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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Judgment reserved on: 01.07.2025***
Judgment pronounced on: 18.07.2025

\+ **FAO (OS) (COMM) 42/2019**

NTPC VIDYUT VYAPAR LIMITED .....Appellant
Through: Mr. Puneet Taneja, Sr. Advocate with Mr. Anil Kumar, Mr. Manmohan Singh Narula and Mr. Amit Yadav, Advocates.

versus

PRECISION TECHNIK PRIVATE LIMITED .....Respondent
Through: Mr. Ramesh Singh, Sr. Advocate with Mr. Sidhartha Sharma, Mr. Arjun Asthana, Ms. Shalini Basu, Mr. Nachiket Chawla and Ms. Hage Nanya, Advocates.

\+ **FAO (OS) (COMM) 128/2019**

PRECISION TECHNIK PRIVATE LIMITED .....Appellant
Through: Mr. Ramesh Singh, Sr. Advocate with Mr. Sidhartha Sharma, Mr. Arjun Asthana, Ms. Shalini Basu, Mr. Nachiket Chawla and Ms. Hage Nanya, Advocates.

versus

NTPC VIDYUT VYAPAR LIMITED ....Respondent
Through: Mr. Puneet Taneja, Sr. Advocate with Mr. Anil Kumar, Mr. Manmohan Singh Narula and Mr. Amit Yadav, Advocates.

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR

J U D G M E N T

HARISH VAIDYANATHAN SHANKAR, J.

FAO (OS) (COMM) 42/2019
FAO (OS) (COMM) 128/2019

1. The present cross-appeals under Section 37 of the **Arbitration and Conciliation Act, 1996**[1], arise from the **impugned order dated 18.12.2018**[2] passed by the learned Single Judge in OMP (Comm) No. 481/2016, titled *"NTPC Vidyut Vyapar Nigam Ltd. vs. Precision Technik Private Limited"*. By the said order, the learned Single Judge partially set aside the Arbitral Award dated 08.05.2015 and permitted NTPC Vidyut Vyapar Nigam Ltd. (hereinafter '***NTPC***') to retain the sum of Rs. 1,82,13,000/-, which it had received upon encashment of the **Performance Bank Guarantee**[3] furnished by Precision Technik Private Limited (hereinafter '***PTPL***').

2. Essentially, NTPC has filed FAO(OS)(COMM) 42/2019, seeking complete setting aside of the Arbitral Award and permission to encash the PBG for the delay period between 08.02.2012 and 21.02.2012, while PTPL has preferred FAO(OS)(COMM) 128/2019, challenging the Impugned Order insofar as it allows NTPC to retain Rs.1,82,13,000/- from the encashment of the PBG.

[1] A&C Act
[2] Impugned Order
[3] PBG

BRIEF FACTS:

3. On 25.07.2010, the **Ministry of New and Renewable Energy**[4], Government of India, issued Guidelines for Phase-1, Batch-1 for the Selection of Grid-connected Solar Power Projects. Under these Guidelines, NTPC was designated as the Nodal Agency to facilitate the procurement of solar power from Solar Power Developers. Pursuant thereto, NTPC issued a **Request for Selection**[5], inviting interested project developers to participate in the selection process. In response, PTPL submitted its bid on 21.09.2010, and a Letter of Intent was issued to it by NTPC on 11.12.2010.

4. On 10.01.2011, the parties executed a **Power Purchase Agreement**[6] for setting up a 5 MW solar power project at Pokhran, Rajasthan. In terms of Article 3.1 of the PPA, PTPL was required to complete the activities listed therein within 180 days from the "Effective Date" of the PPA, which, as per Article 2.1.1, was 10.01.2011. PTPL was obligated to complete the project and commence power supply up to the Contracted Capacity by 09.01.2012, 12 months from the signing of the PPA, which was defined as the Scheduled Commissioning Date under Article 1.1.

5. On 14.02.2012, the Superintendent Engineer, Jodhpur, declared that PTPL's project had been commissioned on 08.02.2012. Owing to the delay of approximately one month beyond the Scheduled Commissioning Date, NTPC, invoking Article 4.6 of the PPA, encashed 20% of the PBG dated 05.01.2011.

6. Power was first injected into the grid from PTPL's project on 21.02.2012. Subsequently, pursuant to a direction issued by MNRE,

[4] MNRE
[5] RfS
[6] PPA

the **Rajasthan Renewable Energy Corporation Limited**[7] determined the Commissioning Date of PTPL's project as 22.03.2012. Based on this, NTPC contends that installation of all project-related equipment was completed only on 22.03.2012.

7. On 03.05.2012, PTPL invoked arbitration under Article 16.3.2 of the PPA. The dispute was accordingly referred to an Arbitral Tribunal for adjudication.

8. The Arbitral Award was rendered on 08.05.2015, wherein the learned Tribunal allowed PTPL's claims by holding that the delay in commissioning was caused by delays on the part of government authorities in granting necessary permissions, clearances, and approvals for laying the transmission line from the project site to the pooling sub-station, which constituted a *force majeure* event under the PPA and was beyond PTPL's control, and further held that the actual commissioning date of 21.02.2012 should be treated as the Scheduled Commissioning Date, thereby rendering NTPC's encashment of the Performance Bank Guarantee unjustified.

9. Aggrieved by the Award, NTPC filed objections under Section 34 of the A&C Act before the learned Single Judge, who, by the Impugned Order dated 18.12.2018, partly set aside the Award by permitting NTPC to retain the encashed amount under the PBG on the reasoning that once all equipment was installed and energy began flowing into the grid, the project was deemed commissioned as of 21.02.2012, resulting in a 43-day delay from the Scheduled Commissioning Date, and since obtaining all necessary consents, clearances, and permits was PTPL's responsibility, the delay was foreseeable and not a *force majeure* event. The Ld. Single Judge,

[7] RRECL

however, rejected NTPC's claim for encashment relating to the period between 08.02.2012 and 21.02.2012 as unsustainable.

10. Both parties, aggrieved by different aspects of the Order dated 18.12.2018 passed by the learned Single Judge in OMP (Comm) No. 481/2016, have filed the present cross-appeals.

SUBMISSIONS OF NTPC:

11. Learned senior counsel for NTPC would submit that the learned Arbitral Tribunal erred in construing Article 11.3.1 of the PPA as an inclusive definition of "Force Majeure", whereas the clause clearly uses the term "means", indicating an exhaustive enumeration of events, and as held in ***S.K. Gupta v. K.P. Jain***[8], such usage excludes any events not expressly mentioned; therefore, the learned Tribunal, by including delays in government approvals and transmission line works, both within the contractor's scope, effectively rewrote the contract, which it had no jurisdiction to do, and this constitutes a patent illegality under Section 34 of the A & C Act, as rightly held by the learned Single Judge.

