribunal in its Judgement dated 17.05.2018 in "***Nabha Power Ltd. V. Punjab State Power Corporation and Another" in*** Appeal No. 283 of 2015 held that PPA is a binding instrument, cannot be varied under regulatory power nor can the Commission grant relief for generator which is not in PPA. PPA terms cannot be reopened for consequential circumstances. Thus, even if the alleged loss to Taxus is due to subsequent issues with GEDA/CEI, the PPA terms cannot be ignored. Further, in ***" S.B.I.W Steels (Private Ltd V. Steel Authority of India Ltd (2022 SCC OnLine Cal 3842)",*** it was held that the absence of a required BIS certification invalidated the supply. Likewise, electricity supply without CEI approval and commissioning without CEI/GEDA certification violates statutory and contractual requirements.

46. Learned counsel for the Appellant also asserted that the present case is comparable to ***"SAIL v. Shri Ambica Mills Ltd. (1998) 1 SCC 465,"*** where the issue was of the applicable price for hot-rolled strips under a scheme. Upon the Respondent's submission of indent, the defective license was corrected, and the revised documentation was submitted after a price change, which SAIL applied retrospectively. The High Court ruled that SAIL, being a government entity, could not penalize the Respondent for defects in the license, emphasizing governmental mishandling. However, the Supreme Court overturned this finding holding that despite the licensing authority's error, SAIL was not obligated to ignore the deficiencies in the indent registration. Therefore, the Taxus contention on being penalized for no fault, cannot be accepted. In this regard, the GERC and the Tribunal have affirmed that the tariff has to be as per COD and rejecting Taxus' argument for a tariff based on an earlier date (31.12.2011), which was attributed to delays caused

by Force Majeure. Consequently, even if Taxus is not at fault for the delays post 31.03.2013, the applicable tariff is as on 08.08.2013.

47. Learned counsel for the Appellant submitted that applying tariff for FY 2013-14 to Taxus is not a penalty; it was determined by GERC after considering costs and return on equity, making it valid and appropriate for solar projects. Contention on loss is incorrect and cannot override PPA terms to allow deemed COD as 31.03.2013. Such an act would be against consumer (public) interest and cannot be allowed. COD is significant for determining the applicable tariff and the LD period, therefore, it has to be as per the PPA. The PPA mandates tariff payment for supply of power for 25 years from COD, and any power injected before COD cannot be considered as supply as per PPA.

Submissions by Respondent -Taxus

48. Learned Counsel for the Respondent No.1, while contending that the commercial operation date of the project to be taken as 31.03.2013 instead of 08.08.2013, submitted that the Respondent No.1 approached the Chief Electrical Inspector on 15.03.2013 and also GEDA on 18.03.2013 for approval of its project. Accordingly, on 29.03.2013, CEI inspected the plant of Respondent No.1 and found the Project ready in all respects. From the letter dated 20.03.2013 from GETCO to CEI, it is clear that the 66 kV double circuit line of GETCO was ready on 20.03.2013; the said 66 KV lines were charged at 18.50 hrs and 18.55 hrs on 30.03.2013 as evidenced from the letter dated 30.03.2013 from Executive Engineer GETCO to Superintending Engineer GETCO. However, the said line was switched off by GETCO. On 31.03.2013, when GEDA officials visited the project site, it was observed that the 66 KV of GETCO was not charged; GETCO could charge the line only at 16.35 hours

and the RMU was charged at 18.20 hours on 31.03.2013 and by this time, the solar radiation had reduced to the extent that the solar plant could not generate power. This fact has been confirmed by GUVNL in its letter dated 30.05.2013. In fact, the CEI in its letter dated 03.04.2013, granting permission to energize the transformer along with the associated equipment, has acknowledged that initial inspection of the solar plant was carried out by Deputy CEI on 29.03.2013. Therefore, the Project was ready in all aspects by 15.03.2013 and the delay till and after 31.03.2013 is not attributable to Respondent No.1. The Minutes of the Meeting held between officials of Respondent No.1, GETCO and PGCVL on 30.03.2013 clearly depicts that the installation & sealing of ABT meter & sealing 66 KV CT & PT at the Project site were in order. It is an undisputed fact that from 01.04.2013 onwards the Project injected energy into the grid continuously which is recorded in the ABT complaint meter installed at the Project site and never disputed by the Appellant.

49. Learned Counsel further submitted that though the Commissioning certificate was issued by GEDA on 17.08.2013 declaring the COD as 08.08.2013, the inspection of the project carried out by GEDA team on 29.03.2013 proves that all pre-requisites for commissioning the Project were found to the GEDA's satisfaction. Still there was a delay of over 4 months on the part of GEDA to issue the certificate and the same cannot be attributed to Respondent No.1. Further, in support of its claim, the learned counsel referring to the judgment dated 09.11.2016 in "***Gujarat Urja Vikas Nigam Limited v Acme Solar Technologies (Gujarat) Private Limited and Ors* (2017) 11 SCC 801"**, contended that the Hon'ble Supreme Court in the said Judgment placed reliance on the date when the plant was ready for commissioning and energizing instead of placing reliance on the certificate

of commissioning issued by GEDA. Thus, GERC has rightly considered the COD for Respondents solar Plant as 31.03.2013.

Judgements relied upon by the Appellant and the Respondent

***Gujarat Urja Vikas Nigam Ltd. v. Acme Solar Technologies (Gujarat) (P) Ltd.*, (2017) 11 SCC 801 ; By both Appellant and Respondent**

50. In the said Judgement, the Supreme Court noted that when parties were bound by the terms and conditions of the PPA, it was not proper on the part of either the State Commission or this Tribunal to travel beyond the said terms and conditions to determine the liability of the first respondent to pay liquidated damages or the period thereof. The Supreme Court took note of the Communication/certificate issued by the Office of the Chief Electrical Inspector dated 31.12.2011, which grants permission to energise the electrical installations along with associated equipment indicating that the switchyard of the first respondent was ready for being energised on 31.12.2011 as well as of the certificate of commissioning issued by GEDA, another mandatory requirement as per terms and conditions of PPA, which certified the date of COD as 13.03.2012, but also indicates that the plant was ready for generation on 31.12.2011 but for the 66 kV transmission line. The Supreme Court then observed that from a reading of the two certificates/communications issued by the office of the Chief Electrical Inspector and GEDA it is abundantly clear that the switchyard and the electrical installations required to be set up by Respondent No.1 were ready for commissioning on 31.12.2011 though the actual commissioning thereof had to await the completion of the transmission lines which was made available by GETCO and accordingly were charged on 13.03.2012 and held

that liability of the Respondent No.1 for payment of LD to be considered only up to 31.12.2011.

NVVN v. Precision Technik, 2018 SCC OnlineDel 13102 ; **By Appellant**

51. In this judgment, the Supreme Court observed that as per the Articles of PPA, it was the obligation of the Respondent to obtain all consents, clearances and permits and to commence the supply of power not later than the Scheduled Commissioning Date and it was also the obligation of the Respondent to connect the Power Project Switchyard with the Interconnection Facilities at the Delivery Point. It cannot pass on this burden to the Petitioner or claim any benefit out of mismanagement of its own affairs. There was no embargo to start route survey immediately upon execution of the PPA, and therefore, it was the decision of the Respondent to start route survey after Financial closure, therefore it cannot claim any extension of time for the period taken by it for the completion of such Route Survey. The Supreme Court also stated that it is a trite law that the *force majeure* clauses are to be narrowly construed. The events or circumstances must not only cause unavoidable delay in the performance of the obligations under the agreement, but also must be such that could not have been avoided even if the affected party had taken reasonable care or complied with the 'Prudent Utility Practices'; the time taken by RRECL and the Government of Rajasthan to grant permission cannot come to any avail of the Respondent, as the Respondent would have been well aware of the bureaucratic delays while dealing with governmental and public sector authorities. Such delays being completely foreseeable, cannot amount to a *force majeure* condition.

***Judgement of this Tribunal in TSPL V. PSPCL (Appeal No. 97 of 2016)-upheld by Supreme court in CA No 12344 of 2016 dated 22.11.2017 ;* By Appellant**

52. This Tribunal referring to the judgement of the Hon'ble Supreme Court in "***Rajasthan State Industrial Development & Investment Corpn"*** and other judgements held that when there are specific express terms providing for notice and the person on whom it is to be served is specifically mentioned as per the PPA, which is binding on both the parties, the concept of substantial compliance of the contract by some mode other than that specified in the contract cannot be introduced. The view taken by this Tribunal that requirement under Article 6.1.1 of the PPA to give advance written notice of intention to synchronise a unit to the Grid System was the mandatory requirement, which was upheld by the Supreme court in its judgement dated 22.11.2017.

***All India Power Engineer Federation v. Sasan Power Ltd., (2017) 1 SCC 487;* By Appellant**

53. The main dispute in this case was related to whether the COD for Unit 3, which was the first unit to be commissioned, had been achieved on 31.03.2013. If it had, then under Schedule 11 to the PPA, the entire first year would get exhausted in one day i.e. 31st March being the end of the contract year, for which tariff payable would be @ 69 paise per unit. If not, then it is only on and from the commencement of COD that such year would begin, which, according to the Appellants, would only begin on 16.08.2013 when a final test certificate in accordance with Article 6 of the PPA was given by the Independent Engineer to the effect that 95% of the contracted capacity had been achieved for a continuous period of 72 hours. Assuming the COD of 31.03.2013, as held by this Tribunal, the consumers would have to pay a

sum of over Rs 1000 crores, being the differential tariff that would apply and therefore if there is any element of public interest involved, the Court steps in to thwart any waiver which may be contrary to such public interest. As per Sections 61 to 63 of the Electricity Act, the appropriate Commission, when it specifies terms and conditions for determination of tariff, is to be guided *inter alia* by safeguarding the consumer interest and the recovery of the cost of electricity in a reasonable manner. Thus, if a waiver is claimed for some of the provisions of the PPA, such waiver, if it affects tariffs that are ultimately payable by the consumer, would necessarily affect the public interest and would have to pass muster of the Commission under Sections 61 to 63 of the Electricity Act.

54. The Supreme court noted that as per an Article in the PPA, after COD of an unit has been achieved, and increased tested capacity over and above that was provided in the PPA, is achieved in a subsequent performance test, certain consequences would follow. Equally, if after COD has been obtained in a unit, and the most recent performance test mentioned during the working of the PPA has been conducted, and it is found that a figure less than contracted capacity is achieved, then the unit shall be derated with certain consequences which are also mentioned in the PPA. The Supreme court upheld the date of COD of the project as held by CERC in its judgement dated 08.08.2014 and not the COD date of 31.03.2013 as held by this Tribunal in its judgement.

***Gujarat Urja Vikas Nigam Ltd. v. Solar Semiconductor Power Co. (India) (P) Ltd.*, (2017) 16 SCC 498 ; By Appellant**

55. The Supreme Court held that the Court should be especially careful in dealing with matters of exercise of inherent powers when the interest of

consumers is at stake. The interest of consumers, as an objective, can be clearly ascertained from the Act. The Preamble of the Act mentions "protecting interest of consumers" and Section 61(*d*) requires that the interests of the consumers are to be safeguarded when the appropriate Commission specifies the terms and conditions for determination of tariff. Under Section 64 read with Section 62, determination of tariff is to be made only after considering all suggestions and objections received from the public. Hence, the generic tariff once determined under the Statute with notice to the public can be amended only by following the same procedure. The approach of this Court ought to be cautious and guarded when the decision has its bearing on the consumers.

56**.** The Commissioning of a project is an act to be performed in terms of the obligation under the PPA and that is between the producer and the purchaser; the Commission cannot extend the time stipulated under the PPA for doing any act contemplated under the agreement in exercise of its powers under Regulation 85. Therefore, there cannot be an extension of the control period under the inherent powers of the Commission. The Commission cannot invoke its inherent jurisdiction to substantially alter the terms of the contract between the parties so as to prejudice the interest of other party and ultimately the consumers. Terms of PPA are binding on both the parties equally.

Haryana Power Purchase Centre v. Sasan Power Ltd., (2024) 1 SCC 247 ; **By Appellant**

57. The Supreme court held that the Tribunal cannot rewrite a contract solemnly entered into between the parties. Such residuary powers to act, which varies the written contract, cannot be located in the power to regulate.

The power cannot, at any rate, be exercised in the teeth of express provisions of the contract; In a matter where the parties have entered into a contract with express provisions, we are unable to agree with the first respondent that the Tribunal would have power to disregard the express provisions of the contract on the score that as it turns out that with passage of time and even change in circumstances, contract cannot be worked except at a loss for the contractor.

