IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

REVIEW PETITION NO. 8 OF 2018

Dated: 27th May, 2024

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
Sardar Patel Vidyut Bhawan
Race Course Circle, Vadodara – 390007
Gujarat … Petitioner(s)

VERSUS

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

2. **GUJARAT ENERGY DEVELOPMENT AGENCY**
Through its Managing Director,
4th Floor, Block No. 11 & 12,
Udhyog Bhavan, Sector – 11
Gandhinagar – 382017, Gujarat ... Respondent No.2

3. **GUJARAT ENERGY TRANSMISSION CORPORATION LIMITED**
Through its Managing Director
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 – 382017
Gujarat … Respondent No. 4

5. **STATE LOAD DESPATCH CENTRE**
Through its Chief Engineer
132 kV Gotri Sub Station Compound

Gotri Road, Near TB Hospital
Vadodara – 3920021 … Respondent No. 5

6. GUJARAT ELECTRICITY REGULATORY COMMISSION
Through its Secretary
6th Floor GIFT ONE
Road 5-C Zone 5, GIFT CITY
Gandhinagar – 382 355
Gujarat … Respondent No. 6

Counsel on record for the Petitioner(s)	:	Anand K. Ganesan Swapna Seshadri Ashwin Ramanathan Harsha Manav Srishti Khindaria
Counsel on record for the Respondent(s)	:	Inder Paul Singh Oberoi Himrit Singh Wadhwa R. K. Srivastava

O R D E R

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

I. INTRODUCTION:

The Gujarat Electricity Regulatory Commission ("the GERC" for short) passed the order in **Ms Taxus Infrastructure & Power Projects Pvt. Ltd. Vs Gujrat Electricity Development Authority & Ors** (Petition No. 1364/2013 dated 30.03.2015). Aggrieved thereby, both Gujarat Urja Vikas Nigam Ltd. ("GUVNL" for short) and Ms Taxus Infrastructure & Power Projects Pvt. Ltd. ("Taxus" for short) preferred appeals before this Tribunal in Appeal Nos. 114/2015 and 131/2015 respectively. This Tribunal, vide common order dated 04.07.2018, disposed of both the said appeals whereby Appeal No. 114/2015 was partly allowed, and Appeal No. 131/2015 was dismissed. The appellant-GUVNL has filed the instant Review Petition before

this Tribunal against the said order dated 04.07.2018. Aggrieved by the very same order dated 04.07.2018, both the parties ie. GUVNL and Taxus have filed appeals before the Supreme Court in Civil Appeal Diary No. 33187 of 2018 and 4323 of 2019 respectively. The Supreme Court, by its order dated 01.03.2019, directed the appeals to be listed after the decision in the Review Petition pending before this Tribunal.

II. ASPECTS ON WHICH REVIEW IS SOUGHT:

The aspects on which review is sought are (a) Re: Commercial Operation Date (**COD**) – The Order allegedly wrongly considers the deemed COD as 31.03.2013, even though the Certificate of the Chief Electrical Inspector is dated 03.04.2013, and the GEDA certificate provides for COD as 08.08.2013; (b) Re: Force Majeure Events and consequent Liquidated Damages **(LD)** –The Order is allegedly silent on the challenge by GUVNL regarding consideration by the State Commission of two events as 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 due to revision of Jantri Rate; as well as application of the principles of Res Judicata and the effect of the Undertaking furnished by Taxus to pay Liquidated Damages, raised before this Tribunal in the Appeal.

Before examining the afore-said aspects, it is useful to take note of the contents of the order of the GERC dated 30.03.2015, the judgement of this Tribunal dated 04.07.2018 (review of which is sought in the present proceedings), and consider the scope of interference in review proceedings.

III. CONTENTS OF THE ORDER PASSED BY THE GERC DATED 30.03.2015:

Petition No.1364 of 2013 was filed by M/s. Taxus Infrastructure & Power Projects Pvt. Ltd seeking the following reliefs: (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 to be with effect from 08.08.2013 onwards, to declare that the solar power plant was commissioned on or before 31.03.2013, and to direct GEDA to issue the certificate of commissioning with effect from 31.03.2013; (ii) to declare that the Petitioner is entitled for 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 Respondent No. 2; (iii) to declare that GUVNL is not entitled to claim any liquidated damages from the Petitioner by virtue of the PPA. And such claim of GUVNL is illegal, void and not maintainable, and as such the Petitioner is entitled to get refund of Rs. 4.50 Crores including the amount of bank guarantee furnished by the Petitioner which is held by GUVNL wrongfully; (iv) to declare that GUVNL is bound to return the bank guarantee of Rs.2.50 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; (v) 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 the terms of the PPA; (vi) 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 the 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; (vii) 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; (viii) 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 and

for other consequential losses suffered by the Petitioner; (ix) to condone the delay in 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 to grant all consequential reliefs in fixing the rates of supplies and pass appropriate orders.

In its Order dated 30.03.2015. the GERC held that the following issues emerged for decision of the Commission: (i) Whether the claim of the petitioner to declare that its power plant was commissioned on 31.03.2013 is legal and valid?; (ii) Whether Force Majeure Event occurred in the present case? Whether the petitioner is eligible to get the relief in terms of the Force Majeure Events as per the terms of the PPA?; (iii) Whether the petitioner is liable to pay liquidated damages or not? If liable to pay liquidated damages, what will be amount of the liquidated damages?; (iv) is the petitioner liable to pay liquidated damages for the period from 31.03.2013 and also eligible to receive the tariff @ of Rs. 9.98 per Unit as per the undertaking given by him on 03.06.2013? Is the undertaking given by the petitioner void-ab-initio or not? (v) is the petitioner eligible to receive the tariff for the energy injected into the grid from 31/03/2013 to 08/08/2013?; (vi) what is the tariff eligible to be received by the petitioner with consideration of commissioning of its project?; (vii) whether the principle of Res-judicata provided under CPC, 1908 is applicable in the present case?; (viii) whether the Commission has jurisdiction to adjudicate the dispute between the parties?; and (ix) is energization of the plant by the petitioner without approval of the authorities concerned?

The GERC observed that, on an analysis of the facts, it was established that (i) The petitioner had been approaching the CEI and GEDA for approval of its project since 18.03.2014; (ii) the CEI inspected the plant

on 29.03.2013 and, as is evident from its letter dated 03.04.2013, the plant was ready in all respects on 29.03.2013; (iii) the 66 KV line connecting the petitioner's plant to the nearby GETCO sub-station, which was the responsibility of GETCO, was also ready on 20.03.2013; (iv) the said 66 KV lines were charges at 18.50 and 18.55 hours on 30.03.2013; (v) the 66 KV line was switch off by GETCO at 19.20 hours on 30.03.2013; (vi) the GEDA official visited the project site on 31.03.2013, and observed that the 66 KV was not charged; (vii) GETCO could charge the line only at 16.35 hours and the RMU was charged at 18.20 hours; and (vii) by this time, the solar radiation had reduced to the extent that the solar plant could not generate power on 31.03.2013.

The GERC then observed that, though the petitioner's plant was ready for charging, it could not be commissioned by 31.03.2013 due to the reasons not attributable to it at all; the plant of the petitioner had injected the energy into the grid from 1.4.2013 onwards continuously which was recorded in the ABT complaint meter installed at the petitioner's plant, and the same was continued up to 8.8.2013, which was not disputed by the respondents; some of the data, from the data submitted by GETCO regarding the generation of energy from the petitioner's plant, were stated in the table which established that, on 01.04.2013, the plant started generation at about 09:00 hours and continued to generate till about 18:45 hours; it was evident that the plant was ready for commissioning on 29.3.2013, as confirmed by Respondent No. 4, CEI in its certificate dated 3.4.2013; based on the inspection dated 29.3.2013, and due to delay in charging of transmission lines (charged at 16:35 Hours) and RMU (charged at 18:20 Hours), the petitioner's plant could not generate any power on 31.03.2013 due to inadequate solar radiation; this fact was confirmed even by Respondent No. 2 GUVNL in its Letter No. GUVNL/Com/Solar/991 dated 30.5.2013 written to the petitioner; the Chief

Electrical Inspector and the representative of GETCO had also admitted that the plant was ready for commissioning on 29.3.2013 and 30.3.2013; from the verification of documents on record and letters of representative of CEI and letters of representative of GETCO and the energy recorded in the energy meters submitted by GETCO with its reply dated 26.02.2014, it was clear that the petitioner's plant was ready for commissioning on 31.03.2013; GEDA had failed to explain the inordinate delay in issuing the commissioning certificate upto17.08.2013, that too after the petitioner's representation dated 10.05.2013 requesting for the commissioning certificates; GEDA, which is the State Nodal Agency for promotion of Renewable Energy Sources, failed to perform the duty cast upon it; in the present case, the representative of GEDA, though visited on 31st March 2013 and found that the plant was not able to generate electricity on 31st March 2013 due to lower solar radiation and non-connectivity of the transmission system with the power plant, no effective step was taken by it; GEDA had also not taken any effective action against the representation made by the petitioner on 10.05.2013 and to declare that its plant was commissioned on 31.03.2013; the whole litigation arose in the present case due to negligent performance and failure to fulfil the duty cast upon GEDA by the State as well as the Commission in various provisions of orders and regulations; and GEDA was directed to act as per the provision of orders of the Commission in future scrupulously, without fail.

After noting that the energy generated from the 5 MW of the Solar Power Project of the petitioner w.e.f. 01.04.2013 and injected into the grid was supplied to GUVNL, the GERC observed that the petitioner was eligible to receive payment for this energy at the tariff decided in the present petition for the period from 31.03.2013 to 08.08.2013; the petitioner was entitled to the declaration that its plant was commissioned on 31.03.2013; and energy

was injected from the plant from 01.04.2013 as recorded in the ABT compliant meter at the petitioner's place and also reflected in the Energy Accounting done by the SLDC, should be treated as sale of energy to the respondent GUVNL; and the petitioner's plant is deemed to have been commissioned on 31.03.2013 and in view of the fact that actual energy generation started from 01.04.2013. The GERC decided and declared that the respondent GUVNL was required to pay the tariff as prevailing on 31.03.2013. The petitioner was allowed to raise bill/invoice to the respondent GUVNL for the energy as recorded in the ABT compliant meter and as also reflected in the energy accounting carried out by the SLDC. The GERC also decided and directed the respondent GUVNL to make payment of the bills/ invoices raised by the petitioner within 15 days from the receipt of the bills issued by the petitioner.

On the claim of the respondent regarding liquidated damages, the GERC observed that absence of decision regarding permission for execution of the Project through SPV created uncertainty regarding purchase of land, obtaining the term-loan, signing of EPC contract etc; the petitioner was not able to decide as to whether to initiate action in its own name or in the name of the proposed SPV; the period during which the petitioner was unable to decide and purchase the land and also to apply for loan to the financial institution, was beyond the control of the petitioner; uncertainty continued in the absence of approval from the Government officials about setting up the plant by the petitioner, which was beyond their control and the same qualified as a Force Majeure Event.

The GERC observed that, after signing the PPA on 8.12.2010, the petitioner initiated action for acquiring the requisite land and signed the MOU with the land owners on 28th and 29th March, 2011; after the issue of SPV was settled in the form of denial by the State Government on

01.04.2011, the petitioner approached the authorities for registration of land; however, in the meantime, the Government of Gujarat had revised the Jantri Rates through GR dated 31.03.2011; the high rates of jantri, as well as uncertainty over the Jantri Rates for non-agricultural land, had created a situation wherein registration of sale deed got delayed up to 28.11.2013; and this delay was definitely beyond the control of the petitioner.

The GERC held that Section 89 of the Bombay Tenancy and Agricultural Lands (Vidarbh Region and Kutch area) Act, 1958, recognized that the collector or other person authorized by the state government was empowered to grant permission for transfer of agricultural land to non-agriculturist; thus, the collector or the officer authorized by the state government was a statutory authority who grants permission; the permission /approval granted by the above authority is a statutory permission/approval as it is under the provisions of the said Act; in the present case, the petitioner had applied for permission under Section 89 (1) (A) of the Bombay Tenancy and Agricultural lands (Vidarbh Region and Kutch area) Act 1958 on 18.10.2011/05.11.2011 to the Deputy Collector/Collector of Kutch; the Deputy Collector, Anjar, vide letter No. JMN/Ganot-89/VASI/222/1/2012 dated 18.02.2012, granted approval under Section 89 (1) (A) of the Bombay Tenancy and Agricultural lands (Vidarbh Region and Kutch area) Act, 1958; and the time elapsed between 18.10.2011/05.11.2011 to 18.02.2012 was the time passed in obtaining the statutory/Government approvals from the concerned authorities u/s 89 (1) (A) of the Bombay Tenancy and Agricultural lands (Vidarbh Region and Kutch area) Act 1958.

The GERC decided that the time elapsed between 25/28.03.2011 to 18.02.2012 was the time passed in obtaining the statutory/Government

approvals from the concerned authorities to purchase agricultural land for industrial purposes and to utilize it for industrial purpose to set up the Solar Power Plant, which was not in the control of the petitioner.

The GERC held that the word “including”, appearing in Article 8.1, indicated that the list of events mentioned therein was not exhaustive but inclusive; therefore, the situation/conditions which were similar in nature to the event specified in Article 8.1 and occurring due to reasons beyond the reasonable control of the party qualified as Force Majeure events; the petitioner and the Respondent GUVNL had consciously agreed that any delay in obtaining legal approval was to be considered as a Force Majeure Event; whenever any disputes arise between the parties, with regard to the provisions of the agreement, it is necessary to read the agreement as a whole with its relevant provisions and give effect to them; in the present case, it is an obligation on part of the petitioner to obtain permission from all statutory and non-statutory bodies and the Government of Gujarat officials which are necessary for the project as per Clause 4 of Schedule 3 read with Articles 2.1. 3.2 and 4.1(i) of the PPA; the petitioner was under a mandatory obligation to obtain the permission required from statutory and non-statutory bodies; and, hence, the delay from 10.01.2011 to 01.04.2011 also qualified as a force majeure event.