12. Learned senior counsel for NTPC would further submit that the PTPL's reliance on Section 56 of the **Indian Contract Act, 1972**[9] is wholly misconceived, since Article 11.3.1 of the PPA contains an express *force majeure* clause, and as held in ***Energy Watchdog v. CERC***[10] and ***Bangalore Electricity Supply Co. Ltd. v. Hirehalli Solar Power Project LLP***[11], where a contract provides for specific contingencies under Section 32, the doctrine of frustration under

[8] (1979) 3 SCC 54
[9] Contract Act
[10] (2017) 14 SCC 80
[11] (2025) 1 SCC 435

Section 56 does not apply; moreover, the argument was never raised before the learned Arbitral Tribunal or in the Section 34 proceedings, and it cannot now be introduced for the first time under Section 37.

13. Learned senior counsel for NTPC would also submit that the learned Single Judge, after analysing the matter in detail in paragraphs 22-30 of the impugned order, rightly concluded that delays attributable to RRECL or state authorities were foreseeable and fell within PTPL's contractual responsibilities under Articles 4.1.1(a & c) and 11.3.1 of the PPA, and since the responsibility for obtaining approvals and ensuring timely grid connectivity was contractually assigned to PTPL, such delays could not qualify as *force majeure* events; further, in paragraphs 31-41 of the impugned order, the Court held that the learned Arbitral Tribunal exceeded its jurisdiction in extending the commissioning timeline for reasons not covered under the *force majeure* clause, and thus the Court rightly upheld NTPC's encashment of the PBG for the delay up to 08.02.2012, though it declined further liquidated damages for the remaining period, which is the limited subject of his present appeal.

14. Learned senior counsel for NTPC would submit that it is admitted that the Respondent failed to inject power into the grid by the Scheduled Commissioning Date of 09.01.2012 and, although the Respondent claims the project was commissioned on 08.02.2012, it is undisputed, and affirmed by the Arbitral Tribunal, that power was first injected only on 21.02.2012, yet the Tribunal, in disregard of Articles 1.1 and 4.6 of the PPA, declined to impose Liquidated Damages, and while the learned Single Judge granted damages only up to 08.02.2012, the delay continued until 21.02.2012, entitling NTPC to damages for the entire period.

15. Learned senior counsel for NTPC would further submit that PTPL, having failed to commission the project by the Scheduled Commissioning Date of 09.01.2012, is in breach of its contractual obligations, and it cannot now take refuge in the existence of extension or liquidated damages provisions to argue that time was not of the essence. It is further submitted that the PPA expressly contemplates that time is of the essence and stipulates a structured mechanism for imposition of pre-agreed damages for delay, while the learned Tribunal and PTPL appear to treat these provisions as discretionary.

16. As regards the issue of loss, learned senior counsel for NTPC would submit that PTPL's argument that liquidated damages cannot be awarded without proof of actual loss and its reliance in this regard on ***Kailash Nath Associates Vs. DDA***[12], are untenable. He would submit that infrastructure contracts, particularly those involving public utilities, are premised on the inherent difficulty of loss quantification, and therefore incorporate pre-estimated damages as a matter of commercial certainty, and such clauses have been upheld in ***Construction & Design Services v. DDA***[13]**,** and ***NTPC v. NTPC Vidyut Vyapar Nigam Ltd. v. Saisudhir Energy Ltd.***[14].

<u>SUBMISSIONS OF PTPL</u>:

17. Learned senior counsel for PTPL would submit that the impugned judgment is liable to be set aside as it exceeds the permissible scope of judicial review, and the learned Single Judge has not only re-evaluated the evidence but has also reinterpreted

[12] (2015) 4 SCC 136
[13] (2015) 14 SCC 263
[14] 2018 SCC OnLine Del 13477

contractual provisions already considered by the learned Arbitral Tribunal, which is contrary to the binding precedents in ***McDermott International Inc. v. Burn Standard Co. Ltd.***[15] and ***Associate Builders v. DDA***[16]; although the learned Court acknowledged that there was no negligence or deliberate delay on PTPL's part, it effectively undertook an appellate review which is impermissible under Section 34.

18. Learned senior counsel for PTPL would further submit that the Arbitral Tribunal's interpretation of the *force majeure* clause, specifically Articles 11.3.1, 11.4.1, and 11.7, was legally sound and contractually consistent, and the Tribunal rightly held that Article 11.3.1 is inclusive rather than exhaustive, as it uses terms like 'any', 'events', and 'circumstances', along with the disjunctive 'or', which supports a broad reading; therefore, delays caused by State-Level Agencies, including RRECL, were correctly treated as *force majeure* events, but the learned Single Judge erroneously treated Article 11.3.1 as exhaustive, disregarded Article 11.4.1, and overlooked that the obligations of State-Level Agencies were incorporated into the PPA through the RfS and the Central Government's mission, and their failure directly impacted PTPL's performance and could not be excluded from the ambit of *force majeure* without effectively rewriting the contract.

19. Learned senior counsel for PTPL would submit that, without prejudice to the above, and even assuming that delays caused by State-Level Agencies do not fall under the contractual definition of *force majeure*, the circumstances independently satisfy the conditions under

[15] (2006) 11 SCC 181
[16] (2015) 3 SCC 49

Section 56 of the Contract Act, and although the learned Tribunal did not expressly invoke Section 56, its findings clearly bring the case within its scope, and it is settled law that courts may rely on supporting legal doctrines to uphold an arbitral award where the underlying reasoning is discernible, as held in ***OPG Power Generation (P) Ltd. v. Enexio Power Cooling Solutions (India) (P) Ltd.***[17].

20. On the issue of the PBG, learned senior counsel for PTPL would submit that the learned Single Judge erred in upholding its encashment, as the learned Arbitral Tribunal had neither examined nor determined whether any actual loss had occurred, and the Single Judge's reasoning effectively amounts to a modification of the award, which is impermissible in law and contrary to the principles laid down by the Hon'ble Supreme Court's ruling in ***Gayatri Balasamy v. ISG Novasoft Technologies Ltd.***[18].

