(2022) 07 DEL CK 0014

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 317, 374 Of 2020

M/S Ntpc Vidyut Vyapar Nigam Ltd. APPELLANT

Vs

M/S Dde Renewable Energy Pvt. Ltd RESPONDENT

Date of Decision : 06-07-2022

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 9, 34
Indian Contract Act, 1872 — Section 74

Citation : (2022) 07 DEL CK 0014

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Bharat Sangal, R R Kumar, Babita Kushwaha, Deepak Khurana, Vineet Tayal, Nishtha Wadhwa

Final Decision : Disposed Of

Judgement

Vibhu Bakhru, J

INTRODUCTION

1. The parties have filed the present petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter 'the A&C Act') impugning an arbitral award dated 21.10.2019 (hereinafter 'the impugned award') delivered by an Arbitral Tribunal comprising of Justice (Retd.) G.N. Ray, Justice (Retd.) Usha Mehra, and Justice (Retd.) G.B. Patnaik as the Presiding Arbitrator (hereinafter 'the Arbitral Tribunal').

2. The impugned award was rendered in the context of disputes that have arisen between the parties in connection with a Power Purchase Agreement dated 10.01.2011(hereinafter 'the Agreement').

THE CONTROVERSY

3. The controversy in the present petition relates to the question whether there was any delay on the part of DDE Renewable Energy Pvt.Ltd. (hereinafter 'DDE')

in complying with its obligations under the Agreement and whether it was liable to pay liquidated damages for the said delay, if any. In addition, NTPC Vidyut Vyapar Nigam Limited (hereinafter 'NVVNL') had also claimed compensation for shortfall in supply of solar power, which was disputed by DDE.

4. The Arbitral Tribunal found that there was a delay of one day in commissioning the solar project and DDE was liable to pay liquidated damages quantified at 20% of the aggregate amount of the performance bank guarantees. The Arbitral Tribunal further found that DDE was not liable to pay any compensation for any shortfall in supply of energy.

5. Both the parties are aggrieved by the finding of the Arbitral Tribunal regarding the delay in commissioning of the solar power project and the consequent decision regarding levy of liquidated damages. According to NVVNL, the delay is in excess of one month and DDE is liable to pay an additional 40% of the aggregate amount of the Performance Bank Guarantees as liquidated damages. According to DDE, there is no delay in commissioning the solar project in question and therefore, it is also aggrieved by the impugned award. In addition, NVVNL is aggrieved by the decision of the Arbitral Tribunal in absolving DDE of any liability on account of shortfall in supply of solar power. Thus, both the parties have assailed the impugned award to the extent that they are aggrieved.

FACTUAL CONTEXT

6. In the month of July 2010, the Ministry of New & Renewable Energy, Government of India (hereinafter 'MNRE') issued certain guidelines for the selection of new grid connected solar power projects. NVVNL was selected as a nodal agency for arranging and purchasing solar power from Solar Power Developers (hereinafter 'SPD' in singular and 'SPDs' in plural).

7. On 18.08.2010, NVVNL issued a request for selection (hereafter 'RFS'), which was followed by a request for proposal (hereafter 'RFP') on 29.10.2010.

8. Pursuant to the said RFP, DDE (a SPD) submitted its bid for establishing a solar power project and supplying power. DDE's bid was accepted and NVVNL issued a Letter of Intent dated 11.12.2010 (hereinafter 'the LoI') accepting DDE's proposal to set up the power project at Village Askandra, Tehsil Nachna in District Jaisalmer, Rajasthan.

9. Thereafter, on 10.01.2011, the parties entered into the Agreement. In terms of the Agreement, DDE agreed to set up a "Solar Power Project based on Advanced Technology of 5 MW capacity" (hereinafter 'the Power Project') and supply power for a period of twenty-five years commencing from the Commercial Operation Date (hereinafter 'COD') of the Power Project.

