

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO.54 OF 2020

Dated: 03.02.2026

Present: Hon'ble Ms. Seema Gupta, Technical Member (Electricity)
Hon'ble Mr. Virender Bhat, Judicial Member

In the matter of:

M/s Talettutayi Solar Projects Four Private Ltd.

Unit No.001, GF, Tower-C
Unitech Cyber Park, Sector-39
Gurugram – 122 001
Haryana, India

... Appellant(s)

Versus

1. Solar Energy Corporation of India Ltd.

Through the Chairman
1st Floor, Wing-A, Prius Platinum Building,
D-3, District Centre, Saket,
New Delhi – 110017

2. Maharashtra State Electricity Distribution Company Ltd.

Through its Chairman and Managing Director
Prakashgad, 5th Floor
Anant Kanekar Marg
Bandra (E) Mumbai – 400 051

3. Central Electricity Regulatory Commission

Through the Secretary
3rd& 4th Floor, Chanderlok Building
36, Janpath, New Delhi – 110 001

... Respondent (s)

Counsel for the Appellant(s) : Sakya Singha Chaudhuri
Avijeet Lala
Anand Kumar Shrivastava
Shikha Pandey

Astha Sharma
Shivam Sinha
Shreya Mukerjee
Gayatri Aryan
Nishant Talwar
Meha Chandra
Arnav Vidyarthi
Nameeta Singh
Anandini Sood
Narayani Anand
Nithya Balaji

Counsel for the Respondent(s) : M G Ramachandran, Sr. Adv.
Ranjitha Ramachandran
Poorva Saigal
Anushree Bardhan
Shubham Arya
Arvind Kumar Dubey
Tanya Sareen for Res. 1

Shashwat Kumar
Rahul Chouhan
Harshit Gupta
Mukut Choudhary for Res. 2

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The appellant, a solar power developer in the State of Maharashtra, has come up with this appeal against the order dated 11.12.2019 passed by 3rd respondent Central Electricity Regulatory Commission (hereinafter referred to as the Commission) in petition no.19/MP/2018 filed by the appellant thereby refusing to extend the Scheduled Commissioning Date (in short SCOD) of the power project of the appellant and permitting the 1st respondent Solar Energy Corporation of India Limited (in short SECI) to levy

damages from the appellant and further directing downwardly revision of the tariff for the appellant's power project.

2. The appellant has set up a 50MW solar power project at Village Chatgaon, District Beed, Maharashtra under the Jawaharlal Nehru National Solar Mission (in short JNNSM) with 1st respondent SECI as a nodal agency, under Phase-2, Batch-3 scheme through a state specific Viability Gap Funding (VGF).

3. The appellant entered into a Power Purchase Agreement (PPA) with 1st respondent on 11.04.2016 and the 1st respondent entered into a Power Sale Agreement (PSA) with 2nd respondent, Maharashtra State Electricity Distribution Company Limited (in short MSEDCL) on 04.11.2016. The effective date under the PPA was 10.04.2016 and the SCOD was 10.05.2017. The appellant's power project achieved commissioning on 10.08.2017. Accordingly, the 1st respondent SECI levied penalty on the appellant for such delay by way of liquidated damages under clause 4.6 of the PPA and also by downward revision of tariff of the appellant's power project. Aggrieved by the said action on the part of 1st respondent SECI, the appellant had approached the Commission by way of petition no.19/MP/2018 which has been disposed off by the Commission vide the impugned order dated 11.12.2019.

4. The detailed facts and circumstances of the case in which the instant appeal has arisen can be conveniently elucidated from the following list of dates and events: -

S No.	Date	Particulars
1.	04.08.2015	Ministry of New and Renewable Energy (“ MNRE ”) issued guidelines under the Jawaharlal Nehru National Solar Mission (“ JNNSM ”) for implementing a scheme to develop 2000 MW of grid-connected Solar PV power projects. Under these MNRE Guidelines , Solar Energy Corporation of India (“ SECI ”) was appointed as the nodal agency to implement this scheme, including Phase-II, Batch-III, through a state-specific Viability Gap Funding (“ VGF ”) scheme to support project development.
2.	27.08.2015	SECI (“Respondent No.1”) issued a Request for Selection (“ RfS ”) inviting proposals from Solar Power Developers (“ SPDs ”) from development of 500 MW of grid-connected Solar PV projects in Maharashtra under JNNSM Phase-II, Batch-III, Tranche-I. The projects were to be developed on a Build-Own-Operate (“ BOO ”) basis through an e-reverse auction. The RfS fell under Category B with a pre-fixed

		tariff of Rs.4.43 per kWh.
3.	10.03.2016	The Appellant's parent company participated in the bidding and was selected as a successful bidder. SECI issued a Letter of Intent (" Lol ") to the Appellant for setting up a 50 MW Solar PV Power Project at Chatgaon village, Telgaon Taluka, Beed District, Maharashtra, for the generation and sale of solar power. Appellant was incorporated as a Special Purpose Vehicle (" SPV ") for the purpose of implementation and operation of the project
4.	29.03.2016	The Appellant submitted two irrevocable and unconditional Performance Bank Guarantees (" PBGs ") totalling Rs. 15 crores as performance security, as required under Clause 3.11 of the RfS. The Appellant later extended the validity of these PBGs on 05.01.2018.
5.	10.04.2016	The Effective Date of the PPA.
6.	11.04.2016	The Appellant entered into a Power Purchase Agreement (" PPA ") with SECI for developing and supplying power from a 50 MW solar PV project located at Chukoda, Newasa, Ahmednagar, Maharashtra, at a tariff of Rs. 4.43/kWh.

		On the same day, a VGF Securitization Agreement (“ VGFSA ”) was also signed, making the Appellant eligible for Viability Gap Funding (“ VGF ”) support of Rs. 23crores from SECI.
7.	11.06.2016	Appellant applied for change in location of Project, in full compliance with the provisions of PPA and RfS, from village- Chukoda, Taluka Newasa, Distt. Ahmednagar, Maharashtra to village – Chatgaon, Taluka Telgaon, Distt. Beed, Maharashtra.
8.	10.06.2016	The Appellant applied to MSETCL for grid connectivity to the nearest substation at 132 kV Talegaon, Beed, Maharashtra, targeting commissioning by 31.03.2017.
9.	02.09.2016	MSETCL, after delay of 84 days, granted in principle approval for grid connectivity to the Appellant at 132/33 kV Telgaon, substation at 132 kV level, Distt. Beed, State Maharashtra.
10.	19.10.2016	The Appellant issued limited notice to proceed to Tata Power Solar Systems Ltd., whereby the SCOD was agreed to be within 6.5 months from such notice.