21. Learned senior counsel for PTPL would also submit that NTPC neither pleaded actual loss nor filed any counterclaim before the learned Tribunal to justify the retention of the PBG, and this failure is fatal to their claim, especially since Article 4.6.1 of the PPA, which NTPC relies upon, functions, in effect, as a penalty clause, as it allows full encashment regardless of whether the delay was for one day or thirty days; thus, in terms of ***Kailash Nath Associates Vs. DDA*** *(supra)*, where a stipulated amount is not a genuine pre-estimate of loss, actual loss must be both pleaded and proved, which NTPC failed to do, and considering that the security was furnished only to ensure timely commencement of supply as evinced in Articles 3.3.1 and

[17] 2025 (2) SCC 417
[18] 2025 SCC OnLine SC 986

3.3.3, its purpose was clearly deterrent and not compensatory, making the encashment punitive and invalid under the Contract Act, and in the absence of any established loss, NTPC's retention of Rs. 1.82 Crores amounts to unjust enrichment.

22. Learned senior counsel for PTPL would further submit that the only clause that provides for compensation in case of delay is Article 4.4.1, which enables quantifiable damages based on actual shortfall in generation, and since the delay in commissioning only affects the supply of energy, any compensation ought to have been computed under this clause; however, the learned Single Judge erroneously relied on ***NTPC Vidyut Vyapar Nigam Ltd. v. Saisudhir Energy Ltd.*** *(supra)*, a case where NTPC had actually pleaded the loss, the penalty clause was not under challenge and Article 4.4.1 was not even considered, making that judgment clearly distinguishable and inapplicable to the present case.

23. Learned senior counsel for PTPL would further submit that, without prejudice, even assuming NTPC suffered any loss, such loss could not exceed Rs. 19.75 lakhs based on the PPA for a 43-day delay, and even under Article 4.4.1 of the PPA, the loss would be capped at Rs. 36.39 lakhs, thus here, making the encashment of Rs. 1.82 Crores wholly disproportionate and arbitrary.

ANALYSIS:

24. The Court has heard both parties at length and carefully examined the pleadings, the impugned order, the arbitral award, and the written submissions filed post-hearing.

25. At the outset, it is pertinent to note that the first injection of power into the grid occurred on 21.02.2012. Accordingly, this date is

to be treated as the actual commissioning of the project. This position was accepted by the learned Arbitral Tribunal and has been subsequently upheld by the learned Single Judge.

26. The central issue in these appeals is whether the delay in commissioning the project, from 08.01.2012 to 21.02.2012, caused by PTPL's efforts to obtain permissions and comply with requirements under the PPA, constitutes a *force majeure* event. If so, NTPC's encashment of the PBG from 10.01.2012 till 21.02.2012 may be rendered infructuous; if not, whether NTPC is entitled to encash the PBG for that period. Accordingly, the matter is to be decided under two heads:

(a). PTPL's claim of *force majeure*; and

(b). NTPC's claim for PBG encashment.

27. While examining these issues under Section 37 of the A&C Act, this Court remains mindful of the Hon'ble Supreme Court's rulings that limit judicial interference in arbitral matters to a narrow scope. In a recent judgment, ***Punjab State Civil Supplies Corpn. Ltd. v. Sanman Rice Mills***[19], the Hon'ble Supreme Court summarized the settled position as follows:

> "**11.** Section 37 of the Act provides for a forum of appeal inter-alia against the order setting aside or refusing to set aside an arbitral award under Section 34 of the Act. The scope of appeal is naturally akin to and limited to the grounds enumerated under Section 34 of the Act.
>
> **12.** It is pertinent to note that an arbitral award is not liable to be interfered with only on the ground that the award is illegal or is erroneous in law that too upon reappraisal of the evidence adduced before the arbitral trial. Even an award which may not be reasonable or is non-speaking to some extent cannot ordinarily be interfered with by the courts. It is also well settled that even if two views are possible there is no scope for the court to reappraise the evidence and to take the different view other than that has been

[19] 2024 SCC OnLine SC 2632

taken by the arbitrator. The view taken by the arbitrator is normally acceptable and ought to be allowed to prevail.

13. In paragraph 11 of *Bharat Coking Coal Ltd. v. L.K. Ahuja*, it has been observed as under:

> "11. There are limitations upon the scope of interference in awards passed by an arbitrator. When the arbitrator has applied his mind to the pleadings, the evidence adduced before him and the terms of the contract, there is no scope for the court to reappraise the matter as if this were an appeal and even if two views are possible, the view taken by the arbitrator would prevail. So long as an award made by an arbitrator can be said to be one by a reasonable person no interference is called for. However, in cases where an arbitrator exceeds the terms of the agreement or passes an award in the absence of any evidence, which is apparent on the face of the award, the same could be set aside."

14. It is equally well settled that the appellate power under Section 37 of the Act is not akin to the normal appellate jurisdiction vested in the civil courts for the reason that the scope of interference of the courts with arbitral proceedings or award is very limited, confined to the ambit of Section 34 of the Act only and even that power cannot be exercised in a casual and a cavalier manner.

15. In Dyna *Technology Private Limited v. Crompton Greaves Limited*, the court observed as under:

> "24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.
>
> 25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should

> not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act."

16. It is seen that the scope of interference in an appeal under Section 37 of the Act is restricted and subject to the same grounds on which an award can be challenged under Section 34 of the Act. In other words, the powers under Section 37 vested in the court of appeal are not beyond the scope of interference provided under Section 34 of the Act.

17. In paragraph 14 of MMTC Limited v. Vedanta Limited, it has been held as under:

> "14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."

18. Recently a three-Judge Bench in Konkan Railway Corporation Limited v. Chenab Bridge Project Undertaking referring to MMTC Limited (supra) held that the scope of jurisdiction under Section 34 and Section 37 of the Act is not like a normal appellate jurisdiction and the courts should not interfere with the arbitral award lightly in a casual and a cavalier manner. The mere possibility of an alternative view on facts or interpretation of the contract does not entitle the courts to reverse the findings of the arbitral tribunal.

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CONCLUSION:

20. In view of the above position in law on the subject, the scope of the intervention of the court in arbitral matters is virtually prohibited, if not absolutely barred and that the interference is confined only to the extent envisaged under Section 34 of the Act. The appellate power of Section 37 of the Act is limited within the domain of Section 34 of the Act. It is exercisable only to find out if

the court, exercising power under Section 34 of the Act, has acted within its limits as prescribed thereunder or has exceeded or failed to exercise the power so conferred. The Appellate Court has no authority of law to consider the matter in dispute before the arbitral tribunal on merits so as to find out as to whether the decision of the arbitral tribunal is right or wrong upon reappraisal of evidence as if it is sitting in an ordinary court of appeal. It is only where the court exercising power under Section 34 has failed to exercise its jurisdiction vested in it by Section 34 or has travelled beyond its jurisdiction that the appellate court can step in and set aside the order passed under Section 34 of the Act. Its power is more akin to that superintendence as is vested in civil courts while exercising revisionary powers. The arbitral award is not liable to be interfered unless a case for interference as set out in the earlier part of the decision, is made out. It cannot be disturbed only for the reason that instead of the view taken by the arbitral tribunal, the other view which is also a possible view is a better view according to the appellate court.

