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**(2022) 07 DEL CK 0013**

**In the Delhi High Court**

**Case No :** Original Miscellaneous Petition (COMM) No. 271, 375 Of 2020, I.A. No. 1559, 2369 Of 2020

M/S Ntpc Vidyut Vyapar Nigam Ltd. APPELLANT

Vs

M/S Newton Solar Pvt. Ltd. RESPONDENT

**Date of Decision :** 06-07-2022

**Acts Referred:**
Arbitration And Conciliation Act, 1996 — Section 9, 34

**Citation :** (2022) 07 DEL CK 0013

**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 08.01.2011(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 Newton Solar Power Private Limited (hereinafter

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'NSPPL') 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 NSPPL.

4. The Arbitral Tribunal found that there was a delay of four days in commissioning the solar project and NSPPL was liable to pay liquidated damages quantified at 20% of the aggregate amount of the performance bank guarantees. The Arbitral Tribunal further found that NSPPL 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 NSPPL is liable to pay an additional 40% of the aggregate amount of the Performance Bank Guarantees as liquidated damages. According to NSPPL, 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 NSPPL 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, NSPPL (a SPD) submitted its bid for establishing a solar power project and supplying power. NSPPL's bid was accepted and NVVNL issued a Letter of Intent dated 11.12.2010 (hereinafter 'the LoI') accepting NSPPL's proposal to set up the power project at Village Askandra, Tehsil Nachna in District Jaisalmer, Rajasthan.

9. Thereafter, on 08.01.2011, the parties entered into the Agreement. In terms of the Agreement, NSPPL 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 07.01.2012.

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

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(hereinafter also referred to as 'the PBG'). It was further agreed that in the event there was a failure on the part of NSPPL to commission the Power Project by the SCD (that is, on or before 07.01.2012), 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, NSPPL furnished the following Bank Guarantees:-

(i) Bank Guarantee No. 3464/2/79 for ?2,35,13,000/- representing 20% of the total PBG, dated 05.01.2011 drawn on Central Bank of India, New Delhi;

(ii) Bank Guarantee No. 3464/2/80 for ?4,70,26,000/- representing 40% of the total PBG, dated 05.01.2011 drawn on Central Bank of India, Delhi;

(iii) Bank Guarantee No. 3464/2/81 for ?4,70,26,000/- representing 40% of the total PBG, dated 05.01.2011 drawn on Central Bank of India, Delhi.

12. Further, in terms of the Agreement, NSPPL, 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, NSPPL 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. NSPPL states that evacuation of the power was dependent upon the transmission line being completed by RRVPNL.

14. According to NSPPL, 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 NSPPL that as a measure of mitigation, Jodhpur Vidyut Vitaran Nigam Ltd., the local DISCOM, permitted NSPPL to temporarily connect the Project by a 33 KV line to an existing 33 KV Sub-station at Village Chandasar, District Jaisalmer. NSPPL claims that by 07.01.2012, 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 NSPPL certifying that it had successfully commissioned the Power Project by 07.01.2012.

17. NSPPL claims that the supply of power from the Power Project commenced from 11.01.2012 and till 09.02.2012 –which was the new commissioning date ascertained by the Review Committee of the MNRE – NVVNL purchased power from NSPPL and paid tariff at the rates specified in the Agreement. The said tariff

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

18. NSPPL 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, NSPPL 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 NSPPL 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 07.01.2012. NSPPL 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-three days in commissioning the Power Project. Aggrieved by this action, on 13.04.2012, NSPPL filed an application (being O.M.P No. 416 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 05.09.2012, this Court modified the aforesaid order and allowed NSPPL to keep one of the bank guarantees alive.

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

ARBITRAL PROCEEDINGS

24. Before the Arbitral Tribunal, NSPPL filed its Statement of Claims. The Arbitral Tribunal noted that although NSSPL had made a large number of claims in its Statement of Claims; it, essentially, pressed the following claims before the Arbitral Tribunal:

"a. sought for refund of Rs.2,35, 13,000/- imposed as liquidated damages (20% of total PPO) deducted under Clause 4.6.1 of the PPA along with interest at 18% from 22.3.2012, which the claimant has paid under protest.

b. Restraint on imposing further liquidated damages (40% of total PPO) amounting to Rs 4 crore 70 lacs 26,000 under Clause 4.6.1 of the PPA.

c. Refund of Rs.29,97,148/- deducted from monthly bills of the claimant towards shortfall in power supply and inform power.

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d. Restraint on deducting an amount of Rs.27,22,014/- for shortfall for supply of power during the year 2011-12 and allow a claim of Rs 4,67,64,900/- which the claimant allegedly suffered due to shortfall in generation and supply of power from 7.1.2012 to 9.6.2012."

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 09.02.2012 as determined by the said Committee.