10. In terms of the Agreement, the Scheduled Commissioning Date (hereinafter 'SCD') was stipulated as 09.01.2012.

11. The Agreement also required DDE to furnish Performance Bank Guarantees

(hereinafter also referred to as 'the PBG'). It was further agreed that in the event there was a failure on the part of DDE to commission the Power Project by the SCD (that is, on or before 09.01.2012), NVVNL would have the right to levy liquidated damages in a phased manner and recover the damages by invoking the PBG. In terms of the Agreement, DDE furnished the following Bank Guarantees:-

(i) Bank Guarantee No. 46151LG000411 for Rs. 2,42,63,000/- representing 20% of the total PBG, dated 05.01.2011 drawn on Punjab National Bank, New Delhi;

(ii) Bank Guarantee No. 46151LG000511 for Rs. 4,85,26,000/- representing 40% of the total PBG, dated 05.01.2011 drawn on Punjab National Bank, Delhi;

(iii) Bank Guarantee No. 46151LG000611 for Rs. 4,85,26,000/- representing 40% of the total PBG, dated 05.01.2011 drawn on Punjab National Bank, Delhi.

12. Further, in terms of the Agreement, DDE, at its own risk and cost, was required to supply power at the Delivery Point and enter into a transmission agreement with the State Transmission Utility (hereinafter 'STU') for "evacuation and connectivity of the STU system upto the delivery point of SPD by the Scheduled Commissioning Date".

13. On 06.07.2011, DDE entered into a Transmission Agreement with the concerned STU – Rajasthan Rajya Vidyut Prasaran Nigam Ltd. (hereafter 'RRVPNL') – whereby RRVPNL also agreed to construct a 132 KV transmission line one month prior to the SCD. The power generated was to be used by NVVNL for further sale to Distribution Companies (DISCOMS) under a Power Sale Agreement (hereinafter 'PSA') entered into between NVVNL and DISCOMS on 10.01.2011. DDE states that evacuation of the power was dependent upon the transmission line being completed by RRVPNL.

14. According to DDE, RRVPNL failed to construct the 132 KV transmission line within the stipulated period due to unrest created by the local public relating to the issue regarding Right of Way (RoW).

15. It is further claimed by DDE that as a measure of mitigation, Jodhpur Vidyut Vitaran Nigam Ltd., the local DISCOM, permitted DDE to temporarily connect the Project by a 33 KV line to an existing 33 KV Sub-station at Village Chandasar, District Jaisalmer. DDE claims that by 10.01.2012, it had constructed and commissioned the Power Project.

16. Thereafter, on 16.01.2012, the Office of Superintending Engineer (RDPPC), Jodhpur DISCOM issued a certificate to DDE certifying that it had successfully commissioned the Power Project by 10.01.2012.

17. DDE claims that the supply of power from the Power Project commenced from 11.01.2012 till 14.02.2012 – which was the new commissioning date ascertained by the Review Committee of the MNRE – NVVNL purchased power from DDE and paid tariff at the rates specified in the Agreement. The said tariff

was applicable only if the Power Project was commissioned by DDE.

18. DDE states that on 06.02.2012, in anticipation of completion of the 132 KV transmission line, NSPPL installed and connected equipment modules aggregating 5 MW capacity.

19. Thereafter, by letters dated 14.02.2012 and 15.02.2012, DDE informed the MNRE and Rajasthan Renewable Energy Corporation Limited (RRECL) that it had commissioned the Power Project but due to the failure on the part of RRVPNL to complete the 132 KV transmission line, it was unable to evacuate the entire power that could be generated form the Power Project.

20. By a letter dated 27.02.2012, RRECL informed DDE regarding the guidelines dated 24.02.2012 issued by the MNRE concerning the commissioning of solar power plants.

21. In view of the guidelines issued by the MNRE regarding the commissioning of solar power plants, NVVNL invoked Clause 4.6.1 of the Agreement and invoked the PBG to the extent of 20% for not commissioning the Power Project on or before 09.01.2012. DDE paid the said amount.