21. It must also be remembered that proceedings under Section 34 of the Act are summary in nature and are not like a full-fledged regular civil suit. Therefore, the scope of Section 37 of the Act is much more summary in nature and not like an ordinary civil appeal. The award as such cannot be touched unless it is contrary to the substantive provision of law; any provision of the Act or the terms of the agreement."

(a) PTPL's claim of *force majeure*

28. Before proceeding further, it is important to look at the key parts of the impugned judgment, where the learned Single Judge carefully examined the arbitral award. The relevant paragraphs of the impugned order have been produced below:

"**19.** A reading of clause 3 .1 and 4.1 of the PPA would show that it was the obligation of the respondent to have obtained all consents, clearances and permits required for the supply of power to the petitioner as per the terms of the PPA. The respondent was further under an obligation to commence the supply of power upto the contracted capacity to the petitioner no later than the Scheduled Commissioning Date.

20. There is some dispute whether the respondent was to obtain the approval required under Section 68 of the Electricity Act, 2003 (hereinafter referred to as the 'Electricity Act') within 180 days from the Effective Date in terms of Article 3.1 of the PPA or whether such approval would fall under Article 4.1 of the PPA and,

therefore, could be obtained before the Scheduled Commissioning Date. This question has gained significance because the Arbitral Tribunal in the Impugned Award has held that it is only on achieving the Financial Closure that the respondent could have applied for the approval under Section 68 of the Electricity Act.

21. In my view, the above issue is not relevant for the purpose of the present adjudication in as much as the respondent has not encashed the Bank Guarantees of the petitioner due to its failure to fulfil its obligation under Article 3.1 of the PPA, but on account of the respondent not being able to make the supply of power on the Scheduled Commissioning Date.

22. It cannot be disputed that under Article 3.1(a) or Article 4.1.1 (a), it was the obligation of the respondent to obtain all consents, clearances and permits. In terms of Article 4.1.1 (c), it was the obligation of the respondent to commence the supply of power no later than the Scheduled Commissioning Date. It was also the obligation of the respondent to connect the Power Project Switchyard with the Interconnection Facilities at the Delivery Point in terms of Article 4.1.1(d) of the PPA. The respondent, therefore, was aware of all permissions that would be required to be taken by it for ensuring the connectivity of the Power Project Switchyard with the Interconnection Facilities to the Delivery Point as also for ensuring the commencement of supply of power by the Scheduled Commissioning Date. Even assuming that the permission under Section 68 of the Electricity Act does not fall within the ambit of Article 3.1(a) of the PPA, it was for the petitioner to have managed its affairs and obtain all requisite consents and approvals within such time as would have enabled it to make the supply of power within the Scheduled Commissioning Date. It cannot pass off this burden to the petitioner or claim any benefit out of mismanagement of its own affairs.

23. In the present case, the Arbitral Tribunal has held that "taking a practical view of a commercial transaction" all other steps for consents and approvals could be taken by the respondent only on achieving the Financial Closure. The Financial Closure was achieved by the respondent by 07.07.2011. Thereafter, it commenced the Route Survey which was necessary as it was a condition precedent for obtaining permission under Section 68 of the Electricity Act for laying transmission line. It has further been held that the respondent took time to convince the villagers and negotiate with them and with the Panchayat to lay the overhead transmission line through their lands. This took a substantial amount of time from 15.7.2011 to 26.09.2011 despite respondent's best efforts.

24. I do not concur with the view that the respondent was entitled to any benefit for the time taken by it for completing the Route Survey. As observed above, it was upon the respondent to have

obtained all necessary consents and approvals. The respondent does not plead and infact cannot plead that it was not aware that for obtaining permission under Section 68 of the Electricity Act for laying transmission line the Route Survey was a condition precedent. Even assuming that Article 3.1(a) did not mandate the respondent to have obtained such consent within 180 days of the Effective Date of the PPA, there was no embargo on the respondent to have started the Route Survey immediately with the execution of the PPA and simultaneously with its efforts to obtain Financial Closure. In the absence of any such embargo, it was the unilateral decision of the respondent to wait for the Financial Closure before commencing the Route Survey. The respondent, therefore, cannot claim any extension of time for the period taken by it for the completion of such Route Survey.

25. The Arbitral Tribunal has further observed that after the completion of the Route Survey, the respondent wrote to RRECL on 26.09.2011 requesting it to arrange for permission under Section 68 of the Electricity Act and for the Gazette notification of the approval for laying of transmission line from the project site to the pooling substation. RRECL forwarded the respondent‟s request for approval to the Energy Department of the Government of Rajasthan only on 19.10.2011, that is, after a delay of 20 days. The respondent sent reminders to RRECL on 05.11.2011, 21.11.2011 and 08.12.2011 for expediting the approval. The Energy Department of the Government of Rajasthan finally granted the approval on 20.12.2011 and the said approval was conveyed by RRECL to the respondent only on 27.12.2011. As the whole process took 90 days, out of which 25 days were wasted by RRECL while forwarding the application of the respondent to the Government of Rajasthan and another 4 days for conveying the approval to the respondent, the respondent had no control over the same and has held such delay to be a force majeure condition entitling the respondent to an extension of time of the Scheduled Commissioning Date.

26. I am unable to agree with the finding of the Arbitral Tribunal. Apart from the fact that such delays are foreseeable and infact normal while dealing with governmental and public sector authorities and can therefore, never be a force majeure event, the Arbitral Tribunal has also not considered what would have been a reasonable time for RRECL to forward the application of the respondent to the Energy Department of the Government of Rajasthan and of the approval received from the Energy Department to the respondent. Surely, the respondent could not have been granted the benefit of extension of time for the period that reasonably could have been contemplated by the parties for the grant of such approval.

27. The Arbitral Tribunal has further observed that the respondent wrote to RRECL on 10.10.2011 requesting it to take steps and advise the appropriate authority to grant permission to construct the approach road from the project site at khasra no.1990 passing through khasras Nos.1993 and 1994. Though the said letter was forwarded by RRECL to the District Collector Jaisalmer, RRECL took 21 days in forwarding the same. In spite of reminders dated 27.10.2012 and 27.12.2011, no permission / approval for construction of the approach road was given. For want of the construction of the approach road, the Arbitral Tribunal felt that the respondent would have faced tremendous difficulty in transporting the equipment and other materials to the project site, contributing to the delay of commissioning of the project by the Scheduled Commissioning Date.