		Thereafter, the demand note was issued by MSETCL after 193 days from the date of the application, as against the standard timeline of 130 days.
11.	04.11.2016	SECI and MSEDCL executed the PSA.
12.	08.11.2016	The Government of India declared demonetization of certain denominations of Indian Currency notes.
13.	23.11.2016	The Respondent No.1/SECI issued a letter imposing extension charges of Rs. 10,000/- per day per MW for non-submission of land documents required under Article 3.1 of the PPA for Financial Closure.
14.	25.11.2016	The Appellant paid the extension charges under protest. Vide the same letter the Appellant requested for extension for submission of sale deeds required for financial closure as while the agreement to sell for required land area was entered into and the Appellant had control and access for project execution, the documentation of ownership transfers is underway, in parallel to site work, is taking time as owners are situated across the states. Appellant assures Respondent No. 1/SECI that this will in no way

		hinder the commissioning deadline.
15.	29.11.2016	MNRE vide Minutes of Meeting dated 29.11.2016 and Office Memorandum dated 02.12.2016 directed for extension of time for financial closure and CS activities of the Project till 31.01.2017 without levying any penalty.
16.	08.12.2016	MSETCL informed the Appellant that to proceed with the proposed evacuation facility, a copy and status of the PSA along with other documents were required. It also stated that a demand note would be issued, and work start permission granted after approval of the MSETCL scheme.
17.	14.12.2016 17.12.2016	The Appellant vide its emails dated 14.12.2016 and 17.12.2016 requested Respondent No.1/SECI to provide the copy of executed PSA. Appellant informed Respondent No.1/SECI that the same is important to start transmission line work for timely commissioning.
18.	19.12.2016	SECI, sent an email stating that the copy of executed PSA had already been shared with the STU and the draft of the same was shared with the Appellant.

19.	20.12.2016	MSETCL issued the demand note wherein the Appellant was directed to pay Rs. 18.77 lacs, after which the supervision works would commence.
20.	22.12.2016	The Appellant made the requisite payment as per the demand note.
21.	26.12.2016	The PPA was amended to reflect a change in the project location, which the Appellant had requested on 11.06.2016 in accordance with the PPA and RfS provisions. The location was changed from Chukoda (Ahmednagar) to Chatgaon (Beed). SECI asked the Appellant to execute the amended PPA only in November 2016.
22.	26.12.2016	The Appellant submitted the SLD, plant and sectional view layout drawings for the plant side in respect of the Project to MSETCL.
23.	30.01.2017	The Respondent No.1/SECI, granted extension to the Appellant and similarly placed SPDs, by extending the date of financial closure and fulfilment of CS activities from 10.11.2016 to 31.01.2017 without any corresponding extension in the SCOD.

24.	04.02.2017	MSETCL granted the approval of SLD after a delay of 46 days.
25.	01.03.2017	The Appellant submitted application before Respondent No.2/MSEDCL for approval of Point of Supply and metering specification for the Project.
26.	09.03.2017	The Appellant submitted an application for approval of earthing calculation and equipment layouts for 132 kV switchyard at Chatgaon.
27.	03.04.2017 12.04.2017	The Appellant issued letters to Respondent No.1/SECI specifically giving details of onerous circumstances, namely, delay in grant of consents, demonetisation, etc. which delayed in the execution of the project, including the delay already condoned by Respondent No. 1/SECI and accordingly, sought extension in SCOD without levy of any penalty.
28.	07.04.2017	Respondent No.2/MSEDCL vide its letter granted approval for Point of Supply after a delay of 36 days.
29.	10.04.2017	MSETCL granted the approval of earthing calculation and equipment layouts for 132 kV

		switchyard at Chatgaon causing delay of 30 days.
30.	25.04.2017	The Appellant sent a letter to Maharashtra Energy Development Agency ("MEDA") informing about commissioning and synchronization of 25 MW out of 50 MW solar plant and further requested MEDA for their necessary coordination during the commissioning process.
31.	01.05.2017	The Respondent No.1/SECI, rejected the request for extension of SCOD by observing that the reason of demonetization and land fragmentation cannot be regarded as reason for delay in timely execution of Project. The Respondent No.1/SECI informed that no extension could be granted to the Appellant without invoking liquidated damages clause.
32.	02.05.2017	Respondent No.2/MSEDCL, changed the Point of Supply from plant end to substation end amounting to a further delay of 61 days.
33.	08.05.2017	The construction of the solar plant was completed.
34.	08.05.2017	Chief Electrical Inspector to the Government

		(“ CEIG ”) granted temporary permission to connect the power supply to the 50 MW solar PV project with allied equipment of the Appellant.
35.	08.05.2017	The Appellant issued letter requesting Respondent No.1/SECI for extension of SCOD from 10.05.2017 to 10.08.2017 without invoking the bank guarantees, on account of reasons completely beyond its control which have delayed the timelines. Appellant sought such extension on the ground of, inter alia demonetization, right of way (“ ROW ”), Lack of support from regulatory authorities.
36.	16.05.2017	The Respondent No.1/SECI sent a letter instructing the Appellant to register its power Project with the MEDA.
37.	25.05.2017	The Appellant submitted requisite documents with MEDA in order to fulfill this new obligation.
38.	07.06.2017	The Appellant requested MSETCL for line clearance with respect to 132 kV Talegaon Substation-Beed line, however, the said request was not granted.
39.	14.06.2017	The Appellant again requested MSETCL for line

		clearance which was again not granted to the Appellant and the said request lapsed.
40.	16.06.2017	The Appellant again issued a letter requesting Respondent No.1/SECI for extension of SCOD from 10.05.2017 to 10.08.2017 without invoking the bank guarantees, on account of reasons completely beyond its control which have delayed the timelines. Appellant informed Respondent No.1 SECI that the construction of the plant and the transmission line is complete for which CEIG certificate has also been received. It was also mentioned that while the construction is complete the state authorities are not cooperating with timely approval as the line clearance from MSEDCL for stringing is awaited, since a 132 kV is passing across our line.
41.	19.06.2017	A meeting was arranged by the Chairman-cum-Managing Director, Respondent No.2/MSEDCL with the final bidders selected by Respondent No.1/SECI to understand the status of projects, the probable date of commissioning and difficulty, if any. The Minutes of Meeting (“ MoM ”) records the expected dates of commissioning of the Appellant’s Project as 05.06.2017 (25 MW) and 10.08.2017 (25 MW).

		The MoM further records the prime concerns for such delay as MEDA registration and requirement of standby meter.
42.	23.06.2017	The Appellant issued letter requesting Respondent No.1/SECI for extension of SCOD from 10.05.2017 to 10.08.2017 without invoking the bank guarantees, on account of reasons completely beyond its control which have delayed the timelines. It was informed to SECI that the line clearance from MSETCL was still awaited.
43.	28.06.2017	The Appellant was finally granted the line clearance by MSETCL.
44.	13.07.2017	The work completion certificate was issued in favour of the Appellant by MSETCL.
45.	08.08.2017	MSEDCL issued the synchronization certificate in favour of the Appellant. The certificate records that appellant's project was commissioned and connected to the grid on 05.08.2017 at 17:16:09 hours. It further recorded that the project was synchronized and supply of power into the grid on 07.08.2017 at 16:33:00 hours.