22. Thereafter, NVVNL sought invocation of the PBG to a further extent of 40% as, according to NVVNL, there was a delay of thirty-six days in commissioning the Power Project. Aggrieved by this action, on 01.05.2012, DDE filed an application (being O.M.P No. 415 of 2012) under Section 9 of the A&C Act before this Court seeking an order restraining NVVNL from encashing the PBG. By an order dated 01.05.2012, this Court directed the parties to maintain status quo regarding the PBG (the remaining two guarantees). By an order dated 03.09.2012, this Court modified the aforesaid order and allowed DDE to keep one of the bank guarantees alive.

23. By a letter dated 10.09.2012, DDE invoked the Arbitration Clause as included in the Agreement. And, the Arbitral Tribunal was constituted.

ARBITRAL PROCEEDINGS

24. Before the Arbitral Tribunal, DDE filed its Statement of Claims. The claims made by DDE in its Statement of Claims are set out below:

"A. A declaration that the Report of the Committee constituted by Ministry of New and Renewable Energy, Govt. of India determining the date of commissioning of the project of the Claimant Company as 14.2.2012, under the PPA is erroneous, baseless and arbitrary;

B. An order quashing the Report of the Committee constituted by Ministry of New and Renewable Energy, Govt. of India determining the date of commissioning of the project of the Claimant Company as 14.2.2012;

C. A declaration that the claimant company has commissioned its project within the stipulated time under the PPA and no Liquidated Damages can be levied by the Respondent under the PPA;

D. A declaration that Clause 4.6 of the PPA, which provides for Liquidated Damages, is invalid and is of no effect as being contrary to the provision of Section 74 of the Contract Act, 1872;

E. A declaration that the Respondent has illegally, and wrongfully imposed Liquidated Damages to the tune of Rs.2,42,63,000/- under the PPA;

F. An order directing the Respondent to refund the amount of Rs.2,42,63,000/- along with interest @ 18% per annum from the date of payment i.e. 16.02.2012 till the date of realization to the Claimant Company;

G. Permanent order restraining the Respondent from invoking the Bank Guarantee No.44371LG000511 furnished by Claimant Company;

H. Payment of an amount of Rs.4,51,02,750/- (Rupees Four Crores Fifty One Lacs Two Thousand and Seven Hundred and Fifty Only) as loss suffered by the Claimant Company due to delayed performance of obligations under the PPA as detailed in paragraph 59 above;

I. A declaration that the demand of Rs.23,94,534/- (Rupees Twenty Three Lacs Ninety Four Thousand Five Hundred Thirty Four Only) made by the Respondent vide letter dated 12.08.2015 on account of compensation for the alleged short supply of 829276 KWH of energy in the Contract Year 2011-2012 (i.e. 10.01.2012 to 31.03.2012) is invalid, non-est and illegal;

J. Permanently restrain the Respondent from acting in any manner 111 furtherance of the letter dated 12.08.2015 including but not limited to deducting/ setting off/adjusting a sum of Rs.23,94,534/- (Rupees Twenty Three Lacs Ninety Four Thousand Five Hundred Thirty Four Only) or any part thereof on account of alleged compensation for the alleged short supply of 829276 KWH of energy in the Contract Year 2011-2012 (i.e. 10.01.2012 to 31.03.2012) from any of the future invoices raised by the Claimant under the PPA;

K. A declaration that the demand of Rs.25,07,259/- (Rupees Twenty Five Lacs Seven Thousand Two Hundred and Fifty Nine Only) on account of sale of infirm power, transmission losses admitted by RDPCC and compensation for short supply of energy in the Contract Year 2012-2013 is invalid, non-est and illegal;

L. Direct the Respondent to refund an amount of Rs.25,07,260/- (Rupees Twenty Five Lacs Seven Thousand Two Hundred Sixty Only) illegally deducted from December, 2013 bill payment on account of sale of infirm power, transmission losses admitted by RDPCC and compensation for short supply of energy in the Financial Year 2012-13 along with interest @18% per annum from 04.03.2014 till the date of realization of the same;

M. The entire cost of arbitration proceedings and other legal cost;

N. Any other relief which this Hon'ble Tribunal deems fit and proper.”

25. One of the principal disputes before the Arbitral Tribunal was regarding the date of commissioning of the Power Project.