Judgement of this Tribunal in Nabha Power Ltd. Vs Punjab state power corporation *(Appeal 283 of 2015) ;* By Appellant

58. The PPA is a binding instrument for the parties. The operation of supercritical base load station at part load or varying load and resultant increase in SHR has been acknowledged at various Government Forums and accordingly, the earlier technical standards, grid code and Competitive Bidding Guidelines have been amended with a specific consideration of allowing increase in SHR on account of reduction in MCR due to part load operation. While these changes would apply to future projects, the same cannot be applied to old plants decided on earlier parameters of the bid documents. The Supreme court opined that the claim of NPL arising out of higher SHR is beyond the periphery of concluded PPA and the provisions of PPA are being scrupulously implemented by PSPCL. Hence, we do not find any rationale in re-opening or re-interpreting the provisions enshrined under the PPA.

59. The PPA entered into between the parties is a statutory and binding instrument which crystalises the rights and obligations of the involved parties. Accordingly, the same would need to be interpreted in the spirit of agreed terms and cannot be defined or derived in its "implied term".

SBIW Steels (P) Ltd. v. SAIL, 2022 SCC Online Cal 3842; **By Appellant**

60. The Steel Authority of India Limited, (the respondent) required TMT bars of varying sizes and entered into an agreement on 16th June, 2011 with the successful bidder, the SBIW Steels; Billets for TMT bars was to be provided by SAIL. As per the bidding document, bidder should have a valid "BIS" Certificate/licence by the Bureau of India Standards and that the manufactured product should have a BIS Certificate after undergoing the required tests. The bidder possessed this licence when the contract was awarded, but their licence expired on 17th May, 2012. Though the bidder continued to supply Bars post May 2022 and up to 27th July 2012, dispute arose, when SAIL stopped supply of billets thereafter. The Arbitrator held in favour of bidder, basing its judgement on the premise that as per bidding document, bidder was required to be a licensee at the tendering stage.

61. However, the Supreme Court observed that Section 14 of the Bureau of Indian Standards Act, 1986 provided that the products of any scheduled industries under the Industrial (Development and Regulation) Act, 1947 would have to conform to the standards of description quality and durability prescribed by the Act; the products of iron and steel had to be manufactured under a BIS licence. As such, the TMT bars are used in construction work where the requirements of quality of the product, its durability and safety are paramount and, accordingly, set aside the order of the Arbitrator holding that BIS licence was necessary only at the time of submission and consideration of the tender and not later on.

***Steel Authority of India Ltd. v. Shri Ambica Mills Ltd.*, (1998) 1 SCC 465 ; By Appellant**

62. In this case, the Shri Ambika Mills is engaged in the manufacture of steel tubes, for which hot rolled strips in coils are required as raw material, which were supplied by SAIL subject to the condition that it must possess the import licence and have to carry out certain export obligations, which for the period in question, namely, April 1983 to March 1984 were given in the import and export policy for that period. SAIL, as an indigenous supplier under the aforesaid import and export policy for 1983-84 made an announcement of the prices at which the raw material will be supplied; pursuant to which Shri Ambika Mills submitted its requirement on 20.08.2013 and Letter of Credit was submitted on 25.08.2013. However, some deficiencies were found in the import Export License, and after rectification same was submitted only on 26.08.1983, by which time price of Raw material got enhanced from 25.08.1983. The main contention of Ambika Steel was that price of Raw Material, prevailing when LC was submitted should be applicable; the same was granted by the High Court of Gujarat.

63. The Supreme Court though agreed with the view that the office of Joint Chief Controller of Imports and Exports could be responsible for the defects in the license, however, held that mere production of Letter of Credit will not be sufficient to determine the price ruling on the date. It must be given by an import licence-holder eligible to get the supplies under the Scheme. In this case, importer will not fall under the category of “import licence-holder eligible to get supplies under the Scheme” as on the date when the Letter of Credit was presented, the licence/release order was defective.

Issue No 3 : Discussion and Analysis

64. The main contention of the Appellant is with regard to COD of 31.03.2013 as per Impugned order, while the CEI certificate is issued on 03.04.2013 and GEDA certificate dated 17.08.2013, indicated COD as 08.08.2013. Let's have a look at the provisions of the PPA. As per Article 4.1 of PPA dated 08.12.2010, the Power producer i.e Taxus "*shall obtain all statutory approvals, clearance and permits for the project at his cost in addition to those approvals as schedule 3"*. Schedule 3, besides other approvals list provides following approvals"

> *"2. Approval of the Electrical Inspectorate, Government of Gujarat for commissioning of the transmission line and the Solar Photovoltaic Grid Interactive Power converters installed at the Project Site.*
> *3. Certificate of Commissioning of the Solar Photovoltaic Grid Interactive Power Project issued by GEDA"*

In the referred PPA, the "Commercial Operation Date" is defined as under:

> ***"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."*

CEI Written Approval dated 03.04.2013

65. In the present case, Respondent-Taxus vide its letter dated 15.03.2013, to Chief Electrical Inspector, informed that they are ready with the set-up of 5 MW plant and requested for approval of related drawings and to schedule their visit for approval. The Chief Electrical

Inspector, while according the approval, vide its letter dated 03.04.2013, has acknowledged the inspection undertaken by Dy. Chief Electrical Inspector on 29.03.2013.

66. We note that no reasons are ascertainable from the record for the gap between the letter of Taxus to Chief Electrical Inspector requesting for visit on 15.03.2013, inspection date of 29.03.2013 and Certificate date of 03.04.2013. However, our attention was drawn by learned counsel for the Appellant that fee was deposited by Taxus vide their letter dated 30.03.2013 by Cheque and there is possibility that only after realizing the due fees, the certificate was issued by the Chief Electrical Inspector vide letter dated 03.04.2013. Though it has been contended by Respondent Taxus that they are injecting the regular energy into the grid from 01.04.2013, which has been disputed by the Appellant contending it to be for the purpose of Testing, however, the fact remains that the written approval is required from the Chief Electrical Inspector as per CEA (Measures relating to safety and Electrical Supply) Regulations 2010 before the commencement of regular supply, as reproduced below:

> ***"Safety provisions for electrical installations and apparatus of voltage exceeding 650 volts 43.***
>
> *Approval by Electrical Inspector: - (1) Voltage above' which electrical installations will be required to be inspected by the Electrical Inspector before commencement of supply or recommencement after shutdown for six months and above shall be as per the notification to be issued by the Appropriate Government, under clause (x) of sub-section (2) of section 176, and sub-section (1) of section 162 of the Act. (2) Before making an application to the Electrical Inspector for permission to commence or recommence supply after an installation has been disconnected for six months and above at voltage exceeding 650 V to any person, the supplier shall ensure that electric supply lines or*

apparatus of voltage exceeding 650 V belonging to him are placed in position, properly joined and duly completed and examined and the supply of electricity shall not be commenced by the supplier for installations of voltage needing inspection under these regulations unless the provisions of regulations 12 to 29, 33 to 35, 44 to 51 and 55 to 77 have been complied ***with and the approval in writing of the Electrical Inspector has been obtained by him:***

Provided that the supplier may energise the aforesaid electric supply lines or apparatus for the purpose of tests specified in regulation 46"

67. In the absence of the Chief Electrical Inspector Certificate on 31.03.2013, it cannot be construed to be declared under commercial operation, injecting regular energy. It is observed that the Tariff for the various financial years are following a downward trend, and thus, commissioning of a project within a particular financial year is very important from the aspect of applicability of Generic tariff for that financial year. The Respondent -Taxus were fully aware about the consequences of delay in getting CEI approval and in our view, the Respondent -Taxus should have been more vigilant in arranging an early visit and even pursuing for the certificate from the Chief Inspector pursuant to the visit on 29.03.2013, within the FY 2012-13, so as to become eligible for the tariff applicable for that year, like inspection fee could have been deposited in advance instead of waiting up to 30.03.2013, which could be one of the probable reason for the delay in getting CEI Certificate. In our view, the State Commission has erred in declaring COD as 31.03.2013 in the absence of Electrical inspectorate Certificate, moreover, when there has not been any undue delay on the part of the

Govt. authorities in granting the requisite certificate on 03.04.2013, post deposition of fee on 30.03.2013, which happens to fall on Saturday.

Approval from GEDA dated 17.08.2013

68. It is noted that the Respondent-Taxus vide its letter dated 19.03.2013 to Dy. Director GEDA and letter dated 20.03.2013 to Director GEDA had informed the readiness of its 5 MW generation plant, and that it is connected to site substation at Kaniyabe bay through 66 KV transmission line as approved by the Electrical Inspector during his visit on 18.02.2012. It was also informed that they have applied for CEI inspection and site 66 kV substation is expected to be connected with GETCO's 66 KV substation by 25.03.2013, and requested for the visit of concerned officials and for their approval. The GETCO has also informed CEI about readiness of their 66 kV Kaniyabe Bay and its connection to Taxus Solar plant and requested for their approval. There is no dispute that GETCO's line was charged on 30.03.2013, which stood OK but switched off by GETCO substation at 19.20 hrs on the same date. Learned counsel for the Respondent-Taxus have claimed that when GEDA officials visited the project in the morning on 31.03.2013, the 66 KV line from the project to GETCO substation was not available as line was only charged again by GETCO at 16.35 hours and transformer at 18.20 hrs. Learned counsel for the Respondent-Taxus has contented that due to inadequate solar radiation by the time GETCO line and transformer was charged by 18.20 hours on 31.03.2013, the solar PV plant could not go into generation mode and the recording of power in the energy meter was not possible, but their plant was ready in all respects, and therefore, COD of 31.03.2013 as allowed by State commission is correct.

69. Per Contra, learned counsel for the Appellant has contended that without the approval of CEI and GEDA, which has been accorded vide their letters dated 03.04.2013 and 08.08.2013, respectively, COD cannot be granted and COD of the plant is to be considered as 08.08.2013.

We note that Respondent No 3, GUVNL, a State Govt Utility, in its letter dated 30.05.2013, has acknowledged this fact based on GEDA letter dated 03.05.2013 as reproduced below:

> *"As conveyed by GEDA through letter dated 3rd May, 2013, the project of M/s. Taxus could not be commissioned on extended time limit of 31st March, 2013. As on 31st March, 2013, the project capacity of 4.93 MW (out of 5 MW) was ready in all respect. The transmission line charged on 31.3.2013 at 16.35 Hrs. and thereafter transformer and RMU Charged at 18.20 Hrs. Owing to inadequate sun radiation, the plant could not go into generation mode and hence recording of power was not possible and hence the plaint could not be commissioned on or before 31.3.2013."*

70. However, in the proceedings before the State Commission, no explanation has been provided by GEDA regarding delay in issuing the certificate of COD for the generation project of Taxus as 08.08.2013 vide their letter dated 17.08.2013 despite the visit undertaken by them on 31.03.2013. Such a callous attitude and casual approach, in our opinion, is due to negligent performance and failure to fulfill duty cast upon them by State Govt. as also observed by the State commission in the impugned order. It is fact that in the PPA, there is requirement of CEI certificate as well as GEDA certificate, for the declaration of commercial operation, but we

cannot ignore the fact that GEDA has not provided any explanation, casting deficiency on the part of the Respondent-Taxus which led to delay in providing the Certificate in declaring the COD of the project as 08.08.2013 by GEDA. Moreover, the very same agency i.e GEDA, as stated by GUVNL in its letter dated 03.05.2013, a state agency, has acknowledged that the almost entire capacity of project of the Respondent- Taxus was ready on 31.03.2013 when they visited the plant and it is only due to inadequate solar radiation that plant could not go into generation, when transmission line of GUVNL was energized on 31.03.2013 at 16.35 hrs. It is also a fact, not disputed by the Appellant, that they have been receiving power from the Respondent -Taxus project since 01.04.2013 though the quantum may vary. As held earlier, the COD of the project could not have been granted before the CEI certificate dated 03.04.20013 being safety requirement as per safety Regulations of CEA, but in our view, the Respondent-Taxus cannot be denied their dues for the energy injected post 03.04.2013, in the event of inordinate delay by GEDA in their certificate declaring COD as 08.08.2013, with no explanation at all for such delay. In our view, considering that the Respondent –Taxus plant was ready on 31.03.2013, the COD of the project to be considered from the date of CEI certificate dated 03.04.2013 ("***Gujarat Urja Vikas Nigam Limited v Acme Solar Technologies (Gujarat) Private Limited and Ors***." **(2017) 11 SCC 801**,

71. In view of above deliberations, the impugned order of the CERC is modified to the extent that i) COD of the project of Respondent -Taxus to be reckoned as 03.04.2013; ii) Period of Delay on account of SPV is not on account of Force- majeure and iii) Period of delay on account of Land registration, though considered to be Force majeure with respect to payment

of LD, in view of undertaking given by Respondent-Taxus, they are liable to supply power at the tariff as agreed to in the said letter dated 28.03.2013, and the payment of liquidated damages.

