



नईदिल्ली  
NEW DELHI

याचिका संख्या./ Petition No. 62/MP/2020

कोरम/ Coram:

श्रीआई .एस .झा, सदस्य /Shri I. S. Jha, Member  
श्रीअरुण गोयल, सदस्य /Shri Arun Goyal, Member  
श्री पी .के .सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 16<sup>th</sup> of September, 2022

**IN THE MATTER OF:**

Petition under Section 79 (1) (b), Section 79 (1) (f) and Section 79 (1) (k) of the Electricity Act, 2003 read with Article 11 of the Power Purchase Agreements dated 04.08.2016 entered into between the Petitioner – Parampujya Solar Energy Private Limited seeking directions to NTPC Limited to act in accordance with the said Article 11 of the Power Purchase Agreements and accepting the impact of Force Majeure events and thereby extend the Scheduled Commissioning Date of the Project of the Petitioner.

**AND IN THE MATTER OF:**

**Parampujya Solar Energy Private Limited**  
Adani House, Shantigram,  
S.G highway, Ahmedabad – 382421, Gujarat

**...Petitioner**

**VERSUS**

**1. NTPC Limited**  
Through its General Manager  
Core 7, Scope Complex,  
7, Institutional Area, Lodi road,

New Delhi – 110003

2. **Southern Power Distribution Company of Telangana Limited (TSSPDCL),**  
Through its Chief General Manager  
(Comml. & RAC),  
Mint Compound, Hyderabad-500 063, Telangana

... Respondents

**Parties Present:** Shri Sanjay Sen, Sr. Advocate, PSEPL  
Shri Nitish Gupta, Advocate, PSEPL  
Ms. Parichita Chowdhury, Advocate, PSEPL  
Ms. Nipun Sharma, Advocate, PSEPL  
Shri Venkatesh, Advocate, NTPC  
Shri Ashutosh Srivastava, Advocate, NTPC  
Shri Abhishek Nangia, Advocate, NTPC  
Shri M. S. Nagar, NTPC

### आदेश/ ORDER

The Petitioner, Parampujya Solar Energy Private Limited, is a Solar Power Developer which owns and operates 10 X 5 MW capacity of solar power plant located at Village Kakireni, District Yadadri, in the State of Telangana. The Petitioner has filed the present Petition under Section 79 (1) (b), 79 (1) (f) and 79 (1) (k), *inter alia* seeking relief on account of force majeure events leading to the delay in commissioning of the Petitioner's solar power project for 23 days from Scheduled Commissioning Date (SCoD).

2. The Respondent No. 1, NTPC Limited (NTPC), has been identified by the Government of India as the Implementation Agency for setting up of Grid-connected Solar PV Power Projects and for facilitating purchase & sale of 33 kV or above Grid-connected Solar PV Power under the National Solar Mission of Government of India.
3. The Respondent No. 2, Southern Power Distribution Company of Telangana Limited (TSSPDCL) is a distribution licensee in the State of Telangana.
4. The Petitioner has made the following prayers:
  - a) *Declare that the Petitioner was prevented from performing its obligation under the PPA due to occurrence of Force Majeure events;*

- b) *To condone the inadvertent delay of 23 days caused for the reasons beyond the control of the Petitioner due to Force Majeure events;*
- c) *Direct the Respondent to refund the amount of Liquidated Damages paid by the Petitioner along with the interest;*
- d) *Pass any such further order/s that this Hon'ble Commission may deem fit in the interest of justice.*

**Background:**

5. The Ministry of New and Renewable Energy (MNRE) issued *Guidelines for Selection of Grid-connected Solar-PV Projects under "State Specific Bundling Scheme" under Batch-II Tranche I of NSM Phase-II* (Guidelines). NVVN on behalf of NTPC was to purchase Solar Power from the Petitioner and sell it to DISCOMS after bundling it with the Thermal Power allocated by Ministry of Power (MoP). NTPC had agreed to sign Power Sale Agreement (PSA) with the Respondent No. 2 (TSSPDCL) to sell such bundled power as per the provisions of the National Solar Mission (NSM).
6. On 09.10.2015, NTPC issued a 'Request for Selection' document (RfS) inviting bids in the State of Telangana. The Petitioner participated in the bidding process and ultimately emerged as a successful bidder. NTPC issued Letter of Intent (LOI) and the Petitioner entered into five (5) Power Purchase Agreements (PPAs) with NTPC for sale of power for a cumulative capacity of 50 MW (10 MW X 5) from its Solar PV Projects located in the State of Telangana on 04.08.2016. As per the PPAs, SCoD of the Projects was 18.08.2017. However, the actual commissioning date of all the five (5) projects is 17.11.2017.
7. The Petitioner has alleged that following Force Majeure Events adversely affected the Projects of the Petitioner resulting in the delay:-
- (i) Introduction of GST by the Government of India
  - (ii) Stoppage of work by Tehsildar
  - (iii) Delay in Synchronisation due to delay in Approval of PSA by the TSERC
8. On 25.10.2017, NTPC extended the SCoD of the Projects by 26 days i.e. from 18.08.2017 to 13.09.2017 on account of Stoppage of Work by Tehsildar.

9. On 14.03.2019, NTPC extended the SCoD of the Projects by 42 days and the revised SCoD was 25.10.2017 on account of Introduction of the GST Laws.
10. Thus, the revised SCoD of the Projects were 25.10.2017 whereas the actual commissioning date of all the five (5) Projects is 17.11.2017. Hence, there is 23 days delay in achieving the actual commissioning. The Petitioner is seeking relief on account of force majeure events for these 23 days.

**Submissions of the Petitioner:**

11. The Petitioner has submitted as under:

**Re: Delay in Synchronisation due to delay in Approval of PSA by the TSERC**

- a) On 17.07.2017, it had served an advance preliminary notice 30 days prior to synchronisation to NTPC.
- b) On 01.08.2017, the Petitioner sent a letter to TSSPDCL informing TSSPDCL that the Petitioner is ready to synchronise the Projects by 12.08.2017.
- c) The Petitioner was verbally informed by TSSPDCL that since the PSA entered into between TSSPDCL and NTPC was pending approval by the Telangana State Electricity Regulatory Commission (TSERC), therefore, TSSPDCL is unable to issue approval for synchronization.
- d) On 03.08.2017, the Petitioner immediately informed above to NTPC/NVVN. As a prudent measure, the Petitioner followed up with TSSPDCL regarding the issue of approval for synchronization vide its letters dated 05.08.2017 and 11.08.2017.
- e) On 16.08.2017, the Petitioner informed that NTPC has rejected the notion that the approval of PSA is a requisite for synchronization.
- f) On 19.08.2017, finally TSERC intervened and instructed the TSDISCOMs (including TSSPDCL) to proceed with the formalities of synchronisation. TSERC also directed TSSPDCL to inform NTPC to not to levy penalty on the developers of solar power project due to this issue of delay on account of non-approval of PSA by the TSERC. Post intervention of TSERC, TSDISCOMs began considering the requests for synchronisation of solar projects.
- g) On 23.08.2017, TSSPDCL informed NTPC of the directions issued by TSERC. TSSPDCL in the same letter further informed NTPC of the intention of the Petitioner to commission the Projects. TSSPDCL then sought the work completion report of the

Projects following which a Synchronization Committee will take necessary action for granting synchronization approval.