26. NVVNL stated that the date of commissioning ought to be considered as the date on which the project capacity was installed and not the date on which energy had flown into the grid. Before the Arbitral Tribunal, NVVNL relied upon the report of the Committee set up by the MNRE by its letter dated 27.02.2012. The Committee had concluded that "a solar PV project will be considered as commissioned if all equipment as per rated project capacity has been installed and energy has flown into the grid". According to NVVNL, the date of commissioning the Power Project was 14.02.2012 as determined by the said Committee.

27. DDE disputed the same. According to DDE, it had commissioned the Power Project on 10.01.2012. It relied upon the report of the Committee of four officers constituted by the Office of the Superintending Engineer (RDPPC) by an Office Order dated 06.01.2012, as well as the Commissioning Certificate dated 16.01.2012 issued by the Office of the Superintending Engineer (RDPCC). On the strength of the said documents, DDE claimed it had commissioned the Power Project on 10.01.2012 – the stipulated Commissioning Date – and therefore, was not liable to pay any liquidated damages to NVVNL in terms of Clause 4.6.1 of the Agreement.

28. However, according to NVVNL, the delay in commissioning was over one month and therefore, DDE was liable to pay liquidated damages at the rate of 20% of the total PBG for the first one month and, further 40% of the total PBG for the delay beyond a period of one month.

29. The second controversy before the Arbitral Tribunal related to the short supply of power during the contract year 2011-12 and 2012-13.

30. NVVNL had deducted a sum of Rs. 25,07,260/- as compensation towards short supply of power and transmission lost during the Contract Year 2012-13 and, a further sum of Rs. 23,94,534/- for short supply of power for the Contract Year 2011-12 (10.01.2012 to 31.03.2012).

31. The said deductions were made belatedly. The deduction for the Contract Year 2012-13 was communicated by a letter dated 16.04.2014, and deduction for the year 2011-12 was communicated by a letter dated 12.08.2015.

32. According to DDE, the deduction of Rs. 25,07,260/- was illegal as the shortfall was not for reasons solely attributable to DDE. It claimed that the shortfall was principally on account of non-commissioning of the 132 KV line for transmission by the STU (RRVPNL). Inter-se NVVNL and DISCOMS, NVVNL had also disputed that any amount was payable to DISCOMS on account of shortfall in supply of power.

33. NVVNL claimed that DDE was responsible for the delay in construction of the 132 KV transmission line. Merely because DDE had engaged RRVPNL for

constructing the 132 KV transmission line did not absolve DDE's responsibility for the same. It was contended on behalf of NVVNL that RRVPNL was engaged as an EPC Contractor by DDE and NVVNL was not concerned with the mode and method in which the transmission line was constructed.

34. The Arbitral Tribunal found that the date of commissioning of the Power Project was 11.01.2012, that is, the date on which the power was first supplied to the grid. The Arbitral Tribunal rejected the contention that the definition of 'commissioning' as provided by the Committee constituted by the MNRE was required to be followed. It held that the said Committee had been constituted after the parties had entered into the Agreement and therefore, the said definition was not binding. However, it did not accept DDE's contention that it had commissioned the Power Project on 10.01.2012. The Arbitral Tribunal held that the object of commissioning is to effect safe and orderly handover of the unit from the contractor to the owner guaranteeing its operability in terms of performance reliability and safety. Thus, it would be appropriate that the date on which the power is generated and injected into the grid be taken as the date of commissioning of the Power Project. The Arbitral Tribunal found that DDE had injected power into the grid on 11.01.2012 and therefore, determined that date as the date of commissioning of the Power Project.

35. Accordingly, the Arbitral Tribunal held that in terms of Clause 4.6.1 of the Agreement, DDE was liable to pay compensation to the extent of 20% of the total PBG for the delay of one day in commissioning the Power Project. Since DDE had paid the said amount, albeit under protest, the Arbitral Tribunal held that there was no question of NVVNL refunding the same.