72. The captioned appeal along with the associated IAs, if any, are accordingly disposed of.

Pronounced in open court on this 12th Day of February, 2025.

(Seema Gupta)	**(Justice Ramesh Ranganathan)**
Technical Member (Electricity)	**Chairperson**

REPORTABLE/~~NON-REPORTABLE~~

ts/ag

COURT-1

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APL No. 114 OF 2015 & IA No. 661 OF 2025

Dated: 17th April, 2025

Present : Hon`ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon`ble Ms. Seema Gupta, Technical Member (Electricity)

In the matter of:

Gujarat Urja Vikas Nigam Limited	....	Appellant(s)
Versus		
Taxus Infrastructure and Power Projects Ltd. & Ors.	....	Respondent(s)

Counsel on record for the Appellant(s)	:	Anand K. Ganesan Swapna Seshadri Ranjitha Ramachandran Arvind Kumar Dubey for App. 1
Counsel on record for the Respondent(s)	:	Inder Paul Singh Oberoi R. K. Srivastava for Res. 1 Suparna Srivastava for Res. 6

ORDER

IA No. 661 OF 2025

(for clarification)

This application is filed seeking clarification of the order passed by us in Appeal No. 114 of 2015 dated 12.02.2025. Ms. Ranjitha Ramachandran, learned Counsel for the Appellant, would point out yet another typographical error in the order and submit that though the order was in fact pronounced in the Court on 13.02.2025, the date of order was reflected as 12.02.2025, and

therefore it necessitates correction. Mr. IPS Oberoi, learned Counsel for the Respondent, fairly states that the order was pronounced on 13.02.2025. The clerical error in the order shall stand corrected and the date of the order recorded as 12.02.2025 shall stand substituted with the date 13.02.2025.

The substantive ground on which this application for clarification is filed is that this Tribunal had, in the aforesaid order, determined the date of commissioning as 03.04.2013; consequently, the tariff to which the Appellant is entitled to is the tariff for the period 2013-14, and not 2012-13; and the tariff for 2012-13 would have been applicable to the Respondent only in case the date of commissioning was held to have occurred on or before 31.03.2013. Since this Tribunal has recorded a finding that the Commissioning date would only be 03.04.2013, it is the tariff for the year 2013-14 which is applicable. Reference to the tariff, in the undertaking, relates to the year 2012-13 and not 2013-14 and, consequently, the direction in the conclusion part of the said order, holding that the Respondent Taxus is liable to supply power at the tariff as agreed to in the letter of undertaking dated 28.03.2013, is evidently a typographical/clerical error which necessitates correction under Section 152 CPC.

The observations in the order were made in the context of the submission urged on behalf of the Respondent that the words “without prejudice” would require the undertaking furnished by the Respondent to be ignored in computing the period for which they were entitled to for extension on account of force majeure events on account of increase in jantri rates. Since this Tribunal has held that the date of commissioning is 03.04.2013, it is only the tariff applicable for the year 2013-14 which the Appellant is entitled to. Consequently, the words “they are liable to supply power at the tariff as agreed to in the said letter dated 28.03.2013” at Para 71 of the said order is a typographical/clerical error which necessitates deletion. We are satisfied that this sentence at Para 71 must be deleted and, consequently, the last three lines of para 71 shall read as under:

"In view of the undertaking given by Respondent-Taxus they are liable for payment of liquidated damages".

The said sentence shall stand substituted in Para 71 of the original order. Further, the first sentence in Para 71 which refers to CERC shall also stand corrected as GERC. A corrected copy of the order shall be made available to learned counsel on both sides on payment of prescribed charges.

With the above observations, the IA is disposed of.

(Seema Gupta) Technical Member (Electricity)	(Justice Ramesh Ranganathan) Chairperson

ts/sk

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO.114 OF 2015 &
IA No.1310 OF 2024

Dated: 13.02.2025

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Smt. Seema Gupta, Technical Member (Electricity)

In the matter of:

GUJARAT URJA VIKAS NIGAM LIMITED
Sardar Patel Vidyut Bhavan,
Race Court Circle,
Vadodara – 390007 (Gujarat) … Appellant(s)

VERSUS

1. **TAXUS INFRASTRUCTURE & POWER PROJECTS LTD**
   804 – A Arcadia, South City – II
   Gurgaon – 122018 (Haryana) ... Respondent No.1

2. **GURAJAT ENERGY DEVELOPMENT AGENCY**
   4th Floor, Block No. 11 & 12
   Udhyog Bhavan, Sector 11
   Gandhinagar – 382017 (Gujarat) ... Respondent No.2

3. **GUJARAT ELECTRICITY TRANSMISSION CORPORATION LIMITED**
   Sardar Patel Vidyut Bhavan
   Race Court Circle
   Vadodara – 390007 (Gujarat) ... Respondent No.3

4. **CHIEF ELECTRICAL INSPECTOR**
   6th Floor, Block 18, Udhyog Bhavan
   Sector 11, Gandhinagar – 382 017
   (Gujarat) ... Respondent No.4

5. **STATE LOAD DESPATCH CENTRE**
132 kV Gotri Sub Station Compound
Gotri Road, Near TB Hospital
Vadodara – 390021 ... Respondent No.5

6. **GUJARAT ELECTRICITY REGULATORY COMMISSION**
6th Floor GIFT ONE
Road 5-C Zone 5, GIFT CITY
Gandhinagar – 382 355 (Gujarat) ... Respondent No.6

Counsel on record for the Appellant(s)	:	Anand K. Ganesan Swapna Seshadri Ranjitha Ramachandran Arvind Kumar Dubey for App. 1
Counsel on record for the Respondent(s)	:	Inder Paul Singh Oberoi R. K. Srivastava for Res. 1 Suparna Srivastava for Res. 6

JUDGMENT

(PER HON'BLE MRS. SEEMA GUPTA, TECHNICAL MEMBER)

1. The instant appeal is preferred challenging the order dated 30.03.2015 passed by the Gujrat Electricity Regulatory Commission **(for short "GERC/State Commission")** in Petition No. 1364 of 2013, whereby the State Commission has held that the Solar PV Power plant of the Respondent No. 1 is deemed to be commissioned on 31.03.2013, therefore, Respondent No. 1 is entitled to raise the bills for the energy injected into the grid w.e.f. 01.04.2013 at the tariff rate applicable for the tariff year 01.04.2012 to 31.03.2013. The State Commission has further held that the delay in commissioning of the plant

to the extent of 402 days is due to the force majeure events and, therefore, the Respondent No. 1 is not liable to pay liquidated damages for the said delay.

This appeal has chequered history, the details of which in brief, are stated as under:

2. The instant appeal and Appeal No. 131 of 2015 were filed before this Tribunal by GUVNL and Taxus, respectively, aggrieved by the order passed by GERC on 30.03.2015. This Tribunal, vide its common order dated 04.07.2018, disposed of both the appeals, whereby Appeal No. 114 of 2015 was partly allowed and Appeal No. 131 of 2015 was dismissed.

3. Aggrieved by the afore-mentioned order of this Tribunal dated 04.07.2018, GUVNL, the Appellant in the instant appeal, had filed the review petition under R.P. No. 8 of 2018 before this Tribunal. Aggrieved by the very same order dated 04.07.2018 of this Tribunal, both GUVNL and Taxus (Appellants in Appeal No. 114 of 2015 and 131 of 2015) have filed appeals before the Supreme Court in Civil Appeal Diary No. 33187 of 2018 and 4323 of 2019, respectively. The Supreme Court vide its order dated 01.03.2019 directed that the said appeals be listed after the decision in the review petition pending before this Tribunal.

4. This Tribunal, after elaborate hearing, has disposed of the Review Petition No. 8 of 2018 by setting aside the earlier judgment passed by this Tribunal dated 04.07.2018 in the instant appeal i.e., Appeal No. 114 of 2015 vide its order dated 27.05.2024 to the limited extent, the relevant portion of which is extracted here-in-below:

" In the light of what has been observed hereinabove, the order passed by this Tribunal, in Appeal No. 114 of 2015 dated 04.07.2018, is set aside to the limited extent of (a) non-consideration of issues raised by the Review Petitioner with respect to the two force majeure events ie (i) denial by the Government of Gujarat to implement the project through a Special Purpose Vehicle and (ii) delay in registration of sale deeds; (b) non-consideration of the 2010 Regulations, the relevant clauses of the PPA, and the judgement of the Supreme Court with respect to the Certificate of Chief Electrical Inspector, and the certificate of GEDA; and (c) failure to consider the contentions raised by the review petitioner regarding the undertaking dated 27.03.2013 furnished by Respondent No.1, and application of the principles of Res Judicata.

The order under review is set aside, and Appeal No. 114 of 2015 shall stand restored to file, to the limited extent indicated hereinabove. It is made clear that we have neither interfered with the findings recorded and the conclusions arrived at in the order under review on all other aspects, nor have we expressed any opinion on the merits of the contentions urged on behalf of the review petitioner. The order under review has been set aside only on grounds that (i) the relevant contractual and statutory provisions, and the judgment of the Supreme Court, have not been considered, and (ii) the order under review has failed to consider and deal with the certain other aspects as indicated hereinabove.

The appeal, on its being restored to file, shall be examined on its merits without being influenced by any observations made in this order. The review petition stands disposed of accordingly."

5. The present Judgement pertains to the issue crystallised in this Tribunal's Order dated 27.05.2024 in RP 8 of 2018 and for the sake of convenience major facts in APL 114 of 2015 are reiterated as under :

The Appellant is the Gujarat Urja Vikas Nigam Limited **("GUVNL")** which is engaged in procurement of power in bulk on behalf of the distribution licensees in the State of Gujarat. The Respondent No. 1 - Taxus Infrastructure & Power

Projects Pvt Ltd is a generating company and had set up its 5 MW Solar Photo Voltaic (PV) Power Project at Village Rapar Khokhara, Taluka Anjar, Dist. Kutch, Gujarat. The Respondent No. 2- Gujarat Energy Development Agency (**GEDA**) is the Nodal Agency for the promotion of renewable energy based generation in the State of Gujarat. The Respondent No. 3 - Gujarat Electricity Transmission Corporation Limited is the transmission licensee in the State of Gujarat. Respondent No. 4, the Chief Electrical Inspector is the authority designated for issuing certificate under the Central Electricity Authority (Measures relating to Safety and Electric Supply) Regulations, 2010 to the effect that the electrical installation fulfills the safety requirements and are ready for energization. The Respondent No. 5 - State Load Despatch Centre **("SLDC")** is the State Body to ensure integrated operation of the power system in the State of Gujarat. The Respondent No. 6 is the Gujarat Electricity Regulatory Commission **("State Commission / GERC").**

6. On 29.01.2010, the State Commission determined the tariff for Solar PV Power Projects commissioned within the control period of two years, up to 28.01.2012. Respondent No. 1 was allocated 5 MW of solar capacity by Government of Gujarat, in line with guidelines issued by Gujarat Energy Development Agency **("GEDA"**) for allocation of solar power capacity (Phase II) and on 08.12.2010, the Appellant entered into a Power Purchase Agreement ("PPA") with Respondent No. 1 for the supply of electricity generated from its 5 MW solar power project. The scheduled commissioning date of the project as per PPA worked out as 31.12.2011.

7. The Appellants have claimed that COD of the project should be considered as 08.08.2013, when certification of GEDA was issued and

contented that the State commission in the Impugned order has wrongly allowed COD of 31.03.2013, ignoring the submission/undertaking made by Appellant/Respondent as well as provisions of PPA.

8. Learned counsel for the Appellant has stated that State Commission in the Impugned order has condoned the delay of 402 days on account of Force majeure, non-considering the issues raised by the Appellant with respect to two Force majeure events i.e non-grant of permission for Implementing the project by SPV and delay in registration of sale deeds.