- h) On 24.08.2017, the Petitioner informed NTPC of the above-mentioned circumstances and the developments that had taken place and requested NTPC to resolve the situation immediately so that the Petitioner can commission the Projects. The Petitioner further requested NTPC to provide an appropriate response to TSSPDCL and grant an extension in SCoD to the Petitioner so as to accommodate the delay caused on account of delay in approval of PSA and synchronisation of the Projects.
- i) On 30.09.2017 the Petitioner wrote a letter to NTPC requesting NTPC to not levy penalty due to delay caused on account of pendency of the PSA approval by the TSERC. NTPC vide its letter dated 30.10.2017 rejected the said request of the Petitioner. NTPC in its letter dated 30.10.2017 stated that the PPAs did not envisage the non-levy of penalty due to delay caused in commissioning of the projects on account of pendency in approval of PSA.

**Re: Commercial Operation**

- j) The Petitioner vide its letter dated 18.12.2017 informed NTPC that the 10 MW x 5 Project commissioned on 17.11.2017 and was under Commercial Operation since 17.12.2017 (i.e. 30 days from the commissioning of full capacity). The Petitioner thus sought for NTPC's acknowledgment of the same. However, due to non-availability of thermal power for bundling, the Commercial Operation of the Project was achieved on 30.12.2017 in terms of the PPA. Therefore, on 10.01.2018, the Petitioner sent a letter to NTPC confirming that the Projects were under Commercial Operation since 30.12.2017.

**Re: Liquidated Damages (LD)**

- k) On 11.07.2018, NTPC sent a letter to YES Bank Limited based on which NTPC claimed the payment of Rs. 1,20,00,000 in terms of the PBGs furnished by the Petitioner.
- l) On 19.12.2018, the Petitioner requested NTPC to not invoke the PBGs and instead sought NTPC's permission to be allowed to remit the LD amount by way of RTGS/NEFT.
- m) On 21.12.2018, NTPC provided the Petitioner with the deadline to make payment of Rs. 3.60 Crores by 26.12.2018. The Petitioner informed NTPC that the computation of

the number of days of delay for granting extension was not done correctly by NTPC. The Petitioner explained that the period of overlap was only for 7 days i.e. from 11.08.2017 to 18.08.2017. The Petitioner requested NTPC to relook into the calculation. The Petitioner also informed NTPC that it would keep the PBG alive corresponding to 36 days i.e. Rs. 3.6 Crores, and sought for NTPC's approval.

- n) On 20.03.2019, NTPC revised its demand for LD due to further extension of SCoD and directed the Petitioner to pay Rs. 2.30 Crore as LD by 25.03.2019 for delay of 23 days from achieving SCoD.
- o) On 20.03.2019, the Petitioner informed NTPC that it had made a payment under protest amounting to Rs. 2.30 Crores for delay in commissioning. The Petitioner provided NTPC with the transaction details of the payment that it had made and sought for the release of PBGs from NTPC. NTPC however did not accept the request of the Petitioner. Compelled by illegal act of NTPC, the Petitioner is approaching this Commission.
- p) The Petitioner had also sought extension in SCoD due to non-approval of PSA and delay in synchronisation of the project with the grid.
- q) The Petitioner could not have anticipated the events of Force Majeure which affected the Projects of the Petitioner. The Petitioner cannot be made to pay the LD in such cases. Under Article 3 of the PPAs, it is clearly stipulated that Force Majeure Events are an exception for the timely completion of the conditions subsequent, and therefore the Petitioner being affected by such Force Majeure Events cannot be burdened by NTPC by way of levy of LD. Therefore, in the foregoing circumstances Liquidated Damages cannot be levied from the Petitioner as the Projects of the Petitioner were impacted by Force Majeure Events completely beyond the prudent and reasonable control of the Petitioner.
- r) The Petitioner was affected by such Force Majeure Events despite making prudent utility practices and fulfilling its obligations under the PPAs. Due to the incorrect time extension granted by NTPC, the Petitioner has been levied with the payment of Liquidated Damages for the incorrect number of days of delay which is gravely prejudicing the Petitioner.

- s) The Petitioner has therefore approached this Commission seeking the extension of SCD on account of Force Majeure Events, in terms of the PPAs, MNRE OM, and other relevant documents.
- t) The Commission has the jurisdiction to adjudicate the present Petition.

**Hearing dated 30.06.2020:**

12. After hearing the learned counsel for the Petitioner, the Commission admitted the Petition and directed to issue notice to the Respondents. The Commission directed the Petitioner to serve copy of the Petition on the Respondents immediately, if not already served. The Respondents were directed to file their reply by 25.7.2020 with advance copy to the Petitioner who may file its rejoinder, if any, by 15.8.2020.

**Submissions of the Respondent No.1 (NTPC):**

2. NTPC in its reply dated 25.07.2020 has submitted as under:

***Re: Delay on account of occurrence of Force Majeure Event.***

- a) The delay on part of TSERC in granting regulatory approval to PSA is stated to have led to delay in synchronization of the Project. The said delay is not covered under force majeure event identified under the PSA. Therefore, the contention of the PSEPL vis-à-vis occurrence of a force majeure event are patently misconceived and the instant Petition deserved to be rejected on this ground alone.
- b) As per Article 5.1 read with Article 4.1 of the PPA the entire obligation of Synchronization has been solely vested upon the Petitioner. Therefore, the plea of force majeure does not emanate from the provisions of the PPA.
- c) Further, the definition of force majeure as set out under Article 11 of the PPA is an exhaustive definition. Article 11.3.1 of the PPA uses the word “means” to define the force majeure events. It is settled position of law that when a definition clause is premised upon the word “means”, the intention behind such usage is to ensure that no other meaning apart from what has been put in the definition clause can be assigned. The above said legal position has been fortified by the Apex Court in the following Judgments *Bharat Cooperative Bank (Mumbai) Ltd. vs. Employees Union [(2007) 4 SCC 685]*; *P. Kasilingam vs. P.S.G. College of Technology, [1995 Supp (2) SCC 348]*.