27. NSPPL disputed the same. According to NSPPL, it had commissioned the Power Project on 07.01.2012. 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, NSPPL claimed it had commissioned the Power Project on 07.01.2012 – 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, NSPPL 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 ?29,97,148/- as compensation towards short supply of power and transmission lost during the Contract Year 2012-13 and, a further sum of ?27,22,014/- for short supply of power for the Contract Year 2011-12 (07.01.2012 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 22.08.2015.

32. According to NSPPL, the deduction of ?29,97,148/- was illegal as the shortfall was not for reasons solely attributable to NSPPL. 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

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that any amount was payable to DISCOMS on account of shortfall in supply of power.

33. NVVNL claimed that NSPPL was responsible for the delay in construction of the 132 KV transmission line. Merely because NSPPL had engaged RRVPNL for constructing the 132 KV transmission line did not absolve NSPPL's responsibility for the same. It was contended on behalf of NVVNL that RRVPNL was engaged as an EPC Contractor by NSPPL 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 NSPPL's contention that it had commissioned the Power Project on 07.01.2012. 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 NSPPL 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, NSPPL was liable to pay compensation to the extent of 20% of the total PBG for the delay of four days in commissioning the Power Project. Since NSPPL 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 NSPPL was not solely responsible for the same and therefore, no such compensation was payable. Accordingly, the Arbitral Tribunal awarded a sum of ?29,97,148/-, which was deducted by NVVNL, in favour of NSPPL 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 six weeks 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 ?27,22,017/- as compensation for short supply of power during the Contract Year 2011-12.

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39. NSPPL's claim for compensation on account of loss suffered to the extent of ? 46,76,49,000/- 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, NSPPL 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 NSPPL 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 NSPPL, 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 07.01.2012. 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 NSPPL had "successfully commissioned 01 No.X 05 MW Solar PV Power Generation Project having MULTI CRYSTALLINE TECHNOLOGY at Village Askandra, Tehsil Nachana & District - Jaisalmer on dated 07th Jan'2012.". He stated that this certificate was not challenged and therefore, the Power Project was commissioned on 07.01.2012. 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.

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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 ?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 four days, 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 ?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.

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47. The Arbitral Tribunal did not accept NSPPL'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 NSPPL 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:

"16…….Commissioning, denotes trials of the component individually machines and its part individually and as a whole and later on all combined together. After commissioning of each unit the plant as a whole can be said to have been commissioned. The common term of commissioning usually means the phase in a project when design process fluids are introduced to the system and sub-systems. The object of commissioning is to effect the safe and orderly handover of the unit from the constructor to the owner guaranteeing its operability in terms of performance reliability safety. In the absence of a definition of the expression commissioning and applying the common parlance view as stated above, in case of a solar power project it would be more appropriate to hold that the date on which the power is generated in the project and the said power was injected to the grid would be the date of commissioning of a power project.

Though Mr. Khurana for the claimant, placed before us the commissioning certificate and contended that the date of commissioning should be taken as 7.1.2012 but on examining the document we find that the power was injected into the grid much later and the report indicates that the complete system was commissioned on 10.1.2012. Under the agreement, the scheduled commissioning date is 7.1.2012, as per the definition and since date of commissioning has been found by the tribunal to be 11.1.2012, there has been a delay in commissioning and Clause 4.6.1 (a) gets attracted entitling the respondent to encash 20% of total performance bank guarantee."

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.

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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 NSPPL 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 NSPPL had set up the Power Project, it had not connected all modules. Even according to NSPPL, it had established all the solar modules by 06.02.2012. Thus, according to NSPPL, it was not in a position to generate 5 MW power prior to 06.02.2012. 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 06.02.2012.

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 NSPPL, the contracted capacity was installed on 06.02.2012.

53. Mr. Sangal had contended that the date of making the contracted capacity available should be accepted as 09.02.2012 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 06.02.2012 to 09.02.2012 on the basis of average rate of installation of PV Arrays by NSPPL. The Committee had no material to doubt NSPPL's assertion that it had installed all the PV Arrays by 06.02.2012. 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, NSPPL would have installed a larger than average number of PV Arrays immediately prior to 06.02.2012 as a delay beyond the said date would expose NSPPL 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

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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 NSPPL'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. NSPPL 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 NSPPL 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

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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, NSPPL 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 NSPPL was required to make all arrangements to connect the Power Project switchyard with interconnection facilities at the delivery point. However, NSPPL 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 NSPPL and the STU (RRVPNL), it cannot be disputed that NSPPL 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 NSPPL and RRVPNL and NSPPL 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 NSPPL, is erroneous. Clearly, the shortfall of delivery is not attributable solely to NSPPL. 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

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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 NSPPL 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, NSPPL's petition under Section 34 of the A&C Act [being OMP (COMM) No. 375/2020] is rejected as unmerited.

66. NVVNL's challenge to the impugned award [being OMP (COMM) No. 271/2020] 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 four days without referring to the installation of the entire contracted capacity, is set aside. It is material to note that if NSPPL's contention that the contracted facility was installed on 06.02.2012 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 four days 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 09.02.2012 – 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.

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