2025 INSC 1034

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6888 OF 2018

CHAMUNDESHWARI ELECTRICITY SUPPLY COMPANY LTD. (CESC) **…APPELLANT(S)**

VERSUS

SAISUDHIR ENERGY (CHITRADURGA) PVT. LTD. & ANR. **…RESPONDENT(S)**

J U D G M E N T

SATISH CHANDRA SHARMA, J.

STATEMENT OF FACTS

1. This appeal is arising from the judgment dated 21.03.2018 of the Appellate Tribunal for Electricity, New Delhi (the "APTEL"), whereby the APTEL has affirmed the order dated 28.01.2015 of the Karnataka Electricity Regulatory Commission (the "State Commission"/"KERC"), whereby the State Commission directed Chamundeshwari Electricity Supply Corporation Limited, the Appellant herein, to restore to the Developer i.e. Respondent No. 1 herein, the amount realised from

the encashment of the performance bank guarantee; extend the timelines for fulfilment of contractual obligations; and to undertake renegotiation of the tariff under the Power Purchase Agreement (the "PPA") for a solar power project.

2. The Appellant, Chamundeshwari Electricity Supply Company Limited ("Chamundeshwari"/"CESC"), is a distribution licensee wholly owned by the State of Karnataka. The Respondent No. 2, Karnataka Power Transmission Corporation Limited ("KPTCL"), is the State transmission utility and a statutory corporation. Both entities are State instrumentalities engaged in discharging public functions under the Electricity Act, 2003. The Respondent No. 1, M/s Saisudhir Energy (Chitradurga) Pvt. Ltd. (the "Developer") a special purpose vehicle promoted and incorporated by M/s Saisudhir Energy Limited, a private generating company selected pursuant to a competitive bidding process for the establishment of a 10 MW solar power project in Chitradurga District.

3. The *lis* traces its origin to a request for proposal issued by the Karnataka Renewable Energy Development Limited (the "KREDL") inviting bids for selection of Solar Power Developers (the "SPDs") to establish grid-connected solar power plants in the State of Karnataka. The bidding process was conducted under the aegis of the State's solar policy to promote renewable energy

capacity. Pursuant to the competitive bidding process, the Respondent No. 1/Developer was selected for development of a 10 MW solar photovoltaic power project at Thallaku Village, Challakere Taluk, Chitradurga District, Karnataka.

4. On 30.08.2012, Appellant and the Respondent No. 1/Developer executed a PPA for procurement of 10 MW solar power at a tariff of Rs. 8.49/kWh, approved by KERC. The PPA envisaged achievement of Commercial Operation Date (the "COD") within 12 months from the Effective Date, preceded by satisfaction of "Conditions Precedent" (the "CPs") under Article 4 of the PPA, within 240 days.

5. On 28.05.2013, the parties executed a supplementary PPA, inter alia, aligning the commissioning schedule and other contractual timelines with the State Commission's tariff order and clarifying the delivery point and interconnection facilities. It reaffirmed that CPs were to be fulfilled within 240 days and COD achieved within 12 months thereafter. The CPs obliged the Respondent No. 1/Developer to acquire land, secure statutory approvals, achieve financial closure, enter into connectivity agreements, and ensure readiness of the evacuation system in coordination with Respondent No. 2/KPTCL.

6. The project site was finalised at Village Thallaku, Challakere Taluk, Chitradurga. The Respondent No. 1/Developer

obtained permission under Section 109 of the Karnataka Land Reforms Act for acquisition of 49.36 acres by the order of the Deputy Commissioner dated 19.02.2014.

7. The evacuation scheme prepared by Respondent No. 2/KPTCL envisaged connection of the project to the State grid through the commissioning of two specific 220 kV double-circuit transmission lines: one between Birenhalli and Thallak; and another between Hiriyur and Gowribidnur. The readiness of these lines was, in effect, a technical and operational precondition for the grant of synchronisation approval as outlined in letter dated 06.02.2014.

8. On 05.04.2014, the Respondent No. 1/Developer sought Appellant's assistance for securing approvals and requested extension of the COD, citing delay in Respondent No. 2/KPTCL's commissioning of the 220 kV lines. Vide letter dated 17.05.2014, Appellant stated that extension could be considered only on condition of a reduced tariff from Rs. 8.49/kWh to Rs. 2.39/kWh. The Respondent No. 1/Developer contested this reduction and approached the State Commission by way of O.P. No. 24 of 2014, seeking inter-alia; i) restoration of the performance bank guarantee; ii) extension of timelines; and iii) consequential direction for tariff renegotiation, thereby retaining the original tariff. Pertinently, vide an interim order

dated 14.11.2014, the State Commission directed Appellant herein not to encash the performance security/bank guarantee.

9. During pendency, the Respondent No. 1/Developer addressed further letters seeking extension of time for CPs fulfilment, pointing to the dependency on Respondent No. 2/KPTCL's works. In response to a Right to Information application, Respondent No. 2/KPTCL confirmed that the 220 kV lines were likely to be commissioned only in August 2015, well beyond the original CP and COD timelines.