36. In view of the Arbitral Tribunal's finding that the Power Project was commissioned on 11.01.2012, NVVNL's claim for further liquidated damages computed at 40% of the PBG was rejected.

37. Insofar as the payment regarding shortfall for supply of power is concerned, the Arbitral Tribunal held that DDE was not solely responsible for the same and therefore, no such compensation was payable. Accordingly, the Arbitral Tribunal awarded a sum of Rs. 25,07,260/-, which was deducted by NVVNL, in favour of DDE along with interest at the rate of 18% per annum from the date of deduction till the date of payment of the amount, if the same was not refunded within a period of one month from the date of the award.

38. In view of the aforesaid findings, the Arbitral Tribunal rejected NVVNL's claim for a further amount of Rs. 23,94,534/- as compensation for short supply of power during the Contract Year 2011-12.

39. DDE's claim for compensation on account of loss suffered to the extent of Rs. 4,51,02,750/- was rejected.

SUBMISSIONS

40. Mr. Sangal, learned senior counsel appearing for NVVNL, has assailed the

impugned award on, essentially, two fronts. First, he submitted that the Arbitral Tribunal has grossly erred in ignoring the language of Clause 4.6.1 of the Agreement. He submitted that Clause 4.6.1 of the Agreement provided for liquidated damages for delay in commencement of supply of power and "making the Contracted Capacity available" but the Arbitral Tribunal had completely ignored the said language. It had interpreted Clause 4.6.1 of the Agreement as providing for liquidated damages for the delay in commissioning and not in making the contracted capacity available.

41. Second, he submitted that the Arbitral Tribunal had grossly erred in denying NVVNL's claim for shortfall of supply of power on account of delay in commissioning the transmission lines. He submitted that in terms of the Agreement, DDE was responsible for supply of power to the point of delivery. It had engaged RRVPNL as a contractor for setting up the line along with the other SPDs. However, it continued to be responsible for delivery of the power at the delivery point. He submitted that the Arbitral Tribunal had grossly erred in not appreciating that the Agreement required DDE to enter into a transmission agreement with the STU (RRVPNL in this case) for evacuation of power to the grid; it did not contemplate the STU to be appointed as an executing agency for construction of transmission line till the point of delivery.

42. Mr Khurana, learned counsel appearing for DDE, countered the aforesaid submissions. He has also assailed the impugned award to the extent the Arbitral Tribunal held that the date of commissioning of the Power Project was 11.01.2012. He submitted that in fact the Power Project was commissioned on 10.01.2012. He submitted that the Office of Superintending Engineer (RDPCC) had issued the Solar PV Power Generation Project - Commissioning Certificate dated 16.01.2012 certifying that DDE had "successfully commissioned 01 No.X 05 MW Solar PV Power Generation Project having CRYSTALLINE PV TECHNOLOGY at Village Askandra, Tehsil Nachana & District - Jaisalmer on dated 10th Jan'2012.". He stated that this certificate was not challenged and therefore, the Power Project was commissioned on 10.01.2012. He contended that the Arbitral Tribunal's decision that injection of power into the grid was necessary for commissioning of the Project is, ex facie, erroneous.

REASONS AND CONCLUSION

43. As is apparent from the above, the controversy in the present case is twofold. The first relates to the levy of liquidated damages under Clause 4.6.1 of the Agreement. And, the second relates to levy of compensation under Clause 4.4.1 of the Agreement.

44. Clause 4.6.1 of the Agreement provides for liquidated damages for delay in commencement of supply of power to NVVNL. The said clause is relevant and set out below:

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

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.

4.6.2 In case the commissioning of Power Project is delayed beyond three (3) months, the SPD shall pay to NVVN, the Liquidated Damages at rate of Rs 1,00,000/- per MW per day of delay for the delay in such commissioning. Provided that the SPD shall be required to make such payments to NVVN in advance on a week to week basis for the period of delay."