***Re: Requirement of actual loss to raise Claim for Liquidated Damages/ Compensation.***

- d) As per Section 74 of the Contract Act, the liquidated damages envisaged under a contract is either: (i) A genuine pre-estimate of damages suffered by a party; or (ii) Any other stipulation by way of a penalty.
- e) It is trite law that in case the relevant clause of a contract dealing with liquidated damage provides for genuine pre-estimate of damages, there is no requirement to prove damage or loss. However, if the said clause provides for imposition of a penalty, there is a requirement to establish loss for getting a reasonable compensation. The above said legal position has been reiterated by the Hon'ble Apex Court in the following cases: *ONGC vs. Saw Pipe Limited [(2003) 5 SCC 705]*; *Construction & Design Services vs. DDA, (2015) 14 SCC 263*. Further in *Bharat Sanchar Nigam Limited v. Reliance Communications Limited (2011) 1 SCC 394* judgment, the Hon'ble Supreme Court had deliberated upon the issue of ascertaining whether the sum named as liquidated damages is a genuine pre-estimate of damages or a stipulation by way of penalty.
- f) Article 4.6 of the PPA deals with liquidated damages. Article 4.6 of the PPA is a prior estimation of probable losses to be suffered by the NTPC. Moreover, Articles 4.6.1.1 to 4.6.1.2 of the PPA further set out the methodology for computation of the said losses. The above said Articles of the PPA are not penal in character. The said clause is not a clause for deterring the PSEPL from breaching PPA but to compensate NTPC for such breach. Therefore, by virtue of Article 4.6 being a genuine pre-estimate of loss suffered by NTPC, the requirement for NTPC to show actual loss suffered is dispensed in law. From above, it is clear that what is required to be established by NTPC is the legal injury, which is distinct from the quantum of loss to be proved. Moreover, the requirement for NTPC/Respondent No.2 to show actual loss suffered is dispensed with and the averments made by PSEPL in this regard are untenable.

***Re: Force Majeure caused by Petitioner***

- g) Article 11.3.1 of the PPA provides that force majeure event should not be within the reasonable control (direct or indirect) of PSEPL. Therefore, any delay/negligence on part of PSEPL in making the Project available for synchronization cannot be regarded as a force majeure event. PSEPL had negligently delayed in making the Project available for synchronization. The same is evident from the letter dated 30.10.2017 issued by NTPC.



For ready reference, the relevant extracts of the letter dated 30.10.2017 have been quoted hereunder:

*“...NTPC has taken up the issue of synchronization with Southern Power Distribution Company of Telangana (TSSPDCL) A Northern Power Distribution Company of Telangana (TSNPDCL) and the issues of synchronization of the projects have been sorted out. Based on follow up by NTPC, both the distribution companies have agreed to the constitution of Synchronization Committees wherein a member of NTPC is also represented. The said committee was formed on 31.08.2017 after the letter received from Telangana Discoms dated 23.08.2017. M/s. Parampujya & M/s. ACME Solar power developers have approached for synchronization of their projects and their projects have been commissioned on 19.09.2017 and from 09.09.2017 to 26.09.2017 respectively. Other projects namely M/s. Parampujya (50 MW DCR), M/s. Karvy (50 MW) & M/s. Azure Power (100 MW) were not ready till date. According to SPDs, these projects may be synchronized by end of October. **This shows that none of the projects were ready till 31.08.2017, when the committee was formed.**”*

*From the above it may be noted that NTPC was ready to get the projects synchronized and the pendency of PSA approval by Telangana State Electricity Regulatory Commission, (TSERC) is not in any way affecting the synchronization of the solar projects in the state of Telangana. However as per direction from Telangana State Electricity Regulatory Commission vide their letter dt. 19.08.2017, that penalty may not be levied for delay, NTPC shall approach MNRE for approval of the same for the projects already commissioned in the month of September, 2017. For other solar power developers, whose projects are yet to be commissioned, the request for not levying of penalty on this ground is not tenable.”*

- h) From the perusal of the above quoted letter, the following position emerges:
- i. The issue of synchronization was taken up by NTPC with Respondent No. 2 and the same was sorted out.
  - ii. The DISCOMS had agreed to the constitution of Synchronization Committee.
  - iii. The said committee was formed on 31.08.2017 after the letter dated 23.08.2017 was received from Respondent No. 2.
  - iv. Other power developers had approached for synchronization of their respective projects and their projects have been commissioned on 19.09.2017 and from 09.09.2017 to 26.09.2017.
  - v. The Project of PSEPL and M/s. Azure Power (100 MW) were not ready till then. According to SPDs, the said projects were requested to be synchronized by end of

October which shows that none of the projects were ready till 31.08.2017, when the committee was formed.

- vi. Therefore, the 23-day delay in synchronization has not been caused due to factors beyond the control of the Petitioner as the Petitioner itself was not ready for its power to be evacuated.
  - vii. Therefore, the contention of the PSEPL that the Project was ready for synchronization is evidently incorrect.
- i) In fact, the Petitioner in the Petition or even otherwise has not controverted the contents of letter dated 30.10.2017, thereby, meaning the Petitioner also accepts that the delay of 23 days was caused due to its own inactions of not being ready to evacuate power. Hence, by virtue of Article 11.3.1 itself the Petitioner cannot claim force majeure as the Petitioner itself has contributed to the event of Force Majeure.
  - j) In view of the above, it is evident that the SCoD of the Project was further delayed by 23 days on account of negligence and inaction on part of PSEPL. Under the garb of occurrence of alleged force majeure event, PSEPL has attempting conceal its inactions and negligence in making the Project ready of synchronization by the stipulated timelines.
  - k) Furthermore, acting in bonafide NTPC has already accepted the delay of 68 days in SCoD of the Project which had arisen on account of genuine hardships faced by PSEPL. However, the additional delay claimed by the PSEPL is on account of extraneous reason which have not been envisaged under the PPA. Therefore, the subsequent delay of 23 days SCoD is solely attributable to PSEPL and PSEPL is liable to pay liquidated damages of Rs. 2.30 Crores to the Petitioner.

**Rejoinder by the Petitioner 10.09.2020:**

- 3. The Petitioner has filed Rejoinder dated 10.09.2020. The Petitioner has submitted as under:
  - Re: Definition of force majeure as contemplated under the PPA is an exhaustive***
  - a) NTPC has submitted that delay on part of TSERC in granting regulatory approval to PSA which has purportedly led to delay in synchronization of the Project has not been even remotely stipulated as a force majeure event under the PPA. However, the Commission while interpreting identical Force Majeure Clause has held that even

occurrence of Force Majeure like event grants right to affected party to seek relief from counterparty during continuation of Force Majeure Events.

- b) Article 11 contains a specific exclusion clause in the PPA and those events which are not excluded in the PPA can become a ground for claiming Force Majeure Events. It is a matter of the record that the grounds which have been taken to claim relief under Force Majeure Clause have been excluded by the PPA, therefore the Petitioner is entitled to seek relief as prayed in the Petition.