46.	10.08.2017	The Appellant successfully commissioned the Project.
47.	05.09.2017	The Appellant filed a representation before MNRE requesting for extension of SCOD.
48.	29.09.2017	Respondent No.1/SECI imposed liquidated damages on the Appellant by invoking two PBGs furnished and maintained by the Appellant amounting to Rs. 15 Crores.
49.	03.10.2017	The Appellant submitted invoice for the period 09.09.2017 to 03.10.2017.
50.	04.10.2017	Aggrieved by the invocation of PBGs, the Appellant approached the Hon'ble Delhi High Court under Section 9 of the Arbitration and Conciliation Act, 1996 being OMP(I)(Comm) 410/2017 seeking interim reliefs in terms of, inter alia, restraining Respondent No.1/SECI from invoking the said PBGs. The Hon'ble High Court vide its order was pleased to direct the parties to maintain the status quo with respect to said PBGs.
51.	05.10.2017	SECI, by way of an email informed the appellant

		that its tariff has been reduced with 1 paisa in line with the provision of RfS/PPA
52.	12.10.2017	MEDA issued Commissioning certificate of the Appellant with 10.08.2017 as the date of the commissioning.
53.	24.10.2017	The Appellant issued dispute notice under the terms of PPA challenging invocation of PBGs and reduction of tariff by 1.00 paisa.
54.	24.10.2017	The Appellant vide its letter requested Respondent No.1/SECI to issue Letter of Credit (“LoC”) due under Article 10.4.2 of the PPA. As per the PPA, the LoC was required to be issued one month prior to commencement of supply of power from the Project. In this regard, the Appellant has sent several reminders vide its letter dated 06.11.2017, 16.11.2017 and 01.12.2017 but to no avail.
55.	13.11.2017	Appellant submitted a revised invoice for the period 09.09.2017 to 30.09.2017 and for the period 01.10.2017 to 31.10.2017.
56.	21.11.2017	Respondent No.1/SECI sent an email to the Appellant intimating that the commissioning date of Project was to be considered as 09.09.2017.

57.	10.01.2018	Petition u/s 79(1) (a) of the Electricity Act was filed before the Central Electricity Regulatory Commission.
58.	05.01.2018	The PBGs were extended for three months.
59.	21.02.2018	The Hon'ble High Court passed a Consent Order, inter alia, directing SECI to release the PBGs, retain the amount of the PBGs from the invoices raised by the Appellant in terms of the PPA. It was further recorded that the balance amount of the invoices along with further invoices shall be paid as per the PPA. Also, that the payment of VGF will be as per the terms of the VGF Securitisation Agreement entered into between the parties.
60.	09.08.2018	Appellant file Amended Petition before the Commission seeking, inter alia, acceptance of 10.08.2017 as the SCOD or to grant extension of time under 4.5 of the PPA, to release the amount of Rs. 15 crores that has been withheld by Respondent No.1/SECI, to set aside reduction of applicable tariff, to release monies with respect to VGF, to issue LC in terms of the article 10.4.2 of the PPA, etc.

61.	04.09.2018	The PPA was amended to revise the contracted capacity and energy terms. SECI's obligation to purchase additional energy was reduced from 130.086 MU to 125.268 MU. The Appellant's minimum generation obligations were also reduced—from 100.521 MU to 96.798 MU for the first 10 years, and from 94.608 MU to 91.104 MU for the remaining term.

5. The case of the appellant before the Commission was that the delay in achieving commissioning of the power project was on account of the delay on the part of the instrumentalities of the State Government in granting approvals or taking actions as well as on account of demonetization of certain Indian currency notes by the Govt. of India with effect from 08.11.2016, and the same was not attributable at all to the appellant. However, the contentions raised by the appellant did not find favour with the Commission which, by way of the impugned order dated 11.12.2019, rejected the prayers made in the petition by the appellant.

6. According to the appellant, the impugned order dated 11.12.2019 is erroneous and cannot be sustained on the following grounds: -

- (i) The Commission has failed to consider that the delay in commissioning the power plant occasioned on account of delay on the part of the regulatory authorities as well as state instrumentalities in granting approvals or taking actions whereas the appellant's power plant and the evacuation system were complete in all respects well before 10.08.2017;
- (ii) the Commission has failed to consider that delay in execution of the PSA by SECI has led to delays in obtaining approvals and consents from the said utilities as well as regulatory authorities;
- (iii) the Commission has incorrectly recorded the commissioning date of the power project as 11.08.2017 instead of 10.08.2017, which has resulted in erroneous downward revision of tariff of the power project; and
- (iv) the Commission has erroneously awarded liquidated damages to SECI without there being any proof of loss or injury suffered by SECI which is a *sine qua non* for award of liquidated damages.

7. The appeal is vehemently contested by the 1st respondent SECI.

8. We have heard Ms. Astha Sharma, learned counsel for the appellant and Mr. M G Ramachandran, learned senior counsel appearing on behalf of SECI and have perused the impugned order as well as other record. We have also gone through the written submissions filed by the learned counsels.

Our Analysis: -

Ground (i): Whether the Commission has failed to consider that the delay in commissioning the power plant occasioned on account of delay on the part of the regulatory authorities as well as state instrumentalities in granting approvals or taking actions whereas the appellant's power plant and the evacuation system were complete in all respects well before 10.08.2017.

9. Learned counsel for the appellant argued that the appellant had submitted application form for grid connectivity on Intra-State Transmission System on 10.06.2016 and as per Regulation 6.9 of Short Term and Long-Term Open Access Regulations, STU was required to convey its decision on grant of connectivity within 30 days from the receipt of the application. It is pointed out that 30 days period expired on 09.07.2016 but in principle approval for grid connectivity was granted by Maharashtra State Electricity Transmission Company Limited (in short MSETCL) only on 02.09.2016 i.e. after 84 days of receipt of the application from the appellant. Thus, it is

conveyed that there was a delay of 54 days in grant of connectivity to the appellant's power project. It is argued that this delay cannot be attributed to the appellant.

10. It is further submitted by appellant's counsel that the construction of the plant was completed as on 06.05.2017 which is evident from the certificate of 09.05.2017 issued by the Electrical Inspection Board on the basis of inspection conducted on 06.05.2017. She argued that this document would show that appellant got permission to energize the installation for testing purposes on temporary basis from 09.05.2017 to 08.06.2017 which permission could not have been given unless the power project was complete and ready to produce electricity. She further referred to work completion report issued by MSETCL on 13.07.2017 to contend that the appellant had completed the work of evacuation system well before 10.08.2017 i.e. 132kV line on 28.06.2017, 132kV bay at 132 kV Telgaon/s on 07.07.2017 and 132kV plant and bay on 12.07.2017. It is her submission that the appellant had completed all the works it was obligated to do under the RfS and the PPA but the synchronization of the plant got delayed as the authorities were not giving timely approvals, which fact was intimated to SECI from time to time. In this regard, she referred to letters dated 16.06.2017 and 23.06.2017 sent by appellant to SECI.