The GERC then observed that Petition No. 1145 of 2011 was filed by the petitioner seeking extension of the control period of Order No. 2 of 2010 dated 29th January, 2010; this petitioner was one of a bunch of petitions, all seeking similar prayers, and hence were disposed of by a common order dated 27.01.2012; though some of the petitioners had raised the issue of uncertainty about Jantri Rates, none of them had raised the issue of force majeure; the Order of the Commission dated 27.01.2012 in Petition No. 1145 of 2011 was challenged by the petitioner before the High Court of

Gujarat by filing SCA No. 2942 of 2012; the High Court decided and directed the Commission to decide the issues raised by the petitioner in Petition No. 1364 of 2013 filed by the petitioner as expeditiously as possible including the issues raised in the amendment petition; in Petition No. 1364 of 2013, the petitioner raised the issues/disputes in the said petition i.e. (i) billing disputes, (ii) liquidated damages disputes, (iii) commissioning date of the project, (iv) tariff receivable by the petitioner etc; as far as the disputes pertaining to the Order dated 27/01/2012 of the Commission in Petition No. 1145 of 2011 was concerned, the petitioner had liberty to approach the Appellate Tribunal for Electricity to appeal against the Commission's Order; the subject matter of the earlier Petition No. 1145 of 2011 and the present Petition No. 1364 of 2013 were distinctly different from each other and the pleas of the respondent reading non-maintainability of the present petition on the above grounds was misleading and was, hence, rejected.

The GERC then observed that the time period of Force Majeure was required to be given effect in to the Commercial Operation Date and Scheduled Commercial Operation Date and was also required to be given its effect in terms of the PPA; the PPA was signed by the parties on 08.12.2010; the SCOD agreed in PPA was 31.12.2011 which was required to be revised with consideration of the force majeure event decided in this order; and, accordingly, revised SCOD of the project was decided as 06.02.2013.

On the issue regarding liquidated damages, the GERC observed that, as the revised SCOD of the project was 06.02.2013 and the deemed dated of commissioning of the project was 31.03.2013, the petitioner was liable to pay liquidated damages for the period for 06.02.2013 to 31.03.2013; and, any amount of liquidated damages recovered by the respondent, in excess of the liquidated damage worked out for this period, shall be

refunded by the respondent within 15 days for the date of this order.

On the issue of the tariff payable to the petitioner, the GERC observed that, according to the relevant clause of the PPA, if the project is commissioned by 30.12.2011, i.e. the SCOD defined in the PPA, the petitioner is entitled to tariff determined by the Commission in its Order No. 2 of 2010, viz., Rs. 15 per kWh for initial 12 years and Rs. 5 per kWh for subsequent 13 years; in case of delay in commissioning of the project, the tariff payable shall be the tariff determined by the Commission for the relevant period or the above period, whichever was lower; the tariff payable to the petitioner was solely governed by the orders of the Commission read with the provisions of the PPA; the Commission had issued Order No. 2 of 2010 for the projects commissioned up to 29.01.2012 and Order No. 1 of 2012 for the projects commissioned thereafter; as such, the applicable tariff was solely related to the date of commissioning of the project, and the PPA also recognized this fact; the petitioner's project is deemed to have been commissioned on 31.03.2013; the applicable tariff on that, as decided in Order No. 1 of 2012, consequential order dated 07.07.2014 and corrigendum to it dated 11.07.2014 passed by the Commission after the direction given by APTEL in its order dated 17.04.2013 in Appeal No. 75 of 2012, was Rs. 10.52 per kWh during the initial 12 years and Rs. 7.00 per kWh in the subsequent years; and, as such, the petitioner was entitled to this tariff only and not Rs. 15.00 per kWh for the initial 12 years and Rs. 5.00 per kWh thereafter as claimed by the petitioner.

On the contention of GUVNL that the present petition was not maintainable on the principle of res-judicata, the GERC observed that Petition No. 1145 of 2011 was filed by the petitioner before the Commission for extension of the control period specified in Order No. 2 of 2010 dated 29.1.2010; in the present petition, the petitioner sought various reliefs;

comparing the prayers of Petition No. 1145 of 2011 and the prayers of the present petition, it was clear that, in both cases, the prayers of the petitioner were different; the petitioner had, in Petition No. 1145 of 2012, prayed for extension of control period on the ground of change in Jantri rate, flooding, non-registration of land etc; the above issues were raised for extension of the control period; while deciding Petition No. 1145 of 2011, the Commission had considered similar 37 number of petitions combinedly; the Commission had not considered the actual facts of the petitioner's case, which were elaborated in the present petition for various relief sought by the petitioner; the Commission's decision in 37 numbers of petitions was based on common facts and issues and common prayer while, in the present case, the petitioner raised specific issues with relevant supplementary documents, and advanced plea for various reliefs sought by them; though the petitioner and the respondent GUVNL were common in the previous as well as the present petitions, the facts of the case and prayers/reliefs sought in the two petitions were different and distinct from each other; hence, the decision on the prayers in Petition No. 1145 of 2011 by the Commission on 27.01.2012 was not applicable in the present case; therefore, the principle of res-judicata is not applicable in the present petition; the principle of res-judicata is applicable only if both the petitioner and respondents are the same in both cases as well as the prayers sought are also similar; in the present case, though the first criteria is fulfilled, the second criteria is not satisfied; and, hence, the principle of res- judicata is not applicable in the present case.

The GERC then noted the respondent's contention that the petitioner was not eligible to raise the issue with regards to (a) Non-registration of land due to revision/re-revision in Jantri rates, (b) delayed in registration of land due to delay in permission under section 89 (1) (A) of Bombay

Tenancy Act 1956, (c) Denial of SPV permission, (d) payment of liquidated damages under the PPA as these issues were raised by the petitioner in Petition No. 1145 of 2011, but not considered by the Commission and were rejected; the GERC observed that the order dated 27.01.2012 of the Commission was challenged before the High Court of Gujarat by the Petitioner; the High Court had directed that, for the above issues, the Petitioner was at liberty to approach APTEL; however, the petitioner did not approach APTEL; and, hence, the petitioner cannot claim the above issues before the Commission as the same have been finalized.

The GERC observed that the above contentions of GUVNL were not valid and acceptable as issues/ prayers of Petition No. 1145 of 2011were distinct and different from those in the present petition; and, hence, it was not covered under the principle of res-judicata and had not attained finality.

The GERC concluded holding that the present petition succeeds partially. (1) The Solar PV Power Plant of the petitioner is deemed to be commissioned on 31.03.2013. (2) The petitioner is entitled to raise the bills for energy injected into the grid w.e.f. 01.04.2013, as reflected in the State Energy Account prepared by SLDC, (3) The respondent shall make payment of the bills so raised within 15 days from the receipt of the bills, (4) The delay of 402 days in commissioning of the plant was due to force majeure events and, as such, the revised SCOD of the project is 06.02.2013. (5) The petitioner is liable to pay liquidated damages for the period from the revised SCOD, viz., 06.02.2013 to the deemed date of commissioning, viz. 31.03.2013. (6) Any amount of liquidated damages, recovered by the respondent, in excess of that payable for the above period shall be refunded by the respondent within 15 days from the date of this order, and (7) The petitioner is entitled to payment for energy supplied by it at the rate of Rs. 10.52 per kWh for the first 12 years and Rs. 7.00 per kWh thereafter, as

decided by the Commission in its Order No. 01 of 2012 read with the consequential order dated 07.07.2014 in Suo –Motu proceeding in Order No. 1 of 2012 and corrigendum to it dated 11.07.2014.

IV. CONTENTS OF THE ORDER UNDER REVIEW DATED 04.07.2018 IN BRIEF:

Appeal No. 114 of 2015 & Appeal No. 131 of 2015 were filed by GUVNL and Taxus under Section 111 of the Electricity Act, 2003 aggrieved by the Order dated 30.3.2015 passed by the GERC in Petition No. 1364 of 2013 filed by Taxus.

In the judgement under review dated 04.07.2018, this Tribunal noted that the questions of law raised by GUVNL, in Appeal No. 114 of 2015, were as follows: (a)whether the State Commission was right in holding that the Solar Project should be deemed to have been commissioned by Taxus on 31.3.2013 despite the fact that certification by GEDA for the commissioning, as per the agreed terms of the PPA (Article 1 – Definition read with Schedule 3), is only on 8.8.2013, and the pre-requisite permission from CEI Inspector for energization of the project was received on 3.4.2013?; (b) whether the State Commission was right in deciding that the delay of 402 days in the commissioning of the Solar Project, namely, from 31.12.2011 (SCOD) till 6.2.2013 was on account of Force Majeure events falling under Article 8 of the PPA?; (c) whether the State Commission was right in rejecting the claim of GUVNL for Liquidated Damages payable by Taxus for the period from 31.12.2011 till 8.8.2013, and restricting such Liquidated Damages only for the period from 6.2.2013 till 31.3.2013?; (d) whether the State Commission was right in holding that Taxus shall be entitled to the tariff at Rs 10.52/kWh for the first 12 years and not Rs 9.98 per kWh (i.e. tariff of the 1st year of the control period)?; (e) whether the State Commission was right in

entertaining the issue of certification by GEDA on the commissioning of the Solar PV Power Project in the proceedings before the State Commission, when GEDA is an independent Agency and is not subject to the jurisdiction of the State Commission?; (f) whether the State Commission is right in deciding the issue of application of the principles of res-judicata and also the issue of purported energization of the Solar Project by Taxus without the prerequisite approval of the Authorities concerned, in favour of Taxus and against GUVNL?; and (g) whether the State Commission was right in over-looking the implication of the undertaking dated 28.3.2013 given by Taxus on the aspect of payment of Liquidated Damages based on which the extension was granted by GUVNL, even though GUVNL was entitled to terminate the PPA due to delay beyond one year from SCOD?

This Tribunal then noted the submissions, of the learned Senior counsel appearing for GUVNL which were: (a) the State Commission has not dealt with many issues raised by GUVNL during the proceedings before the State Commission. (b) the State Commission has erred in deciding deemed commissioning of the Solar Project on 31.3.2013 instead of 8.8.2013, ignoring the specific provisions of the PPA which provides for certification by GEDA for considering the date of the commissioning. The grievance of Taxus against the decision of GEDA, on the commissioning date of the Solar Project, can be taken up in an Appropriate Forum (i.e. Writ Petition under Article 226 of the Constitution of India) and not in proceedings under Section 86(1) (f) of the Act, for adjudication before the State Commission which is for adjudication of the dispute between Taxus as a Generating Company and GUVNL as a licensee. (c) the State Commission, as an adjudicator, is bound by the terms and conditions of the PPA and cannot decide contrary to the specific provisions of the PPA. The decision of the State Commission in not accepting the GEDA's certificate on

commissioning date of 8.8.2013 is contrary to the terms of the PPA. (d) the State Commission has erred in deciding the commissioning date as 31.3.2013 based on the letter dated 15.3.2013, the correspondence dated 19.3.2013 and 20.3.2013 with GEDA and communication dated 20.3.2013 addressed by Taxus to the CEI, the inspection of the power plant on 29.3.2013, and the certificate for energization issued on 3.4.2013. CEI had issued approval for energization only vide letter dated 03.04.2013. Accordingly, there was no question of the Solar Project being commissioned on 31.3.2013 i.e. prior to the pre-requisite approval by the CEI. (e) in view of requirements under law and based on the actual energy generation from the Solar Project prior to 3.4.2013 which was not corresponding to the 5 MW capacity, the Solar Project could not be considered to have been commissioned or under commercial operation prior to 3.4.2013. (f) the State Commission has erred in holding that the Solar Project was affected by Force Majeure events for the period from 31.12.2011 to 6.2.2013 due to delay in Government of Gujarat's decision regarding implementation of the project through an SPV, delay in registration of land sale deeds, delay in granting statutory approval under Section 89 A of the Bombay Tenancy and Agriculture Lands (Vidarbha Region and KutchArea) Act, 1958 ("**1958 Act"**). These reasons were specifically raised by Taxus in the earlier Petition No. 1145 of 2011 filed before the State Commission, the same were duly considered by the State Commission and were dealt with and rejected in the Order dated 27.1.2012 passed by the State Commission. Taxus had chosen to challenge the said order of the State Commission before the High Court and had raised these issues and then voluntarily chose to have the petition disposed of with liberty to move this Tribunal and as they did not exercise that liberty, they cannot be permitted to raise the same issues again before the State Commission. (g) the State Commission had failed to appreciate that Taxus had given an undertaking dated 28.03.2013

specifically stating that '*we shall pay the liquidated damages from the Scheduled Commercial Operation Date agreed to in the Power Purchase Agreement dated 8.12.2010 up to the date of the commissioning of the Solar Power Project in view of the period extended by GUVNL as a special case*' in view of inordinate delay in commissioning of the Solar Project. Accordingly, the claim for extension of time beyond SCOD on the basis of FM is an afterthought and contrary to the said undertaking. (h) The State Commission had erred in accepting the plea of FM made by Taxus due to delay in the decision of GoG on implementation of the Solar Project under an SPV. In terms of Article 4.1 of the PPA, it is the obligation of Taxus to obtain all statutory approvals, clearances and permits. Taxus had itself chosen to implement the Solar Project through an SPV and had applied to the GoG. In the circumstances, it was not open to the State Commission to construe the period from 10.1.2011 to 1.4.2011 as FM event. (i) The State Commission failed to appreciate that the request made by Taxus to set up the Solar Project in the name of another Company is in violation of the Guidelines notified by the GoG, wherein a specific undertaking as below is required:

> *"I also give an undertaking that, "No change in the share holding pattern of the Applicant company shall be done without the prior approval of Government. At least 51% of the voting rights shall be maintained by the applicant company for a period of 5 (five) years from the date of allotment.*"