28. I again cannot agree with the reasoning of the learned Arbitral Tribunal. The Arbitral Tribunal does not give reference to any clause of the PPA which would require RRECL to obtain such permission. In any case, the above finding would be contrary to Article 3.1(a), 3.1 (c) and 4.1.1(a) of the PPA which obliges the respondent to obtain all consents, clearances and permits required for the supply of power as also for making all arrangements to connect the Power Project Switchyard with the Interconnection Facilities at the Delivery Point.

29. The Arbitral Tribunal further observes that though the possession of the project site was given to the respondent on 25.05.2011, the demarcation of the plot was done wrongly by the Patwari. Once the respondent had done substantial civil construction work on the land after taking possession, the land was demarcated afresh by the Patwari on 11.11.2011, resulting in the delay in the implementation of the project.

30. Here again I am unable to agree with the Arbitral Tribunal. The Arbitral Tribunal has based its findings on mere conjectures and surmises. It has not discussed or even noted the exact nature of the redemarcation exercise done by the Patwari and its effect on the work already done by the respondent on the project site. The exact effect of such fresh demarcation exercise had to be shown by the respondent for seeking extension of time. In any case, in terms of Article 3.1(e) of the PPA, it was the obligation of the respondent to have clear title and possession of the land and therefore, the petitioner cannot be denied its contractual rights due to the above reason.

31. The Arbitral Tribunal has held that the above events would constitute force majeure in terms of Article 11.3 of the PPA. It has held that Article 11.3.1 lists out the force majeure events illustratively. Article 11.4 read with Article 11.7 further allows circumstances, other than those provided in Article 11.3.1, to be included as force majeure events. The Tribunal, therefore, holds

that as the respondent could not commission the Power Project on the Scheduled Commissioning Date because of delay in grant of permission, sanction and approval for laying the transmission line by the governmental instrumentalities, that is, RRECL and the Energy Department of the Government of Rajasthan, on which the respondent had no control directly or indirectly, the same amounted to a force majeure event and the respondent was entitled to extension of time.

32. I am unable to agree with the above finding of the Arbitral Tribunal. Article 11.3.1 uses the word "means" while enumerating the events or circumstances or combination of events stated therein as consisting force majeure. It is a settled law that the use of the word "means" indicates that definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in the definition" (P Kasilingam & Ors. vs. P.S.G. College of Technology & Ors. 1995 Supp (2) SCC 348 and Bharat Co-Operative Bank (Mumbai) Ltd. vs. Co-Operative Bank Employees Union, (2007) 4 SCC 685.

33. In any case, it is trite law that the force majeure clauses are to be narrowly construed. The events or circumstances must not only cause unavoidable delay in the performance of the obligations under the agreement, but also must be such that could not have been avoided even if the affected party had taken reasonable care or complied with the 'Prudent Utility Practices'.

34. In the present case, the respondent itself having delayed initiating and completing the Route Survey and applying for permission to construct the approach road, it certainly has not acted with reasonable care or complied with the Prudent Utility Practices. Further, the time taken by RRECL and the Government of Rajasthan to grant permission cannot come to any avail of the respondent, as the respondent would have been well aware of the bureaucratic delays while dealing with governmental and public sector authorities. Such delays being completely foreseeable, cannot amount to a force majeure condition.

*****

37. Applying the ratio of the above judgment, the finding of the Arbitral Tribunal that the respondent was entitled to the grant of extension of time of the Scheduled Commissioning Date cannot be sustained.

*****

41. I am conscious of the limitations on the powers of this Court while exercising jurisdiction under Section 34 of the Act, however, in view of the specific clauses of the PPA and the law enunciated by the Supreme Court on the force majeure conditions, the findings of the Arbitral Tribunal cannot be sustained and are liable to be set aside."

29. It is evident that the learned Single Judge conducted a thorough and reasoned examination of the arbitral award. Upon such meticulous scrutiny, the Judge proceeded to hold that the delay in obtaining governmental clearances or consents etc. cannot be considered either unforeseeable or beyond the control of PTPL, especially in the context of contracts that inherently involve regulatory compliance.

30. PTPL's contractual obligations under the PPA are clearly stated. Article 3.1(a) requires PTPL to obtain all necessary consents, clearances, and permits for supplying power to NTPC. In addition, Articles 4.1.1(a), (c), and (d) make it clear that PTPL must, at its own cost and risk, secure and maintain these approvals throughout the term of the agreement, start power supply no later than the Scheduled Commissioning Date, and ensure connectivity between the Power Project Switchyard and the Interconnection Facilities at the Delivery Point. These provisions together show that PTPL had the sole and continuing responsibility to get all necessary approvals on time.

31. PTPL's conduct in the discharge of these obligations reflects a glaring absence of diligence. As the learned Single Judge rightly observed, PTPL was fully aware from the outset that a Route Survey was a statutory prerequisite for securing permission under Section 68 of the Electricity Act, 2003, critical for the construction of the transmission line. Following the financial closure, the period from 15.07.2011 to 26.09.2011 was utilized for conducting the route survey in preparation for laying the transmission line. Notwithstanding the absence of any contractual prohibition, PTPL unilaterally chose to defer this vital step until after achieving Financial Closure on

07.07.2011. This deferment was neither mandated nor justified and plainly constitutes a self-induced delay.

32. PTPL's further explanation that incorrect demarcation of the project site by the Patwari contributed to project delays is similarly untenable. Though the possession of land was granted on 25.05.2011, PTPL allegedly discovered the misalignment only after construction had already commenced, necessitating a fresh demarcation on 11.11.2011. However, under Article 3.1(e) of the PPA, it was incumbent upon PTPL to ensure that it had clear title and possession of the site. Its failure to verify this foundational requirement before commencing civil works is a manifestation of gross negligence. Such self-inflicted lapses cannot dilute NTPC's contractual entitlements or be recast as extraneous obstacles.