10. Due to the inability to evacuate the contracted power, Appellant claims to have procured power from alternate sources at higher rates, incurring losses to the tune of Rs. 48.65 crores. The Respondent No. 1/Developer, on the other hand, faced encashment of the performance bank guarantee to the tune of Rs. 24.9 crores despite COD being rendered impossible due to Respondent No. 2/KPTCL's admitted delay.

11. Vide final order dated 28.01.2015, the State Commission held that the delay in completion of the evacuation system constituted a Force Majeure event under the PPA and accordingly ordered: (i) restoration of the encashed performance security to the Respondent No. 1/Developer; (ii) extension of the contractual timelines and (iii) renegotiation of the project tariff in the light of the revised commissioning schedule.

12. Aggrieved by the orders passed by the State Commission, Appellant filed Appeal No. 176 of 2015 before the APTEL and APTEL vide the impugned order dismissed the appeal filed by the Appellant thereby affirming the findings and directions of the State Commission. It is against this concurrent view of the *fora* below that Appellant has approached this Court in the present appeal.

SUBMISSIONS BY THE APPELLANT

13. Learned Senior Counsel appearing for Appellant submits at the outset that the dispute cannot be adjudicated without first appreciating the essential character of the agreement between the parties. It is urged that the PPA, executed on 30.08.2012 and supplementary PPA on 28.05.2013, is in its essence a contingent contract within the meaning of the Indian Contract Act, 1872 (the "Contract Act"). The PPA is a self-contained commercial arrangement concluded through competitive bidding. Its terms allocate risk and provide specific remedies.

14. Obligation to achieve the COD within the stipulated period is, by the very structure of the PPA, inextricably linked to the readiness of the evacuation system - a responsibility that rests squarely on Respondent No. 2/KPTCL, the State transmission utility. In the absence of such readiness, Respondent No. 1 was

aware that synchronisation and injection of power into the grid is technically impossible.

15. Inviting our attention to Article(s) 4 and 5 of the PPA, learned Senior Counsel submits that while Article 4 sets out the CPs to be duly complied with by the Respondent No. 1/Developer within the stipulated timelines, Article 5 enumerates the substantive obligations to be discharged in furtherance of the contractual scheme. It is urged that the framework of these provisions does not contemplate any dilution of responsibility on the premise that certain elements may require coordination with other agencies, or may otherwise lie beyond the control of the Respondent No. 1/Developer. The said Article(s), in material part, provide as follows:

> *"ARTICLE 4: CONDITION PRECEDENT*
>
> *4.1 Condition Precedent*
>
> *Save and except as expressly provided in Articles 4, 14, 18, 20 or unless the context otherwise requires, the respective rights and obligations of the Parties under this Agreement shall be subject to the satisfaction in full of the conditions precedent specified in this Clause 4 (the "Conditions Precedent") by the Developer within 240 (two hundred and forty) days from the Effective Date, unless such completion is affected by any Force Majeure event, or if any of the activities is specifically waived in writing by CESC Mysore.*

4.2 Conditions Precedent for the Developer

The Conditions Precedent are required to be satisfied by the Developer shall be deemed to have been fulfilled when the Developer shall have:

a) obtained all Consents, Clearances and Permits required for supply of power to CESC Mysore as per the terms of this Agreement;
b) not Applicable
c) achieved Financial Closure and provided a certificate to CESC Mysore from the lead banker to this effect;
d) made adequate arrangements to connect the Power Project switchyard with the Interconnection Facilities at the Delivery Point;
e) obtained power evacuation approval from [Karnataka Power Transmission Company Limited ("KPTCL")/CESC Mysore, as the case may be];
f) produced as per the requirements set out in Schedule 1, the documentary evidence of having the clear title and possession of the land required for the Project in the name of Developer;
g) fulfilled Technical Requirements for Solar PV Project as per the format provided in Schedule 2 and also provides the documentary evidence for the same;
h) delivered to CESC Mysore from confirmation, in original, of compliance with the equity lock-in condition as set out in 5.2; and
i) delivered to CESC Mysore a legal opinion from the legal counsel of the Developer with

respect to the authority of the Developer to enter into this Agreement and the enforceability of the provisions thereof.

4.2.1 Developer shall make all reasonable endeavours to satisfy the Conditions Precedent within the time stipulated and CESC Mysore shall provide to the Developer all the reasonable cooperation as may be required to the Developer for satisfying the Conditions Precedent.

4.2.2 The Developer shall notify CESC Mysore in writing at least once a month on the progress made in satisfying the Conditions Precedent. Developer shall promptly inform the CESC Mysore when any Conditions Precedent is satisfied by it.

4.3 Damages for delay by the Developer

In the event that the Developer does not procure fulfillment of any or all of the Conditions Precedent set forth in Clause 4.2 within the period of 240 days and the delay has not occurred for any reasons attributable to CESC Mysore or due to Force Majeure, the Developer shall pay to CESC Mysore Damages in an amount calculated at the rate of 0.2% (zero point two per cent) of the Performance Security for each day's delay until the fulfillment of such Conditions Precedent, subject to a maximum period of 30 (thirty) days. On expiry of the said 30 (thirty) days, CESC Mysore at its discretion may terminate this Agreement.