***Re: Requirement of Actual Loss to raise a Claim for Liquidated Damages/Compensation.***

- c) NTPC has submitted that there is no requirement to prove loss if there is Liquidated Damages stipulated in the Contract. It is NTPC's case that it has suffered legal injury which entitles it to recover liquidated damages. NTPC has relied on an array of judgments wherein it has been held that where there is a genuine pre-estimate of damages, there is no requirement to establish loss for getting compensated for the said damages. The case as sought to be established by NTPC is incorrect and the reliance placed by NTPC on the various judgments is misconceived and denied in seriatim.
- d) NTPC was never entitled for damages, since the liquidated damages stipulated by the encashment of Performance Bank Guarantee under the PPA is not a genuine pre-estimated loss, rather it is in nature of a penalty. Even presuming, without admitting that the Petitioner has delayed the commissioning of the project (which is not the case in the present petition) NTPC could not have levied liquidated damages because the delay caused is not attributable to the Petitioner. Moreover, NTPC has not even demonstrated any losses that it has allegedly suffered from.
- e) Section 74 does not dispense with the requirement that the party seeking damages should not prove that it has suffered loss or damage. The settled position of law is that even if a sum named in the PPA is termed as "liquidated damages", there is still a requirement of ascertaining loss even when the agreement is binding. The court / tribunal is therefore duty bound to ascertain whether or not there is any actual loss or damage and based on it determine the reasonable compensation. It is not correct that the stipulation by way of liquidated damages in the PPA is in itself evidence of damage more so when in the instant case there were Force Majeure events.

- f) Without prejudice to the fact that Liquidated Damages cannot be levied on the Petitioner, under the law on compensation for breach of contract under Section 74 of the Indian Contract Act, 1872, 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 a reasonable compensation of such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Commission. In cases where the amount fixed is in the nature of a penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both the cases, the liquidated damages amount stipulated is the upper limit beyond which the Court /Commission cannot grant reasonable compensation. Even the said genuine pre-estimated damages can be awarded without proof of actual damages only in case the actual damages suffered by a party could not be estimated. However, in the present case, the same would not apply since the damages if at all suffered by NTPC are quantifiable and can be identified. It is submitted that where the damages/losses can be identified and estimated, the same are to be demonstrated in order to determine the liquidated damages. Since, electricity is movable the alleged actual loss suffered by NTPC can be assessed. NTPC, having not suffered through any loss is simply trying to escape from its obligation to demonstrate whether it has suffered any damages.
- g) Section 74 of the Indian Contract Act allows reasonable compensation for damage or loss caused by breach of contract, damage or loss caused is a sine qua non for the applicability of Section 74. If the Force Majeure or impossibility to perform as contained under Section 56 of the Act is accepted, then the case will close. If it is not accepted as Force Majeure or impossibility to perform as contained under Section 56 of the Act, then reasonable compensation is to be paid and the claimant has to give proof that the loss or damage arises out of the contract. The Hon'ble Supreme Court of India in the case of *Kailash Nath v Delhi Development Authority* (2015) 4 SCC 136 has held that only when the damage or loss is difficult or impossible to prove, the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.
- h) Therefore, unless NTPC establishes that it has suffered actual loss, and the same is adjudicated, the amount cannot be termed as a debt due and enforceable. It is a settled law that the burden is always on the party who claims compensation, to prove actual

loss even for reasonable compensation. If the liquidated damages claimed are not debt due, there cannot be any encashment of the bank guarantee. The claim of Liquidated Damages by NTPC is not sustainable in the absence of the proof of any actual loss suffered by NTPC.

***Re: Petitioner's synchronisation was delayed on account of its inaction and negligence***

- i) NTPC has submitted that Project was delayed on account of negligence and inaction on part of PSEPL. Bare reading of documents annexed with the Petition suggests otherwise and reflects that the Petitioner had to undertake responsibilities of NTPC to ensure timely completion of the synchronisation activity. Delay in TSERC approval significantly delayed the synchronisation process.
- j) In light of the above submissions it is prayed that this Commission allow the present Petition. The Petitioner reiterates the present Petition and the instant rejoinder and states that all contentions and averments of NTPC to the contrary are wrong and denied.

**Hearing dated 23.06.2022:**

4. During the course of hearing, learned senior counsel for the Petitioner and Respondents made detailed submissions in the matter as under:

*“Learned senior counsel for the Petitioner mainly submitted that there was a delay of 23 days in commissioning of its 10×5 MW solar power project for supply of power through NTPC in terms of PPA dated 4.8.2016. NTPC has acknowledged delay in development of the Project on account of introduction of GST and stoppage of work by Tehsildar and extended the SCOD of the projects by 42 days and 26 days respectively, till 25.10.2017. However, NTPC has refused to extend SCOD on account of delay in synchronization due to delay in approval of PSA by TSERC and levied Liquidated Damages (LD). He further added that NTPC is required to prove the damages incurred by it. In this regard, reliance was placed on the judgment of Hon`ble Supreme Court in the matter of Kailash Nath Associates vs DDA [(2015) 4 SCC 136], Construction & M/s Godawari Green Energy Limited vs NTPC Vidyut Vyapar Ltd. to contend that LD prescribed in the contract is only a ceiling and damages could only be levied to an extent NTPC could demonstrate the actual damages caused to it. Reliance was also placed on the order dated 11.10.2017 in Petition No 304/MP/2013 in the case of Godawari Green Energy Limited vs NTPC Vidyut Vyapar Nigam Limited &Ors and judgment of Hon`ble High Court of Delhi in the case of Engineers India Limited vs Tema India Limited [FAO (OS) 487/2017].*

3. Learned counsel for NTPC submitted that, contrary to the plea taken in the Petition, the Petitioner has not made out any case of force majeure in its arguments. It was further submitted that the claim of the Petitioner is categorically covered in the force majeure exclusion provision of the contract. As regards law of damages, the judgment of Hon'ble Supreme Court can be distinguished as the Petitioner was aware of the liability to pay LD on account of delay in COD in terms of the provisions of the PPA.

4. Considering the request of the learned counsel for the Respondent, the Commission permitted the Respondent to file its written submissions including on the aspect of applicability of the various judgments/authorities relied upon by the Petitioner with regard to claims of liquidated damages within two weeks with copy to the Petitioner, who may file its response/written submissions, if any, within two weeks thereafter.

**Written Submissions filed by NTPC:**

5. NTPC has filed Written Statement on 22.07.2022 vide which it has reiterated its submissions already given in the pleadings and as such the same are not reproduced for the sake of brevity. Additionally, NTPC has submitted as under:

***Re: PSEPL is seeking to challenge the PPA in the garb of the present Petition***

- a) PSEPL has contended that the liquidated damages being imposed in terms of Article 4.6 is onerous and arbitrary. Such a contention goes to the very root of the agreement entered into between the parties and cannot be sustained at this stage.
- b) PSEPL has been selected for execution of the instant project after conducting a public process of competitive bidding basis the guidelines issued by the Ministry of New and Renewable Energy, Government of India. It is an admitted fact that PSEPL was aware of the contents of the contract, specifically Article 4.6 of the PPA, and after being satisfied had placed its bid for execution of the Project.
- c) At no point of time, PSEPL had sought a clarification, much less an objection to the provisions of the PPA. However, in order to escape its liability for payment of liquidated damages, has raised this specious plea that such an imposition is arbitrary in nature.
- d) In fact, there is no averment made in the present Petition regarding the Article 4.6 being arbitrary. Whereas during the course of arguments, PSEPL has changed its entire case and has gone to the extent of challenging the provisions of the PPA which it has executed without any demur. Therefore, if the plea of PSEPL that NTPC is levying a penalty is accepted, then Article 4.6 will be rendered redundant.