33. Also, after completing the Route Survey, PTPL wrote to RRECL on 26.09.2011, requesting assistance for obtaining the statutory sanction under Section 68 the Electricity Act, 2003. This request was forwarded to the State Energy Department only on 19.10.2011, culminating in approval on 20.12.2011, which was conveyed on 27.12.2011. Additionally, PTPL claimed logistical challenges due to the absence of an access road, for which permission was sought through RRECL on 10.10.2011. However, RRECL forwarded the request after a 20-day delay, and no approval was granted despite multiple reminders. These allegations, even if factually accurate, do not advance PTPL's case. The PPA does not cast any obligation upon RRECL or any other agency to procure such approvals. Moreover, in infrastructure projects of this scale, the average time consumed by public agencies for grant of permissions are inherently foreseeable. A commercially sophisticated entity like

PTPL was duty-bound to factor in such bureaucratic lag and adopt timely risk-mitigation strategies. Its failure to do so betrays a lack of project preparedness and does not qualify as a *force majeure*.

34. While the Arbitral Tribunal said these combined delays amounted to a *force majeure* event under Articles 11.3, 11.4, and 11.7 of the PPA, we are of the view that the learned Single Judge rightly disagreed with this finding. Article 11 of the PPA states as follows:

> "**11. ARTICLE 11: FORCE MAJEURE**
>
> **11.1 Definitions**
>
> **11.1.1** In this Article, the following terms shall have the following meanings:
>
> **11.2 Affected Party**
>
> **11.2.1** An affected Party means NVVN or the SPD whose performance has been affected by an event of Force Majeure.
>
> **11.3 Force Majeure**
>
> **11.3.1** A 'Force Majeure' means any event or circumstance or combination of events those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:
>
> a) Act of God, including, but not limited to lightning drought, fire and explosion (to the extent originating from a source external to the site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon or tornado;
> b) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade/embargo, revolution, riot, insurrection, terrorist or military action; or
> c) radioactive contamination or ionising radiation originating from a source in India or resulting from another Force Majeure Event mentioned above excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the Power Project by the Affected Party or those employed or engaged by the Affected Party.
> d) An event of Force Majeure identified under NVVN-Discom PSA, thereby affecting delivery of power from SPD to Discom.

11.4 Force Majeure Exclusions

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

a. Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts or consumables for the Power Project;
b. Delay in the performance of any contractor, sub-contractor or their agents;
c. Non-performance, resulting from normal wear and tear typically experienced in power generation materials and equipment;
d. Strikes at the facilities of the Affected Party;
e. Insufficiency of finances or funds or the agreement becoming onerous to perform; and
f. Non-performance caused by, or connected with, the Affected Party's:
   i. Negligent or intentional acts, errors or omissions;
   ii. Failure to comply with an Indian Law; or
   iii. Breach of or default under this Agreement.

11.5 Notification of Force Majeure Event

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

Provided that such notice shall be a pre-condition to the Affected Party's entitlement to claim relief under this Agreement. Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed. The Affected Party shall give the other Party regular (and not less than monthly) reports on the progress of those remedial measures and such other information as the other Party may reasonably request about the Force Majeure Event.

11.5.2 The Affected Party shall give notice to the other Party of (i) the cessation of the relevant event of Force Majeure; and (ii) the cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this

Agreement, as soon as practicable after becoming aware of each of these cessations.

11.6 Duty to Perform and Duty to Mitigate

11.6.1 To the extent not prevented by a Force Majeure Event pursuant to Article 11.3, the Affected Party shall continue to perform its obligations pursuant to this Agreement. The Affected Party shall use its reasonable efforts to mitigate the effect of any Force Majeure Event as soon as practicable.

11.7 Available Relief for & Force Majeure Event

11.7.1 Subject to this Article 11:

(a) no Party shall be in breach of its obligations pursuant to this Agreement except to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure Event;

(b) every Party shall be entitled to claim relief in relation to a Force Majeure Event in regard to its obligations, including but not limited to those specified under Article 4.5;

(c) For avoidance of doubt, neither Party's obligation to make payments of money due and payable prior to occurrence of Force Majeure events under this Agreement shall be suspended or excused due to the occurrence of a force Majeure Event in respect of such Party.

(d) Provided that no payments shall be made by either Party affected by a Force Majeure Event for the period of such event on account of its inability to perform its obligations due to such Force Majeure Event."

35. Article 11.3 expressly uses the term *"means"* while defining *force majeure*, signifying a defined and ring-fenced enumeration of events that qualify for such status. This interpretation aligns with settled jurisprudence, including the authoritative pronouncement of the Hon'ble Supreme Court (5-Judges) in ***Punjab Land Development and Reclamation Corpn. Ltd. v. Presiding Officer, Labour Court***[20] held as under:

"**72.** The definition has used the word 'means'. When a statute says that a word or phrase shall "mean"— not merely that it shall "include" — certain things or acts, "the definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in definition" (per Esher,

[20] (1990) 3 SCC 682

M.R., *Gough* v. *Gough* [(1891) 2 QB 665: 65 LT 110]). A definition is an explicit statement of the full connotation of a term."

(Emphasis supplied)

36. Further, a 3-judges bench of the Hon'ble Supreme Court in ***Urban Land and Infrastructure Ltd. v. Union of India***[21] observed as follows:

"**82.** This statement of the law, as can be seen from the quotation hereinabove, is without citation of any authority. In fact, in *Jagir Singh* v. *State of Bihar* [*Jagir Singh* v. *State of Bihar*, (1976) 2 SCC 942 : 1976 SCC (Tax) 204] , SCC paras 11 and 19 to 21 and *Mahalakshmi Oil Mills* v. *State of A.P.* [*Mahalakshmi Oil Mills* v. *State of A.P.*, (1989) 1 SCC 164 : 1989 SCC (Tax) 56] , SCC paras 8 and 11 (which has been cited in *P. Kasilingam* [*P. Kasilingam* v. *PSG College of Technology*, 1995 Supp (2) SCC 348]), this Court set out definition sections where the expression "means" was followed by some words, after which came the expression "and includes" followed by other words, just as in *Krishi Utpadan Mandi Samiti case* [*Krishi Utpadan Mandi Samiti* v. *Shankar Industries*, 1993 Supp (3) SCC 361 (2)] . In two other recent judgments, *Bharat Coop. Bank (Mumbai) Ltd.* v. *Employees Union* [*Bharat Coop. Bank (Mumbai) Ltd.* v. *Employees Union*, (2007) 4 SCC 685 : (2007) 2 SCC (L&S) 82] , SCC paras 12 and 23 and *State of W.B.* v. *Associated Contractors* [*State of W.B.* v. *Associated Contractors*, (2015) 1 SCC 32 : (2015) 1 SCC (Civ) 1] , SCC para 14, this Court has held that wherever the expression "means" is followed by the expression "and includes" whether with or without additional words separating "means" from "includes", these expressions indicate that the definition provision is exhaustive as a matter of statutory interpretation. It has also been held that the expression "and includes" is an expression which extends the definition contained in words which follow the expression "means". From this discussion, two things follow. *Krishi Utpadan Mandi Samiti* [*Krishi Utpadan Mandi Samiti* v. *Shankar Industries*, 1993 Supp (3) SCC 361 (2)] cannot be said to be good law insofar as its exposition on "means" and "includes" is concerned, as it ignores earlier precedents of larger and coordinate Benches and is out of sync with later decisions on the same point. Equally, Dr Singhvi's argument that clauses (*a*) to (*i*) of Section 5(8) of the Code must all necessarily reflect the fact that a financial debt can only be a debt which is disbursed against the consideration for the time value of money, and which permeates clauses (*a*) to (*i*), cannot be accepted as a matter of statutory interpretation, as the expression "and