9. Heard Ms. Ranjita Ramchandran, the learned counsel for the Appellant, and Mr. Amit Kapoor, learned counsel for the Respondent; the rival contentions and issues emerged therein are deliberated below under various heads:

Issue No 1: Raising of Force Majeure issue, barred due to res judicata

Submissions by the Appellant

10. Learned Counsel for Appellant submitted that Article 4.3 of the PPA provides imposition of LD in the event of delay in commissioning. GERC, in the Impugned order, while holding three events as Force Majeure event (402 days), held Taxus was liable to pay liquidated damages only for the remaining period of delay. Learned counsel submitted that Taxus has filed Petition No. 1145 of 2011 before GERC, for extension of Control period (as defined by the GERC through its tariff order dated 29.01.2010 passed in Order 2 of 2010), which was rejected by GERC by its order dated 27.01.2012. This was challenged by Respondent-Taxus before Hon'ble High Court, and the matter was settled with liberty to Respondent-Taxus to

approach this Tribunal vide Order dated 26.02.2014, however, Respondent-Taxus did not do so, therefore, GERC order attained finality. When the said order attained finality, the Taxus by way of new Petition before this Tribunal cannot claim any relief on same aspects, which could have been raised, or for any relief, which could have been claimed, but was not. Admittedly, due to the delays in land issues, jantri rate revisions, Respondent-Taxus sought for extension of SCOD and requested for non-levy of LD. However, GERC rejected the petition holding that several projects were commissioned within the control period, and that no liberty was granted to Taxus. Learned counsel submitted that, since the order dated 27.01.2012, though common in similar petitions, was passed by GERC, the principle of *res judicata* shall apply as Petition No. 1145 of 2011 was decided and rejected. GERC erroneously held that *res judicata* applies only if the prayers are similar, contrary to the provisions of CPC. This finding contradicts other observations made by GERC as it acknowledged that the grounds in the said Petition such as jantri rates and non-registration of land are the same as those in the present case. Furthermore, the reliefs sought in both the petitions are similar, as Petition No. 1145 of 2011 also requested for an extension of SCOD and non-levy of LD. If Taxus did not raise the Force Majeure claim in Petition No. 1145 of 2011 on the same facts, it is legally barred from doing so in the current petition ("***Rakha Singh v. Amrit Lal (AIR 1984 P&H 47)***,". Taxus could have raised the Force Majeure plea in the earlier petition but did not do so, and is thus precluded from raising it in the present petition.

Submissions by Respondent - Taxus

11. Regarding the contention of the Appellant that Respondent has raised the same issues in Petition No.1145 of 2011, which was rejected by GERC by its order dated 27.01.2012, learned counsel submitted that Respondent-

Taxus was one amongst a group of 37 Petitioners seeking extension of control period of GERC order No 2 of 2010 dated 29.01.2010. In the said petition, Taxus has raised various issues like i) Billing disputes, ii) Liquidated damages disputes, iii) Commissioning date of the project, iv) Tariff receivable by Taxus etc. The pleadings in Petition No. 1145 of 2011 and that in Taxus petition under Impugned order are distinct from each other. Since the batch of matters were disposed of by GERC by common order, the actual facts pleaded by the Appellant in the said petition were not considered. The Order was based on common facts and issues and common prayer ignoring the specific issues pleaded by Taxus with relevant to supplementary documents. As such, the principle of *res-judicata* is not applicable in the present case.

Issue No 1: Discussion & Analysis

12. It is a settled law, governed by Section 11 of the Code of Civil Procedure, that *res judicata*, is a doctrine that prohibits a court from re-examining a case that has already been conclusively decided by the same court, involving the same parties, subject matter, and under the same title as reproduced here under:

> *"11. Res judicata.—No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.*
>
> *"Explanation IV.— Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in such suit."*

13. From a bare reading of the section, it is evident that a decision of a Court is final not only if it has been decided in an earlier suit between the same parties but also if the matter might or ought to have been made ground of defence or attack in the former suit. The principle underlying the Explanation is that if a party had an opportunity to raise a matter in a suit that should be considered to have been raised and decided. The object of the principle is to cut short litigation between the parties so that a person may not be vexed again and again with regard to the same matter ("**Rakha Singh v. Amrit Lal (AIR 1984 P&H 47)**.

14. To deliberate on the applicability of *res judicata* for condoning the delay on account of Jantri rates and finalization of SPV under force majeure, let us examine the plea taken by Respondent -Taxus in petition 1145 of 2011 and the State commission order dated 27.01.2012 in the batch of appeals including the said petition of Respondent, having attained finality in the absence of challenge subsequent to High Court order and other related facts.

15. It is noted that the State Commission vide its order No 2 of 2010 dated 29.01.2010 has issued comprehensive tariff order on Solar Energy for procurement of power by distribution Licensee and other from solar energy projects in the State of Gujarat, subsequent to Solar Energy Policy 2009 announced by Govt of Gujarat, to be applicable to solar projects commissioned during the control period of two years ending 28.01.2012; thus once a project qualifies for the tariff as determined in the order, same tariff is to be applicable for the entire life of the project.

16. Various solar power project developers including Respondent - Taxus (vide petition No 1145 of 2011) have approached the State Commission for

extension of the control period, from one month to six months, implying that tariff so notified to be applicable for further period beyond 28.01.2012. It is a fact that the Respondent Taxus in its petition No 1145 of 2011 has cited the delay of about four months from the date of submission of conveyance deed for registration from 04.06.2011 till land registration on 04.10.2011 on account of Jantri rates which is beyond their control, as well as denial for SPV permission and sought extension of Control Period as defined in order dated 29.01.2010 by four months as well as control period in the PPA to be considered as 28.01.2012 instead of 31.12.2011.

17. The State Commission in its order noted that though various petitioners (developers) have requested for extension of SCOD, non-levy of liquidated damages in addition to extension of control period, however, none of the petitioners have given any specific data and they have also clarified that the petitions do not relate to any dispute in the context of the PPA and they are not asking for adjudication of any dispute under Section 86 (1)(f) of the Electricity Act 2003. We also note from the Petition No.1145 of 2011 of the Respondent -Taxus, the waiver of liquidated damages was not sought, rather it pleaded that in the event of non-extension of Control period, it will be penalized twice for the same delay, even non-attributable to it i.e revised tariff as well as payment of liquidated damages in terms of PPA. The State Commission treated all the Petitions as Petitions seeking extension of the control period and not for adjudication of dispute under PPA and the State commission vide its order dated 27.01.2012 dismissed all the Petitions, extract from the order is reproduced below:

> *5.2 The above petition is similar to other petitioners which have asked for extension of the control period. Though, unlike other petitioners, he has mentioned adjudication of dispute under the PPA. Some other*

petitioners such as those in Petition Nos. 1145, 1146, 1147, 1148, 1164, 1169, 1171, 1179 and 1182 of 2011 and 1186 of 2012 have requested for extension of the SCOD and non-levy of liquidated damages, in addition to extension of control period. However, none of these petitioners has provided any information as to whether he has taken recourse to resolution of disputes in accordance with the provisions of the PPA before approaching the Commission. During the hearing also the petitioners, did not furnish any such detail. In view of this, we treat these petitions as petitions seeking extension of the control period and not for adjudication of disputes under the PPA.

11.3 It can be seen from the above that the reasons put forward by the petitioners for extension of control period - though some common factors are there are project specific. In some cases, there could have been delay due to change of project site. In some cases, there may be delay because of more time taken to obtain NA permission, or permission under the Tenancy Act. In some cases, the project construction could have been affected for a few days because of water logging due to excessive rains. However, one cannot infer that because of these and some of the other factors, most of the projects were affected. If there is an event which is known to have statewide and large-scale ramifications, then only there could be a case for issue of a general order to extend the control period. In fact, the issues raised by the petitioners, as rightly pointed out by the learned Advocate for the respondents, indirectly imply existence of Force Majeure conditions, which can be addressed only within the framework of PPA. There is no justification to issue a general order extending the control period determined in the tariff order of 29 January 2010. In fact, extending the control period will mean an amendment to the above order of the Commission which will require a different procedure and cannot be done based on individual petitions referring to individual project specific problems and issues. In fact, the extensions asked for range from one month to six months. There are also other aspects such as progress of the project and size of the project which vary widely. On the other hand, a number of projects as discussed in the following paragraphs, have already been commissioned or are likely to be commissioned. Hence, it is evident that the petitioners have not been able to establish that the reasons put forward by them can justify an extension of the control period which is a modification of the Tariff Order of 29 January 2010,

especially when a discussion paper has already been issued for determining the tariff for the next control period.

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.

18. Thus, the Petitions filed by the developers including that of Respondent No1- Taxus was for the general Extension of control period of the Tariff so determined by the State Commission, vide its order dated 29.01.2010, and not that of specific events with time lines for condonation of delay on account of Force Majeure events. The Petitions by the developers including Respondent-Taxus, which culminated in passing of the order dated 27.01.2012 by the State Commission was for invoking the inherent power of the State commission to extend control period determined by it in the order No 2 of 2010 dated 29.01.2010.

19. In the petition (No 1364/2013 dated 30.03.2015) filed by Respondent No 1-Taxus before the State Commission, which resulted in passing of the impugned order dated 30.03.2015, where the plea of Force Majeure was taken and have sought for the following specific relief:

i) To quash and set aside the certificate of commissioning issued by Respondent No. 1, GEDA on 17.08.2013 stating the date of

commissioning with effect from 08.08.2013 onwards and to declare that the solar power plant was commissioned on or before 31.03.2013 and direct GEDA to issue the certificate of commissioning with effect from 31.03.2013.

ii) To declare that the Petitioner is entitled for the payment of tariff for the energy generated and injected into the grid from 31.03.2013 to 8.8.2013 which is recorded in the energy meter and received by the Respondent No. 2.

iii) Pending adjudication and disposal of this Petition the Commission may direct the Respondent No. 2 to immediately pay to the Petitioner all outstanding bills towards supply made with interest at the rate of 18% per year,

iv) To declare that GUVNL is not entitled to claim for any liquidated damages from the Petitioner by virtue of the PPA Agreement and such claim of GUVNL is illegal, void and not maintainable and as such the Petitioner is entitled to get refund of Rs. 4.5 Crores including the amount of bank guarantee furnished by the Petitioner which is held by GUVNL wrongfully;

v)To declare that GUVNL is bound to return the bank guarantee of Rs.2.5 Crores submitted on behalf of the Petitioner by it banker towards commissioning of the power plant, as the power plant has been duly commissioned and hence the purpose of bank guarantee has lost its force;

vi) To direct GUVNL to pay interest at the rate of 18% p.a. over and above the invoice amount in respect of supplies made and enjoyed by GUVNL for not making payment within 30 days from the date of submission of invoices as per terms of PPA Agreement;

vii) To declare that the Petitioner is entitled to get all the benefits of the original commissioning date as the Petitioner is not responsible in any manner for delay in commissioning of the project as stipulated to be commissioned on or before 31.12.2011 as the same was occasioned due to force majeure circumstances exempted under the PPA agreement,

viii) To direct GUVNL to pay the full amount of the invoices received for the supplies made from the period of 1.4.2013 till 7.8.2013 which has been wrongfully withheld by GUVNL in breach of the contract;

ix) To direct GUVNL to pay additional compensation for its wrongful actions in not making payment of the invoices raised with effect from 1.4.2013 till date by way of other consequential losses suffered by the Petitioner:

x) To condone the delay of commissioning and making available the power plant on 31.03.2013 instead of 31.12.2011 in view of the facts and circumstances which were beyond the control of the Petitioner and are covered under the force majeure clause of the PPA and Grant all consequential reliefs in fixing the rates of supplies and pass appropriate orders on GUVNL.

20. The scheduled COD of the project as per PPA was 28.12.2011, and at the time of instituting the Petition No.1145 of 2011 i.e. on 06.12.2011 before State Commission, project of the Respondent was not even commissioned, so liability of liquidated damages could not have been crystalised and the Respondent – Taxus could not have been in a position to plead their case for invoking Force Majeure clause with exact timelines in Petition No. 1145 of 2010. We take note that the Respondent has neither raised the issue of non-levy of LD on account of Force Majeure events and nor it could have raised such a plea, to be covered under the ambit of Explanation IV of Section 11 of Code of civil Procedure, therefore, we do not find merit in the submission of Appellant that Respondent -Taxus is barred from raising Force Majeure issue under *res judicata* as per Section 11 of Code of Civil Procedure.

Issue No 2: Condonation of Delay on account of Force Majeure; Applicability of Liquidated Damages (LD)

Submissions by the Appellant

21. Learned counsel for the Appellant contended that Respondent No 1-Taxus bears the responsibility for obtaining all necessary approvals including arrangement for land as mentioned in Article 2.1 and 3 of the PPA. Article 8.1 provides for *Force-Majeure* in case of failures in meeting milestones are due to specified events, and relief under Article 8.2 is available only if performance obligations are genuinely prevented or delayed due to *Force-majeure*. The High Court in "***Halliburton Offshore Services v. Vedanta Limited"* (2020) 3 Arb LR 113** noted that while COVID-19 qualifies as *Force-Majeure*, its actual impact on non-performance must be assessed. Not every instance of non-performance can be justified through *Force-majeure* invocation; the facts must establish that genuine prevention occurred due to *Force-majeure*, which should be interpreted narrowly. This principle was reiterated in "***MSEDCL v. MERC" (2022) 4 SCC 657.*** In ***NVVN v. Precision Technik 2018 (SCC Online Del 13102)"*** it was held that the generator must secure approvals, and delays attributable to normal regulatory processes do not constitute as *Force-Majeure*. It was also observed that the Arbitral Tribunal based its findings on mere surmises. Exact effect has to be taken into consideration for time extension and to construe *Force-majeure* clause. In light of these principles, it must be determined whether any claimed event qualifies as *Force-Majeure* and whether it substantively impacted the project timeline. If the project delays arise from unrelated causes, *Force-Majeure* claims cannot be substantiated. GERC failed to adequately examine these facts and proceeded based on assumptions. As per facts on record, alleged

events did not materially affect the project's timeline and project was delayed due to other reasons.