45. It is relevant to note that the question whether the said amount of liquidated damages is a genuine pre-estimate of damages is no longer res integra. In NTPC Vidyut Vyapar Nigam Limited v. M/s Saisudhir Energy Limited: FAO (OS) No. 275/2016, decided on 18.01.2018, this Court held that the liquidated damages as mentioned in Clause 4.6 of the Power Purchase Agreement are a genuine pre-estimate of damages. Mr. Khurana also did not seriously dispute that the liquidated damages as provided under Clause 4.6.1 of the Agreement would be leviable for any delay in completing the Power Project beyond the Scheduled Commissioning Date (SCD). He, however, submitted that in view of the said decision, damages should be pegged at Rs. 1,00,000/- per MW per day for the entire period and the liquidated damages quantified at 20% of the aggregate bank guarantees for a delay of one day, is excessive.

46. The said contention is unpersuasive. A plain reading of the judgment in NTPC Vidyut Vyapar Nigam Limited v. M/s Saisudhir Energy Limited (supra) indicates that the observations of the Court to peg damages at Rs. 1,00,000/- per MW per day were in the context of Clause 4.6.2 of the relevant Power Purchase Agreement (which is similarly worded as the Agreement). However, the finding that the amount provided in Clause 4.6 of the Power Purchase Agreement was a genuine pre-estimate damage would apply to Clause 4.6.1 of the Agreement as well.

47. The Arbitral Tribunal did not accept DDE's contention that the Certificate of Commissioning dated 16.01.2012 was conclusive as the Arbitral Tribunal held that the matter as to the date of commissioning of the Power Project was a contractual matter and not a regulatory one. Therefore, the date of commissioning of the Power Project for the purpose of applying Clause 4.6.1 of

the Agreement was required to be considered based on the contract between the parties and not on the basis of any certificate issued for the purpose of synchronization of the power plant for transmitting the solar power.

48. The expression 'commissioning' is not defined under the Agreement; therefore, the Arbitral Tribunal was of the view that the meaning of the expression 'commissioning' as normally understood in common parlance was applicable. The Arbitral Tribunal found that commissioning of the Power Plant would require injection of power to the power grid. Since DDE had injected power into the grid for the first time on 11.01.2012, the Arbitral Tribunal accepted the same as the date of commissioning of the Power Project. The relevant extract of the impugned award is set out below:

"15 So far as the question of commissioning of the project is concerned we have in Newton Solar arrived at the conclusion that even though commissioning is not defined in PPA, it would mean the date on which the power was injected into the grid by the power developer and not the date mentioned in the so called commissioning certificate. In that view of the matter in the case in hand we are of the considered opinion that the claimant's project can be said to have been commissioned on 11.01.2012, the date on which the power was injected into the grid and not on 10.01.2012 as indicated in the commissioning certificate that has been issued to the claimant…."

49. It is settled law that the decision of the Arbitral Tribunal regarding construction or interpretation of a contract falls squarely within its jurisdiction and the same would not warrant any interference by this Court in a proceeding under Section 34 of the A&C Act unless the same is found to be patently erroneous or an impossible view.

50. The Arbitral Tribunal was required to determine the controversy having regard to the language of Clause 4.6.1 of the Agreement – "the delay in such commencement of supply of power and making the Contracted Capacity available for dispatch by the Scheduled Commissioning Date". Thus, clearly, the Arbitral Tribunal was required to determine the date on which DDE had made available the contracted capacity. There is no dispute that the contracted capacity is 5 MW and the same was to be supplied at the Delivery Point. The Arbitral Tribunal has proceeded to determine the date of commissioning of the Power Project without alluding to the requirement of "making the Contracted Capacity available" as stipulated in Clause 4.6.1 of the Agreement.

51. There is no dispute that although DDE had set up the Power Project, it had not connected all modules. Even according to DDE, it had established all the solar modules by 08.02.2012. Thus, according to DDE, it was not in a position to generate 5 MW power prior to 08.02.2012. Mr. Sangal had relied upon the report of the Committee constituted for ascertaining the date of commissioning. The said report also clearly indicates the date of installation of full capacity of PV Arrays as 08.02.2012.