(j) The State Commission failed to appreciate that Taxus cannot raise its issue with GoG before the State Commission as it was not an issue between GUVNL and Taxus. Further, it does not fall within any of the events mentioned in Article 8.1 of the PPA dealing with FM. (K) The State Commission erred in holding that there was an FM Event for delay in the registration of the Sale Deed on account of the revision in Jantri Rate. The

acquisition of land was entirely at the cost and responsibility of Taxus. Taxus had on its own decided not to set up the project in the Solar Park where the land was to be allocated by the GoG with all associated facilities and approvals. In any event, the revision in the Jantri Rate was made on 1.4.2011 and further revised on 18.4.2011, and thereafter with effect from 11.5.2011 the provisional registration of the Title Deed of the agricultural land for industrial purpose was allowed. In the circumstancesmentioned above, the delay of 40 days cannot in any manner be construed as a Force Majeure event. (l) The State Commission has failed to appreciate that a number of other Solar Power Project Developers had established the solar power projects in the District Kutch, where Taxus's plant is located and these project developers had completed the projects without any claim of having been affected by the delay in the Notification of Jantri Rate or release of the registered land sale deed documents. If other Project Developers could validly establish the power project in the same Kutch area, there cannot be any claim of FM. (m) The State Commission also failed to appreciate that the claim made by Taxus regarding delay in grant of permission under the 1958 Act was devoid of any merit. The State Commission erred in relying on Section 89 (1) (a) of the 1958 Act whereas the applicable provision is Section 89A of the said Act. Taxus in its Petition had clearly stated that it had applied for permission under Section 89A and the permission granted by the Collector was also under Section 89A. The State Commission has failed to consider that no prior permission or approval is required under Section 89A for purchase and use of land for bonafide industrial purpose and such approval is only required under Section 89 (1) (a) of the said Act. Section 89 A of the 1958 Act is an exception to Section 89 of the said Act and was introduced by an amendment in the year 1996 and 1997. The Resolution dated 20.7.1996 issued by the State Government brings out the reasons behind introduction of Section 89 A for the purpose that the land

acquisition for industrial purposes gets delayed inordinately and was creating hurdles in implementing projects. The amendments provided that if a party has a clear title to the land and wished to use it for bonafide industrial purpose, he can immediately start doing so and within one month of beginning such usage, seek certificate from the Collector in this regard. The role of the Collector is only to verify whether the title of the land is clear or not and that the land is being used for a bonafide industrial purpose. As one of the bona fide industrial purpose is setting up the power projects, Taxus could have acquired clear title to the land and begun construction of the solar project. The conditions of Section 89 would not be applicable to the case of the Taxus. (n) The State Commission erred in relying on the decision dated 11.11.2013 of this Tribunal in Appeal No. 54 of 2013 and Order dated 07.04.2012 of the State Commission in Petition No. 1125 of 2011 (Cargo Solar) particularly when Taxus did not choose to challenge the Order dated 27.1.2012 passed by the State Commission. The case of Cargo Solar is distinguishable as being a Solar Thermal project, the land requirement was much higher; and (o) The State Commission has failed to appreciate that the reliance of Taxus on the word 'without prejudice' stated in the top of the undertaking dated 28.3.2013 was misplaced. The undertaking stated 'without prejudice' in view of the fact that Taxus had undertaken obligations in view of GUVN L agreeing to extend the term of the commissioning under the PPA as a special case. Term 'without prejudice' would mean that so long a s GUVNL did not extend the term as a special case for Taxus, it did not have any obligation in terms of the undertaking. GUVNL has acted in terms of the offer made by Taxus and extended the term, it is then not open to Taxus to claim that its obligations under the said document are not to be enforced but GUVNL will have to abide by its obligation of extension of the term. The extension of term was a subsequent obligation and in consideration of Taxus agreeing to pay LD.

On the issue relating to commissioning of the Solar Project, this Tribunal reproduced certain parts of the order of the GERC, and then observed that it could be seen therefrom that the State Commission, after considering relevant aspects of the case, had held that, though the Solar Project was ready for charging, it could not be commissioned by 31.3.2013 due to reasons beyond its control; as per the PPA signed between GUVNL and Taxus, COD is a defined expression; and the COD of the Solar Project is the date on which Solar Project is available for commercial operation as per the certificate of GEDA, and such date as specified in the written notice given by Taxus to GUVNL at least 10 days in advance.

After analysing the findings of the State Commission regarding the certificate issued by GEDA, and after reproducing the relevant extract of the order of the GERC, this Tribunal observed that it could be seen from the above that based on facts and circumstances of the case, and non-explanation/failure to fulfil duty on part of GEDA in issuing the commissioning certificate, the State Commission had held that the deemed date of commissioning of Solar Project as 31.3.2013; GUVNL had contended that GEDA, being an external agency, is not governed by the provisions of the Act, and hence the remedy against the grievance with GEDA regarding issuance of commissioning certificate lies elsewhere in the form of a writ petition, and not with the State Commission; GUVNL had also contended that the State Commission could not alter the terms and conditions of the PPA entered into between the parties; GUVNL had relied on various judgements of the Supreme Court and this Tribunal; they had gone through the said judgements and found that the references were mostly related to the PPAs entered for tariff determined under Section 63 of the Act, whereas in the present case the State Commission had determined the generic tariff under Section 62 of the Act; they had gone through the provisions of the PPA

wherein it was mentioned that availability of the Solar Project for commercial operation was to be certified by GEDA; from a perusal of the Orders dated 29.1.2010 and 27.1.2012, they observed that the commissioning/ commercial operation of the solar projects were linked with the applicable tariff on them; further, these regulations were termed as "Determination of tariff for Procurement of Power by the Distribution Licensees and others from Solar Energy Projects"; so, any dispute about commissioning was directly linked to the tariff at which procurement of solar power was done by GUVNL; the State Commission had earlier dealt with issues connected to GEDA in similar cases which had travelled to this Tribunal and also the High Court, and there had been no adverse findings on the dealings of GEDA certificate by the State Commission; the State Commission has jurisdiction over the interpretation of the PPA entered into between the parties; it is the prerogative of the State Commission to adjudicate any dispute on the terms of the PPA for tariff determined under Section 62 of the Act; they were of the considered opinion that the State Commission was the correct forum for adjudication of any dispute regarding commissioning of the Solar Project even though the certificate was to be issued by GEDA; the judgements relied upon by GUVNL on this were not applicable to the present case, and the contentions of GUVNL were misplaced; the State Commission, while deciding the issue of deemed commissioning of the Solar Project, had gone into details of the sequence of events leading to no injection of power from the Solar Project on 31.3.2013, and thereafter injection of power into the grid from 1.4.2013 onwards; the analysis of the State Commission included deliberation on the visits of CEI & GEDA for certification as required under the PPA, and thereafter issuance of certificates by CEI & GEDA; the State Commission had stated that, till the time GETCO could connect the Solar Project on 31.3.2013, there was no insolation and hence power could not be injected to

the grid; as per the certificate of CEI issued on 3.4.2013 which was based on the visit on 29.3.2013, the Solar Project was ready but could not inject power due to non-availability of evacuation system which was the responsibility of GETCO; power was injected into the grid by the Solar Project from 1.4.2013 onwards and had been consumed by the discoms in the State of Gujarat; there was no mechanism/procedure in the PPA to define the commissioning/COD; it merely stated certificate of commissioning from GEDA under Schedule 3 of the PPA; this clearly established that it was the discretion of GEDA to issue such certificate certifying solar power project to be available for commercial operation from a particular date; this could also be inferred by the certificate dated 17.8.2013 issued by GEDA which also did not speak about the basis of issuance of such certificate except mentioning electricity generation on 8.8.2013 for the time from 1145 Hrs. to 1345 Hrs. without interpreting the same; and they were of the considered view of the State Commission regarding GEDA not being diligent in carrying out its duties conferred upon it by the GoG/State Commission.

This Tribunal further observed that they did not find any such communication on record which revealed the contention of GETCO before the State Commission; on the contrary, GETCO had declared the portion of transmission line connecting the Solar Project as being declared on commercial operation w.e.f. 31.3.2013; in case GETCO was ready for commercial operation of its transmission system before 31.3.2013, it had the option to approach the State Commission for declaration of the said transmission system under commercial operation in terms of GERC (Multi-Year Tariff) Regulations, 2011 at a prior date, which was not the case; this clearly established that GETCO was not ready with its transmission system before the sunset of 31.3.2013; the State Commission, in the Impugned Order, has emphasised that, in Petition No. 1126 of 2011 and allied matter,

GUVNL had admitted that, in case the plant was ready for commissioning but if the transmission system was not available in that eventuality, it is deemed that the plant is commissioned and the plant developer is eligible to receive the tariff prevailing on the respective date; making evacuation system available was the responsibility of GETCO, and this was evident from schedule 3 of the PPA and observations of the State Commission in the Impugned Order; and they were of the considered opinion that there was no legal infirmity in the decision of the State Commission in considering 31.3.2013 as the deemed date of commissioning for the Solar Project.

On the issue related to the tariff applicable to the Solar Project, this Tribunal observed that the State Commission had come to the conclusion that tariff of Rs. 10.52/kWh shall be applicable to the Solar Project; the State Commission, while referring to its decisions in orders dated 29.1.2010 and 27.1.2012 wherein GETCO had been made responsible for creation of necessary transmission network for solar power projects in the State of Gujarat and admission on the part of GUVNL regarding entitlement of tariff determined by the Commission in its order No.2 of 2010 dated 29.1.2010 in case a solar project was ready for commissioning, but could not be commissioned due to non-availability of evacuation system, had concluded that the Solar Project was entitled for the tariff as prevailing on 31.3.2013; in the present case, the SCOD of the Solar Project was 31.12.2011 which was falling under the control period as per the order dated 29.1.2010 of the State Commission, and accordingly the tariff as per the said order was Rs. 15/kWh for the initial 12 years starting from COD of the Solar Project, and Rs.5 per kWh from the 13th year to 25th year; the same had been agreed in Article 5 of the PPA; the control period, as per the order dated 29.1.2010, was 2 years which ended on 28.1.2012; the State Commission came with new tariff order dated 27.1.2012 for solar power projects with control period

beginning from 29.1.2012 to 31.3.2015; accordingly, the applicable tariff for the Solar Project of Taxus shall be the applicable tariff for commissioning of the Solar Project from 29.1.2012 to 31.3.2013 as per the State Commission's order dated 27.1.2012; the State Commission based on its decision of deemed commissioning date as 31.3.2013 for the Solar Project, and as per the provisions of the PPA and based on this Tribunal's judgement and change in tariff issued by way of corrigendum decoded tariff of Rs. 10.52/ kWh for first 12 years and Rs. 7/kWh for subsequent years; in view of the provisions for applicable tariff under the PPA, condonation of certain delays in commissioning of the Solar Project and as per the tariff orders there was no significance of such undertakings even though the Solar Project was delayed by more than one year; in view of the same and their decision on agreeing to the decision of the State Commission on the deemed commissioning date of the Solar Project as 31.3.2013, the tariff had to be set as per the provisions of the PPA which worked out to be the tariff applicable for FY 2012-13; the State Commission has rightly determined the same as Rs. 10.52/kWh for the first 12 years and Rs 7/ kWh for the subsequent years; and they did not find any legal infirmity in the decision of the State Commission on the issue of applicable tariff.

On the issue regarding the duration of FM events and consequently applicability of LD on Taxus for delay in commissioning of the Solar Project, this Tribunal extracted the relevant portions of the Impugned Order, and observed that the State Commission had considered the delays on account of rejection of application for execution of Solar Project through SPV by GoG, registry of land purchased for the Solar Project and delay in granting statutory approval under Section 89 (1) (a) of the 1958 Act as FM events, and had condoned the delay of 402 days on account of these; based on this decision, the State Commission, as a consequential effect, had worked out

the revised SCOD as 6.2.2013, and had held that Taxus was liable to pay LD to GUVNL for the period from 7.2.2013 till deemed commissioning date i.e. 31.3.2013; by Amendment Act No 7 of 1997. which introduced Section 89A, the amendments were introduced in the 1958 Act related to land use for the industrial purposes; corresponding amendments in the Bombay Land Revenue Code, 1879 were also made; after careful consideration of the Impugned Order, they were of the opinion that the State Commission, while discussing the pleadings made by Taxus and in its concluding table, had recorded the said event under Section 89 (A); however, while analysing the event, the State Commission had discussed the provisions of Section 89 (1) (A) of the 1958 Act; the State Commission had concluded its findings, while considering the case under Section 89 (1) (a) while mentioning in the table as 89 (A); they found substance in the submissions made by GUVNL as perusal of Section 89 (A) of the 1958 Act revealed that actually there was no such prior requirement of certificate from the Collector (such requirement was post facto to check the requirement was for bona fide reasons) for using non-agricultural land for industrial purpose; the Supreme Court, in **Dipak Babaria v. State of Gujarat 19 (1986) 1 SCC 581** while dealing with the 1958 Act, had made similar observations on requirement of certificate from the Collector; the permission obtained/granted from the Collector was also under Section 89 (A) of the 1958 Act; they were of the considered opinion that the State Commission had committed an error in deciding this part as FM event; accordingly, the said period was disallowed as FM; and hence the Impugned Order passed by the State Commission was liable to be set aside and the matter stood remitted back to the State Commission to pass consequential order.

This Tribunal was of the considered opinion that the issues raised in Appeal No. 114 of 2015 were answered in favour of the Appellant

("GUVNL"); accordingly, the instant Appeal filed was allowed in part; the Impugned Order dated 30.3.2015 was set aside; and the matter stood remitted back to the State Commission to the extent discussed at para 12 (u) of the Order.

V. LIMITED SCOPE OF REVIEW:

It is submitted by Sri R.K. Srivastava, Learned Counsel for the 1st Respondent that the scope of a review petition is very limited i.e. (i) proof that, even after exercise of due diligence, some facts were not the knowledge of the review petitioner, when the original order was passed, and (ii) Mistake or error apparent from the face of record; the Review Petitioner has not taken any such ground in the review petition; there are a catena of judgments which define the scope of a review petition; the Review Petitioner, in fact, wants to get the case re-opened in the garb of review which is not permissible; and the scope of review is not to re-hear a matter which is already decided.