11. The learned counsel cited the judgment of this Tribunal dated 10.02.2024 in Appeal No.126/2022, M/s Surya Urja Private Ltd v. CERC and Ors., wherein it has been held that when the delay on the part of project developer to supply power is mainly due to external factors, it is not justified to hold the developer liable for liquidated damages.

12. On behalf of 1st respondent SECI, it is argued by learned senior counsel that Article 4.1 and 4.2 of the PPA executed between the parties provide that the appellant shall be responsible for applying and obtaining all the consents, approvals, permits as well as for making all arrangements to connect the power project switchyard with the interconnection facilities at the delivery point, metering, land obligation and other obligations related to timely construction of the project. It is submitted that SECI has no obligation in this regard. The learned senior counsel further pointed out that no *force majeure* notice as required under Article 11.5 of the PPA has ever been issued by the appellant, and therefore, its claim that the delay was on account of external factors, not within its control, cannot be considered. It is argued that even otherwise also, the appellant cannot plead *ipso facto* that the time taken for obtaining approvals from instrumentalities of the Government as *force majeure* event as it was for the appellant to act as a prudent utility and factor in the time to be taken by the Government Instrumentalities in granting approvals. It is argued that the

appellant has failed to show that the delay in grant of approvals by the Govt. Instrumentalities was unavoidable. Reliance is placed upon the judgment of the Delhi High Court in NTPC Vidyut Vyapar Nigam Limited v. Precision Technik Pvt. Ltd 2018 SCC OnLine DEL 13102 and Pasitheia Infrastructure Ltd. v. Solar Energy Corporation of India and Anr. 2017 SCC Online DEL 12562.

13. In order to analyze the rival contentions/submissions on behalf of the parties, we find it pertinent to extract hereunder the relevant provisions of the PPA dated 11.04.2016 executed between the appellant and 1st respondent
SECI:-

"1.1 Definitions

Scheduled Commissioning Date; shall mean 10.05.2017;"

"2.1 Effective Date

2.1.1 This agreement shall come into effect from 10.04.2016 and such date shall be referred to as the Effective Date."

"3 ARTICLE 3: CONDITIONS SUBSEQUENT

3.1 Satisfaction of conditions subsequent by the SPD

The SPD agrees and undertakes to duly perform and complete all of the following activities at SPD's own risk and cost within seven (7) months from the Effective

Date, unless such completion is affected by any Force Majeure event, or if any of the activities is specifically waived in writing by SECI:

- a) The SPD shall obtain or apply (as applicable) for all Consents, Clearances and Permits required for construction of the Project as per the terms of this Agreement. The SPD shall also obtain all Consents, Clearances and Permits required for operation and supply of power to SECI before Commissioning of the Project;*
- b) The SPD shall execute VGF Securitization Agreement (if applicable) with SECI as per format provided in Schedule-4 of this Agreement;*
- c) The SPD shall make Project financing arrangements and provide necessary certificates to SECI in this regard;*
- d) The SPD shall make adequate arrangements to connect the Power Project switchyard with the Interconnection Facilities at the Delivery Point;*
- e) The SPD shall sign a Transmission Agreement with CTU/STU/ Transmission Utilities confirming the evacuation and connectivity of the CTU/STU/Transmission Utilities system up to the delivery point of SPD by the Scheduled Commissioning Date; -*

- f) *The SPD shall produce the documentary evidence of the clear title and possession of the acquired land @ minimum 1.5 hectare/MW in the name of SPD;*
- g) *The SPD shall be required to demonstrate/infuse cumulative capital in the form of Equity for an amount of at least Rs. 0.84 Cr./MW. The SPD shall be required to demonstrate/infuse cumulative capital in the form of Equity for an amount of at least Rs. 1.20 Cr/MW before the disbursement of first tranche of VGF. For avoidance of any doubt, the SPD not availing any VGF shall be required to demonstrate/infuse cumulative capital in the form of Equity for an amount of at least Rs. 1.20 Cr/MV/before the COD;*
- h) *The SPD shall fulfil the technical requirements according to criteria mentioned under Clause 2.6 (B) of JNNSM guidelines for selection of new projects and produce the documentary evidence of the same. The SPD shall also specify their plan for meeting the requirement for domestic content (if applicable).*

The SPD shall submit to SECI the relevant documents as stated above, complying with the Conditions Subsequent, within seven (7) months from the Effective Date."

"3.3 Performance Bank Guarantee

3.3.3 If the SPD fails to commence supply of power from the Scheduled Commissioning Date specified in this Agreement or any further extension thereof granted by SECI, subject to conditions mentioned in Article 4.5, SECI shall encash the Performance Bank Guarantee without prejudice to the other rights of SECI under this Agreement."

"4 ARTICLE 4: CONSTRUCTION & DEVELOPMENT OF THE PROJECT

4.1 SPD's Obligations

4.1.1 The SPD undertakes to be responsible, at SPD's own cost and risk, for:

- a) obtaining all Consents, Clearances and Permits other than those obtained under Article 3.1 and maintaining all Consents, Clearances and Permits in full force and effect during the Term of this Agreement; and*
- b) designing, constructing, erecting, commissioning, completing and testing the Power Project in accordance with the applicable Law, the Grid Code, the terms and conditions of this Agreement and Prudent Utility Practices; and*
- c) the commencement of supply of power up to the Contracted Capacity to SECI no later than the*

Scheduled Commissioning Date and continuance of the supply of power throughout the term of the Agreement;

- d) connecting the Power Project switchyard with the Interconnection Facilities at the Delivery Point; and*
- e) owning the Power Project throughout the Term of Agreement free and clear of encumbrances, except those expressly permitted under Article 15;*
- f) maintaining its controlling shareholding (controlling shareholding shall mean not less than 51% of the voting rights and paid-up share capital) prevalent at the time of signing of PPA in the Company/Consortium developing the project up to a period of one (1) year after Commercial Operation Date. However transfer of controlling shareholding within the same Group Companies will be allowed with the permission of SECI even before one year period from COD subject to the condition that the management control remains within the same Group Companies: and*
- g) fulfilling all obligations undertaken by the SPD under this Agreement.*

4.2 Information regarding Interconnection Facilities

4.2.1 The SPD shall be required to obtain all information from STU/ CTU/ concerned authority with regard to the Interconnection; Facilities necessary to enable it to

design, install and operate Plant and all interconnecting apparatus/ equipment on the SPD's side of the Delivery Point to enable delivery of electricity at the Delivery Point.”