52. This Court is of the view that the Arbitral Tribunal's finding in computing the delay for the purpose of Clause 4.6.1 of the Agreement without reference to the date on which all the PV Arrays were installed – which implied the installation of the entire 5 MW capacity – is erroneous. According to DDE, the contracted capacity was installed on 08.02.2012.

53. Mr. Sangal had contended that the date of making the contracted capacity available should be accepted as 14.02.2012 as determined by the said Committee. However, this Court finds it difficult to accept the same. The concerned Committee had notionally extended the date of installation from 08.02.2012 to 14.02.2012 on the basis of average rate of installation of PV Arrays by DDE. The Committee had no material to doubt DDE's assertion that it had installed all the PV Arrays by 08.02.2012. It is expected that a person would increase his pace of work as the deadline to complete the same approaches. It is erroneous to assume that he would continue to maintain an average pace of work notwithstanding the final deadline. Thus, in the normal course, DDE would have installed a larger than average number of PV Arrays immediately prior to 08.02.2012 as a delay beyond the said date would expose DDE to a further levy of liquidated damages of 40% of the PBG.

54. Having stated the same, this Court is not required to examine this aspect in any further detail as the Arbitral Tribunal has not considered the same. The impugned award rests solely on the premise that the date of commissioning of the Power Project was 11.01.2012 as some power was supplied on that date. This is, ex facie, erroneous.

55. Mr. Khurana had contended that it was admitted by NVVNL that liquidated damages under Clause 4.6 of the Agreement were for delay in setting up the Power Project and not for supplying power. Thus, the date when 5 MW of power was supplied is not relevant. Indisputably, it is NVVNL's case in its pleadings that liquidated damages were payable for delay in setting up the Power Project and not for supply of power. But this contention is not destructive of or in conflict with NVVNL's stand that the Power Project would be complete when it is able to generate and make available the contracted capacity of 5MW. This capacity was required to be made available on or before the Scheduled Commissioning Date (SCD).

56. Insofar as DDE's challenge to the impugned award is concerned, this Court finds no infirmity with the decision of the Arbitral Tribunal to examine the question of delay in the context of the contractual provisions and not on the basis of the Certificate of Commissioning dated 16.01.2012, which was issued from a regulatory perspective.

57. The second question to be examined is whether the decision of the Arbitral Tribunal to reject NVVNL's claim for compensation under Clause 4.4.1 of the Agreement is erroneous. Clause 4.4.1 of the Agreement is relevant and set out below:

“4.4 Right to Contracted Capacity & Energy

4.4.1 NVVN, at any time during a Contract Year, shall not be obliged to purchase any additional energy from the SPD beyond 10.731 Million kWh (MU) if for any Contract Year, it is found that the SPD has not been able to generate minimum energy of 7.665 Million kWh (MU) on account of reasons solely attributable to the SPD, the non-compliance by SPD shall make SPD liable to pay the compensation provided in the PSA as payable to Discoms and shall duly pay such compensation to NVVN to enable NVVN to remit the amount to Discoms. This compensation shall be applied to the amount of shortfall in generation during the Contract Year. The amount of compensation shall be 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.”

58. It is clear from the plain language of Clause 4.4.1 that an SPD would be liable to pay compensation, as payable to DISCOMS, in terms of the Power Sale Agreement (PSA), if there is a shortfall in generating the stipulated minimum energy on account of reasons “solely attributable to the SPD”. Thus, the Arbitral Tribunal was required to address the dispute whether the shortfall as claimed by NVVNL was solely for the reasons attributable to the SPD and whether NVVNL was liable to pay such compensation to DISCOMS.

59. DDE along with six other SPD’s agreed for construction of 33/132 KV pulling station near the project site. There is no dispute that the various SPD’s including DDE had entered into the Agreement with the STU (RRVPNL), whereby RRVPNL had agreed to construction of the 132 KV transmission line. The power supply by the seven SPDs was to be evacuated from the pulling station by a 132 KV line to Pokhran GSS. The power evacuation plan was provided by the concerned STU (RRVPNL). RRVPNL had agreed to construct the 132 KV line for evacuation of power and complete the work one month prior to the SCD. RRVPNL had also agreed to provide open access for full supply of the power from the Power Project for the entire duration of the Agreement.