[21] (2019) 8 SCC 416

includes" speaks of subject-matters which may not necessarily be reflected in the main part of the definition."

(Emphasis supplied)

37. Similarly, a 5-judges bench of the Hon'ble Supreme Court in ***Jaishri Laxmanrao Patil v. State of Maharashtra***[22] observed as follows:

> "**156.2.** The use of the term "*means*" which has been interpreted to imply an exhaustive definitional expression, in several decisions of this Court [*Punjab Land Development & Reclamation Corpn. Ltd.* v. *Labour Court*, (1990) 3 SCC 682: 1991 SCC (L&S) 71 where a Constitution Bench stated: (SCC p. 717, para 72) "*72*. The definition has used the word "means". When a statute says that a word or phrase shall "mean"— not merely that it shall "include" — certain things or acts, 'the definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in definition' [per *Gough* v. *Gough*, (1891) 2 QB 665 (CA)]. A definition is an explicit statement of the full connotation of a term." Also *P. Kasilingam* v. *P.S.G. College of Technology*, 1995 Supp (2) SCC 348; *Black Diamond Beverages* v. *CTO*, (1998) 1 SCC 458 and *Godrej & Boyce Mfg. Co. Ltd.* v. *State of Maharashtra*, (2014) 3 SCC 430.] , as a device to place the matter beyond the pale of interpretation, to ensure that the only meaning attributable is the one directed by the provision. Thus, SEBCs are, by reason of Article 366(26-C) *only those deemed to be so under Article 342-A.*
>
> *****
>
> **217.** To ascertain the plain meaning of the legislative language, we proceed to construe Article 342-A of the Constitution of India. Article 342-A was inserted in the Constitution by the Constitution (102nd Amendment) Act, 2017. A plain reading of Article 342-A(1) would disclose that the President shall specify the socially and educationally backward classes by a public notification after consultation with the Governor. Those specified as socially and educationally backward classes in the notification shall be deemed to be socially and educationally backward classes in relation to that State or Union Territory for the purposes of the Constitution. Article 342-A(2) provides that inclusion or exclusion from the list of socially and educationally backward classes specified in the notification under Article 342-A(1) can be only done by law made by Parliament. The words "Central List" used in Article 342-A(1) had given rise to conflicting interpretations. Article 366 deals with definitions. Clause (26-C) was inserted in Article 366 of the

[22] (2021) 8 SCC 1

> Constitution by the Constitution (102nd Amendment) Act, 2017 according to which, socially and educationally backward classes shall mean such backward classes as are so deemed under Article 342-A for the purposes of the Constitution. The use of word "means" indicates that the definition is a hard-and-fast definition, and no other meaning can be assigned to the expression that is put down in definition. [See : *The Agricultural Holdings (England) Act, 1883, In re* sub nom *Gough* v. *Gough* [*The Agricultural Holdings (England) Act, 1883, In re* sub nom *Gough* v. *Gough*, (1891) 2 QB 665 (CA)] , *Punjab Land Development & Reclamation Corpn. Ltd.* v. *Labour Court* [*Punjab Land Development & Reclamation Corpn. Ltd.* v. *Labour Court*, (1990) 3 SCC 682: 1991 SCC (L&S) 71] and *P. Kasilingam* v. *P.S.G. College of Technology* [*P. Kasilingam* v. *P.S.G. College of Technology*, 1995 Supp (2) SCC 348].] When a definition clause is defined to "mean" such and such, the definition is prima facie restrictive and exhaustive. [*Indra Sarma* v. *V.K.V. Sarma*, (2013) 15 SCC 755: (2014) 5 SCC (Civ) 440: (2014) 6 SCC (Cri) 593]"
>
> ***(Emphasis supplied)***

38. Additionally, Article 11.4 further narrows the scope by explicitly excluding certain events from being treated as *force majeure*, even if they involve delay or hardship. Article 11.7 sets out the specific reliefs available where a qualifying *force majeure* event is established. In this context, PTPL's attempt to categorize project delays caused by its own inaction or foreseeable administrative processes as *force majeure* is contractually unsustainable.

39. It is noteworthy that Article 11.5 mandates that the affected party must notify the other party of a *force majeure* event as soon as reasonably practicable, but no later than seven days from when it knew or ought to have known of the event's commencement. If communication is disrupted, notice must be given within one day of its restoration. This notice is a precondition to claiming relief and must include full particulars of the event, its impact, proposed remedial measures, and regular progress updates (at least monthly). The affected party must also notify the other of the cessation of both

the event and its effects on contractual performance as soon as reasonably possible.

40. However, the record clearly indicates that PTPL failed to comply with the mandatory pre-condition under Article 11.5, which requires timely notice to invoke the benefit of *force majeure*. PTPL did not raise the claim of *force majeure* at the time of the alleged events but only asserted it retrospectively upon realizing that it had failed to commission the project within the Scheduled Commissioning Date and could be subjected to the consequences outlined under Article 4.6 of the PPA.

41. Besides, as a final attempt, PTPL has, for the first time in this appeal under Section 37 of the A&C Act, sought to invoke Section 56 of the Contract Act by contending that administrative delays made performance of the contract impossible. This contention is wholly misconceived. Not only was this plea never raised before the Arbitral Tribunal or the learned Single Judge, but the PPA contains an express and exhaustive *force majeure* clause governing such contingencies. In view of these circumstances, we find no reason to examine this belated assertion at this stage.

42. In light of the above, we find no error in the conclusions drawn by the learned Single Judge. The delays attributed to PTPL appear to arise from its lack of diligence and failure to act with requisite foresight. Such delays, being foreseeable and remediable, do not constitute *force majeure* under the PPA.