21. Learned counsel for the Appellant contended that after obtaining land allotment on 14.10.2010 and signing the PPA on 08.12.2010, Taxus sought permission to assign the project to an SPV on 10.01.2011; which was rejected by the state Government on 01.04.2011. GERC has allowed entire period as *Force-Majeure*, but it was Taxus' choice to undertake the project through SPV causing delay, and as such, time taken by the Government was reasonable; the *Force-majeure* claim fails because implementing the project through an SPV was not required for project construction. Taxus, as the party to the PPA, could have proceeded with the project without the SPV. The decision to use an SPV was a commercial choice, and the Allotment Policy disallowed changes in shareholding, while the PPA required GUVNL's consent for assignment (Article 12.9), which could be refused. Therefore, the delay was due to Taxus' actions and is to be excluded from *Force-majeure* as per Article 8.1(b)(6) of PPA. Financing issues cannot be considered as *Force-majeure*, especially when Taxus sought cheaper financing despite the Tariff Orders already considered prevailing interest rates.

22. GERC, in the Impugned order erroneously held that Taxus could not proceed with the implementation of the project pending application, despite no evidence or specific claims of its impact. Further it is also contrary to the facts, as MOUs with the farmers for land was executed by Taxus from 25-29.03.2011, prior to the decision; therefore, delay, if any, was due to Taxus land identification process and not due to pendency of the application. Taxus itself acknowledged that land procurement takes time. Although GERC noted the MOU date, it wrongly concluded that pendency of application caused land uncertainty.

23. Further, claim of Taxus that it could not register sale deeds due to the pending revision of jantri rates is also not correct as sale deeds were submitted on 06.06.2011 and received on 22/28.11.2011. GERC considered the period starting from 01.04.2011, though Taxus was not ready before 06.06.2011 since the sale deed itself was submitted by Taxus on 06.06.2011. The claim that landowners refused to sign the sale deeds due to jantri rate revisions is incorrect, as the sale deeds were signed on 06.06.2011 without any revision. Furthermore, a provisional mechanism for sale deeds had been in place since 11.05.2011. The sale deeds were registered, pending verification by the Industry Inspector, and there was no valid reason for not proceeding with the project. Other projects were commissioned during this period, as shown in evidence presented to GERC and noted in its earlier order dated 27.01.2012, confirming that jantri rate revisions did not prevent construction.

24. Learned counsel for the Appellant stated that Taxus claimed that fund disbursement was delayed due to the inability to mortgage land, but no evidence supported this claim. Financing issues were excluded from *Force-Majeure* as held in the order dated 04.07.2018. Moreover, the facts shows that the delay was not caused due to pendency of registration of sale deed, as loan was sanctioned on 29.07.2011, and the loan agreement was signed on 21.11.2011, while the sale deed was registered on 22/28.11.2011. Therefore, registration was not a pre-condition for sanction of the loan. The actual delay was due to arranging finances by Taxus and not due to the registration of sale deed.

25. The loan agreement, signed before the sale deed registration, had no provision requiring the sale deed to be registered before hand. The letter dated 29.07.2011 by the Appellant should not be introduced for the first time at the

stage of appeal. As such, Clause 8 of the Security provision does not require security before the loan agreement but refers to future security. In fact, clause 9 of the loan agreement did not mandate sale deed registration before signing of loan agreement. Even Clause 2.3 of loan Agreement allows for interim loans against BG, which Taxus could have availed, if necessary. Nonetheless, the facts show that the delay was only due to arranging finances by Taxus and not because of registration of sale deed.

Submissions by Respondent No 1 - Taxus

26. Learned Counsel for the Respondent submitted that after execution of the PPA on 02.12.2010, Taxus approached the Energy and Petrochemicals Department, Gujarat Government, seeking permission to set up the Project through SPV on 10.01.2011, which was primarily to arrange cheaper finance from international lenders; however the same was denied by letter dated 01.04.2011 without assigning any reasons, during which period, Respondent was unable to take steps for implementation of the project, as it was to be done in the name of the project company; proposed SPV or Taxus. The learned counsel asserted that other similar developers were allowed to execute the project through SPV. Thus, the delay on this account cannot be attributed to Taxus, and to be treated as *Force-Majeure* Event.

27**.** Regarding the delay in implementation of the project due to delay in signing of sale deed, learned counsel submitted that after the MOU was signed by Taxus on 25/29.03.2011 with the farmers for the procurement of agricultural land for establishing the Project, sale/conveyance deeds could not be registered, also acknowledged by Sub-Registrar, Anjar in its letter dated 26.07.2011 due to following facts:

a) Government of Gujarat issued a GR dated 31.03.2011 and revised the Jantri rate for the procurement/sale of agricultural land, however the GR was silent on Jantri Rates for non-agricultural land; since the Jantri rate revised for agricultural land was too high, led to agitation across the State.

(b) On 18.04.2011, the Jantri Rates were reduced, however the new GR also did not notify Jantri Rates for non-agriculture land.

(c) On 29.07.2011, IREDA sanctioned the term loan of Rs. 44,30,00,000/- in favor of Taxus for development of the Project. The terms and conditions of loan stipulated the requirement to disclose land/title deeds. Even the agreement for term loan executed between Taxus and IREDA stipulates such requirements

(d) Since the land purchased by the Taxus was non-agriculture land, it was not allowed to be registered in the name of Taxus. Taxus vide its letter dated 16.08.2011 took up the matter with Deputy Commissioner, Revenue, Bhuj, Gujarat stating its inability to get the sale deeds executed in the absence of a new Jantri rate which would affect the execution of the Project.

(e) After resolution of Jantri rate issue, the sale deed was registered on 28.11.2011

(f) On 18.02.2012, Dy. Collector granted approval to Taxus to purchase the agriculture land for the project. The sanctioned term loan was not released by IREDA due to the non-availability of land for the Project.

28. The changed rates of Jantri as well as uncertainty over Jantri rates for non-agricultural land created a situation which was beyond the reasonable control of Respondent No.1- Taxus.

Issue No 2 : Discussion and Analysis

29. We take note that Guidelines for allocation of Solar Power Capacity Phase II) by Gujarat Energy Development Agency, under which the subject project has been allocated, stipulates that Applicant shall provide the information about the promoters and their shareholding and no change in shareholding shall be permitted for a period of 5 years once the allotment is made, relevant extract from the Guidelines is reproduced below:

> ***5. Minimum Equity to be held by the Applicant Company:***
> *The applicant Company shall provide, with the application form, the information about the Promoters and their share holding in the applicant company indicating the controlling interest. No change in the shareholding pattern of the Applicant Company shall be permitted for a period of 5 (five) years once the allotment is made. However, the applicant, with the prior approval of Government of Gujarat, may bring in Technical Partners who will contribute in the Equity. In such cases, the share holding patterns declared shall not go below 51%.*

30. The Respondent No 1-Taxus has applied for the allocation of 5 MW solar capacity under the above guidelines, which was granted by Govt. of Gujarat on 14.10.2010 and also entered into PPA with the Appellant on 08.12.2010. It was only on 10.01.2011, i.e. almost after 3 months of allocation of project, Respondent Taxus approached EPD, Govt of Gujarat, who had issued LOI to the Respondent –Taxus, for permission for setting up the project through SPV, which was denied by Govt. of Gujarat on 01.04.2011. The Respondents were aware that though the guidelines prohibits such a change in shareholding but approached the Govt. for such an approval as per their commercial interest or any other obligation. Though it is contended by the Respondent- Taxus that such a permission has been granted by the Govt. of Gujarat for other developers, however, in our view, such an approval, which will have change in

shareholding pattern from that given along with application, is at the discretion of Govt., as it is not available as a matter of right, and time taken in grant of approval or denial cannot be considered as Force-majeure. Therefore, in our view, Respondent - Taxus are not justified in claiming the time taken by Govt. of Gujarat in denial of the permission to set up the project as a SPV to be covered under *Force-majeure,* and we find force in the submission of the Appellant on this account. We are of the view that the State commission has erred in granting the period up to 01.04.2011 i.e. denial of permission for setting up the project through SPV under Force-majeure.

31. The Respondent -Taxus has signed the MOU with the farmers for the procurement of land for establishing the project from 25/29.03.2011and the main purpose of MOU seems to enable the Respondent -Taxus to apply for all types of local and State Govt. authority approvals for setting of the solar Power Project of 5 MW on the land and as per the provisions of the MOU, the price for purchase of the land is to be mutually decided. Immediately thereafter on 31.03.2021, Govt. of Gujarat vide its GR dated 31.03.2011revised Jantri rated for sale and purchase of Agricultural land, which was quite high but the GR was silent about non-agricultural land, which lead to agitation. These Jantri rates for agriculture land was reduced vide GR dated 18.04.2011 but still jantri rates for non-agricultural land were not notified . As noted from the letter dated 26.07.2011 of the Sub-Registrar, though the property documents for registration were acknowledged but were kept pending. The Respondent - Taxus, on 16.08.2011 also took up the matter with Deputy Commissioner (Revenue), Bhuj Gujarat for resolving the issue of Jantri rates so that land can be registered as it was a great deterrent for project progress. It was only on 28.11.2011, the sale deed were registered after resolving of Jantri rate issue.

We also note from the Loan sanction letter dated 29.07.2011 (though submitted first time before this Tribunal) from Indian Renewable Energy Development Agency Limited **("IREDA")** that the sanction loan is subject to fulfillment of certain conditions, which amongst other included "Equitable mortgage by Deposit of Title Deeds of All Immovable Properties/Assets pertaining to 5 MW grid connected solar PV power plant". The other formalities to be completed for execution of loan documents included "***Certificate from an Advocate that the borrower has acquired the land and it has prima facie good and marketable title"*** and requirement for completion of security included Copy(ies) of property papers and Investigation of Title of Project properties. The loan agreement also was signed on 21.11.2011. Regarding the contention of the Appellant that sale deeds were signed on 06.06.2011, we do not find merit in the submission of the Appellants that since sale deeds were signed on 06.06.2011 and Loan agreement got signed on 21.11.2011 registration of land cannot be a pre-condition for loan signing and the delay is on account of arrangement of funds which is not covered under *Force-majeure*. In our view, the title for the land gets registered in the name of Respondent -Taxus only subsequent to the registration of land deed, which is a condition under loan sanction letter for creating security as well as under loan agreement. Thus, it cannot be considered as simply a question of fund arrangement, as the Respondent No1 – Taxus has got the sanction letter on 29.07.2011, subsequent to signing of MOU and signing of sale deed, the loan agreement could be signed on 21.11.2011, probably when clarity about registration of sale deed emerged as the registration of sale deed was done immediately thereafter, on 22.11.2011/28.11.2011. Thus, the delay in loan signing and arrangement of funds is mainly on account of delay in registration of sale deeds. Thus, the delay from 01.04.2011- 22.11.2011/28/11.2011 in registering the sale

deed is on account of issuance of Jantri rates and to be considered as Force majeure.

Meaning of word " Without Prejudice" inscribed on the Undertaking dated 28.03.2013 provided by Respondent Taxus and accepted by the Appellant

32. Learned counsel for the Appellant contended that the GUVNL had the right to terminate the PPA if the project was delayed beyond one year from the SCOD as per Article 4.3 of the PPA. However, GUVNL agreed not to terminate the PPA on the condition that Taxus would pay LD. Taxus, in an undertaking dated 28.03.2013, agreed to pay LD for the extended period to be granted by GUVNL. While GERC acknowledged this undertaking for tariff purposes, it did not address LD liability. The words "without prejudice" in the heading applies only to the revised tariff, not for LD. In the case in "***Oberoi Constructions v Worli Shivshahi Co-op Hsg Society Ltd."* (2008) 5 BomCR 855,** it was held that it is without prejudice if terms are not accepted but if terms are accepted, a complete contract is established and letter although written without prejudice operates to alter the state of things. Since GUVNL agreed and Taxus accepted, Taxus' liability to pay LD remains operational.