"4.5 Extension of Time

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

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

the Scheduled Commissioning Date and the expiry Date shall be deferred for a reasonable period but not less than 'day to day basis, to permit the SPD or SECI through the use of due diligence to overcome the effects of the Force Majeure Events affecting the SPD or SECI or till such Event of Default is rectified by SECI".

"4.6 Liquidated Damages for delay in commencement of supply of power to SECI

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

1. *Delay upto one (1) months - SECI will encash 20% of the total Performance BG on per day basis and proportionate to the Capacity not Commissioned*
2. *Delay of more than one (1) month and upto three (3) months - SECI will encash the remaining Performance BG on per day basis and proportionate to the Capacity not Commissioned.*

In case the commissioning of the Project is delayed by more than 3 months after the scheduled Commissioning Date, the pre-fixed tariff given in the Article 9.1 shall be reduced at the rate of half paisa (0.50) per kWh per day of delay for the delay in such remaining capacity which was not commissioned."

14. It is not in dispute that the PPA came into effect on 10.04.2016 and the SCOD of the appellant's Solar Power Project was 10.05.2017, but the project was commissioned by the appellant on 10.08.2017.

15. The case of the appellant is that delay due to procedural anomalies perpetrated by the SECI and State Instrumentalities led to delay in commissioning of the project for no fault of the appellant thereby holding up of the commissioning of the project till 10.08.2017.

16. As per Article 3 of the PPA, the appellant had agreed and undertaken to perform and complete all the activities mentioned as "conditions subsequent"

therein at its own risk and cost within seven months from the effective date. These “conditions subsequent” are stated in Article 3.1, the first of which is to apply and obtain all consents, clearances and permits required for construction of the project as per the terms of the agreement. It was envisaged under Article 3 that the appellant shall complete all the activities related to construction of the power project within seven months from the effective date of the PPA i.e. 10.04.2016 unless such completion is affected by any *force majeure* event or is specifically waived in writing by SECI. Thus, the appellant was obligated to complete all such activities before 10.11.2016 at its own risk and cost.

17. Article 11 of the PPA specifies *force majeure* events and their impact upon the rival obligations of the parties. The same is extracted hereinbelow: -

“11 ARTICLE 11: FORCE MAJEURE

11.1 Definitions

11.1.1 *In this Article, the following terms shall have the following meanings:*

11.2 Affected Party

11.2.1 *An affected Party means SECI or the SPD whose performance has been affected by an event of Force Majeure.*

11.3 Force Majeure

11.3.1A *'Force Majeure' means any event or circumstance or combination of events those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:*

- a) *Act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon or tornado if and only if it is declared /notified by the competent state/central authority / agency (as applicable);*
- b) *any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action if and only if it is declared/notified by the competent state/central authority/agency (as applicable); or*
- c) *radioactive contamination or ionising radiation originating from a source in India or resulting from another Force Majeure Event mentioned above*

excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the Power Project by the Affected Party or those employed or engaged by the Affected Party.

- d) *An event of Force Majeure identified under SECI-Buying Utility PSA, thereby affecting delivery of power from SPD to Buying Utility.*

11.4 Force Majeure Exclusions

11.4.1 *Force Majeure shall not include (i) any event on circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force Majeure:*

- a) *Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts or consumables for the Power Project;*
- b) *Delay in the performance of any contractor, sub-contractor or their agents;*
- c) *Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;*
- d) *Strikes at the facilities of the Affected Party;*
- e) *Insufficiency of finances or funds or the agreement becoming onerous to perform; and*

- f) *Non-performance caused by, or, connected with the Affected Party's:*
 - i) *Negligent or intentional acts, errors or omissions;*
 - ii) *Failure to comply with an Indian Law; or*
 - iii) *Breach of, or default under this Agreement.*

11.5 Notification of Force Majeure Event

11.5.1 *The Affected Party shall give notice to the other Party of any event of Force Majeure as soon as reasonably practicable, but not later than seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. If an event of Force Majeure results in a breakdown of communications rendering it unreasonable to give notice within the applicable time limit specified herein, then the Party claiming Force Majeure shall give such notice as soon as reasonably practicable after reinstatement of communications, but not later than one (1) day after such reinstatement.*

11.5.2 *Provided that such notice shall be a pre-condition to the Affected Party's entitlement to claim relief under this Agreement. Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed. The Affected Party*

shall give the other Party regular (and not less than monthly) reports on the progress of those remedial measures and such other information as the other Party may reasonably request about the Force Majeure Event.

11.5.3 The Affected Party shall give notice to the other Party of (i) the cessation of the relevant event of Force Majeure; and (ii) the cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this Agreement, as soon as practicable after becoming aware of each of these cessations.”

18. We have already noted that as per Article 3.1 of the PPA, the appellant was duty bound to apply for and obtain all consents, clearances and permits required for construction of the project and for operation as well as supply of power to SECI before commissioning of the project. Thus, it was the responsibility of the appellant to take necessary steps in this regard and to persuade the concerned authorities to grant the necessary consents/clearances/approvals/permits/connectivity as early as possible. The appellant appears to be taking refuge under the *force measure* clause of the PPA in contending that the delay was not attributable to it but occasioned on account of delay on the part of SECI as well as other Govt. Instrumentalities in granting approvals or taking actions for which the appellant cannot be held

responsible. Therefore, the appellant was required to follow the procedures/conditions laid down in Article 11 of the PPA before invoking the said *force measure* clause. Clause 11.5.1 specifically provides that the party affected by any *force measure* event shall give notice of such event to the other party as soon as reasonably practicable but not later than seven days after the date on which such party gained knowledge about the commencement of the *force measure* event. Article 11.5.2 provides that such notice shall be precondition to the entitlement of the affected party to claim relief under the PPA and the notice shall include complete particulars of the event of *force measure*, its effects on the party claiming relief thereunder and the remedial measures proposed by the party.

19. No such notice appears to have been served by the appellant upon the 1st respondent SECI, and therefore, the appellant is precluded from claiming any relief under the *force measure* events upon which it is relying. We may note that the appellant has written letters dated 03.04.2017, 12.04.2017, 08.05.2017 and 16.06.2017 to 1st respondent SECI seeking extension of SCOD of the power project from 10.05.2017 to 10.08.2017. However, perusal of the letters would reveal that these have been sent much after the happening and cessation of the purported *force majeure* events on the basis of which the appellant had claimed extension of SCOD. Further, these appear to be

general communications issued by appellant to SECI expressing difficulty in completion of the power project on account of issues related to land acquisition, demonetization and delays from various local regulatory authorities in granting approvals. The specific instances related to delay on the part of any regulatory/governmental authorities in granting the approvals have nowhere been stated in these letters. Therefore, these do not constitute *force majeure* notices under clause 11.5.1 of the PPA.