A. JUDGEMENTS:

i. RELIED ON BEHALF OF THE REVIEW PETITIONER:

Ms. Ranjeeta Ramachandran, Learned Counsel for the Review Petitioner, has relied on the following decisionson the scope of review, and in support of her submission that the above aspects constitute grounds for review: (a) **Lily Thomas: (2000) 6 SCC 224;** (b) **Moran Mar: AIR 1954 SC 526;** (c) **Rajendra Singh: (2005) 13 SCC 289**; (d) **M K Venkatachalam, ITO: AIR 1958 SC 875;** (e) **Amarjit Kaur: (2003) 10 SCC 228;** (f) **Collector, Cuttack & Ors: 2014 SCC online Ori 478;** and (g) **Selection Committee for Admission: AIR 1972 Mys 44,** to submit that, when the Supreme Court has held that certificates by GEDA and CEI are

mandatory requirements, this Tribunal could not have decided to the contrary.

Ms. Ranjeeta Ramachandran, Learned Counsel for the Review Petitioner, would submit that the judgments relied on behalf of Taxus proceed on the basis that all pleas were addressed and considered in the Impugned Orders which is not the case here; (a) Decision of this Tribunal in **Rama Shankar Awasthi** proceeds on basis that the Order therein had considered, analysed, evaluated and adjudicated the issue; (b) Decision of the Madhya Pradesh High Court in **Krishan Kant Bhargava (dated 15.03.2022)** is on the aspect of appreciation of evidence; however, the present case involves issue of non-consideration of aspects and documents which has been recognized by the Supreme Court as a ground for review; (c) **Ram Sahu (CA No. 3601 of 2020)** refers to judgments on when court disposes of a case without applying its mind to a provision of law, that may amount to error apparent on the face of record; and (d) Decision in **Murali Sundaram (CA No.1167-1170 of 2023)** also proceeds on the basis that original order had already considered and dealt with the issue,

ii. RELIED ON BEHALF OF THE 1ST RESPONDENT:

Sri R.K. Srivastava, Learned Counsel for the first respondent, would rely on (1) **S. Madhusudhan Reddy vs. V. Narayan Reddy and Others (Judgement of the Supreme Court in Civil Appeal No. 5503-04 of 2022 dated 18.08.2022)**; (2) **Shri Ram Sahu (Dead) through LRS vs. Vinod Kumar Rawat & Ors. (Judgement of the Supreme Court in Civil Appeal No. 3601 of 2020 dated 03.11.2020)**; (3) **Krishan Kant Bhargava vs. Bhagwan Sharan and Others (Judgement of the Madhya Pradesh High Court in RP No. 711 of 2021 dated 15.03.2022 reported in MANU/MP /0528/2022)**; (4) **Rama Shankar Awasthi vs. Lanco Anpara Power**

Limited and Others (Judgement of APTEL in Review Petition No. 02 of 2019 dated 24.04.2019 reported in MANU/ET/0053/2019); and (5) **S. Murali Sundaram vs. Jothibai Kannan & Others (Judgement of the Supreme Court in Civil Appeal No. 1167-1170 of 2023 dated 24.04.2023)**.

B. JUDGEMENTS RELIED ON BEHALF OF THE REVIEW PETITIONER:

In **Lily Thomas v. Union of India, (2000) 6 SCC 224,** the Supreme Court held that review is not an appeal in disguise; justice is a virtue which transcends all barriers, and the rules or procedures or technicalities of law cannot stand in the way of administration of justice; law has to bend before justice; if the Court finds that the error pointed out in the review petition was under a mistake, and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist, and its perpetration shall result in miscarriage of justice, nothing would preclude the Court from rectifying the error; rectification of an order stems from the fundamental principle that justice is above all; and it is exercised to remove the error and not for disturbing finality.

In ***S. Nagaraj* v. *State of Karnataka* :1993 Supp (4) SCC 595,** the Supreme Court held that Review literally and even judicially means re-examination or reconsideration; the basic philosophy inherent in it is the universal acceptance of human fallibility; yet in the realm of law, Courts and even Statutes lean strongly in favour of finality of the decision legally and properly made; and exceptions, both statutorily and judicially, have been carved out to correct accidental mistakes or miscarriage of justice.

C. JUDGEMENTS RELIED ON BEHALF OF 1ST RESPONDENT:

In **S. Madhusudhan Reddy vs. V. Narayana Reddy (Judgment of Supreme Court in Civil Appeal No. 5503-04 of 2022 dated 18.08.2022),**

the Supreme Court held that the power of review can be exercised for correction of a mistake but not to substitute a view; such powers can be exercised within the limits of the statute dealing with the exercise of power; review cannot be treated like an appeal in disguise; the mere possibility of two views on the subject is not a ground for review; once a review petition is dismissed no further petition of review can be entertained; the rule of law of following the practice of the binding nature of the larger Benches and not taking different views by the Benches of coordinated jurisdiction of equal strength has to be followed and practised; the error contemplated under the rule must be such which is apparent on the face of the record, and not an error which has to be fished out and searched; it must be an error of inadvertence; the words "any-other sufficient reason appearing in Order 47 Rule 1 CPC" must mean "a reason sufficient on grounds at least analogous to those specified in the rule"; error apparent on the face of the proceedings is an error which is based on clear ignorance or disregard of the provisions of law; such an error is an error which is a patent error, and not a mere wrong decision; it must be one which must be manifest on the face of the record; what is an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case; in a review petition it is not open to the Court to re-appreciate the evidence and reach a different conclusion, even if that is possible; appreciation of the evidence on record is fully within the domain of the appellate court; if, on appreciation of the evidence produced, the court records a finding of fact and reaches a conclusion, that conclusion cannot be assailed in a review petition unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto; and, under the garb of filing a review petition, a party cannot be permitted to

repeat old and overruled arguments for reopening the conclusions arrived at in a judgment.

In **Ram Sahu v. Vinod Kumar Rawat, (2021) 13 SCC 1,** the Supreme Court relied on its earlier judgements in ***Haridas Das* v. *Usha Rani Banik*, (2006) 4 SCC 78**; ***Meera Bhanja* v. *Nirmala Kumari Choudhury*, (1995) 1 SCC 170; *Aribam Tuleshwar Sharma* v. *Aribam Pishak Sharma*, (1979) 4 SCC 389**; **Shivdev Singh v. State of Punjab, AIR 1963 SC 1909; Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale, AIR 1960 SC 137**; ***Parsion Devi* v. *Sumitri Devi*, (1997) 8 SCC 715**; **Lily Thomas v. Union of India, (2000) 6 SCC 224; *Chhajju Ram* v. *Neki*, 1922 SCC OnLine PC 11**; ***Moran Mar Basselios Catholicos* v. *Mar Poulose Athanasius*, AIR 1954 SC 526**; **Inderchand Jain v. Motilal, (2009) 14 SCC 663; State of W.B. v. Kamal Sengupta, (2008) 8 SCC 612; *Rajender Kumar* v. *Rambhai*, (2007) 15 SCC 513; *Patel Narshi Thakershi* v. *Pradyumansinghji Arjunsinghji*, (1971) 3 SCC 844**;***T.C. Basappa* v. *T. Nagappa*, AIR 1954 SC 440**; **Hari Vishnu Kamath v. Syed Ahmad Ishaque, (1955) 1 SCR 1104; *Thungabhadra Industries Ltd.* v. *State of A.P.*, AIR 1964 SC 1372**; ***Haridas Das* v. *Usha Rani Banik*, (2006) 4 SCC 78**; ***K. Ajit Babu* v. *Union of India*, (1997) 6 SCC 473; State of Haryana v. M.P. Mohla, (2007) 1 SCC 457;** and ***Gopal Singh* v. *State Cadre Forest Officers' Assn.*, (2007) 9 SCC 369,** to observe that the principles which can be culled out from the above noted judgments are: (*i*) The power of the Tribunal to review its order/decision is akin/analogous to the power of a civil court under Section 114 read with Order 47 Rule 1 CPC; (*ii*) The Tribunal can review its decision on either of the grounds enumerated in Order 47 Rule 1 and not otherwise; (*iii*) The expression “any other sufficient reason”, appearing in Order 47 Rule 1, has to be interpreted in the light of other specified grounds; (*iv*) An error which is

not self-evident and which can be discovered by a long process of reasoning, cannot be treated as an error apparent on the face of record; (*v*) An erroneous order/decision cannot be corrected in the guise of exercise of the power of review; (*vi*) A decision/order cannot be reviewed on the basis of a subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court; (*vii*) while considering an application for review, the tribunal must confine its adjudication with reference to material which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent; and (*viii*) mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.

In **S. Murali Sundaram v. Jothibai Kannan, 2023 SCC OnLine SC 185,** the Supreme Court observed that, in **Perry Kansagra,** it had summed up the principles relating to exercise of the review jurisdiction under Order 47 Rule 1 CPC, as under: (i) Review proceedings are not by way of appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC; (ii) Power of review may be exercised when some mistake or error apparent on the fact of record is found. But error on the face of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on the points where there may conceivably by two opinions; (iii) Power of review may not be exercised on the ground that the decision was erroneous on merits; (iv) Power of review can also be exercised for any sufficient reason which is wide enough to include a misconception of fact or law by a court or even an advocate; (v) An application for review may be necessitated by way of invoking the doctrine

actus curiae neminem gravabit; an error which is required to be detected by a process of reasoning can hardly be said to be an error on the face of the record; in **Shanti Conductors (P) Ltd** it was held that, under the guise of review, the petitioner cannot be permitted to reagitate and reargue questions which have already been addressed and decided, and an error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of record.

The Supreme Court concluded holding that it appeared that the High Court had considered the review application as if it was an appeal against the order passed by the High Court earlier; the same was wholly impermissible while deciding the review application; even if the judgment sought to be reviewed was erroneous, the same cannot be a ground to review the same in exercise of powers under Order 47 Rule 1 CPC; and an erroneous order may be subjected to appeal before the higher forum but cannot be a subject matter of review under Order 47 Rule 1 CPC.

In **Rama Shankar Awasthi vs. Lanco Anpara Power Limited (judgment in Review Petition No. 02 of 2019 dated 20.04.2019),** this Tribunal held that, once a judgment is pronounced and an order is passed, the court becomes functus officio and it cannot thereafter arrogate itself to re-hear the case and re-open the matter; the dictum of the Apex Court in a catena of judgments is that a party is not entitled to seek a review of the judgment merely for the purpose of a re-hearing and a fresh decision of the case; the review petitioner, in the guise of the present proceedings, had virtually sought a rehearing of the original Appeals; the review petitioner cannot avail of this mode of legal redress as the following two main criteria is to be satisfied for entertaining a review petition:-(i) Proof that even after exercise of due diligence some facts were not to the knowledge of the review petitioner, when the original order was passed; (ii) Mistake or error apparent

from the face of record; in the present case, the review petitioner has failed to prove or establish any of the above mandatory criteria for review of the original judgment of this Tribunal; the Review Petitioner/Appellant, under the guise of the present review petition, is seeking to reopen the entire case which is impermissible under the review jurisdiction; the entire grounds, pleadings, arguments etc. were made by the Review Petitioner/Appellant in the main Appeal also to contest on the same prayers/issues which were duly considered, analysed, evaluated and adjudicated by this Tribunal in detail after hearing all the parties at considerable length; from the contents of the review petition, as well as the written submissions of the Review Petitioner, it was clear that neither any additional nor fresh ground had been made by the Review Petitioner now, which otherwise substantiate its pleadings for reviewing the judgment; what emerged conclusively was that the case in the review petition neither related to any discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the review petitioner or could not be produced by him at the time when the judgment was pronounced nor any mistake or error apparent on the face of the judgment had been specifically pointed out nor any other sufficient reason or ground had been made out by the Review Petitioner; and a judgment has to be seen in its entirety and should not be assailed based on certain paragraphs, only on pick and choose methodology.

In **Krishan Kant Bhargava v. Bhagwan Sharan, 2022 SCC OnLine MP 475,** the Madhya Pradesh High Court, relying on the judgements of the Supreme Court in **Kamlesh Verma v. Mayawati, (2013) 8 SCC 320, Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius, AIR 1954 SC 526**, **Board of Control of Cricket India v. Netaji Cricket Club: (2005) 4 SCC 741,** and **Akhilesh Yadav v. Vishwanath Chaturvedi: AIR 2013 SCW 1316,** observed that the scope of review of an order by a Court

of Civil Judicature, is circumscribed by Section 114 of the Code which provides that a review of an order is permissible upon discovery of new and important matter of evidence; only error apparent on the face of record is liable to be reviewed; and such error must stare one in the face where no elaborate arguments are necessary to pin-point the error.