33. Per Contra, Learned Counsel for the Respondent No.1 asserted that the reliance placed upon a purported undertaking dated 28.03.2013 stating that the agreed tariff would be of Rs. 9.98/- per unit for the first 12 years from the date of commissioning of the project and Rs. 7 per unit for 13 years, and they shall pay LD is erroneous, since the Respondent has inscribed the word '*without prejudice*' at the top of the undertaking, therefore the said

undertaking was without prejudice to the rights and contentions of Respondent No.1-Taxus.

34. The Contents of the notarized undertaking dated 28.03.2013, provided by Respondent – Taxus to Appellant is reproduced below:

> ***"Subject: Undertaking, without prejudice by M/s. Taxus Infrastructure and Power Projects Pvt Ltd for revised tariff of solar power project as per GERC Order dated 27.1.2012***
> *On behalf of M/s. Taxus Infrastructure and Power Projects Pvt Ltd, I am submitting the Undertaking that we agree to supply power to GUVNL from our 5 MW solar Power project at Village: Rapar-Khokhara Tal Anjar Dist: Kutchh at the tariff of Rs. 9.98/Unit for first 12 years from the date of commissioning of the project and Rs. 7.00/Unit for 13 years thereafter as determined by Gujarat Electricity Regulatory Commission through Solar Tariff Order dated 27.1.2012.*
>
> *Further, we agree that we shall pay liquidated damages from Scheduled Commercial Operation Date agreed in the PPA dated 8 December 2010 up to date of commissioning of the solar project in lieu of period extended by GUVNL as a special case."*

35. Though the word, "without prejudice "is written at the top, however, the undertaking is notarized and clearly states that Respondent -Taxus has agreed to pay liquidated damages from the scheduled commercial operation date agreed in the PPA in lieu of the period extended by GUVNL as well as agreed for a tariff of Rs 9.98/unit for first 12 years after commissioning of the project and Rs 7/ unit for 13 years thereafter. As contended by the Appellant, the undertaking was in lieu of not exercising the right of termination of PPA under Article 4.3 by the Appellant, as there was delay in commissioning of project by Respondent –Taxus by more than a year. <u>According to the Black's Law Dictionary, "without prejudice" means without loss of any rights or in a way that</u>

does not harm or cancel the legal rights or privileges of a party. The phrase "without prejudice" generally means that a statement, offer, or action cannot be used as evidence in later legal proceedings. It is often used in negotiations, settlement and legal correspondence to ensure that parties can discuss potential resolutions without the risk of those discussions being used against them. If an offer is made "without prejudice" it means that if the offer is rejected, it cannot be presented as evidence of liability or an admission in the court. In the present case, undertaking has been given by the Respondent Taxus, in lieu of extension in time as special case so as not to get the PPA terminated. It is a fact that the Appellant did not terminate the PPA, based on the undertaking given by the Respondent –Taxus, as contended by the Appellant. The Bombay High Court in the judgement in "***Oberoi Constructions v Worli Shivshahi Co-op Hsg Society Ltd."*** **(2008) 5 BomCR 855,** has referred to the definition of "without prejudice" contained in the judgement of **Lindley, L J, in walker v Wilsher** ; (1970)1 SCC 186: AIR 1970 SC 1059, is as given hereunder:

> ***15.*** *The next legal contention was advanced is as to what will be the effect of the words "without prejudice". On behalf of the appellants the learned Counsel has drawn our attention to the judgment of the Supreme Court in the case of (Chairman and MD, NTPC Ltd. v. Reshmi Constructions, Builders and Contractors)[3], reported in 2004 DGLS 339 (soft): (2004) 2 S.C.C. 663 : A.I.R. 2004 S.C. 1330. The Apex Court noted that even correspondence marked as "without prejudice" may have to be interpreted differently in different situations. The interpretation would be based amongst others according to usage in the profession and that no issue of public policy is involved. The Supreme Court quoted with approval the judgment in (Rush & Tompkins Ltd. v. Greater London Council)[4], All. E.R. PP. 551g-552b. It was held that "the rule which gives the protection of privilege to "without prejudice" correspondence depends partly on public policy, namely the need to facilitate compromise and partly an implied agreement. In the same judgment the exposition of definition of "without prejudice" contained in the judgment*

of Lindley, L.J., in (Walker v. Wilsher)[5], 12 Q.B.D. 337 was set out, which reads as under.

"What is the meaning of the words "without prejudice"? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in letter are accepted a complete contract is established and the letter although written without prejudice, operates to alter the old stage of things and to establish a new one."

The referred judgement held as under

***"17.** It would thus, be clear that the expression "without prejudice" is to be understood on the fact situation. When parties agree to a set of things then merely marking on the document without prejudice would be of no consequence. However, if the material indicates that the negotiations are still in progress and there is no finality on what was contained in the document marked 'without prejudice' then the document marked 'without prejudice' cannot be considered without the consent of both the parties."*

In Wharton's Law Lexicon, the author while interpreting the term *"without prejudice" observed as under (Ref.* the supreme Court Judgement in the "Superintendent (Tech I) Central Exercise, I.D.D Jabalpur and Others Vs Pratap Rai **(1978) 3 SCC 113**):

Similarly, in Wharton's Law Lexicon the author while interpreting the term "without prejudice" observed as follows:

"The words import an understanding that if the negotiation fails, nothing that has passed shall be taken advantage of thereafter; so, if a defendant offers, 'without prejudice', to pay half the claim, the plaintiff must not only rely on the offer as an admission of his having a right to some payment.

The rule is that nothing written or said 'without prejudice' can be considered at the trial without the consent of both parties—not even by a Judge in determining whether or not there is good cause for depriving a successful litigant of costs.... The word is also frequently used without the foregoing implications in statutes and inter partes to exclude or save transactions, acts and rights from the consequences of a stated proposition and so as to mean 'not affecting', 'saving' or excepting."

36. Therefore, the undertaking furnished by the Respondent-Taxus 'without prejudice' would mean that they can go back on their undertaking if terms are not accepted but if terms are accepted, a complete contract is established. In our view, the Respondent-taxus having avoided the termination of agreement based on undertaking given by them and accepted by the Appellant, cannot now turn around and wish away their liability of payment of LD as well as tariff offered in the undertaking, by referring to the word " without prejudice" inscribed on top of the undertaking.

37. In view of the above deliberation, though we have come to the conclusion that the Appellant should be entitled for the relief from payment of LD, for the delay for the period from 01.04.2011 to 21.11.2011in registering the sale deed and consequently the signing of loan agreement for loan disbursal on account of issue of Jantri rates, being *force Majeure* event, but we are unable to concur with the view of the State Commission in Impugned order, in view of undertaking given by the Respondent –Taxus for payment of LD in lieu of period extended by GUVNL as a special case so as to avoid termination of PPA as per the provisions contained therein.

Issue No 3 : Commissioning Date (COD) of Solar Project of Respondent – Taxus

Submissions by the Appellant

38. Learned counsel for the Appellant submitted that as per Article 2 and Article 3 of PPA, all necessary approvals are required to be taken by the Respondent No 1 for declaring COD which includes certification by GEDA as per definition of COD under Article 1.1 and Chief Electrical Inspector

certificate (CEI certificate) under the Central Electricity Authority (Measures relating to Safety and Electric Supply) Regulations, 2010. GERC has erroneously considered the COD as 31.03.2013 without these approvals as CEI certificate is dated 03.04.2013 while GEDA has certified COD as 08.08.2013 vide its letter dated 17.08.2013.

39. Learned counsel for the Appellant submitted that based on similar PPA, in "***GUVNL v. Acme Solar Technologies (Gujarat) Pvt Ltd, (2017) 11* SCC 801**," the Hon'ble Supreme Court held that CEI approval and GEDA certification are mandatory under the said PPA, and had considered the project readiness date for LD based on these certificates. In the present case, the CEI certificate is dated 03.04.2013, and GEDA certified COD as 08.08.2013, without both these approvals, the project cannot be deemed to be commissioned on 31.03.2013.

40. Learned counsel for the Appellant further contended that unlike in Acme, where the GEDA certificate confirmed that the plant was ready except for the transmission line, the GEDA certificate dated 17.08.2013 in respect of Taxus made no such certification. Thus, the Taxus' contention of readiness of the project as on 31.03.2013 (which was accepted by GERC), pending GETCO's line, is not certified by GEDA and is contrary to the PPA. In fact, GETCO's line was ready on 30.03.2013, when it was charged and stood ok as per letter dated 30.03.2013 from Executive Engineer (Const), GETCO Anjar to the Superintending Engineer Circle Office GETCO, Anjar, as extracted in the Impugned order, therefore finding of line's non-readiness is also contrary to record. Further, Taxus' reliance on readiness of transmission line to claim readiness of plant cannot be accepted as the meeting held on 30.03.2013 and the letter dated 30.03.2013 pertain only to GETCO's line and does not denote the Appellant plant's readiness. A

transmission line can be ready without the power plant being operational. As per the PPA, only the GEDA certificate confirms COD.

41. Under Article 3.7, Taxus must comply with applicable law. Regulation 43 of CEA (Measures relating to Safety and Electric Supply) Regulations 2010 mandates that electricity supply can only commence after obtaining written approval from the Electrical Inspector. The CEI certificate dated 03.04.2013 granted permission to energize, making any operation before this date becomes unlawful. COD requires the plant to be available for commercial operation, which is impossible without CEI approval. Therefore, the COD of 31.03.2013, which is prior to CEI written approval is contrary to Regulations. Only an inspection date is insufficient since the law requires written approval. The quantum of power injection from 01.04.2013 was of negligible amount, probably for testing, not the supply under PPA.

42. The Taxus is responsible to get necessary approvals on time and it has to bear the consequences for any delay on its part in obtaining such approvals and that it cannot pass on the burden to GUVNL for such delay "***(NVVN v. Precision Technik 2018 SCC Online Del 13102)"***. Even otherwise, Taxus failed to complete the legal formalities. It submitted the cheque for inspection fees only on 30.03.2013 (Saturday) and obviously could not be deposited before 01.04.2013. As seen from the conduct of GETCO, it had paid inspection fees in advance, indicating that the delay until 03.04.2013 was due to Taxus. GEDA could not have certified readiness prior to CEI's written approval and as such Taxus did not take any steps immediately and waited till 10.05.2013 to write to GEDA, which demonstrates lack of diligence on its part.

43. Learned counsel for the Appellant submitted that the principle of Section 50 of the Contract Act applies specifically in the context of Commissioning/COD of power project. In the judgement of this Tribunal in ***TSPL v. PSPCL (Appeal No. 97 of 2016)*** dated 03.06.2016, upheld by the Hon'ble Supreme Court in (CA No. 12344 of 2016 dated 22.11.2017), which states that when contract provides that a particular thing relating to a contract has to be done in a particular manner, it has to be done in that manner and not in any other manner. Contention of substantial compliance and implied terms were rejected. Therefore, if the PPA requires readiness to be certified by GEDA, Taxus cannot assert readiness through other means. In ***"Sasan Power Ltd, (2017) 1 SCC 487,"*** the Supreme Court rejected the claim of commissioning on 31.03.2013, holding that it contradicted the PPA, as the COD affects tariff, thereby impacting consumer/public interest. Similarly, in this case, declaring COD on 31.03.2013 (FY 2012-13) instead of 08.08.2013 (FY 2013-14) affects the applicable tariff, and the consumer interest, and there cannot be any alleged concession/waiver by GUVNL or GEDA or even GERC on PPA requirements.

44. Further, in ***"GUVNL v. Solar Semiconductor Power Company (India) Pvt Ltd"*** (2017)16 SCC 498, it was held that commissioning is act performed in terms of obligation under PPA & between producer and purchaser & Court cannot assume to itself powers not otherwise conferred. Court should be careful in dealing with matters when consumer interest is at stake. By accepting COD as 31.03.2013, GERC has disadvantaged consumers with higher tariff & decided on commissioning contrary to terms of PPA.

45. In "***HPPC v. Sasan Power Ltd.,"*** (2024) 1 SCC 247, the Supreme Court held that it cannot make a new bargain or disregard express provisions

of contract on basis of loss to contractor/ change in circumstances. Similarly, this Tribunal in its Judgement dated 17.05.2018 in "***Nabha Power Ltd. V. Punjab State Power Corporation and Another" in*** Appeal No. 283 of 2015 held that PPA is a binding instrument, cannot be varied under regulatory power nor can the Commission grant relief for generator which is not in PPA. PPA terms cannot be reopened for consequential circumstances. Thus, even if the alleged loss to Taxus is due to subsequent issues with GEDA/CEI, the PPA terms cannot be ignored. Further, in ***" S.B.I.W Steels (Private Ltd V. Steel Authority of India Ltd (2022 SCC OnLine Cal 3842)",*** it was held that the absence of a required BIS certification invalidated the supply. Likewise, electricity supply without CEI approval and commissioning without CEI/GEDA certification violates statutory and contractual requirements.