20. The Apex Court has in a recent judgment in case of Chamundeshwari Electric Supply Company Ltd. v. Saisudhir Energy (Chitradurga) Pvt. Ltd and Anr. 2025 SCC OnLine SC 1816 held that requirement of *Force Majeure* notice is not mere directory but a condition precedent for invoking the *Force Majeure* clause. The relevant portion of the judgment is extracted hereinbelow: -

“40. The finding of Force Majeure by the State Commission cannot be sustained for the reason that Article 14.5 of the PPA stipulates that the affected party “shall” issue notice within seven days of knowledge of the event. This requirement is not merely directory; it is a condition precedent for invoking the clause. ...”

21. Therefore, in the absence of the requisite notice, *force majeure* event agitated by the appellant can not be considered.

22. Even otherwise also, the appellant has failed to show that the delay in achieving the SCOD of the power project was neither avoidable nor attributable to it. It is an established principle of law that *force majeure* clauses in an agreement have to be construed narrowly. As held in NTPC Vidyut Vyapar Nigam Limited case (supra), the events or circumstances, in order to constitute *force majeure* events, 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 if the affected party had taken reasonable care or complied with the prudent utility practices. The *force majeure* event must be one which is beyond the control of the party concerned and not forceable by it. Before invoking the doctrine of *force majeure*, it must be shown that the event which has caused delay was one which the party to the agreement did not foresee and could not, with reasonable diligence, have foreseen.

23. In the instant case, the appellant had taken upon itself the obligation to apply for and to obtain all consents, clearances and permits required for construction of the power project. The appellant could have reasonably

foreseen that some of the permissions/approvals may get delayed or rejected by the concerned Governmental Instrumentalities, and therefore, it is precluded from pleading *force majeure* to justify its failure to commission the power project within the stipulated time period.

24. Furthermore, clause 11.4.1 provides that the events and circumstances which were within the reasonable control of the parties shall not constitute *force measure* event. It is contended on behalf of the appellant that MSETCL had taken 84 days to grant approval for grid connectivity of the appellant's power project. It is stated that the appellant submitted application form for grid connectivity on 10.06.2016, the decision on which should have been conveyed within 30 days from the receipt of the application which expired on 09.07.2016 but the in-principle approval was granted by MSETCL on 02.09.2016 with a delay of 54 days. However, nothing has been pointed out from the record by the appellant's counsel to show that the appellant had remained vigilant and had been pursuing its application for grid connectivity with MSETCL vigorously. It appears that after applying for grid connectivity on 10.06.2016, the appellant conveniently forgot the same and never bothered to send any reminders to MSETCL to issue approval for grid connectivity within the requisite timeframe and without any delay. Had the appellant followed up with the concerned officials of MSETCL vigorously in this regard, the delay in grant

of approval for grid connectivity could have been avoided. Therefore, it does not lie in the mouth of the appellant to say that such delay cannot be attributed to it.

25. Hence, we are unable to countenance the contentions of the appellant that the delay in commissioning of the power project was solely on account of delay on the part of the regulatory authorities as well as the Governmental Instrumentalities in granting approvals or taking actions. No error can be found on this aspect in the impugned order of the Commission.

Ground (ii): Whether the Commission has failed to consider that delay in execution of the PSA by SECI has led to delays in obtaining approvals and consents from the said utilities as well as regulatory authorities.

26. Learned counsel for the appellant submitted that while in-principle approval for grant of connectivity was issued by MSETCL on 02.09.2016, although belatedly, the demand note could be issued only after the submission of PSA executed between SECI with 2nd respondent MSEDCL. It is argued that since the PSA was executed by SECI with MSEDCL highly belatedly i.e. on 04.11.2016, such delay led to the delay in issuance of demand note by MSETCL which was necessary for the reason that the appellant had to pay inspection charges towards inspection of equipment, testing charges,

publication charges etc. It is submitted that the non-execution of PSA by SECI immediately after execution of PPA between the appellant and SECI had a direct impact on appellant's ability to proceed with the evacuation work.

27. According to the learned counsel, PPA and PSA form composite transactions, and therefore, execution of PPA on 11.04.2016 without the execution of consequent PSA by SECI with MSEDCL, was in itself incomplete.

28. On this aspect, we may note that no timeline has been provided either in the PPA or in the RfS for execution of PSA between the SECI and ultimate buyer of the electricity. Further, there is nothing in Article 3.1 of the PPA to suggest that execution of PSA between SECI and the ultimate buyer was a condition precedent for fulfilment of obligations by the appellant under the said clause. There is nothing either in the PPA or in the RfS to show that absence of PSA was an impediment for the appellant to apply and obtain all the consents, clearances and permits etc. required for the construction of the power project as noted in Article 3.1 of the PPA.

29. It is also to be noted that concededly, the appellant had never approached or called upon SECI to identify buyer of electricity and to execute PSA forthwith after the execution of the PPA. It is for the first time on 14.12.2016 that the appellant enquired from the SECI about the copy of PSA

to be made available to MSETCL in connection with the evacuation facility. It is, therefore, evident that non-signing of PSA between SECI and MSEDCL was nowhere responsible for delay on the part of the appellant in fulfilling its obligation under Article 3.1 of the PPA.

30. Further, the appellant has nowhere stated in any of the letters dated 03.04.2017, 12.04.2017, 08.05.2017 and 16.06.2017 addressed by it to SECI that non-signing of PSA is holding up the construction of the power project and its commissioning. Therefore, it is evident that the appellant had at no point of time projected non-signing of PSA by SECI as a ground for delay in fulfilment of its obligations under Article 3.1.

31. In view of our observations in Paragraph Nos.18 to 20 hereinabove also, the appellant is precluded from projecting the non-signing of PSA by SECI as a *force majeure* event to seek extension of SCOD of the power project. Thus, it cannot be said that delay in execution of PSA by SECI has led to delays in obtaining approvals and consents from the concerned Govt. Instrumentalities as well as regulatory authorities by the appellant. No fault can be found in the findings of the Commission on this score as well.

32. The judgments cited by learned counsel for the appellant i.e. Lanco Power Limited v. HERC & Ors. Appeal No.15 of 2011, Ayana Ananthapuramu

Solar Private Limited v. Andhra Pradesh Electricity Regulatory Commission & Ors. Appeal No.368, 369, 370, 371, 373 of 2019, Lanco Budhil Hydro Power Private Ltd. v. Haryana Electricity Regulatory Commission and Ors. Appeal No.188 of 2011, Southern Power Distribution Company and Andhra Pradesh Ltd. and Ors. v. CERC and Ors. Appeal Nos.210 of 2019, 211 of 2019, 212 of 2019, have been rendered on altogether different aspects of the matter and have no bearing to the issue at hand.

Ground (iii): Whether the Commission has incorrectly recorded the commissioning date of the power project as 11.08.2017 instead of 10.08.2017, which has resulted in erroneous downward revision of tariff of the power project.