D. REVIEW : ITS SCOPE:

Order 47 Rule 1 of the Code of Civil Procedure provides for filing an application for review. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used therein. It may allow a review on three specific grounds, namely (*i*) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed, (*ii*) mistake or error apparent on the face of the record and (*iii*) for any other sufficient reason. (***Moran Mar Basselios Catholicos* v. *Most Rev. Mar Poulose Athanasius* : AIR 1954 SC 526; *Board of Control for Cricket in India* v. *Netaji Cricket Club*, (2005) 4 SCC 741; Vedanta Ltd. v. Odisha ERC, 2023 SCC OnLine APTEL 4)**

An application for review is maintainable not only upon discovery of a new and important piece of evidence or when there exists an error apparent on the face of the record but also if the same is necessitated on account of some mistake or for any other sufficient reason. The words 'any other sufficient reason' must mean 'a reason sufficient on grounds, at least analogous to those specified in the rule'. (***Moran Mar Basselios Catholicos* v. *Most Rev. Mar Poulose Athanasius* : AIR 1954 SC 526; *Board of Control for Cricket in India* v. *Netaji Cricket Club*, (2005) 4 SCC 741; Vedanta Ltd. v. Odisha ERC, 2023 SCC OnLine APTEL 4).**

The power of review is not to be confused with the appellate power which may enable an appellate Court to correct all manner of errors committed by the subordinate Court (***Aribam Tuleshwar Sharma* v. *Aribam Pishak Sharma* : (1979) 4 SCC 389; *Meera Bhanja* v. *Nirmala Kumari Choudhury*, (1995) 1 SCC 170; *Mudiki Bhimesh Nanda* v. *Tirupati Urban Development Authority*, (2005) 4 ALD 792 (DB); Vedanta Ltd. v. Odisha ERC, 2023 SCC OnLine APTEL 4).**

The dictionary meaning of the word "review" is "the act of looking, offer something again with a view to correct or improve. The power of review can be exercised for correction of a mistake and not to substitute a view. The mere possibility of two views on the subject is not a ground for review. (***Lily Thomas* v. *Union of India* : (2000) 6 SCC 224; *Mudiki Bhimesh Nanda* v. *Tirupati Urban Development Authority*, (2005) 4 ALD 792 (DB); Vedanta Ltd. v. Odisha ERC, 2023 SCC OnLine APTEL 4).**

Review literally, and even judicially, means re-examination or reconsideration. The basic philosophy inherent in it is the universal acceptance of human fallibility. Yet, in the realm of law, Courts lean strongly in favour of the finality of a decision-legally and properly made. Exceptions have been carved out to judicially correct accidental mistakes or errors which result in miscarriage of justice. **(*P. Neelakanteswaramma* v. *Uppari Muthamma* : (1998) 3 AnWR 132 (DB); *Shivdeo* v. *State of Punjab*, AIR 1963 SC 1909**; **Vedanta Ltd. v. Odisha ERC, 2023 SCC OnLine APTEL 4)**. An application for review would lie, *inter alia*, when the order suffers from an error apparent on the face of the record, and permitting the same to continue would lead to failure of justice. In the absence of any such error, the finality attached to the judgment/order cannot be disturbed. The Review Court does not sit in appeal over its own order. A rehearing of the matter is impermissible in law. It constitutes an exception to the general rule that, once

a judgment is signed or pronounced, it should not be altered. Review is not an appeal in disguise. (***Inderchand Jain* v. *Motilal*, (2009) 14 SCC 663; *Rajendra Kumar* v. *Rambai*, (2007) 15 SCC 513; *Lily Thomas* v. *Union of India* : (2000) 6 SCC 224; Vedanta Ltd. v. Odisha ERC, 2023 SCC OnLine APTEL 4).**

An error, which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review. In the exercise of the review jurisdiction, it is not permissible for an erroneous decision to be "reheard and corrected". There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by the higher forum, the latter alone can be corrected by the exercise of the review jurisdiction. (***Parsion Devi* v. *Sumitri Devi*, (1997) 8 SCC 715; *Mudiki Bhimesh Nanda* v. *Tirupati Urban Development Authority*, (2005) 4 ALD 792 (DB)**; **Vedanta Ltd. v. Odisha ERC, 2023 SCC OnLine APTEL 4)**. An error which is not self-evident, and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying exercise of the power of review. A review petition, it must be remembered, has a limited purpose. **(*Haridas Das* v. *Usha Rani Banik* : (2006) 4 SCC 78; Vedanta Ltd. v. Odisha ERC, 2023 SCC OnLine APTEL 4).**

A review lies only for correction of a patent error. (***Thungabhadra Industries* v. *Government of A.P.*, AIR 1964 SC 1372; *Mudiki Bhimesh Nanda* v. *Tirupati Urban Development Authority*, (2005) 4 ALD 792; *Delhi Administration* v. *Gurdip Singh Uban*, (2000) 7 SCC 296; Vedanta Ltd. v. Odisha ERC, 2023 SCC OnLine APTEL 4).** The error contemplated under the rule is not an error which is to be fished out and searched. It must be an error of inadvertence. (***Lily Thomas* v. *Union of***

India **: (2000) 6 SCC 224; Vedanta Ltd. v. Odisha ERC, 2023 SCC OnLine APTEL 4).** It must be an error which must strike one merely on looking at the record and not one which requires a long drawn process of reasoning on points where there may conceivably be two opinions. (***Meera Bhanja's case*** **(supra);** ***Mudiki Bhimesh Nanda*** **v.** ***Tirupati Urban Development Authority*****, (2005) 4 ALD 792 (DB));** ***Satyanarayan Laxminarayan Hegde*** **v.** ***Mallikarjun Bhavanappa Tirumale*****, AIR 1960 SC 137; Vedanta Ltd. v. Odisha ERC, 2023 SCC OnLine APTEL 4).** There can be no review unless the Court is satisfied that there exists a material error manifest on the face of the earlier order resulting in miscarriage of justice. (***Avtar Singh*** **v.** ***Union of India*****, 1980 Supp SCC 562 : AIR 1980 SC 2041;** ***P. Neelakanteswaramma*** **v.** ***Uppari Muthamma*** **: (1998) 3 AnWR 132 (DB); Vedanta Ltd. v. Odisha ERC, 2023 SCC OnLine APTEL 4).**

An error, which necessitates review, should be something more than a mere error and it must be one which must be manifest on the face of the record. If the error is so apparent that, without further investigation or enquiry, only one conclusion can be drawn in favour of the petitioner, a review will lie. If the issue can be decided just by a perusal of the records, and if it is manifest, it can be set right by reviewing the order. If the judgment/order is vitiated by an apparent error or it is a palpable wrong, and if the error is self evident, review is permissible. (***S. Bagirathi Ammal*** **v.** ***Palani Roman Catholic Mission*****, (2009) 10 SCC 464; Vedanta Ltd. v. Odisha ERC, 2023 SCC OnLine APTEL 4).** A review proceeding cannot be equated with the original hearing of the case and the finality of the judgment will be reconsidered only where a glaring omission or patent mistake or like grave error has crept into by judicial fallibility. (***Northern India Caterers*** **v.** ***Lt. Governor Delhi*****, (1980) 2 SCC 167;** ***Mudiki Bhimesh Nanda*** **v.** ***Tirupati Urban Development Authority*****, (2005) 4 ALD 792 (DB);** ***Sow Chandra***

***Kante* v. *Sheikh Habib* : (1975) 1 SCC 674; Vedanta Ltd. v. Odisha ERC, 2023 SCC OnLine APTEL 4).**

A party is not entitled to seek review of a judgment merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances, of a substantial and compelling character, make it necessary to do so. (***Northern India Caterers* v. *Lt. Governor Delhi*, (1980) 2 SCC 167; *Sajjan Singh* v. *State of Rajasthan*: AIR 1965 SC 845; Lily Thomas v. Union of India, (2000) 6 SCC 224; Vedanta Ltd. v. Odisha ERC, 2023 SCC OnLine APTEL 4).**

Review is not a rehearing of an original matter, and the power of review cannot be confused with the appellate power which enables a superior court to correct all errors committed by a subordinate court. (***Kamlesh Verma* v. *Mayawati* : (2013) 8 SCC 320; Vedanta Ltd. v. Odisha ERC, 2023 SCC OnLine APTEL 4).** The power of review must be exercised with extreme care, caution and circumspection and only in exceptional cases. (***Jain Studios Ltd.* v. *Shin Satellite Public Co. Ltd.* : (2006) 2 SCC 628; *Kamlesh Verma* v. *Mayawati* : (2013) 8 SCC 320))**. An error which is not self-evident, and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for a patent error. (***Kamlesh Verma* v. *Mayawati* : (2013) 8 SCC 320; Vedanta Ltd. v. Odisha ERC, 2023 SCC OnLine APTEL 4).**

While it is true that the scope of interference in review proceedings is extremely limited, and it is only where the tests stipulated in Order 47 Rule 1 CPC are satisfied that review of the earlier order can be sought, that does

not mean that this Tribunal can, in no case, review its earlier order. However, limited the scope of interference in review proceedings may be, what is required to be ascertained is whether the review sought by the petitioner satisfies the requirements of Order 47 Rule 1 CPC and, if it does, then the earlier order of this Tribunal must, necessarily, be reviewed and set aside to the extent it suffers from an error apparent on the face of the record. Let us now examine whether the contentions, raised in the review petition, justify exercise of the power of review to interfere with earlier order passed by this Tribunal.

VI. IS CONSIDERATION OF COD AS 31.03.2023 CONTRARY TO REGULATIONS, JUDGMENT OF THE SUPREME COURT AND THIS TRIBUNAL AS WELL AS THE PPA, AND IS IT THEREFORE AN ERROR APPARENT ON THE FACE OF THE RECORD?

A. PETITIONER'S SUBMISSIONS:

Ms. Ranjeeta Ramachandran, Learned Counsel for the Review Petitioner, would submit that, in terms of the PPA, the commissioning/COD of the project requires various approvals including Electrical Inspector approval and GEDA certification which must be obtained by the Power Producer; Article 3.2 & 3.3 refer to such approvals being required for completion of project, and to be obtained within COD ie Article 2.1 read with the definition of Approvals read with Schedule 3 items 2 and 3 ; further, the definition of COD also provides certification by GEDA as a pre-requisite; therefore, CEI certificate is necessary for commissioning; and the impugned Order erroneously considers deemed COD as 31.03.2013, even though there is no certification for such date.

Ms. Ranjeeta Ramachandran, Learned Counsel, would submit that, with respect to a similar PPA, the Supreme Court, in **GUVNL v. Acme Solar Technologies (Gujarat) Pvt Ltd & Ors (2017) 11 SCC 801**, held that the

CEI Certificate and the GEDA Certificate are mandatory requirements under the PPA, and they had considered the date of readiness of the project based on such certificates; similarly, in present case, CEI certificate is dated 03.04.2013, and GEDA has certified the date of commissioning as 08.08.2013; in the absence of the said two certificates, the project cannot be held to have been commissioned or to even be ready for commissioning on 31.03.2013; unlike in the case of **ACME**, where GEDA had noted that the plant was ready but for the transmission line, GEDA, in its certificate dated 17.08.2013 in the present case, has not provided any such certification; therefore, the contention of Taxus (accepted in the Impugned Order) that it was ready on 31.03.2013, but for the readiness of GETCO's line, has not been certified by GEDA and, therefore, is contrary to the PPA and the judgment of the Supreme Court; in fact, GETCO's transmission line was ready on 30.03.2013 when it was charged; and, therefore, the finding of this Tribunal regarding non-readiness is also contrary to record.

Ms. Ranjeeta Ramachandran, Learned Counsel, would also submit that Section 50 of Contract Act, 1872 provides for performance of promise to be made in the manner prescribed; this principle has been applied specifically in the context of Commissioning/COD of a power project (thermal) by this Tribunal, in **Talwandi Sabo Power Limited v. PSPCL (Judgement in Appeal No. 97 of 2016 dated 03.06.2016)** to state that, when the contract provides that a particular thing relating to a contract should be done in a particular manner, it has to be done in that manner and in no other; further the contention of substantial compliance and implied terms was rejected in the said case; the said judgment has been upheld by the Supreme Court in CA No. 12344 of 2016 dated 22.11.2017; in **Sasan Power Ltd (2017) 1 SCC 487**, the Supreme Court has rejected the claim of commissioning as 31.03.2013 as being contrary to the PPA; it was also held

therein that there cannot be any waiver of the conditions of the COD by the procurer when it adversely impacts the tariff, and therefore consumer interest/public interest; similarly, in the present case also, consideration of COD as 31.03.2013, instead of 08.08.2013, affects the tariff, and thereby consumer interest; there cannot be any alleged concession by GUVNL on the PPA requirement; in **GUVNL v. Solar Semiconductor Power Company (India) Pvt Ltd (2017) 16 SCC 498,** the Supreme Court held that commissioning is an act performed in terms of the obligations under the PPA, and is between the producer and the purchaser; the Court should be careful in dealing with matters when interests of consumers is at stake and, in the Supplementing Judgment, it was recognized that the PPA terms and conditions are binding; Regulation 43 of the CEA (Measures relating to Safety and Electric Supply) Regulations, 2010 stipulates that supply of electricity must commence after obtaining written approval of the Electrical Inspector; the CEI certificate dated 03.04.2013 provides that "*permission is hereby granted to energise*"; thus,Taxus could not have energised or commenced supply before 03.04.2013; therefore, allowance of COD on 31.03.2013 prior to written approval of CEI, is contrary to statutory provisions; the CEI Certificate is a mandatory requirement both under the statute and the PPA; the specific issue, that the COD cannot be prior to the date of CEI certificate, was raised in the Appeal, but the Impugned Order leaves it unaddressed; the quantum of injection from 01.04.2013 was of negligible amount, probably for testing rather than supply of power under the PPA, which obviously cannot happen without CEI approval; the impugned Order, while disregarding the GEDA Certificate dated 17.08.2013, has not considered the mandatory aspect of such certification under the PPA, particularly in the context of Section 50 of the Contract Act, and the judgment in **ACME SOLAR;** further it overlooks the principles settled in **Talwandi Sabo**, **Sasan Power** and **Solar Semi Conductor**; commissioning/COD is

important for determination of the applicable tariff (Article 5.2 of PPA) as well as for determination of the period of liquidated damages (Article 4.3); and the impugned Order has allowed the higher tariff as per deemed COD of 31.03.2013 which is contrary to consumer interest.

B. CONTENTIONS OF 1ST RESPONDENT:

With respect to non-consideration of the contention regarding Certificate of Chief Electrical Inspector dated 03.04.2013 permitting charging of the electrical installations and that the Commercial Operation Date cannot be considered to be before the said date, Sri R.K. Srivastava, Learned Counsel for the first respondent, would submit that this Tribunal was well aware of and had considered the above submissions of GUVNI on the above aspect, while passing the order dated 04.07.2018, as follows: (A) Page 29 of the Review Petition, Para 5 (q) (i); (B) Page 30 of the Review Petition. Para 7(A) (a); (C) Page 36, 37 of the Review Petition, Para 10 (b) (d) (e); (D) Page 44 of the Review Petition. Para 12 (a). (b) (c); (E) Page 46 of the Review Petition, Para 12 (c); (F) Page 50 of the Review Petition. Para 12 (g); (G) Page 52 of the Review Petition, Para 12 (h); (H) Page 53 of the Review Petition, Para 12 (i); and (I) Page 54 of the Review Petition, Para 12 (j).