(b) <u>NTPC's claim for PBG encashment</u>

43. We would now address the issue of the entitlement of NTPC to encash the PBG for the period 10.01.2012 to 21.02.2012 under Article

4.6.1 of the PPA. It is pertinent to note that NTPC has already encashed Rs. 1,82,13,000/- that is equivalent to one month's PBG, and the learned Single Judge has upheld it.

44. Before addressing that question, it is necessary to consider the examination undertaken by the learned Single Judge in the impugned order on this issue. The relevant paragraphs of the impugned order are reproduced below:

> "**42.** As the Arbitral Tribunal found the respondent to be entitled to an extension of time of the Scheduled Commissioning Date, it consequently directed the petitioner to return the amount of Rs.1,82,13,000/- received by the petitioner through the encashment of the Performance Bank Guarantee to the respondent along with interest @ 10% per annum from the date of the Award till realization. In view of the finding above, this direction cannot be sustained and is liable to be set aside.
>
> **43.** Learned senior counsel for the respondent, relying upon the judgment of the Supreme Court in ***Kailash Nath Associates*** (supra) has contended that the petitioner has failed to prove any damages suffered by it due to the delay in the supply of power by the respondent. Further, relying upon Clause 4.4.1 of the PPA, he submits that the petitioner would at best be entitled to receive from the respondent such compensation computed at the rate equal to the compensation payable by the Discoms towards non-meeting of RPOs, subject to a minimum of 25% of the applicable tariff.
>
> **44.** I am unable to agree with the submission of the leaned senior counsel for the respondent.
>
> ****
>
> **46.** As far as Article 4.4.1 is concerned, it applies only where the project has already been commissioned and thereafter the Solar Power Developer is unable to generate the minimum amount of energy in a contract year. Per contra, Article 4.6.1 of the PPA provides for imposition of liquidated damages on the SPD for being unable to commence the supply of power by the Scheduled Commissioning Date. The two provisions, therefore, apply in separate spheres and cannot control the operation of each other in their own sphere. There is no allegation that the liquidated damages mentioned in Article 4.6.1 amount to a penalty. Therefore, there is no reason to limit its effect and scope by invoking Article 4.4.1.
>
> **47.** In ***Sai Sudhir Energy Ltd.*** (supra), the Division Bench of this Court, having upheld the right of the petitioner to seek liquidated

damages, has further considered the question relating to reasonableness and quantum of damages. In the facts of that case, it directed the SPD therein to pay damages at the rate of Rs.1 lac per Mega Watt per day. In the present case, the petitioner has already encashed the Performance Bank Guarantee for a sum of Rs.1,82,13,000/- for the delay till 08.02.2012. Though, I am unable to agree with the finding of the Arbitral Tribunal that the circumstances mentioned hereinabove amounted to force majeure conditions, the circumstances relied upon by the respondent, certainly show that it was not as if the respondent was not serious about completion of the project on time or was intentionally or negligently delaying the performance of its obligations.

48. In my view, therefore, the claim of the petitioner that it should be allowed to encash the Bank Guarantee for the further period of delay between 8.2.2012 to 21.2.2012 by the respondent cannot be sustained. Interest of justice would be met if the petitioner is allowed to retain the amount of Rs.1,82,13,000/- obtained by it from the encashment of the Performance Bank Guarantee.

49. In view of the above, the Award in so far as it directs the petitioner to refund the amount of Rs.1,82,13,000/- along with interest at the rate of 10% per annum from the date of the Award till realization is set aside, leaving the parties to bear their own costs of the petition."

45. Article 4.6.1 of the PPA, which stipulates pre-estimated liquidated damages for delay in commencing supply of power to NTPC during the initial three months, provides:

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

a. Delay upto one (1) month - NVVN will encash 20% of total Performance Bank Guarantee.
b. Delay of more than one (1) month and upto two months- NVVN will encash another 40% of the total Performance Bank Guarantee.
c. Delay of more than two and upto three months - NVVN will encash the remaining performance Bank Guarantee."

46. While examining the matter, the learned Single Judge categorically held that "*There is no allegation that the liquidated*

damages mentioned in Article 4.6.1 amount to a penalty. Therefore, there is no reason to limit its effect and scope by invoking Article 4.4.1". PTPL has not questioned this finding in its appeal. It was only during the hearing and in written submissions that PTPL argued Article 4.4.1 is penal in nature. At this stage, we do not consider it appropriate to reopen that issue. Our limited task is to determine whether the learned Single Judge was correct in upholding NTPC's entitlement to encash the PBG while denying any further encashment.

47. The Hon'ble Supreme Court in ***Kailash Nath Associates v. DDA*** (*supra*) has summarized the principles on contractual liquidated damages and compensation, including when courts may interfere with stipulated sums and the role of proof of actual loss. The conclusions set out in that judgement state as follows:

> **"43.** On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:
>
> **43.1.** Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.
>
> **43.2.** Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.
>
> **43.3.** Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.
>
> **43.4.** The section applies whether a person is a plaintiff or a defendant in a suit.

> **43.5.** The sum spoken of may already be paid or be payable in future.
>
> **43.6.** The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.
>
> **43.7.** Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction *before* agreement is reached, Section 74 would have no application."
>
> ***(Emphasis supplied)***

48. In the present case, NTPC has not been able to establish the actual loss or damage suffered due to the delay attributable to PTPL in the commencement of the project. While we are mindful that, in large-scale infrastructure projects, quantification of actual loss resulting from time overruns is inherently complex and often impracticable, the law does not mandate proof of precise loss where the parties have agreed to a mechanism of reasonable compensation. The underlying principle is that such compensation should be fair, proportionate and not punitive in nature.

49. In this context, the learned Single Judge, in our opinion, has carefully appraised the facts and circumstances, and rightly concluded that the sum of Rs. 1,82,13,000/-, which was the PBG for one month, constitutes a just and reasonable compensation for the period of delay from 08.01.2012 to 21.02.2012. The learned Single Judge further held, and we concur, that any additional claim towards further encashment of the PBG would not only lack justification but would also amount to imposing an excessive and inequitable burden on PTPL. Accordingly, NTPC's claim for further encashment of the PBG cannot be sustained.

***CONCLUSION*:**

50. For the reasons set out above, no ground is made out by either party to warrant interference with the impugned order dated 18.12.2018 passed by the learned Single Judge, which deserves affirmation.

51. The present appeals and all pending applications, if any, are disposed of in the above terms.

52. No order as to costs.

SUBRAMONIUM PRASAD, J.

HARISH VAIDYANATHAN SHANKAR, J.

JULY 18, 2025/sm/er