***Re: Requirement of Actual Loss to Claim Liquidated Damages/Compensation for breach of contract***

- e) PSEPL has breached the extended COD and thereby has committed a breach of the PPA which makes it liable for payment of liquidated damages as agreed under the PPA. Accordingly, NTPC had imposed liquidated damages on PSEPL to the tune of Rs. 2.3 Crores for the delay of 23 days in commissioning its Project. PSEPL, in its submissions, has wrongly contended that NTPC has to establish that it has suffered actual loss and, in this regard, PSEPL placed its reliance upon the Hon'ble Supreme Court's Judgment in *Kailash Nath Associates vs. Delhi Development Authority &Anr.*, (2015) 4 SCC 136 and order dated 11.10.2017 in Petition No 304/MP/2013 in *Godawari Green Energy Limited vs NTPC Vidyut Vyapar Nigam Limited &Ors.* and judgment of Hon'ble High Court of Delhi in *Engineers India Limited vs Tema India Limited* [FAO (OS) 487/2017]. The contentions raised by PSEPL is misconceived and based on lopsided understanding of law.

***Re: Damages suffered by NTPC in present case are difficult and/or impossible to prove due to the intermittent nature of power production***

- f) PSEPL has made a submission that since electricity is a movable good, the alleged actual loss suffered by NTPC can be assessed and hence the NTPC cannot claim liquidated damages without proving actual loss.
- g) PSEPL while making this frivolous submission is oblivious of the fact that the nature of generation of power by PSEPL's plant is intermittent as the plant is a solar power plant. The actual production by PSEPL's Solar Power Plant depends upon various external natural factors which are beyond the contemplation of the both the parties. Therefore, the actual loss suffered on account of delay in commissioning of the Project is difficult or impossible to assess.
- h) In the present case, the parties had executed the contract after due deliberations. The parties were well-aware of the difficulty in assessing the damages resulting out of delay in commissioning and hence Article 4.6 was drafted to deal with damages in such cases. In other words, the parties provided for a genuine pre-estimate of damages in Article 4.6 in case of delay in commissioning. Therefore, PSEPL cannot be allowed to contend that NTPC is levying penalty in the garb of liquidated damages when PSEPL has itself deliberately entered into the agreement. The parties had agreed on Article 4.6 since they

were well aware that the actual loss due to delay in commissioning was difficult or impossible to prove. It is significant to point out the Judgment dated 12.01.2015 passed by the Hon'ble Tribunal in Appeal No. 154 of 2013 titled as M/s. Lanco Kondapalli Power Limited vs. APERC &Ors. In the said Judgment, the Hon'ble Tribunal had settled the issue of claim of liquidated damages without establishing the actual loss or injury.

- i) Therefore, considering the nature of generation (which is intermittent), actual losses cannot be assessed in the present case and the provision for liquidated damages agreed upon by the parties have to be taken as a genuine pre-estimate of damages.

**Written Submissions of the Petitioner:**

6. The Petitioner has filed the Written Statement on 22.08.2022 vide which it has reiterated its stand taken in the plaint. In addition, the Petitioner has submitted as under:

***Re: Petitioner's case on force majeure***

- a. NTPC has no basis either in fact or in law to state that the delay in commissioning of the Project is attributable to the Petitioner. The Petitioner on 17.07.2017 had served the advance preliminary notice 30 days prior to synchronisation of the Project, to NTPC. The Petitioner even intimated TSSPDCL vide its letter dated 01.08.2017 of its readiness to synchronise. However, the Petitioner was orally informed by TSSPDCL that approval for synchronisation cannot be granted till the time the PSA executed between TSSPDCL and NTPC is approved by TSERC. As a result of the same, the Petitioner in spite of having achieved readiness was unable to commission its Project on time. In this regard, it is further submitted that TSERC vide its Order dated 19.08.2017, issued specific directions to TSSPDCL to proceed with the formalities of synchronisation of the plants, pending approval of PSA, without penalising the project developers. This is in itself evidences that the delay on this account cannot be attributed to the Petitioner.
- b. NTPC has further contended that the delay on part of TSERC in approving the PSA, which led to the delay in synchronisation of the Project is not stipulated as an event of Force Majeure in the PPA. APTEL, in a number of its decisions has held that delay in grant of approval(s) / clearances by statutory authorities will constitute an event of Force Majeure. The Petitioner has placed its reliance on: Judgment dated 14.09.2020 – Appeal No. 351 of 2018 (*Chennamangathihalli Solar Power Project v. Bangalore*



*Electricity Supply Company Ltd. & Ors.*); Judgment dated 05.07.2021 – Appeal No. 67 of 2021 (*Solitaire BTN Solar Pvt. Ltd. v. Tamil Nadu Electricity Regulatory Commission & Ors.*).

- c. A perusal of the above-mentioned decisions abundantly clarifies that, delays in grant of approval(s) / clearance(s) etc. by statutory / government authorities cannot be attributed to the project developers, and ought to be considered as an event of Force Majeure. NTPC is merely trying to interpret the provisions of the PPA in a hyper-technical manner to obfuscate the Petitioner's case.
- d. NTPC has no basis to deny the Petitioner's case, or even allege that there were any lacunae on part of the Petitioner which led to the delay in commissioning of the Project. Therefore, the reliance placed by NTPC in support of its arguments does not sustain in the facts and circumstances of the present case.
- e. NTPC has further alleged that the Petitioner negligently delayed in making the Project available for synchronisation. NTPC has relied on the letter dated 30.10.2017 in this regard to state that as of August 2017, the issues w.r.t synchronisation were resolved, and other developers were able to commission their projects by September 2017. NTPC has alleged that the Petitioner has been negligent which has caused a delay of 23 days in commissioning of the Project. Such contentions of NTPC are incorrect in so far NTPC seeks to deny the Petitioner's legitimate claim on account of Force Majeure event. NTPC delayed in approaching this Commission for the adoption of tariff. This Commission in its Order dated 01.03.2021 in Petition No. 549/AT/2020 has observed that NTPC has displayed utter negligence and lack of diligence by procuring the power and making the related financial transactions over the years in spite of being fully aware that the tariff of such power has not been adopted as required under Section 63 of the Electricity Act. This Commission also observed that merely because no adverse claims have been made by the Solar Power Developers or the Distribution Licensees in regard to the status of the procurement being not valid in view of the delay in filing the petition, is no ground for justifying the action of NTPC.
- f. NTPC on one hand inordinately delayed in filing the petition for adoption of tariff and on the other hand is seeking damages from the Petitioner, when it has not suffered any loss whatsoever. Such conduct of NTPC demonstrates mala fides on part of NTPC in penalising the Petitioner for no fault of its own. Despite such inordinate delay on part

of NTPC, PSEPL endeavoured to commission its Project, and it was only on account of such efforts that the situation could be mitigated in spite of the hurdles which were faced by the Petitioner. The Petitioner's Project commissioned with a delay of 23 days which would have been much higher if the Petitioner did not adopt prudent utility practices.