With respect to the contention that the finding that GETCO was not ready until 31.03.2013 evening, and the allowance of deemed commissioning date of 31.03.2013 being erroneous, Sri R.K. Srivastava, Learned Counsel for the first respondent, would submit that it is not clear as to what is the submission of GUVNL regarding these aspects of review; if GUVNI. states that the findings of this Tribunal is wrong in the said order dated 04.07.2018, then the (alleged) wrong decision (only for the sake of argument and not admitted), can be a matter of appeal and not of review;

and the above aspects have also been considered at length by this Tribunal in its order dated 04.07.2018.

C. ANALYSIS:

i. CONTENTS OF RELEVANT PARTS OF THE IMPUGNED JUDGEMENT:

The submission, urged on behalf of the 1st Respondent by Shri R. K. Srivastava, learned Counsel, is that this Tribunal had considered this aspect while passing the order under review dated 04.07.2018, and certain paragraphs of the said judgement are relied upon in support thereof. We must, therefore, take note of the contents of the paragraphs relied on behalf of the 1st Respondent in this regard.

In Para 5(q)(i) of the order under review, this Tribunal observed that Appeal No. 114 of 2015 had been filed by GUVNL on the following, among other, issues: (i) Against allowing deemed commissioning of the Solar Project as on 31.03.2013 even though CEI issued permission for energization of Solar Project on 03.04.2013 and GEDA certified commissioning date as 08.08.2013 as per the provisions of the PPA. At Para 10(b) of the impugned Judgement, this Tribunal noted the submission, urged on behalf of GUVNL, that the State Commission had erred in deciding deemed commissioning of the Solar Project on 31.03.2013 instead of 08.08.2013 ignoring the specific provisions of the PPA which provided for certification by GEDA for considering the date of the Commissioning; the grievance of Taxus, against the decision of GEDA on the commissioning date of the Solar Project, could be taken up in an Appropriate Forum (i.e. Writ Petition under Article 226 of the Constitution of India) and not in proceedings under Section 86(1)(f) of the Act, for adjudication before the State Commission, which is for adjudication of the dispute between Taxus

as a Generating Company and GUVNL as a licensee; (d) the State Commission had erred in deciding the commissioning date as 31.03.2013 based on the letter dated 15.03.2013, the correspondence dated 19.03.2013 and 20.03.2013 with GEDA and communication dated 20.03.2013 addressed by Taxus to the CEI, the inspection of the power plant on 29.03.2013, and the certificate for energization issued on 03.04.2013; CEI had issued the approval for energization only vide letter dated 03.04.2013; accordingly, there was no question of the Solar Project being commissioned on 31.03.2013 i.e. prior to the prerequisite approval by the CEI; (e) in view of the requirements under law and based on the actual energy generation from the Solar Project prior to 03.04.2013, which was not corresponding to the 5 MW capacity, the Solar Project could not be considered to have been commissioned or under commercial operation prior to 03.04.2013.

Thereafter, in Para 12, this Tribunal recorded its observations. In Para 12(c), this Tribunal examined the findings recorded by the State Commission on the issue of commissioning, and reproduced certain portions of the Order, impugned in the said Appeal, passed by the GERC. Thereafter, in Para 12(g), this Tribunal observed that they had also considered that the State Commission, while deciding the issue of deemed commissioning of the Solar Project, had gone into details of the sequence of events leading to no injection of power from the Solar Project on 31.03.2013, and thereafter injection of power into the grid from 01.04.2013 onwards; the analysis of the State Commission included deliberation on the visits of CEI & GEDA for certification as required under the PPA, and thereafter issuance of certificates by CEI & GEDA; the State Commission had stated that, till the time GETCO could connect the Solar Project on 31.03.2013, there was no insolation and hence power could not be injected to the grid; the State Commission had further observed that, as per the certificate of CEI issued

on 03.04.2013 which was based on the visit on 29.03.2013, the Solar Project was ready but could not inject power due to non-availability of evacuation system which was the responsibility of GETCO; power was injected into the grid by the Solar Project from 01.04.2013 onwards, and had been consumed by the discoms in the State of Gujarat; further, a careful perusal of the PPA revealed that there was no mechanism/procedure to define the commissioning/COD; and it merely stated that the certificate of commissioning from GEDA was under Schedule 3 of the PPA.

After extracting the relevant portion of the Schedule 3, this Tribunal observed that this clearly established that it was the discretion of GEDA to issue such certificate certifying solar power project to be available for commercial operation from a particular date; this can also be inferred by the certificate dated 17.08.2023 issued by GEDA which also does not speak about the basis of issuance of such certificate except mentioning electricity generation on 08.08.2013 and the time from 1145 hrs. to 1345 hrs. without interpreting the same; and, accordingly, they were of the considered view that the State Commission was justified in its conclusions regarding GEDA not being diligent in carrying out the duties conferred upon it by the Government of Gujarat/ State Commission.

In Para 12(h) of the impugned Judgement, this Tribunal noted that GUVNL had also contended that the State Commission had not gone into the details of disconnecting the transmission line connecting to the Solar Project on 30.03.2013, and again connecting it on 31.03.2013 late in the evening when the Solar Project was not able to go into generating mode due to absence of solar radiation; according to GUVNL, the works at Taxus end were not completed so the Solar Project was not able to go into generating mode, and hence GETCO was not at fault; they had gone through the details of the issue, and found that GETCO had placed an affidavit before the State

Commission stating that, after it received communication from Taxus, it energized the transmission line in the evening of 31.03.2013; however, they did not find any such communication on record which revealed the contention of GETCO before the State Commission; on the contrary they found that GETCO had declared the portion of transmission line connecting the Solar Project as being declared to be commercial operational w.e.f. 31.03.2013; this becomes important, in case GETCO was ready for commercial operation of its transmission system before 31.03.2013, it had the option to approach the State Commission for declaration of the said transmission system under commercial operation in terms of the GERC (Multi-Year Tariff) Regulations, 2011 at a prior date, which was not the case; and this clearly establishes that GETCO was not ready with its transmission system before the sunset of 31.03.2013.

In Para 12(i) of the impugned judgement, this Tribunal further observed that the State Commission, in para 10.29 of the Order Impugned in the appeal before it, had emphasized that, in Petition No. 1126 of 2011 and allied matters, GUVNL had admitted that, in case the plant is ready for commissioning, but if the transmission system was not available, in that eventuality, it was deemed that the plant was commissioned and the plant developer was eligible to receive the tariff prevailing on the respective date; making the evacuation system available was the responsibility of GETCO; and this was also evident from Schedule 3 of the PPA.

After extracting Schedule 3 of the PPA, this Tribunal, in Para 12(j) of the impugned Judgement, observed that, in view of these discussions, they were of the considered opinion that there was no legal infirmity in the decision of the State Commission in considering 31.03.2013 as the deemed date of commissioning for the Solar Project.

ii. RELEVANT CLAUSES OF THE PPA:

Article 1.1 of the PPA dated 08.12.2010 stipulates that, for all purposes of this Agreement, the following words and expressions shall have the respective meanings set forth below. There-under, the term “approvals” has been defined to mean the permits, clearances, licenses and consents as are listed in Schedule hereto and any other statutory approvals. The term “Commercial Operate Date” is defined as 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.

Article 2 relates to licenses, permits and conditions precedent. Article 2.1 stipulates that the Power Producer, at its sole cost and expense, shall acquire and maintain in effect all clearances, consents, permits, licenses and approvals required from time to time by all regulatory / statutory competent authority(ies) in order to enable it to perform its obligations under the Agreement; GUVNL will render all reasonable assistance to the Power Producer to enable the latter to obtain such clearances without any legal obligation on the part of GUVNL. Under the proviso thereto, non-rendering or partial rendering of assistance shall not in any way absolve the Power Producer of its obligations to obtain such clearances; nor shall it mean to confer any right or indicate any intention to waive the need to obtain such clearances.

Article 3 relates to construction and operation. Article 3.2 stipulates that, for the purposes of such completion of the Project, the Power Producer and GUVNL shall together endeavour to ensure that all Approvals pursuant to Article 2.1 are cleared within the Commercial Operation Date. Article 3.3

provides that, for the purposes of such completion of the Project, the Power Producer shall take all necessary steps for obtaining Approvals pursuant to Article 2.1.

Schedule 3 of the PPA relates to approvals, and item 2 there-under relates to 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. Item 3 relates to Certificate of Commissioning of the Solar Photovoltaic Grid Interactive Power Project issued by GEDA.

iii. LETTER OF THE CEI DATED 03.04.2013:

The Office of the Chief Electrical Inspector issued the letter dated 03.04.2013 to the 1st Respondent on the subject of initial inspection of the electrical installation of the solar power plant of the 1st Respondent. Item 3 of the reference therein is the letter No. DCEI/MEH/SOLAR/917 dated 30.03.2013. The said letter states that, in terms of Para 32 and 43 of the Central Electricity Regulatory Authority (Measures relating to Safety & Electric Supply) Regulations, 2010, permission was hereby granted to energize the above solar panels and transformers along with the associated equipment. The permission granted to the 1st Respondent by the Chief Electrical Inspector was by letter dated 03.04.2013.

iv. CERTIFICATE ISSUED BY GEDA:

A Certificate of Commissioning was issued on 17.08.2013 by the Gujarat Energy Development Agency (a Government of Gujarat Organisation). By the said Certificate, GEDA certified that the 1st Respondent's solar power project was connected to 66 kV site sub-station; and the project site sub-station was connected to 220/66 kV GETCO sub-

station. Thereafter, it details electricity generation for the purpose of commissioning of the project. In the table there-under, it states the date of commissioning to be 08.08.2013.

v. CEA REGULATIONS,2010:

In exercise of the powers conferred by Section 177 of the Electricity Act, 2003, the Central Electricity Authority made the Central Electricity Authority (Measures relating to Safety and Electric Supply) Regulations 2010, for measures relating to voltage and electric supply. These regulations came into force from the date of the notification ie 20.09.2010. Chapter VI relates to safety provisions for electrical installations and apparatus of voltage exceeding 650 volts. Regulation 43 relates to Approval by Electrical Inspector. Regulation 43(1) stipulates that voltage above which electrical installations would be required to be inspected by the Electrical Inspector before commencement of supply, or recommencement after shut down for six months and above, shall be as per the notification to be issued by the Appropriate Government under Section 176(2)(x) and Section 162(1) of the Electricity Act.

Regulation 43(2) stipulates that, before making an application to the Electrical Inspector for permission to commence supply, 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. Under the proviso thereto, the supplier may energise the aforesaid electric supply lines or apparatus for the purpose of tests specified in regulation 46.

While a certificate was issued by the Chief Electrical Inspector, vide letter dated 03.04.2023, granting permission to Taxus to energise the solar power and transmission along with associated equipment, the certificate issued by GEDA on 17.08.2023 records the date of commissioning to be 08.08.2023.

vi. TERMS OF THE PPA ARE BINDING:

A conjoint reading of the definition of the term *"approval"* in Article 1.1 read with items 2 and 3 of Schedule III of the PPA, makes it clear that approval of the Electrical Inspector for Commissioning of the transmission line, and the certificate of commissioning issued by GEDA are among the *"approvals"* which the power producers is required to acquire in order for it to perform its obligations under the agreement. Article 3.2 of the PPA further requires these approvals to be cleared within the commercial operation date, and Article 3.3 requires the power producer to obtain approvals for the purpose of completion of the project. The certificates of the Chief Electrical Inspector and GEDA are contractual approvals required to be obtained by the Respondent power producer.

Rights and obligations of the parties flow from the terms and conditions of the Power Purchase Agreement (PPA). The PPA is a contract entered between the parties with a clear understanding of the terms of the contract. A contract, being a creation of both the parties, is to be interpreted having due regard to the actual terms settled between the parties. (**Gujarat Urja Vikas Nigam Ltd. v. Solar Semiconductor Power Co. (India) (P) Ltd., (2017) 16 SCC 498).** As parties are bound by the terms and conditions of the

PPA, it is improper on the part of either the State Commission or the Appellate Tribunal to travel beyond the said terms and conditions. (***Gujarat Urja Vikas Nigam Ltd. v. Acme Solar Technologies (Gujarat) (P) Ltd.*, (2017) 11 SCC 801).**

A party cannot claim anything more than what is covered by the terms of contract, for the reason that a contract is a transaction between two parties and has been entered into with open eyes and understanding the nature of contract. The contract, being a creature of an agreement between two or more parties, has to be interpreted giving a literal meaning unless there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract, and it is not permissible for the court to make a new contract, however reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without any outside aid. The terms of the contract should be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely. **(Rajasthan State Industrial Development & Investment Corpn; Talwandi Sabo Power Limited v. PSPCL (Judgement in Appeal No. 97 of 2016 dated 03.06.2016).**

vii. INTEREST OF CONSUMERS:

In ***All India Power Engineer Federation v. Sasan Power Ltd.*, (2017) 1 SCC 487,** the Supreme Court held that 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; even if a waiver is claimed of some of the provisions of the PPA, such waiver, if it affects tariffs that are ultimately payable by the consumer, would necessarily affect public interest, and would

have to pass muster of the Commission under Sections 61 to 63 of the Electricity Act.

In **Gujarat Urja Vikas Nigam Ltd. v. Solar Semiconductor Power Co. (India) (P) Ltd., (2017) 16 SCC 498,** the Supreme Court held that Courts should be 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 Electricity 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; and, therefore, the approach of this Court ought to be cautious and guarded when the decision has its bearing on the consumers.