33. Article 4.6 of the PPA needs to be referred on the aspect under consideration and the same is extracted hereinbelow: -

"4.6 Liquidated Damages for delay in commencement of supply of power to SECI

4.6.1 If the SPD is unable to commence supply of power to SECI by the Scheduled Commissioning Date other than for the reasons specified in Article 4.5.1, the SPD

shall pay to SECI, damages for the delay in such commencement of supply of power and making the Contracted Capacity available for dispatch by the Scheduled Commissioning Date as per the following:

- a) Delay up to one (1) month -SECI will encash 20% of the total Performance BG on per day basis and proportionate to the Capacity not commissioned.*
- b) Delay of more than one (1) month and up to three months - SECI will encash remaining Performance BG on per day basis and proportionate to the Capacity not commissioned.*

In case the commissioning of the Power Project is delayed beyond three (3) months from the Scheduled Commissioning Date, the pre-fixed tariff given in the Article 9.1 shall be reduced at the rate of half paisa (0.50 paisa) per kWh per day of delay for the delay in such remaining capacity which is not commissioned.

4.6.2 The maximum time period allowed for commissioning of the full Project Capacity with encashment of Performance Bank Guarantee and reduction in pre-

fixed tariff shall be limited to twenty five (25) months from the date of signing of this Agreement. In case, the commissioning of the Power Project is delayed beyond twenty five (25) months from the date of signing of this Agreement, it shall be considered as an SPD Event of Default and provisions of Article 13 shall apply and the Contracted Capacity shall stand reduced/amended to the Project Capacity Commissioned within twenty five (25) months of signing of PPA and the PPA for the balance Capacity will stand terminated.

4.6.3 However, if as a consequence of delay in commissioning, the applicable tariff changes, that part of the capacity of the Project for which the commissioning has been delayed shall be paid at the tariff as per Article 9.2 of this Agreement.”

34. What Article 4.6.1 of the PPA stipulates is that in case, the commissioning of the project is delayed by more than 3 months after the SCOD, the prefixed tariff given in Article 9.1 shall be reduced at the rate of 0.50 paisa per kWh per day of delay for the delay in such remaining capacity which is not commissioned.

35. In the instant case, the SCOD for the power project of the appellant was 10.05.2017. Therefore, in order to enjoy the protection of retaining the pre-fixed tariff, the appellant was to commission its project within three months from the date of SCOD i.e. on or before 10.08.2017. This is noted by the Commission also in Paragraph No.115 of the impugned order. However, the Commission has further noted that since the project of the appellant was commissioned on 11.08.2017, there was a delay of one day and accordingly directed SECI to downwardly revise the tariff as per Article 4.6.1 of the PPA.

36. Learned counsel for the appellant has drawn out attention to synchronization certificate dated 08.08.2017 issued by Superintending Engineer certifying that the project of the appellant was synchronized and supply of power from it into the grid was commenced on 07.08.2017 at 16.33 hrs. She also drew our attention to the commissioning certificate dated 12.10.2017 issued by Maharashtra Energy Development Agency (MEDA) certifying that the appellant's power project has been successfully commissioned on 10.08.2017.

37. Be that as it may, there is nothing on record to hold that the appellant has commissioned the power project on 11.08.2017, as noted by the Commission in the impugned order. It is also not the case of SECI that the

appellant commissioned its power project on 11.08.2017. Thus, the said date of commissioning of power project by the appellant has been incorrectly noted in the impugned order by the Commission. The actual date of commissioning of the power project by the appellant shall have to be taken as 10.08.2017 which is well within the period of three months stipulated under clause 4.6.1 (b) of the PPA for retaining the prefixed tariff as per Article 9.1 of the PPA. Therefore, the direction issued by the Commission to SECI for downward revision of tariff of the appellant's power project cannot be sustained as the same is erroneous. The same deserves to be set aside.

Ground (iv): the Commission has erroneously awarded liquidated damages to SECI without there being any proof of loss or injury suffered by SECI which is a *sine qua non* for award of liquidated damages.

38. Relying upon the judgments of the Supreme Court in Fateh Chand v. Balkishan Dass 1963 AIR 1405, UOI v. Raman Iron Foundry (1974) 2 SCC 231, H.M. Kamaluddin Ansari v. UOI AIR 1984 SC 29, ONGC v. Saw Pipes Ltd (2003) 5 SCC 740, Maula Bux v. UOI AIR 1970 SC 1955, and Kailash Nath Associates v. DDA and Anr. (2015) 4 SCC 136, it was argued by learned counsel for the appellant that the Commission has erred in awarding liquidated damages to SECI without there being any proof of loss or injury suffered by SECI which is a *sine qua non* for awarding liquidated damages. She argued

that award of liquidated damages without proof regarding the legal injury suffered by SECI is contrary to the settled law that even where liquidated damages are specified in the agreement, the court shall award reasonable compensation to the aggrieved party as a measure of restitution for the loss suffered by it and the aggrieved party has to demonstrate the legal injury suffered by it on account of breach of contract as well as the actual loss suffered where the same can be quantified.

39. The learned counsel would further argue that SECI has neither pleaded that it has actually suffered any loss on account of delay on the part of the appellant in commissioning the power project nor produced any evidence to establish the actual loss. She pointed out that SECI merely contended that it is entitled to damages under the PPA without producing any further evidence.

40. Per contra, learned counsel for SECI would argue that as per settled law, if a sum named as liquidated damage in an agreement is not by way of penalty but is a genuine pre-estimate of loss that would be suffered, then there is no necessity to prove actual loss, and the agreement reached between the parties stipulating the sum is binding and is payable. He submitted that what is required to be established is the legal injury which is distinct from the quantum of loss to be proved. He further argued that SECI has suffered legal injury/loss on account of non-availability of power from the appellant's power project with

effect from the scheduled commissioning date, and therefore, is entitled to award of liquidated damages in terms of Article 4.6.2 of the PPA.

41. The primary argument advanced on behalf of the appellant is that since the 1st respondent SECI has failed to prove that it suffered any loss on account of non-supply of power by the appellant with effect from 10.05.2017, the Commission has erred in granting compensation to the SECI. The argument is based upon Sections 73 and 74 of the Indian Contract Act, 1872 which are quoted hereinbelow: -

“73.Compensation for loss or damage caused by breach of contract.—When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.—When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

74. Compensation for breach of contract where penalty stipulated for.— When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been

caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception.—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.”

42. Section 73 of the Contract Act embodies the general principle with regards to assessment of damages caused by the breach of contract and provides that the compensation would be payable by the party committing the breach for the damages caused to the other party, which damage was anticipated by parties to be likely to occur in case of the breach of the agreement or which arose naturally in the usual course of things from such breach. Section 74 speaks of the measure of damages to be awarded in case of breach of contract where the contract itself specifies any amount to be paid in case of such breach or contains any other stipulation by way of penalty. In both the cases the measure of damages is reasonable compensation, not exceeding the amounts so specified in the contract or the penalty stipulated for, whether or not actual damage or loss is proved to have been caused by the breach.