***Re: NTPC's claim for damages being de hors the provisions of the PPA***

- g. NTPC has further alleged that the Petitioner by way of the present petition is seeking to challenge the PPA by claiming that the LD levied upon it is arbitrary. Such allegations made by NTPC are baseless and without any merit whatsoever. The Petitioner has challenged the manner in which the provisions of the PPA have been implemented. It is the manner of levy of LD by NTPC which is arbitrary, and not the provision which envisages the said levy. The Petitioner has placed its reliance on Articles 4.5.1 and 4.6.1 of the PPA. Article 4.6.1 enables the levy of LD in certain circumstances, however, it carves out an exception which is provided under Article 4.5.1 of the PPA i.e. occurrence of Force Majeure event affecting the developer of the Project. The PPA provides the manner in which damages / compensation can be levied, which is incumbent upon TSSPDCL's claim for the same. Article 4.4.1 of the PPA the PPA lays down the prerequisites for claiming compensation / damages from the Petitioner by NTPC. This is the enabling provision for NTPC to claim damages under the PPA. A conjoint reading of the above provisions shows that LD can be recovered by NTPC only upon demonstration of losses, which NTPC has failed to do in the present case. Further, in a back-to-back arrangement, as is in the present case, when TSSPDCL (the ultimate procurer of power from Petitioner's Project), has not claimed for any damages, then it is not understood as to how and why NTPC seeks to levy LD. At this point, it should also be noted that as an intermediary procurer, NTPC is entitled to trading margin of Rs. 0.07/kWh which is to be recovered from the distribution licensees, such as TSSPDCL in terms of the PSA. Such recovery starts only after COD of the Project, and supply of power to the distribution licensee. It is an admitted position that, for the period of 23 days, where the Petitioner was delayed on account of uncontrollable circumstances, TSSPDCL has not penalised/claimed any damages for NTPC and there

is no loss of trading margin for NTPC. Therefore, there is no basis for NTPC to claim any damages from PSEPL on the pretext of delay in commissioning of the Project.

- h. NTPC has not justified how the amounts collected by way of LD are utilised when the ultimate procurer i.e., the DISCOM has not claimed for any damages. Even during the course of proceedings, NTPC was unable to answer this query, when the same was raised by this Commission. This shows the mala fide intent on part of NTPC for incorrectly levying LD on the Petitioner. As such practice as adopted by NTPC ought to be set aside. The settled law on interpretation of contracts is that the provisions of a contract must be read in their entirety and not in piece meal manner. The Petitioner has placed its Reliance on the following decisions of the Hon'ble Supreme Court: *Export Credit Guarantee Corporation of India Limited v Garg Sons International (2014) 1 SCC 686*; *Bank of India v. K. Mohandas (2009) 5 SCC 313*.

***Re: Demonstration of losses for claiming damages***

- i. NTPC has failed to prove the damages incurred by it due to delay in Commissioning of the Project and in achieving the Conditions Subsequent. Further, the judicial precedent being relied upon by NTPC are old. The law has evolved since then, and therefore, it is imperative that the decisions rendered subsequently be taken into account for consideration of the issues raised in the present matter. In this regard, it is pertinent to highlight that the law is well-settled by the Hon'ble Supreme Court in the case of *Oil and Natural Gas Corporation Limited v Saw Pipes Limited* cited as (2003) 5 SCC 705, whereby it has been inter alia held that terms of a contract are required to be considered in order to ascertain if a party is liable to pay any damages. *Kailash Nath Associates v. DDA* cited as (2015) 4 SCC 136, once again emphasised on the need to prove losses in order to claim damages. The above clarifies the following:
  - (a) where a sum is named in a contract as a liquidated amount payable by way of damages/penalty, only reasonable compensation can be awarded not exceeding the amount so stated;
  - (b) the damages/ loss as claimed by a party is required to be proved and only in the 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.

- j. In addition to the aforesaid, for an LD to be a genuine pre- estimate of damages, NTPC has to prove the same through pleadings and evidence. In the present case the LD clause, as framed , is in the nature of penalty, without any relationship with any loss/ damage suffered by NTPC. Therefore, NTPC is not entitled to any amount by virtue of the LD clause i.e., it does not represent a genuine pre estimate of damages/ loss.
- k. In the present circumstances, since NTPC has failed to prove any damages/losses suffered by it due to delay in commissioning of the Project and fulfilment of Conditions Subsequent within the stipulated time, therefore, no claim on account of LD can be raised/claimed by NTPC.

### **Analysis and Decision**

7. We have heard the learned counsels for the Petitioners and the Respondents and have carefully perused the records.

8. The primary issues that arise for consideration before the Commission in the present matter are as under:

*Issue No. 1: Whether the Petitioner was prevented from performing its obligation under the PPA due to occurrence of Force Majeure events?*

*Issue No. 2: Whether the inadvertent delay of 23 days caused due to Force Majeure events needs to be condoned?*

*Issue No. 3: Whether the Respondent should be directed to refund the amount of Liquidated Damages paid by the Petitioner along with the interest?*

9. We now take issues one by one for discussion:

***Issue No. 1: Whether the Petitioner was prevented from performing its obligation under the PPA due to occurrence of Force Majeure events?***

**AND**

***Issue No. 2: Whether the inadvertent delay of 23 days caused due to Force Majeure events needs to be condoned?***

10. Since Issue No. 1 & Issue No. 2 are similar in nature, the same are taken together for discussion. The Petitioner has submitted that it has set up 10 X 5 MW Solar Power Projects and has entered into PPAs on 04.08.2016. In terms of the PPA, SCoD of the Projects was 18.08.2017. However, on account of certain force majeure events, namely, introduction of GST, stoppage of work by Tehsildar and delay in synchronization due to delay in approval of PSA by TSERC, the development of the projects was adversely affected and could be commissioned only on 17.11.2017. NTPC has acknowledged delay in development of the Projects on account of introduction of GST and stoppage of work by Tehsildar and has extended the SCOD of the Projects by 42 days and 26 days respectively, i.e. till 25.10.2017. However, NTPC has refused to extend the SCoD on account of delay in synchronization due to delay in approval of PSA by TSERC. The Petitioner has submitted that 23 days' delay caused due to Force Majeure events needs to be condoned. *Per contra*, NTPC has submitted that the delay of 23 days SCoD is solely attributable to PSEPL and PSEPL is liable to pay liquidated damages of Rs. 2.30 Crores to the Petitioner.