Consequently, it is not open either to the Commission or to this Tribunal to construe a provision in the PPA, or to exercise its inherent power contrary to the terms and conditions of the PPA, in a manner which would adversely affect consumer interest.

viii. WHEN CAN REVIEW BE SOUGHT:

The expression, 'for any other sufficient reason' in Order 47 Rule 1 of the Civil Procedure Code has been given an expanded meaning and a decree or order passed under misapprehension of the true state of circumstances has been held to be sufficient ground to exercise the power of review. (**Lily Thomas v. Union of India, (2000) 6 SCC 224).** The words "sufficient reason", occurring in Rule 1 of Order 47 of the CPC, is wide

enough to include a misconception of fact or law by a court or even an advocate. An application for review may be necessitated by way of invoking the doctrine *'actus curiae neminem gravabit'"*. (***Board of Control of Cricket India v. Netaji Cricket Club*:*(2005) 4 SCC 741).***

The Court may re-open its judgment if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice. (***O.N. Mohindroo* v. *Distt. Judge, Delhi* [(1971) 3 SCC 5; Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi [(1980) 2 SCC 167**; **Lily Thomas v. Union of India, (2000) 6 SCC 224).** Where, without any elaborate argument, one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out. **(Thungabhadra Industries Ltd. v. The Govt. of Andhra Pradesh, AIR 1964 SC 1372)**

ix. FAILURE TO NOTICE A STATUTORY PROVISION:

If the attention of the Court is not drawn to a material statutory provision during the original hearing, the Court will review its judgment (***Girdhari Lal Gupta* v. *D.H. Mehta*:(1971) 3 SCC 189; Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi [(1980) 2 SCC 167**; **Lily Thomas v. Union of India, (2000) 6 SCC 224).** If the order is plainly and obviously inconsistent with a specific and clear provision of the statute, that must inevitably be treated as a mistake of law apparent from the record. (**M.K. Venkatachalam v. Bombay Dyeing and Mfg. Co. Ltd., (1958) 34 ITR 143).**

In terms of Regulation 43(2) of the 2010 CEA Regulations, supply of electricity should not be commenced by the supplier unless approval in writing of the Electrical Inspector has been obtained by him. The 2010 Regulations were made in the exercise of powers conferred on the Central

Electricity Authority under Section 177 of the Electricity Act. These regulations, which are statutory in character and have the force of law, were not brought to the notice of this Tribunal when the earlier order was passed. Failure to bring this statutory provision to the notice of this Tribunal would constitute a ground to review the earlier order.

x. FAILURE TO NOTICE A BINDING PRECEDENT:

When there is a legal position clearly established by a well-known authority and by some unfortunate oversight, the Judge has gone palpably wrong by the omission of those concerned to draw his attention to the authority, it may be a ground coming within the category of an error apparent on the face of the record. **(M. Murari Rao v. Balavanth Dixit, AIR 1924 Mad 98; Natesa Naicker v. Sambanda Chettiar, AIR 1941 Madras 918; Sri Karutha Kritya Rameswaraswami Varu v. R. Ramalinga Raju, AIR 1960 Andh. Pra. 17; Tinkari Sen v. Dulal Chandra Das, AIR 1967 Cal 518; Medical and Dental College, Bangalore v. M.P. Nagaraj, AIR 1972 Mys. 44; Collector v. Bharat Chandra Bhuyan, 2014 SCC OnLine Ori 478).** Where there is a decision of the Supreme Court holding the field and the High Court (or a statutory tribunal) takes a contrary view, it needs no elaborate argument to point to the error. The error is self-evident. (**Collector v. Bharat Chandra Bhuyan, 2014 SCC OnLine Ori 478).**

Where there is a decision of the Supreme Court bearing on a point and where a Court (or Tribunal) has taken a view on that point which is not consistent with the law laid down by the Supreme Court, it needs no elaborate argument to point to the error and there could reasonably be no two opinions entertained about such an error. Such an error would clearly be an error apparent on the face of the record. **(Selection Committee for**

Admission to the Medical and Dental College, Bangalore v. M.P. Nagaraj, 1971 SCC OnLine Kar 133 : AIR 1972 Mys 44)

In **Amarjit Kaur v. Harbhajan Singh, (2003) 10 SCC 228,** the Supreme Court held that the order passed rejecting the review application summarily, despite the fact that a judgment of the Supreme Court relevant for the purpose had been brought to the notice of the Court, without even expressing any view on the matter, by itself, was sufficient to set aside the order made on the review petition.

In **Prism Johnson Ltd. v. M.P. ERC, 2023 SCC OnLine APTEL 2,** this Tribunal observed that it had only applied the law declared by the Supreme Court, in **MSEDCL v. JSW STEEL,** to the facts of the case before it , and they were satisfied that failure of the Counsel to draw the attention of this Tribunal to the relevant part of the said judgment of the Supreme Court, would constitute an error apparent on the face of the record.

In ***Gujarat Urja Vikas Nigam Ltd. v. Acme Solar Technologies (Gujarat) (P) Ltd.*, (2017) 11 SCC 801,** the Supreme Court observed that it had taken note of the communication/certificate issued by the Office of the Chief Electrical Inspector dated 31-12-2011 (a mandatory requirement under Clause 3 Schedule 2) to the first respondent which recited that, upon inspection of the electrical installation and associated equipment at the switchyard of the first respondent at the new site, permission was granted to energise the electrical installations along with associated equipment; this would indicate that the switchyard of the first respondent was ready for being energised on 31-12-2011; regard must also be had to the certificate of commissioning issued by GEDA which is another mandatory requirement in terms of the terms and conditions of PPA dated 31-5-2010; in the said certificate, though the date of commissioning was mentioned as 13-3-2012,

it has also been certified that the plant was ready for generation on 31-12-2011, but for the 66 kV transmission line; reading the aforesaid two certificates/communications, issued by the office of the Chief Electrical Inspector and GEDA, it was abundantly clear that the switchyard and the electrical installations required to be set up by Respondent 1 were ready for commissioning on 31-12-2011 though the actual commissioning thereof had to await completion of the transmission lines which was made available by GETCO; and, accordingly, were charged on 13-3-2012.

In **GUVNL vs. Solar Semiconductor Power Company (India) Private Limited: (2017) 16 SCC 498**, the Supreme Court has categorically held that the certificate of the Chief Electrical Inspector and GEDA are mandatory in character. The attention of this Tribunal was, evidently, not drawn to the said judgment of the Supreme Court. Failure to bring the said judgment, in **Solar Semiconductor Power Company (India) Private Limited,** to the notice of this Tribunal is also a ground to review the earlier order.

xi. SECTION 50 OF THE CONTRACT ACT:

Section 50 of the Indian Contract Act, 1872 relates to performance in manner or at time prescribed or sanctioned by promise. It is stipulated therein that the performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions. The Illustrations thereunder are:- (a) B owes A 2,000 rupees. A desires B to pay the amount to A's account with C, a banker. B, who also banks with C, orders the amount to be transferred from his account to A's credit, and this is done by C. Afterwards, and before A knows of the transfer, C fails. There has been a good payment by B. (b) A and B are mutually indebted. A and B settle an account by setting off one item against another, and B pays A the balance

found to be due from him upon such settlement. This amounts to a payment by A and B, respectively, of the sums which they owed to each other. (c) A owes B 2,000 rupees. B accepts some of A's goods in reduction of the debt. The delivery of goods operates as a part payment. (d) A desires B, who owes him Rs. 100, to send him a note for Rs. 100 by post. The debt is discharged as soon as B puts into the post a letter containing the note duly addressed to A.

In **Talwandi Sabo Power Limited v. PSPCL (Judgement in Appeal No. 97 of 2016 dated 03.06.2016),** this Tribunal observed that Section 50 of the Indian Contract Act embodies the legal principle that when the contract expressly provides that a particular thing, relating to furtherance of the contract, has to be done in a particular manner then it has to be done in that manner and in no other.

As held by this Tribunal, in **Talwandi Sabo Power Limited**, the contract between the parties must necessarily be performed in the manner prescribed which, in terms of the Articles of the PPA referred to hereinabove, require the power producer to obtain all necessary approvals before commissioning. It is evident, from the aforesaid paragraphs of the order under review, that the judgement of this Tribunal, in **Talwandi Sabo Power Limited,** was also not noticed by this Tribunal while passing the order under review We are satisfied, therefore, that the said order necessitates interference on these grounds.

VII. FAILURE TO CONSIDER CONTENTIONS RELATING TO FORCE MAJEURE AND LIQUIDATED DAMAGES IS A GROUND FOR REVIEW:

A. PETITIONER'S CONTENTIONS:

Ms. Ranjeeta Ramachandran, Learned Counsel for the Review Petitioner, would submit that, under Article 4.3 of the PPA, Taxus is liable to pay Liquidated Damages for the delay in commissioning of the project; Taxus had claimed and the GERC had accepted three events as force majeure events covering a total of 402 days, and had held Taxus liable for Liquidated Damages only for the balance period; the allowance of force majeure for all three reasons was challenged by GUVNL; the impugned Order has only rendered a finding in respect of one event [approval under Section 89A of the Bombay Tenancy Act] in favour of GUVNL, and the finding of GERC was set aside to this extent; however there is no analysis or finding on the other two events [denial by the Government of Gujarat for implementation of the project through SPV and delay in registration of sale deeds due to revision in Jantri rate] which were also challenged by GUVNL; Taxus, in its reply, has not pointed out any finding of this Tribunal on these two aspects; and there is not even a confirmation of the findings of the GERC on these aspects, let alone any reasoning or analysis.

B. CONTENTION OF THE 1ST RESPONDENT:

On non-consideration of the issues raised by GUVNL on the two force majeure events (i) denial by the Government of Gujarat for implementation of project through Special Purpose Vehicle and (ii) delay in registration of sale deeds due to revision of Jantri Rate, Sri R.K. Srivastava, Learned Counsel for the first respondent, would submit that this Tribunal was well aware of and had considered the above submissions of GUVNL on the above aspect, while passing the said order dated 04.07.2018 as follows: (A) Page 29 of the Review Petition. Para 5 (q) (ii); (B) Page 30 of the Review Petition-Para 7(A) (b); (C) Page 37 of the Review Petition-Para 10 (1)(b); (D) Page 38 of the Review Petition-Para 10 (h); (E) Page 39 of the Review Petition-Para 10 (k); (F) Page 44 of the Review Petition- Para 12 (a); (G) Page 60 of

the Review Petition- Para 12 (q)((b); and (H) Page 71 of the Review Petition- at the end of the Para 12 (p) starting with "From the above……";

C. ANALYSIS:

i. CONTENTS OF THE RELEVANT PARTS OF THE IMPUGNED JUDGEMENT:

With respect to non-consideration of the issues raised by the Review Petitioner on the two force majeure events ie (1) denial by the Government of Gujarat for implementation of the project through Special Purpose Vehicle, and (2) delay in registration of sale deeds due to revision in Jantri rate, the submission, urged on behalf of the 1st Respondent, is that this Tribunal had considered the above submission while passing the order under review dated 04.07.2018. The submission, in short, is that, since these aspects have been considered by this Tribunal earlier, even if the findings, recorded in the order under review, are contended to be erroneous by the Review Petitioner, that does not, by itself, justify seeking review, and their remedy is only to question the order of this Tribunal by way of an appeal which, in the present case, is the appeal pending before the Supreme Court.

Since certain paragraphs of the order under review are relied upon by Shri R. K. Srivastava, learned Counsel for the 1st Respondent in this regard, it is useful to note what this Tribunal has recorded in the said paragraphs. In Para 5(1)(ii) of the order under review, this Tribunal observed that Appeal No. 114 of 2015 has been filed by GUVNL on the following issue : (ii) against allowing the prayer of Taxus and considering the various periods of delay as Force Majeure events and rejecting the claim of GUVNL for Liquidated Damages.

Para 7 of the order under review relates to the questions of law and, under Clause A(b) thereof, this Tribunal observed that GUVNL has raised

the following questions of law in Appeal No. 114 of 2015 which are as follows: (b) whether, in the facts and circumstances of the case, the State Commission is right in deciding that the delay of 402 days in the commissioning of the Solar Project, namely, from 31.12.2011 (SCOD) till 6.2.2013 was on account of FM events falling under Article 8 of the PPA?". Thereafter, at Para 10(h) of the order under review, this Tribunal recorded the contention urged, on behalf of GUVNL, that the State Commission had erred in accepting the plea of force majeure made by Taxus due to delay in the decision of the Government of Gujarat on implementation of the Solar Project under a SPV; in terms of Article 4.1 of the PPA, it is the obligation of Taxus to obtain all statutory approvals, clearances and permits; Taxus had itself chosen to implement the Solar Project through an SPV, and had applied to the Government of Gujarat; and, in the circumstances, it was not open to the State Commission to construe the period from 10.01.2011 to 01.04.2011 as a Force Majeure event.

Thereafter, in Para 10(k), this Tribunal recorded the submission, urged on behalf of GUVNL, that the State Commission had erred in holding that there was a Force Majeure Event for the delay in registration of the Sale Deed on account of the revision of Jantri Rate; acquisition of land was entirely at the cost and responsibility of Taxus; Taxus had, on its own, decided not to set up the project in the Solar Park where the land was to be allocated by the Government of Gujarat with all associated facilities and approvals; in any event, the revision in the Jantri Rate was made on 01.04.2011 and further revised on 18.04.2011 and thereafter, with effect from 11.05.2011, the provisional registration of the Title Deed of agricultural lands for industrial purposes was allowed; and, in the circumstances mentioned above, the delay of 40 days cannot, in any manner, be construed as a Force Majeure event.

Thereafter, in Para 12(a) of the order under review, this Tribunal recorded its observations as follows: (a) in the present Appeals, GUVNL has raised questions of law and Taxus has not raised any particular questions of law; the core issues for deliberation related to the commissioning date of the Solar Project, the tariff application and the Force Majeure events affecting the commissioning of the Solar Plant and Liquidated Damages thereupon; and they were proceeding to deal with the same based on these issues raised in the present Appeals.

At Para 12(p), this Tribunal recorded that the final issue raised in the Appeals was regarding the duration of the Force Majeure events and consequent applicability of Liquidated Damages on Taxus for the delay in commissioning of the Solar Project; Taxus had contended that the delay in commissioning of the Solar Project was due to Force Majeure events and it should not be penalized to pay Liquidated Damages until commissioning of the Solar Project i.e. 31.03.2013; whereas, GUVNL had contended that the delay in commissioning of the Solar Project was due to reasons attributable to Taxus and the same cannot be termed as Force Majeure events.