46. Learned counsel for the Appellant also asserted that the present case is comparable to ***"SAIL v. Shri Ambica Mills Ltd. (1998) 1 SCC 465,"*** where the issue was of the applicable price for hot-rolled strips under a scheme. Upon the Respondent's submission of indent, the defective license was corrected, and the revised documentation was submitted after a price change, which SAIL applied retrospectively. The High Court ruled that SAIL, being a government entity, could not penalize the Respondent for defects in the license, emphasizing governmental mishandling. However, the Supreme Court overturned this finding holding that despite the licensing authority's error, SAIL was not obligated to ignore the deficiencies in the indent registration. Therefore, the Taxus contention on being penalized for no fault, cannot be accepted. In this regard, the GERC and the Tribunal have affirmed that the tariff has to be as per COD and rejecting Taxus' argument for a tariff based on an earlier date (31.12.2011), which was attributed to delays caused

by Force Majeure. Consequently, even if Taxus is not at fault for the delays post 31.03.2013, the applicable tariff is as on 08.08.2013.

47. Learned counsel for the Appellant submitted that applying tariff for FY 2013-14 to Taxus is not a penalty; it was determined by GERC after considering costs and return on equity, making it valid and appropriate for solar projects. Contention on loss is incorrect and cannot override PPA terms to allow deemed COD as 31.03.2013. Such an act would be against consumer (public) interest and cannot be allowed. COD is significant for determining the applicable tariff and the LD period, therefore, it has to be as per the PPA. The PPA mandates tariff payment for supply of power for 25 years from COD, and any power injected before COD cannot be considered as supply as per PPA.

Submissions by Respondent -Taxus

48. Learned Counsel for the Respondent No.1, while contending that the commercial operation date of the project to be taken as 31.03.2013 instead of 08.08.2013, submitted that the Respondent No.1 approached the Chief Electrical Inspector on 15.03.2013 and also GEDA on 18.03.2013 for approval of its project. Accordingly, on 29.03.2013, CEI inspected the plant of Respondent No.1 and found the Project ready in all respects. From the letter dated 20.03.2013 from GETCO to CEI, it is clear that the 66 kV double circuit line of GETCO was ready on 20.03.2013; the said 66 KV lines were charged at 18.50 hrs and 18.55 hrs on 30.03.2013 as evidenced from the letter dated 30.03.2013 from Executive Engineer GETCO to Superintending Engineer GETCO. However, the said line was switched off by GETCO. On 31.03.2013, when GEDA officials visited the project site, it was observed that the 66 KV of GETCO was not charged; GETCO could charge the line only at 16.35 hours

and the RMU was charged at 18.20 hours on 31.03.2013 and by this time, the solar radiation had reduced to the extent that the solar plant could not generate power. This fact has been confirmed by GUVNL in its letter dated 30.05.2013. In fact, the CEI in its letter dated 03.04.2013, granting permission to energize the transformer along with the associated equipment, has acknowledged that initial inspection of the solar plant was carried out by Deputy CEI on 29.03.2013. Therefore, the Project was ready in all aspects by 15.03.2013 and the delay till and after 31.03.2013 is not attributable to Respondent No.1. The Minutes of the Meeting held between officials of Respondent No.1, GETCO and PGCVL on 30.03.2013 clearly depicts that the installation & sealing of ABT meter & sealing 66 KV CT & PT at the Project site were in order. It is an undisputed fact that from 01.04.2013 onwards the Project injected energy into the grid continuously which is recorded in the ABT complaint meter installed at the Project site and never disputed by the Appellant.

49. Learned Counsel further submitted that though the Commissioning certificate was issued by GEDA on 17.08.2013 declaring the COD as 08.08.2013, the inspection of the project carried out by GEDA team on 29.03.2013 proves that all pre-requisites for commissioning the Project were found to the GEDA's satisfaction. Still there was a delay of over 4 months on the part of GEDA to issue the certificate and the same cannot be attributed to Respondent No.1. Further, in support of its claim, the learned counsel referring to the judgment dated 09.11.2016 in "***Gujarat Urja Vikas Nigam Limited v Acme Solar Technologies (Gujarat) Private Limited and Ors* (2017) 11 SCC 801"**, contended that the Hon'ble Supreme Court in the said Judgment placed reliance on the date when the plant was ready for commissioning and energizing instead of placing reliance on the certificate

of commissioning issued by GEDA. Thus, GERC has rightly considered the COD for Respondents solar Plant as 31.03.2013.

Judgements relied upon by the Appellant and the Respondent

***Gujarat Urja Vikas Nigam Ltd. v. Acme Solar Technologies (Gujarat) (P) Ltd.*, (2017) 11 SCC 801 ; By both Appellant and Respondent**

50. In the said Judgement, the Supreme Court noted that when parties were bound by the terms and conditions of the PPA, it was not proper on the part of either the State Commission or this Tribunal to travel beyond the said terms and conditions to determine the liability of the first respondent to pay liquidated damages or the period thereof. The Supreme Court took note of the Communication/certificate issued by the Office of the Chief Electrical Inspector dated 31.12.2011, which grants permission to energise the electrical installations along with associated equipment indicating that the switchyard of the first respondent was ready for being energised on 31.12.2011 as well as of the certificate of commissioning issued by GEDA, another mandatory requirement as per terms and conditions of PPA, which certified the date of COD as 13.03.2012, but also indicates that the plant was ready for generation on 31.12.2011 but for the 66 kV transmission line. The Supreme Court then observed that from a reading of the two certificates/communications issued by the office of the Chief Electrical Inspector and GEDA it is abundantly clear that the switchyard and the electrical installations required to be set up by Respondent No.1 were ready for commissioning on 31.12.2011 though the actual commissioning thereof had to await the completion of the transmission lines which was made available by GETCO and accordingly were charged on 13.03.2012 and held

that liability of the Respondent No.1 for payment of LD to be considered only up to 31.12.2011.

NVVN v. Precision Technik, 2018 SCC OnlineDel 13102 ; **By Appellant**

51. In this judgment, the Supreme Court observed that as per the Articles of PPA, it was the obligation of the Respondent to obtain all consents, clearances and permits and to commence the supply of power not later than the Scheduled Commissioning Date and it was also the obligation of the Respondent to connect the Power Project Switchyard with the Interconnection Facilities at the Delivery Point. It cannot pass on this burden to the Petitioner or claim any benefit out of mismanagement of its own affairs. There was no embargo to start route survey immediately upon execution of the PPA, and therefore, it was the decision of the Respondent to start route survey after Financial closure, therefore it cannot claim any extension of time for the period taken by it for the completion of such Route Survey. The Supreme Court also stated that it is a trite law that the *force majeure* clauses are to be narrowly construed. The events or circumstances must not only cause unavoidable delay in the performance of the obligations under the agreement, but also must be such that could not have been avoided even if the affected party had taken reasonable care or complied with the 'Prudent Utility Practices'; the time taken by RRECL and the Government of Rajasthan to grant permission cannot come to any avail of the Respondent, as the Respondent would have been well aware of the bureaucratic delays while dealing with governmental and public sector authorities. Such delays being completely foreseeable, cannot amount to a *force majeure* condition.

***Judgement of this Tribunal in TSPL V. PSPCL (Appeal No. 97 of 2016)-upheld by Supreme court in CA No 12344 of 2016 dated 22.11.2017 ;* By Appellant**

52. This Tribunal referring to the judgement of the Hon'ble Supreme Court in "***Rajasthan State Industrial Development & Investment Corpn"*** and other judgements held that when there are specific express terms providing for notice and the person on whom it is to be served is specifically mentioned as per the PPA, which is binding on both the parties, the concept of substantial compliance of the contract by some mode other than that specified in the contract cannot be introduced. The view taken by this Tribunal that requirement under Article 6.1.1 of the PPA to give advance written notice of intention to synchronise a unit to the Grid System was the mandatory requirement, which was upheld by the Supreme court in its judgement dated 22.11.2017.

***All India Power Engineer Federation v. Sasan Power Ltd., (2017) 1 SCC 487;* By Appellant**

53. The main dispute in this case was related to whether the COD for Unit 3, which was the first unit to be commissioned, had been achieved on 31.03.2013. If it had, then under Schedule 11 to the PPA, the entire first year would get exhausted in one day i.e. 31st March being the end of the contract year, for which tariff payable would be @ 69 paise per unit. If not, then it is only on and from the commencement of COD that such year would begin, which, according to the Appellants, would only begin on 16.08.2013 when a final test certificate in accordance with Article 6 of the PPA was given by the Independent Engineer to the effect that 95% of the contracted capacity had been achieved for a continuous period of 72 hours. Assuming the COD of 31.03.2013, as held by this Tribunal, the consumers would have to pay a

sum of over Rs 1000 crores, being the differential tariff that would apply and therefore if there is any element of public interest involved, the Court steps in to thwart any waiver which may be contrary to such public interest. As per Sections 61 to 63 of the Electricity Act, the appropriate Commission, when it specifies terms and conditions for determination of tariff, is to be guided *inter alia* by safeguarding the consumer interest and the recovery of the cost of electricity in a reasonable manner. Thus, if a waiver is claimed for some of the provisions of the PPA, such waiver, if it affects tariffs that are ultimately payable by the consumer, would necessarily affect the public interest and would have to pass muster of the Commission under Sections 61 to 63 of the Electricity Act.

54. The Supreme court noted that as per an Article in the PPA, after COD of an unit has been achieved, and increased tested capacity over and above that was provided in the PPA, is achieved in a subsequent performance test, certain consequences would follow. Equally, if after COD has been obtained in a unit, and the most recent performance test mentioned during the working of the PPA has been conducted, and it is found that a figure less than contracted capacity is achieved, then the unit shall be derated with certain consequences which are also mentioned in the PPA. The Supreme court upheld the date of COD of the project as held by CERC in its judgement dated 08.08.2014 and not the COD date of 31.03.2013 as held by this Tribunal in its judgement.

***Gujarat Urja Vikas Nigam Ltd. v. Solar Semiconductor Power Co. (India) (P) Ltd.*, (2017) 16 SCC 498 ; By Appellant**

55. The Supreme Court held that the Court should be especially careful in dealing with matters of exercise of inherent powers when the interest of

consumers is at stake. The interest of consumers, as an objective, can be clearly ascertained from the Act. The Preamble of the Act mentions "protecting interest of consumers" and Section 61(*d*) requires that the interests of the consumers are to be safeguarded when the appropriate Commission specifies the terms and conditions for determination of tariff. Under Section 64 read with Section 62, determination of tariff is to be made only after considering all suggestions and objections received from the public. Hence, the generic tariff once determined under the Statute with notice to the public can be amended only by following the same procedure. The approach of this Court ought to be cautious and guarded when the decision has its bearing on the consumers.

56**.** The Commissioning of a project is an act to be performed in terms of the obligation under the PPA and that is between the producer and the purchaser; the Commission cannot extend the time stipulated under the PPA for doing any act contemplated under the agreement in exercise of its powers under Regulation 85. Therefore, there cannot be an extension of the control period under the inherent powers of the Commission. The Commission cannot invoke its inherent jurisdiction to substantially alter the terms of the contract between the parties so as to prejudice the interest of other party and ultimately the consumers. Terms of PPA are binding on both the parties equally.

Haryana Power Purchase Centre v. Sasan Power Ltd., (2024) 1 SCC 247 ; **By Appellant**

57. The Supreme court held that the Tribunal cannot rewrite a contract solemnly entered into between the parties. Such residuary powers to act, which varies the written contract, cannot be located in the power to regulate.

The power cannot, at any rate, be exercised in the teeth of express provisions of the contract; In a matter where the parties have entered into a contract with express provisions, we are unable to agree with the first respondent that the Tribunal would have power to disregard the express provisions of the contract on the score that as it turns out that with passage of time and even change in circumstances, contract cannot be worked except at a loss for the contractor.

Judgement of this Tribunal in Nabha Power Ltd. Vs Punjab state power corporation *(Appeal 283 of 2015) ;* By Appellant

58. The PPA is a binding instrument for the parties. The operation of supercritical base load station at part load or varying load and resultant increase in SHR has been acknowledged at various Government Forums and accordingly, the earlier technical standards, grid code and Competitive Bidding Guidelines have been amended with a specific consideration of allowing increase in SHR on account of reduction in MCR due to part load operation. While these changes would apply to future projects, the same cannot be applied to old plants decided on earlier parameters of the bid documents. The Supreme court opined that the claim of NPL arising out of higher SHR is beyond the periphery of concluded PPA and the provisions of PPA are being scrupulously implemented by PSPCL. Hence, we do not find any rationale in re-opening or re-interpreting the provisions enshrined under the PPA.