60. It is also not seriously disputed that there was delay in construction of the said transmission line. Thus, sensu stricto, DDE was not solely responsible for the said delay. The Arbitral Tribunal has also referred to Clause 3.1 of the Agreement. Sub-clause (a), (c) and (d) of Clause 3.1 are relevant and are set out below:-

“3. ARTICLE 3 : CONDITIONS SUBSEQUENT

3.1 Satisfaction of conditions subsequent by the SPD

The SPD agrees and undertakes, to duly perform and complete all of the following activities at the SPD’s own cost and risks within 180 days from the Effective Date, unless such completion is affected by and Force Majeure event, or if any of the activities is specifically waived in writing by NVVN:

a) The SPD shall obtain all Consents, Clearances and Permits required for supply of power to NVVN as per the terms of this Agreement;

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c) The SPD shall make adequate arrangements to connect the Power Project switchyard with the Interconnection Facilities at the Delivery Point;"

d) The SPD shall sign a Transmission Agreement with STU confirming the evacuation and connectivity of the STU system upto the delivery point of SPD b the Scheduled Commissioning date;"

61. It is clear from the above that DDE was required to make all arrangements to connect the Power Project switchyard with interconnection facilities at the delivery point. However, DDE was also required to sign the Transmission Agreement with the STU for confirming the evacuation and connectivity of the STU system upto the Delivery Point. Although NVVNL was not a party to the agreement between DDE and the STU (RRVPNL), it cannot be disputed that DDE was obliged to enter into an agreement with the STU.

62. Mr. Sangal has contended that the arrangement for construction of the 132 KV line was entirely between DDE and RRVPNL and DDE was required to bear the entire costs. There is no cavil with this contention. However, the same does not imply that the finding of the Arbitral Tribunal that the shortfall in delivery is not solely attributable to DDE, is erroneous. Clearly, the shortfall of delivery is not attributable solely to DDE. In any view, the Arbitral Tribunal's decision cannot be stated to be patently erroneous. The said view is not only a possible view but a plausible one.

63. It is also relevant to note that NVVNL had not accepted its liability to pay compensation to DISCOMS. On the contrary, the Arbitral Tribunal found that NVVNL had disputed its liability to pay any compensation to DISCOMS under the PSA. Therefore, the Arbitral Tribunal held that it was not open for NVVNL to claim any compensation from DDE under Clause 4.4.1 of the Agreement.

64. This Court finds no ground to interfere with the decision of the Arbitral Tribunal to reject NVVNL's claim for compensation regarding shortfall of power. The Arbitral Tribunal's view is a plausible one and warrants no interference in these proceedings under Section 34 of the A&C Act.

65. In view of the above, DDE's petition under Section 34 of the A&C Act [being OMP (COMM) No. 374/2020] is rejected as unmerited.

66. NVVNL's challenge to the impugned award [being OMP (COMM) No. 317/2020] succeeds to a limited extent. The impugned award to the extent that the Arbitral Tribunal found that the delay in commissioning the Power Project is one day without referring to the installation of the entire contracted capacity, is set aside. It is material to note that if DDE's contention that the contracted facility was installed on 08.02.2012 is accepted, there would, in effect, be no material impact on the final outcome. This is because 20% of the PBG is leviable

as liquidated damages for a delay upto one month. Therefore, whether the delay is one day or one month would make no material difference as far as levy of liquidated damages is concerned. However, if it is found that NVVNL's contention is correct that the contracted capacity was established and made available on 14.02.2012 – which prima facie appears to be unmerited – NVVNL may be entitled to claim further liquidated damages in terms of Clause 4.6.1 (b) of the Agreement.

67. NVVNL's petition is allowed to the aforesaid extent. The parties are at liberty to agitate the said dispute afresh in view of the observations made herein.

68. The petitions are, accordingly, disposed of in the aforesaid terms. All pending applications are also disposed of.