This Tribunal thereafter noted the findings of the State Commission in dealing with the force majeure events and, after extracting portions of the order impugned in Appeal No. 114 of 2015 and Appeal No. 131 of 2015, observed that, from the above, it could be seen that the State Commission had considered the delays on account of rejection of the application for execution of the Solar Project through SPV by the Government of Gujarat, registration of land purchased for the Solar Project, and delay in granting statutory approval under Section 89 (1) (a) of the 1958 Act as Force Majeure events, and had condoned the delay of 402 days on account of these; further, based on this decision, the State Commission, as a consequential effect, had worked out revised SCOD as 06.02.2013, and had held that Taxus was liable

to pay Liquidated Damages to GUVNL for the period from 07.02.2013 till the deemed commissioning date i.e. 31.03.2013.

In the order passed by the GERC, which was impugned before this Tribunal in Appeal Nos. 114 of 2015 and 131 of 2015, the Commission had held that the delay in commissioning of the first Respondent's power project, to the extent given in the table below, was due to force majeure. (i) Delay in grant of permission to the Special Purpose Vehicle (SPV) company, the period of delay was from 10.01.2011 till 01.04.2011 ie for 79 days, (ii) delay due to non-registration of Land Sale Deed, the delay on this account was from 01.04.2011 to 22.11.2011 ie for a period of 236 days, (iii) delay in granting statutory approval under Section 89(A)- the period of delay was from 18.10.2011 to 18.02.2012 ie of 122 days.

With respect to the delay in granting statutory approval under Section 89(A) of the Bombay Tenancy Act, this issue was held in favour of GUVNL by this Tribunal, and the order of the GERC was set aside, to this extent, in the order under review. This Tribunal, after extracting Section 89(A) of the Bombay Tenancy Act, 1958, as introduced by Act 7 of 1997 which related to land use for the industrial purposes, observed that the State Commission, while discussing the pleadings of the first Respondent and in its concluding table, had recorded the said event under Section 89(A); however, while analysing the event, the State Commission had discussed the provisions of Section 89(1)(A) of the 1958 Act; the State Commission had concluded its findings while considering the case under Section 89(1)(a) while mentioning it in the table; there was substance in the submissions made by GUVNL that Section 89(A) revealed that there was no such prior requirement of certificate from the Collector (such requirement is post facto for the purpose of checking the requirement is for bona fide reasons) for using non-agricultural land for industrial purpose. It was also observed that the

Supreme Court, in **Dipak Babaria v. State of Gujarat: (1986) 1 SCC 581,** while dealing with the 1958 Act, had made similar observations on the requirement of certificate from the Collector.

This Tribunal further observed that a perusal of the petition, filed by the first Respondent before the State Commission, showed that they had mentioned Section 89(A) for the purpose of approval from the Collector; the permission obtained/granted by the Collector was also under Section 89 (A) of 1958 Act; this Tribunal was of the considered opinion that the State Commission had committed an error in deciding this part as force majeure event, and accordingly it was disallowing the said period as force majeure event.

The impugned order passed by the State Commission was set aside, and the matter stood remitted back to the State Commission to pass consequential order. Despite having noted in the order under review, the question of law in para 7(b) and (c) ie whether, in the facts and circumstances of the case, the State Commission was right in deciding that the delay of 402 days in the commissioning of the 5 MW Solar PV Power Project, namely, from 31.12.2011 (Scheduled Commercial Operation Date) till 6.2.2013 was on account of Force Majeure events falling under Article 8 of the Power Purchase Agreement?, and (c) whether in the facts and circumstances of the case, the State Commission is right in rejecting the claim of Appellant for liquidated damages payable by Respondent No. 1 for the period from 31.12.2011 till 8.8.2013 and restricting such liquidated damages only for the period from 6.2.2013 till 31.3.2013? and thereafter recording the undertaking given by the first Respondent with respect to liquidated damages from SCOD in view of the period extended by the GUVNL as a special case in view of the inordinate delay in commissioning of the solar project, and recording the submissions urged on behalf of the GUVNL at para 10(k) and 10(l). this

Tribunal, however, has not dealt with these two claims, with respect to force majeure, raised by the first Respondent which was approved by the State Commission.

ii. RELEVANT CLAUSES OF THE PPA:

Article 4 of the PPA relates to undertakings, and Article 4.3 relates to liquidated damages for delay in Commissioning the project /Solar Photovoltaic Grid Interactive Power Plant beyond Scheduled Commercial Operation date, and there-under, it is stated that if the project is not commissioned by its Scheduled Commercial Operation Date other than the reasons mentioned below, the Power Producer shall pay to the GUVNL liquidated damages for delay at the rate of Rs.10000 (Rupees Ten Thousand) per day per MW for delay of first 60 days and Rs15000 (Rupees Fifteen Thousand) per day per MW thereafter; liquidated damage is payable up to delay period of 1 year from Scheduled Commercial Operation Date; if the Power Producer fails to make payment of the liquidated damages for a period exceeding 30 days, GUVNL shall be entitled to invoke the Bank Guarantee to recover the liquidated damages amount; in case of delay more than 1 year, GUVNL assumes no obligation and has the right to terminate the Power Purchase Agreement by giving 1 month termination notice; (1) the project cannot be Commissioned by Scheduled Commercial Operation Date because of Force Majeure event; or (2) the power producer is prevented from performing its obligations because of material default on part of GUVNL; (3) power producer is unable to achieve commercial operation on Scheduled Commercial Operation Date because of delay in transmission facilities/ evacuation system for reasons solely attributable to GETCO.

Article 5 relates to rates and charges, and Article 5.2 stipulates that GUVNL shall pay the fixed tariff mentioned hereunder for the period of 25

years for all the Scheduled Energy /Energy injected as certified in the monthly SEA by SLDC; the tariff is determined by Hon'ble Commission vide Tariff Order for Solar based power project dated 30.01.2010; tariff for Photovoltaic project: Rs.15/ KWh for first 12 years and thereafter Rs.5/KWh from 13th Year to 25th Year; above tariff shall apply for solar projects commissioned on or before 31st December 2011; in case, commissioning of Solar Power Project is delayed beyond 31st December, 2011, GUVNL shall pay the tariff as determined by Hon'ble GERC for Solar Projects effective on the date of commissioning of solar power project or above mentioned tariff, whichever is lower.

There were three events of delay which, according to the GERC, constituted force majeure events. This Tribunal has held in favour of the review petitioner with respect to the provisions of the Bombay Tenancy Act. The other two events of delay, which according to the GERC constituted force majeure events, were (i) denial by the Government of Gujarat to implement the project through a Special Purpose Vehicle, and (ii) delay in registration of sale deeds due to delay in Jantri Rate.

It is evident, from the contents of the order under review referred to hereinabove, that, while the contentions urged on behalf of the review petitioner in this regard has been noted as also the relevant portions of the order passed by the GERC which was impugned therein, the submissions urged on behalf of the review petitioner, that these events cannot be held to be force majeure events, has not been dealt with in the order under review.

iii. FAILURE TO CONSIDER CONTENTIONS:

In **Rajender Singh v. Lt. Governor, Andaman & Nicobar Islands, (2005) 13 SCC 289,** the Supreme Court held that the impugned judgment does not deal with and decide many important issues as could be seen from

the grounds of review; the High Court was not justified in ignoring the material on record which, on proper consideration, may justify the claim of the appellant; the impugned judgment is a clear case of an error apparent on the face of the record and non-consideration of relevant documents; the power of review extends to correct all errors to prevent miscarriage of justice; Courts should not hesitate to review their own earlier order when there exists an error on the face of the record and the interest of justice so demands in appropriate cases; the grievance of the appellant was that, though several vital issues were raised and documents placed, the High Court has not considered the same in its review jurisdiction; and the High Court's order in the review petition was not correct, and necessitated interference.

As held by the Supreme Court, in **Rajendra Singh Vs. Lt. Governor, Andaman and Nicobar: (2005) 13 SCC 289,** failure to consider and adjudicate the contentions raised by the petitioner is also a ground to review the order and, since the contentions urged on behalf of GUVNL regarding the two events of delay not constituting force majeure events has not been considered and dealt with, the earlier order of this Tribunal necessitates review on this score.

VIII. UNDERTAKING FURNISHED BY THE 1ST RESPONDENT AND PRINCIPLES OF RES JUDICATA:

A. SUBMISSIONS URGED ON BEHALF OF THE PETITIONER:

Ms. Ranjeeta Ramachandran, Learned Counsel, would submit that, in addition to the merits, the Petitioner-GUVNL had also raised the issue that such aspects cannot be considered at all in view of the principles of res judicata and in view of the undertaking given byTaxus; (a) Res Judicata – Taxus had filed a Petition for extension of the control period before the GERC based on the same above-stated events claimed for the delay, which was

rejected vide Order dated 27.01.2012; Taxus challenged this before the Gujarat High Court, and then withdrew it with the option to appeal to this Tribunal, but Taxus did not appeal; and this issue has been raised in Appeal by GUVNL, but no finding has been given thereon, and even Taxus has not pointed out any such finding. (b) Undertaking dated 28.03.2013 by Taxus to pay Liquidated Damages up to the date of commissioning- This issue has been raised in Appeal. The reference to Undertaking by GUVNL was in the context of Liquidated Damages. However, the Impugned Order has erroneously considered the Undertaking on issue of tariff, and not for Liquidated Damages.

B. SUBMISSIONS URGED ON BEHALF OF THE 1ST RESPONDENT:

With respect to the appellant's submission regarding non-consideration of their contentions raised on the undertaking dated 27.03.2013 given by the 1st Respondent Taxus and Res Judicata, Sri R.K. Srivastava, Learned Counsel for the first respondent, would submit that this Tribunal was well aware of, and had considered the above submissions of GUVNL, on the above aspects, while passing the said order dated 04.07.2018, as follows: (A) Page 12 of the Review Petition-Para 7 (1), (B) Page 12 of the Review Petition- Para 7 (g), and (C) Page 38 of the Review Petition- Para 10 (g); this Tribunal, after discussing and deciding the issues raised by parties and questions of law. in Para 13 of the Review Petition, has stated that all the questions of law raised by GUVNL and all issues raised by Taxus have been dealt with while discussing the main issues and do not require any further deliberations on the same; this Tribunal had discussed all aspects raised by GUVNL in the instant Review Petition; it is thus clear that GUVNL has attempted to get the appeal re-heard by way of the instant Review Petition, which is not legally permissible; and it is pertinent to state

that the Appeals filed by both the parties are already pending before the Supreme Court.

C. ANALYSIS:

i. CONTENTS OF RELEVANT PARTS OF THE IMPUGNED JUDGEMENT:

With respect to the issue regarding non-consideration of the contentions raised on the undertaking dated 27.03.2013 given by the 1st Respondent and Res Judicata, Shri R. K. Srivastava, learned Counsel for the 1st Respondent, would submit that these aspects have also been considered by this Tribunal in the judgement under review. Learned Counsel would refer to Para 7 (f) and (g) where this Tribunal noted that GUVNL had raised the following questions of law: (f) whether in the facts and circumstances of the case, the State Commission was right in deciding the issue of application of principles of res-judicata and also the issue of purported energization of the Solar Project by Taxus without the prerequisite approval of the Authorities concerned, in favour of Taxus and against GUVNL? (g) whether, in the facts and circumstances of the case, the State Commission was right in over-looking the implication of the undertaking dated 28.03.2013 given by Taxus on the aspect of payment of Liquidated Damages based on which the extension was granted by GUVNL even though the GUVNL was entitled to terminate the PPA due to delay beyond one year from SCOD?

In Para 10(g) of the impugned Judgement, this Tribunal noted the submission urged on behalf of GUVNL that the State Commission had failed to appreciate that Taxus had given an undertaking dated 28.03.2013 specifically stating that, 'we shall pay the *liquidated damages from the Scheduled Commercial Operation Date agreed to in the Power Purchase*

Agreement dated 08.12.2010 up to the date of the commissioning of the Solar Power Project in view of the period extended by GUVNL as a special case' in view of inordinate delay in commissioning of the Solar Project; and, accordingly, the claim for extension of time beyond the SCOD on the basis of Force Majeure was an afterthought and contrary to the said undertaking.

In Para 13 of the Judgement under review, this Tribunal had observed that, in view of the discussions and decision on the above, all questions of law raised by GUVNL and all issues raised by Taxus had been dealt while discussing the main issues as above and does not require any further deliberations on the same.

ii. LETTER OF UNDERTAKING:

The first Respondent filed a notarized undertaking, without prejudice to the revised tariff of solar power project as per GERC order dated 27.01.2012. The said undertaking, submitted on behalf of the first Respondent, expressly stated that the first Respondent agreed to supply power to GUVNL from their 5 MW solar power project at Village: Raper-Khokhara Tal: Anjar Dist: Kutchh at a tariff 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 thirteen years thereafter, as determined by the Gujarat Electricity Regulatory Commission by its Solar Tariff Order dated 27.01.2012.

Under the said Undertaking, the first Respondent further agreed that they shall pay liquidated damages from Schedule Commercial Operation Date, agreed in the PPA dated 08.12.2010, up to the date of commissioning of the solar project in lieu of the period extended by GUVNL as a special case.

The contentions urged on behalf of the review petitioner with respect to these two issues have also been noted by this Tribunal in the order under review. However, neither have the submissions urged on behalf of the review petitioner, on these two aspects, been considered nor have they been dealt with in the order under review. In the light of the law declared by the Supreme Court, in **Rajendra Singh Vs. Lt. Governor, Andaman and Nicobar: (2005) 13 SCC 289,** failure of this Tribunal to consider and adjudicate these aspects is also a ground to review the said order.

IX. CONCLUSION:

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.

Pronounced in the open court on this the **27th day of May, 2024**.

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

REPORTABLE / ~~NON-REPORTABLE~~