43. Bare perusal of Section 74 would reveal that parties are free to stipulate any amount in the agreement that will be paid by the party who commits breach of the terms of the agreement i.e. defaulting party to the other party in the agreement. It further provides that the amount of liquidated damages so fixed in the agreement would be the maximum amount payable by the defaulting party and the court will not allow more than that amount fixed in the contract but may award a smaller amount depending upon the facts and

circumstance of the case. In other words, the court would award only a reasonable amount of liquidated damages even though the same are pre-estimated and spelt out in advance in the contract.

44. The Hon'ble Supreme Court has interpreted Section 74 of the Contract Act in a catena of judgements and the latest one being Kailash Nath Associates v. DDA & Anr. (2015) 4 SCC 136, the relevant paragraphs of which are reproduced hereunder: -

“33. Section 74 occurs in Chapter 6 of the Indian Contract Act, 1872 which reads "Of the consequences of breach of contract". It is in fact sandwiched between Sections 73 and 75 which deal with compensation for loss or damage caused by breach of contract and compensation for damage which a party may sustain through non-fulfillment of a contract after such party rightfully rescinds such contract. It is important to note that like Sections 73 and 75, compensation is payable for breach of contract under Section 74 only where damage or loss is caused by such breach.”

“43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:-

43.1 Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine preestimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

43.2 Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3 Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.

43.4 The Section applies whether a person is a plaintiff or a defendant in a suit.

43.5 The sum spoken of may already be paid or be payable in future.

43.6 The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the

liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

43.7 Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.”

45. Thus, any damage or loss suffered by a party due to breach of contract on the part of another party to the contract is a sine qua non for applicability of this section i.e. for award of liquidated damages. Even if a sum of money is stipulated in the contract as liquidated amount payable by the defaulting party by way of damages, only reasonable compensation commensurate with the loss/damages suffered by the other party, can be awarded not exceeding the amount so specified in the contract. Further, in cases where damage or loss is difficult or impossible to prove, the liquidated amount named in the contract, if a genuine pre-estimate of damages or loss, can be awarded.

46. In Maula Bux v. Union of India (1969) 2 SCC 544, the Apex court has held as under:-

6. Reliance in support of this contention was placed upon the expression (used in Section 74 of the Contract Act), "the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused there by, to receive from the party who has broken the contract reasonable compensation". It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree, and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression "whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules.

Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine preestimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him.”

47. In the case of Fateh Chand v. Balkishan Dass, 1963 SCC OnLine SC 49, it has been held by the Apex court as under: -

“10. Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases(i) where the contract names a sum to be paid in case of breach and `ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not

exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damages"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or

which the parties knew when they made the contract, to be likely to result from the breach.

...

15. Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties predetermined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief' as a plaintiff. The section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the court is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. Use of the expression "to receive from the party who has broken the contract" does not predicate that the jurisdiction of the court to adjust amounts which have

been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach.”

48. It is thus well settled that the essential ingredients required to be pleaded and established by a party claiming damages on account of breach of contract are: -

- (a) There has been breach of contract by the other party;
- (b) the party complaining of such breach has suffered in injury or damage as a result of the breach of contract by the other party; and
- (c) the injury suffered is proximate and direct result of the breach committed by the other party.

49. The expression “whether or not actual damage or loss is proved to have been caused thereby” occurring in Section 74 have been interpreted to mean that where it is possible to prove actual damage or loss, such proof is not

dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount indicated in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

50. In the instant case, it was the specific case of SECI before the Commission that it has suffered loss by reason of non-supply of power by the appellant from its solar power project with effect from its SCOD i.e. 10.05.2017. We may note that the 1st respondent SECI besides being a nodal agency to implement the Jawahar Lal Nehru National Solar Mission, is also a Trading Licensee and was acting as a trader in electricity. Concededly, it had executed PSA dated 04.11.2016 with MSEDCL for supply of power, to be procured by it from the appellant's power project under the PPA dated 11.04.2016, to MSEDCL with effect from the SCOD of the appellant's power project i.e. 10.05.2017. Manifestly, since the appellant did not commission the power project on 10.05.2017 and did not commence electricity supply to SECI from that date, SECI was not in a position to fulfill its obligation for sale of power to MSEDCL under the PSA dated 04.11.2016. Thus, breach of terms of the PSA on the part of SECI occurred on account of breach of terms of the PPA by appellant in not commissioning the project and not starting supply of power from the SCOD. However, the exact quantum of loss/damages suffered by SECI on account of breach of terms of PPA by the appellant have

nowhere been stated or explained by SECI either before the Commission or before this Tribunal. At the same time, we feel that the liquidated damages specified in clause 4.6.1 of the PPA to be a genuine pre-estimate of the loss that would be suffered by SECI, in case, of non-supply of electricity by appellant from the SCOD of the power project. As per this provision of the PPA, delay in commissioning of the power project up to one month will result in encashment of 20% of the Performance Bank Guarantee (PBG) on per-day basis and proportionate to the capacity not commissioned. In case, the delay extends beyond one month and up to three months, it will result in encashment of remaining PBG on per-day basis and proportionate to the capacity not commissioned. Thus, the levy of liquidated damages from the appellant, in case of non-commissioning of the power project on or before its SCOD, will depend upon the days of delay occasioning in commissioning of the power project. It cannot be said that such damages specified in the PPA for non-commissioning of the power project by its SCOD are exorbitant or unconscionable. These cannot be treated as penalty. The parties had agreed that the power project would be commissioned by 10.05.2017 with further agreement that in case, such timelines are not adhered to, the PBGs furnished by the appellant would be encashed step-by-step depending upon the extent of delay in commissioning the power project. Therefore, the 1st respondent SECI was not required to prove actual loss or damage suffered by it on

account of non-commissioning of the power project by the appellant during the stipulated time period.

Conclusion: -

51. In view of the above discussion we do not see any ground to interfere in the findings and conclusion of the Commission that no case has been made out by the appellant for extension of SCOD of its power project, and therefore, there was no reason to restrain SECI from claiming damages under Article 4.6 of the PPA. However, we are unable to sustain the directions of the Commission to 1st respondent SECI for downward revision of the tariff for the appellant's power project. The same is hereby set aside. We hold that the appellant would be liable to pre-fixed tariff as mentioned in Article 9.1 of the PPA from the date of commissioning of the power project and commencement of supply of power from the project to SECI.

52. The impugned order of the Commission, therefore, stands partly set aside and the appeal stands partly allowed to the extent stated hereinabove.

Pronounced in the open court on this the 3rd day of February, 2026.

(Virender Bhat)
Judicial Member

(Seema Gupta)
Technical Member (Electricity)

✓

REPORTABLE / NON-REPORTABLE

tp