11. The gist of the submissions of the Petitioner is as under:

<b>Events</b>	<b>Period</b>	<b>Extension of SCoD allowed by NTPC</b>
SCoD as per PPAs	18.08.2017	
Stoppage of work by Tehsildar	11.08.2017 to 06.09.2017 (27 days)	18.08.2017 to 13.09.2017 (27 days) NTPC letter dated 25.10.2018
GST Law (MNRE OM dt. 20.06.2018)	01.07.2017 to 31.08.2017 (62 days)	13.09.2017 to 25.10.2017 (42 days) NTPC letter dated 14.03.2019
Revised SCoD	25.10.2017	
Actual Commissioning Date	17.11.2017	
Petitioner has submitted that there was delay in synchronization due to delay in approval of PSA by TSERC and as such period of 23 days (from 25.10.2017 to 17.11.2017) delay in commissioning shall be condoned		

12. The Commission observes that relevant provisions from PPAs are as under:

#### **4.5 Extensions of Time**

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

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

*the Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the limit prescribed in Article 4.5.2, for a reasonable period but not less than 'day for day' basis, to permit the SPD or NTPC through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or NTPC, or till such time such Event of Default is rectified by NTPC.*

4.5.2 *Subject to Article 4.5.7, in case of extension occurring due to reasons specified in Article 4.5.1, any of the dates specified therein can be extended by NTPC, subject to the condition that the Scheduled Commissioning Date would not be extended by more than three (3) months.*

*4.5.2.1 In case extension is required to be given beyond 3 months due to delay for reasons specified in Article 4.5.1, NTPC will approach MNE, who will be authorized to decide on further extensions.*

....

### **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; or*
- 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.*
- c) radio active 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 NTPC-Discom PSA, thereby affecting delivery of power from SPD to Discom.*

13. From the above, the Commission observes that Article 4.5.1 stipulates that in the event that the Petitioner is prevented from performing its obligations under Article 4.1 by the SCoD due to Force Majeure Events affecting the Petitioner, the SCoD shall be deferred for a reasonable period but not less than 'day for day' basis, to permit the Petitioner or NTPC through the use of due diligence, to overcome the effects of the Force Majeure Events. Further, Article 11.3.1 stipulates that 'Force Majeure' events are those that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under the PPA including an event affecting delivery of power from the Petitioner to Discom.

***Re: Stoppage of work by Tehsildar***

14. The Commission observes that on 11.08.2017, the concerned Tehsildar has ordered to stop execution work of the projects to maintain law and order situation in the area. The work at the project sites was resumed on 06.09.2017. The Petitioner has alleged that the period from 11.08.2017 to 06.09.2017 i.e. for 27 days constitutes the force majeure events under Article 11.3 and as such the SCoD needs to be extended by 27 days. NTPC vide letter dated 25.10.2018 extended the SCoD from 18.08.2017 to 13.09.2017. In view of above, the Commission holds that the event stands already addressed.

***Re: Introduction of the CGST, 2017 (GST laws) by the Government of India***

15. The Commission observes that the Government of India notified GST laws on 01.07.2017. Thereafter, MNRE vide its Office Memorandum dated 20.06.2018 approved the grant of 62 days extension in SCoD of Solar Power Plants on account of impact of GST Laws. NTPC vide letter dated 14.03.2019 extended the SCoD by 42 days i.e. the SCoD was revised to 25.10.2017. The Commission observes that there was overlapping of 20 days period (from 11.08.2017 to 31.08.2017) between events of stoppage of work by Tehsildar and introduction of GST Laws as such 42 days extension in SCoD was granted to the Petitioner. The Commission observes that NTPC has correctly revised the SCoD to 25.10.2017. As such, the Commission holds that no extra relief can be extended to the Petitioner on this ground.

***Re: Delay in Synchronisation due to delay in Approval of PSA by the TSERC***

16. The Commission observes that relevant provisions as per PPAs are as under:

**5. ARTICLE 5: SYNCHRONISATION, COMMISSIONING AND COMMERCIAL OPERATION**

**5.1 Synchronization, Commissioning and Commercial Operation**

*5.1.1 The SPD shall give the concerned RLDC/SLDC and NTPC at least sixty (60) days prior advanced preliminary written notice and at least thirty (30) days advanced final written notice, of the date on which it intends to synchronize the respective units of Power Projects to the Grid System.*

*5.1.2 Subject to Article 5.1.1, the Power Project may be synchronized by the SPD to the Grid System when it meets all the connection conditions prescribed in applicable Grid Code, CEA guidelines and CERC Regulations then in effect and otherwise meets all other Indian legal requirement or synchronisation to the Grid System.*

*5.1.3 The Synchronization equipment shall be installed by the SPD at its generation facility of the Power Project at its own cost. The SPD shall synchronize its system with the Grid System only after the approval of synchronization scheme is granted by the head of the concerned sub-station/Grid System and is checking/verification is made by the concerned authorities of the Grid System.*

*5.1.4 The SPD shall immediately after each synchronization/desynchronization inform the sub-station of the Grid System to which the Power Project is electrically connected in accordance with applicable Grid Code.*

*5.1.5 The SPD shall commission the Project within thirteen (13) Months from the Effective Date.*

*5.1.6 The project shall be entitled for payment of energy @ Rs. 3.00 per kWh as infirm power till Commercial Operation Date (CoD). The Project CoD shall be considered after 30 days from the actual date of commissioning. CoD is intended to match allocation and availability of thermal power for bundling.*

*5.1.7 The 25 year tenure of PPA shall commence from Commercial Operation Date.*

...

17. From the above, the Commission observes that the Petitioner has to give the concerned RLDC/SLDC and NTPC at least sixty (60) days prior advanced preliminary written notice and at least thirty (30) days advanced final written notice, of the date on which it intends to synchronize the respective units of Power Projects to the Grid System. The Projects were to be synchronized by the Petitioner to the Grid System when it had met all the connection conditions prescribed in applicable Grid Code, CEA guidelines and CERC Regulations. The Petitioner shall synchronize its system with the Grid System only after the approval of synchronization scheme.

18. In the instant case, the Commission notes that the Petitioner has served an advance preliminary notice 30 days prior to synchronisation to NTPC on 17.07.2017 for synchronisation of project on 12.08.2017. However, law and order problem occurred at the project sites from 11.08.2017 which remained up till 06.09.2017 (as per stoppage of work by Tehsildar). Meanwhile, on the request of the Petitioner and after intervention and instruction from TSERC on 19.08.2017,



TSSPDCL constituted a Synchronization Committee for granting synchronization . NTPC synchronized various other projects (M/s. Parampujya & M/s. ACME) and the same stand commissioned on 19.09.2017 and from 09.09.2017 to 26.09.2017 respectively. However, the projects of the Petitioner namely M/s. Parampujya (50 MW DCR), M/s. Karvy (50 MW) & M/s. Azure Power (100 MW) were not ready for synchronization. We observe that the SCoD of the Projects was revised to 25.10.2017 but the Petitioner could not achieve Commissioning even by 25.10.2017. However, the projects of the Petitioner achieved actual commissioning on 17.11.2017.