59. The PPA entered into between the parties is a statutory and binding instrument which crystalises the rights and obligations of the involved parties. Accordingly, the same would need to be interpreted in the spirit of agreed terms and cannot be defined or derived in its "implied term".

SBIW Steels (P) Ltd. v. SAIL, 2022 SCC Online Cal 3842; **By Appellant**

60. The Steel Authority of India Limited, (the respondent) required TMT bars of varying sizes and entered into an agreement on 16th June, 2011 with the successful bidder, the SBIW Steels; Billets for TMT bars was to be provided by SAIL. As per the bidding document, bidder should have a valid "BIS" Certificate/licence by the Bureau of India Standards and that the manufactured product should have a BIS Certificate after undergoing the required tests. The bidder possessed this licence when the contract was awarded, but their licence expired on 17th May, 2012. Though the bidder continued to supply Bars post May 2022 and up to 27th July 2012, dispute arose, when SAIL stopped supply of billets thereafter. The Arbitrator held in favour of bidder, basing its judgement on the premise that as per bidding document, bidder was required to be a licensee at the tendering stage.

61. However, the Supreme Court observed that Section 14 of the Bureau of Indian Standards Act, 1986 provided that the products of any scheduled industries under the Industrial (Development and Regulation) Act, 1947 would have to conform to the standards of description quality and durability prescribed by the Act; the products of iron and steel had to be manufactured under a BIS licence. As such, the TMT bars are used in construction work where the requirements of quality of the product, its durability and safety are paramount and, accordingly, set aside the order of the Arbitrator holding that BIS licence was necessary only at the time of submission and consideration of the tender and not later on.

***Steel Authority of India Ltd. v. Shri Ambica Mills Ltd.*, (1998) 1 SCC 465 ; By Appellant**

62. In this case, the Shri Ambika Mills is engaged in the manufacture of steel tubes, for which hot rolled strips in coils are required as raw material, which were supplied by SAIL subject to the condition that it must possess the import licence and have to carry out certain export obligations, which for the period in question, namely, April 1983 to March 1984 were given in the import and export policy for that period. SAIL, as an indigenous supplier under the aforesaid import and export policy for 1983-84 made an announcement of the prices at which the raw material will be supplied; pursuant to which Shri Ambika Mills submitted its requirement on 20.08.2013 and Letter of Credit was submitted on 25.08.2013. However, some deficiencies were found in the import Export License, and after rectification same was submitted only on 26.08.1983, by which time price of Raw material got enhanced from 25.08.1983. The main contention of Ambika Steel was that price of Raw Material, prevailing when LC was submitted should be applicable; the same was granted by the High Court of Gujarat.

63. The Supreme Court though agreed with the view that the office of Joint Chief Controller of Imports and Exports could be responsible for the defects in the license, however, held that mere production of Letter of Credit will not be sufficient to determine the price ruling on the date. It must be given by an import licence-holder eligible to get the supplies under the Scheme. In this case, importer will not fall under the category of “import licence-holder eligible to get supplies under the Scheme” as on the date when the Letter of Credit was presented, the licence/release order was defective.

Issue No 3 : Discussion and Analysis

64. The main contention of the Appellant is with regard to COD of 31.03.2013 as per Impugned order, while the CEI certificate is issued on 03.04.2013 and GEDA certificate dated 17.08.2013, indicated COD as 08.08.2013. Let's have a look at the provisions of the PPA. As per Article 4.1 of PPA dated 08.12.2010, the Power producer i.e Taxus "*shall obtain all statutory approvals, clearance and permits for the project at his cost in addition to those approvals as schedule 3"*. Schedule 3, besides other approvals list provides following approvals"

> *"2. Approval of the Electrical Inspectorate, Government of Gujarat for commissioning of the transmission line and the Solar Photovoltaic Grid Interactive Power converters installed at the Project Site.*
> *3. Certificate of Commissioning of the Solar Photovoltaic Grid Interactive Power Project issued by GEDA"*

In the referred PPA, the "Commercial Operation Date" is defined as under:

> ***"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."*

CEI Written Approval dated 03.04.2013

65. In the present case, Respondent-Taxus vide its letter dated 15.03.2013, to Chief Electrical Inspector, informed that they are ready with the set-up of 5 MW plant and requested for approval of related drawings and to schedule their visit for approval. The Chief Electrical

Inspector, while according the approval, vide its letter dated 03.04.2013, has acknowledged the inspection undertaken by Dy. Chief Electrical Inspector on 29.03.2013.

66. We note that no reasons are ascertainable from the record for the gap between the letter of Taxus to Chief Electrical Inspector requesting for visit on 15.03.2013, inspection date of 29.03.2013 and Certificate date of 03.04.2013. However, our attention was drawn by learned counsel for the Appellant that fee was deposited by Taxus vide their letter dated 30.03.2013 by Cheque and there is possibility that only after realizing the due fees, the certificate was issued by the Chief Electrical Inspector vide letter dated 03.04.2013. Though it has been contended by Respondent Taxus that they are injecting the regular energy into the grid from 01.04.2013, which has been disputed by the Appellant contending it to be for the purpose of Testing, however, the fact remains that the written approval is required from the Chief Electrical Inspector as per CEA (Measures relating to safety and Electrical Supply) Regulations 2010 before the commencement of regular supply, as reproduced below:

> ***"Safety provisions for electrical installations and apparatus of voltage exceeding 650 volts 43.***
>
> *Approval by Electrical Inspector: - (1) Voltage above' which electrical installations will be required to be inspected by the Electrical Inspector before commencement of supply or recommencement after shutdown for six months and above shall be as per the notification to be issued by the Appropriate Government, under clause (x) of sub-section (2) of section 176, and sub-section (1) of section 162 of the Act. (2) Before making an application to the Electrical Inspector for permission to commence or recommence supply after an installation has been disconnected for six months and above at voltage exceeding 650 V to any person, the supplier shall ensure that electric supply lines or*

apparatus of voltage exceeding 650 V belonging to him are placed in position, properly joined and duly completed and examined and the supply of electricity shall not be commenced by the supplier for installations of voltage needing inspection under these regulations unless the provisions of regulations 12 to 29, 33 to 35, 44 to 51 and 55 to 77 have been complied ***with and the approval in writing of the Electrical Inspector has been obtained by him:***

Provided that the supplier may energise the aforesaid electric supply lines or apparatus for the purpose of tests specified in regulation 46"

67. In the absence of the Chief Electrical Inspector Certificate on 31.03.2013, it cannot be construed to be declared under commercial operation, injecting regular energy. It is observed that the Tariff for the various financial years are following a downward trend, and thus, commissioning of a project within a particular financial year is very important from the aspect of applicability of Generic tariff for that financial year. The Respondent -Taxus were fully aware about the consequences of delay in getting CEI approval and in our view, the Respondent -Taxus should have been more vigilant in arranging an early visit and even pursuing for the certificate from the Chief Inspector pursuant to the visit on 29.03.2013, within the FY 2012-13, so as to become eligible for the tariff applicable for that year, like inspection fee could have been deposited in advance instead of waiting up to 30.03.2013, which could be one of the probable reason for the delay in getting CEI Certificate. In our view, the State Commission has erred in declaring COD as 31.03.2013 in the absence of Electrical inspectorate Certificate, moreover, when there has not been any undue delay on the part of the

Govt. authorities in granting the requisite certificate on 03.04.2013, post deposition of fee on 30.03.2013, which happens to fall on Saturday.

Approval from GEDA dated 17.08.2013

68. It is noted that the Respondent-Taxus vide its letter dated 19.03.2013 to Dy. Director GEDA and letter dated 20.03.2013 to Director GEDA had informed the readiness of its 5 MW generation plant, and that it is connected to site substation at Kaniyabe bay through 66 KV transmission line as approved by the Electrical Inspector during his visit on 18.02.2012. It was also informed that they have applied for CEI inspection and site 66 kV substation is expected to be connected with GETCO's 66 KV substation by 25.03.2013, and requested for the visit of concerned officials and for their approval. The GETCO has also informed CEI about readiness of their 66 kV Kaniyabe Bay and its connection to Taxus Solar plant and requested for their approval. There is no dispute that GETCO's line was charged on 30.03.2013, which stood OK but switched off by GETCO substation at 19.20 hrs on the same date. Learned counsel for the Respondent-Taxus have claimed that when GEDA officials visited the project in the morning on 31.03.2013, the 66 KV line from the project to GETCO substation was not available as line was only charged again by GETCO at 16.35 hours and transformer at 18.20 hrs. Learned counsel for the Respondent-Taxus has contented that due to inadequate solar radiation by the time GETCO line and transformer was charged by 18.20 hours on 31.03.2013, the solar PV plant could not go into generation mode and the recording of power in the energy meter was not possible, but their plant was ready in all respects, and therefore, COD of 31.03.2013 as allowed by State commission is correct.

69. Per Contra, learned counsel for the Appellant has contended that without the approval of CEI and GEDA, which has been accorded vide their letters dated 03.04.2013 and 08.08.2013, respectively, COD cannot be granted and COD of the plant is to be considered as 08.08.2013.

We note that Respondent No 3, GUVNL, a State Govt Utility, in its letter dated 30.05.2013, has acknowledged this fact based on GEDA letter dated 03.05.2013 as reproduced below:

> *"As conveyed by GEDA through letter dated 3rd May, 2013, the project of M/s. Taxus could not be commissioned on extended time limit of 31st March, 2013. As on 31st March, 2013, the project capacity of 4.93 MW (out of 5 MW) was ready in all respect. The transmission line charged on 31.3.2013 at 16.35 Hrs. and thereafter transformer and RMU Charged at 18.20 Hrs. Owing to inadequate sun radiation, the plant could not go into generation mode and hence recording of power was not possible and hence the plaint could not be commissioned on or before 31.3.2013."*

70. However, in the proceedings before the State Commission, no explanation has been provided by GEDA regarding delay in issuing the certificate of COD for the generation project of Taxus as 08.08.2013 vide their letter dated 17.08.2013 despite the visit undertaken by them on 31.03.2013. Such a callous attitude and casual approach, in our opinion, is due to negligent performance and failure to fulfill duty cast upon them by State Govt. as also observed by the State commission in the impugned order. It is fact that in the PPA, there is requirement of CEI certificate as well as GEDA certificate, for the declaration of commercial operation, but we

cannot ignore the fact that GEDA has not provided any explanation, casting deficiency on the part of the Respondent-Taxus which led to delay in providing the Certificate in declaring the COD of the project as 08.08.2013 by GEDA. Moreover, the very same agency i.e GEDA, as stated by GUVNL in its letter dated 03.05.2013, a state agency, has acknowledged that the almost entire capacity of project of the Respondent- Taxus was ready on 31.03.2013 when they visited the plant and it is only due to inadequate solar radiation that plant could not go into generation, when transmission line of GUVNL was energized on 31.03.2013 at 16.35 hrs. It is also a fact, not disputed by the Appellant, that they have been receiving power from the Respondent -Taxus project since 01.04.2013 though the quantum may vary. As held earlier, the COD of the project could not have been granted before the CEI certificate dated 03.04.20013 being safety requirement as per safety Regulations of CEA, but in our view, the Respondent-Taxus cannot be denied their dues for the energy injected post 03.04.2013, in the event of inordinate delay by GEDA in their certificate declaring COD as 08.08.2013, with no explanation at all for such delay. In our view, considering that the Respondent –Taxus plant was ready on 31.03.2013, the COD of the project to be considered from the date of CEI certificate dated 03.04.2013 ("***Gujarat Urja Vikas Nigam Limited v Acme Solar Technologies (Gujarat) Private Limited and Ors***." **(2017) 11 SCC 801**,

71. In view of above deliberations, the impugned order of the GERC is modified to the extent that i) COD of the project of Respondent -Taxus to be reckoned as 03.04.2013; ii) Period of Delay on account of SPV is not on account of Force- majeure and iii) Period of delay on account of Land registration, though considered to be Force majeure with respect to payment

of LD, in view of undertaking given by Respondent-Taxus, they are liable for payment of liquidated damages.

72. The captioned appeal along with the associated IAs, if any, are accordingly disposed of.

Pronounced in open court on this 13th Day of February, 2025.

(Seema Gupta)	**(Justice Ramesh Ranganathan)**
Technical Member (Electricity)	**Chairperson**

REPORTABLE/~~NON-REPORTABLE~~

ts/ag