19. We observe that Article 11.3.1 specifically stipulates that event affecting delivery of power from the Petitioner to DISCOM is covered under Force Majeure events and the benefit of the same is available in case the Petitioner is ready to deliver power and commission the projects. However, in the instant case, it is observed that the Petitioner's projects were not ready for the delivery of power and commissioning of projects even till 25.10.2017 (revised SCoD) and could commission the projects only on 17.11.2017. In view of above discussion, the Commission holds that no relief can be extended to the Petitioner on this ground and delay of 23 days (25.10.2017 to 17.11.2017) cannot be condoned.
20. It is pertinent to mention here that the Petitioner has submitted that vide letter dated 19.08.2017, TSERC had intervened and instructed TSDISCOMs (including TSSPDCL) to proceed with the formalities of synchronisation and also directed NTPC to not to levy penalty on the developers, due to delay on account of PSA. We are of the view that the directions of the TSERC are applicable only on the solar power developers which were ready for commissioning on SCoD as per respective PPAs. In the instant case, it has already been held that the Petitioner's projects were not ready for commissioning till 25.10.2017 (revised SCoD) and could be commissioned only on 17.11.2017. Hence, no relief can be granted to the Petitioner on account of the letter dated 19.08.2017 issued by TSERC.
21. The issues 1 & 2 are disposed of accordingly.

***Issue No. 3: Whether the Respondent should be directed to refund the amount of Liquidated Damages paid by the Petitioner along with the interest?***

22. We observe that Article 4.6 of the PPAs stipulates as under:

***“4.6 Liquidated Damages for delay in commencement of supply of power to NTPC***

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

*4.6.1.1 Delay upto five (5) month: NTPC will encash the Performance Bank Guarantee on per day basis and proportionate to capacity not commissioned, with 100% encashment for 5 months delay.*

*4.6.1.2 Delay beyond five month: In case the commissioning of Project is delayed beyond 5 months, the SPD shall, in addition to encashment of Bank Guarantee by NTPC, additionally pay to NTPC the Liquidated Damages @ Rs. 1,00,000 per MW per day of delay for the delay in such remaining Capacity which is not commissioned.*

*The amount of liquidated damages would be recovered from the SPD from the payments due on account of sale of solar power to NTPC in thirty (30) equal monthly instalments from first billing cycle.*

*4.6.2 The maximum time period allowed for commissioning of the full Project Capacity with encashment of Performance Bank Guarantee and payment of Liquidated Damages shall be limited to twenty five (25) months from the Effective Date. In case, the commissioning of the Power Project is delayed beyond twenty five (25) months from the Effective Date, it shall be considered as an SPD Event of Default and provisions of Article 13 shall apply and the Contracted Capacity shall stand reduced/amended to the Project Capacity Commissioned within twenty five (25) months of the Effective Date and the PPA for the balance Capacity will stand terminated and shall be reduced from the selected capacity.”*

23. From the above, we observe that Article 4.6.1 of the PPAs stipulates that, if the SPD is unable to commence supply of power to NTPC by the SCoD, then the SPD shall pay to NTPC, Liquidated Damages for the delay in such commencement of supply of power and making the Contracted Capacity available for dispatch by the SCoD. NTPC can encash the Performance Bank Guarantee on per day basis and proportionate to capacity not commissioned, with 100% encashment for 5 months delay. We have already held that the Petitioner’s projects were not ready for commissioning and commencement of supply of power even till 25.10.2017 (revised SCoD) and could be commissioned only on 17.11.2017. This has resulted in delay in commencement of supply of power by the Petitioner to NTPC even by revised SCOD. Article 6.4.1 provides for payment of liquidated damages for delay in commencement of power supply by SCOD in the form of encashment of Performance Bank Guarantee. For delay upto five months, 100% PBG can be encashed.

24. The Petitioner has submitted that NTPC has to prove the loss suffered by it on account of delay in commencement in supply of power. NTPC has submitted that since Article 4.6.1 of the PPA provides for pre-estimated liquidated damages in the form of 100% PBG for delay upto a period of five months, there is no requirement of on the part of NTPC to prove the actual loss before encashing the PBG. Both parties have placed reliance on the judgement of the Hon'ble Supreme Court in the case of *Kailash Nath Associates Vs Delhi Development Authority & Others [(2015) 4 SCC 136]*.

25. We have considered the rival contention of the parties. In *Kailash Nath* judgement, Hon'ble Supreme Court has interpreted the scope of Section 74 of the Indian Contract Act, 1876 which is extracted as under:

*“74.Compensation for breach of contract where penalty stipulated for.—When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.”*

26. Thus, as per Section 74, the party complaining of the breach of contract is entitled to receive the compensation whether or not the actual damage or loss is proved to have been caused. After referring to a number of judgements such as in *Fateh Chand Vs Balkishan Dass [(1964) 1 SCR 515]*, *Maula Bux Vs Union of India [(1970) 1 SCR 1405]*, *Shri Hanuman Cotton Mills Vs. Tata Aircraft Limited [ (1969) 3 SCC 522]* and *ONGC Ltd Vs Saw Pipes Ltd [(2003) 5 SCC 705]*, Hon'ble Supreme Court in *Kailash Nath Case* has observed the following:

*“68. From the aforesaid discussions, it can be held that:*

*(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.*

*(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.*

*(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent*

*to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.*

*(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.”*

It is evident from para 68(3) of the *Kailash Nath* Judgement that in every case of breach of contract, the person aggrieved by the breach is not required to prove the actual loss or damage suffered by him before he can claim a decree. Further, para 68(4) of the judgement states that in some contracts, it would be impossible for the court to assess the compensation arising from the breach and if the compensation claimed is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation. In the present case, since there is delay on the part of the Petitioner in achieving the COD of the project by the date of revised COD and commencement of supply of electricity to NTPC, this has resulted in breach of the terms and conditions of the PPA. In terms of Section 74 of the Indian Contract Act and the principles laid down in para 68(3) and (4) of *Kailash Nath* judgement, NTPC is not required to prove the loss or damage suffered on account of delay in commencement of supply of electricity by the Petitioner for claiming the compensation. Since the parties have agreed to pre-estimated compensation in the PPA to be paid in the event of delay in achieving COD and commencement of supply which the Commission considers as reasonable, NTPC is entitled to encash the PBG in terms of Article 4.6 of the PPA on account of breach of the provisions of the PPA by the Petitioner.

27. In the light of the above discussion and clear-cut provision of the Article 4.6.1 of the PPA, we do not find any infirmity in the action of NTPC to encash the BG for breach of the provisions of the PPA by the Petitioner. Consequently, the Petitioner is not entitled for refund of the encashed PBG. The Issue No. 3 is accordingly decided against the Petitioner.
28. Petition no. 62/MP/2020 is disposed of in terms of the above.

Sd/-  
पी. के. सिंह  
(सदस्य)

Sd/-  
अरुण गोयल  
(सदस्य)

Sd/-  
आई. एस. झा  
(सदस्य)