4.4 Performance Security

a) For due and punctual performance of its obligations under this Agreement, relating to the Project, the Developer has delivered to CESC

Mysore, simultaneously with the execution of this Agreement, an irrevocable and revolving bank guarantees from a scheduled bank acceptable to CESC Mysore for an amount of Rs. 24,90,00,000/- (Rupees Twenty Four Crores Ninety Lakhs only) ("Performance Security"). The Performance Security is furnished to CESC Mysore in the form of three bank guarantees in favour of Managing Director of the CESC Mysore as per the format provided in Schedule 3 and having validity up to 1 year from the Commercial Operation Date. The details of the bank guarantees furnished towards the Performance Security are given below;

(i) Bank Guarantee No. 2657BG3652012 dated 24 August, 2012 for an amount of Rs. 4,98,00,000/- (Rupees Four Crores Ninety Eight Lakhs only);

(ii) Bank Guarantee No. 2657BG3662012 dated 24 August, 2012 for an amount of Rs. 9,96,00,000/- (Rupees Nine Crores Ninety Six Lakhs only); and

(iii) Bank Guarantee No. 2657BG3672012 dated 24 August 2012 for an amount of Rs. 9,96,00,000/- (Rupees Nine Crores Ninety Six Lakhs only).

b) Appropriation of Performance Security

Upon occurrence of a Developer Default or failure to meet the Conditions Precedent by the Developer, CESC Mysore shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to encash and appropriate the relevant amounts from the Performance Security as Damages for such Developer Default or Conditions Precedent. Upon such encashment and appropriation from the Performance Security, the Developer shall, within

30 (thirty) days thereof, replenish, in case of partial appropriation, to its original level the Performance Security, and in case of appropriation of the entire Performance Security provide a fresh Performance Security, as the case may be, and the Developer shall, within the time so granted, replenish or furnish fresh Performance Security as aforesaid failing which CESC Mysore shall be entitled to terminate this Agreement in accordance with Article 16.

c) Release of Performance Security

Subject to other provisions of this Agreement, CESC Mysore shall release the Performance Security, if any within 1 year from the Commercial Operation Date.

The release of the Performance Security shall be without prejudice to other rights of CESC Mysore under this Agreement."

"ARTICLE 5: OBLIGATION OF THE DEVELOPER

5.1 Obligations of the Developer

5.1.1 Subject to and on the terms and conditions of this Agreement, the Developer shall at its own cost and expense;

a) procure finance for and undertake the designing, constructing, erecting, testing, commissioning and completing of the Power Project in accordance with the Applicable Law and Grid Code observe, fulfill, comply with and perform all its obligations set out in this Agreement or arising hereunder;

b) comply with all Applicable Laws and obtain applicable Consents, Clearances and Permits (including renewals as required) in the performance of its obligations under this Agreement and maintaining all Applicable Permits in full force and effect during the Term of this Agreement;

c) commence supply of power up to the Contracted Capacity to CESC Mysore no later than the Scheduled Commissioning Date and continue the supply of power throughout the term of the Agreement;

d) connect the Power Project switchyard with the Interconnection Facilities at the Delivery Point;

e) own the Power Project throughout the Term of Agreement and keep it free and clear of encumbrances, except those expressly permitted under Article 19; and

f) comply with the equity lock-in conditions set out in Clause 5.2; and

g) be responsible for all payments related to any taxes, cesses, duties or levies imposed by the Government Instrumentalities or competent statutory authority on land, equipment, material or works of the project to or on the electricity consumed by the Project or by itself or on the income or assets owned by it;

h) be responsible for the construction of additional bays in case required;

i) construct and carry out the maintenance of the transmission line up to the Delivery Point, during the Agreement Period and pay applicable

supervision charges to the concerned Government Instrumentality;

j) make arrangements for auxiliary consumption and bear all the related costs for the same.

5.1.2 The Developer shall discharge its obligations in accordance with Good Industry Practice and as a reasonable and prudent person.

5.1.3 The Developer shall, at its own cost and expense, in addition to and not in derogation of its obligations elsewhere set out in this Agreement:

a) make, or cause to be made, necessary applications to the relevant government agencies with such particulars and details, as may be required for obtaining Applicable Permits and obtain and keep in force and effect such Applicable Permits in conformity with the Applicable Laws;

b) procure, as required, the appropriate proprietary rights, licenses, agreements and permissions for materials, methods, processes and systems used or incorporated into the Power Project;

c) make reasonable efforts to maintain harmony and good industrial relations among the personnel employed by it or its Contractors in connection with the performance of its obligations under this Agreement;

d) ensure and procure that its Contractors comply with all Applicable Permits and Applicable Laws in the performance by them of any of the Developer's obligations under this Agreement; and

e) not do or omit to do any act, deed or thing which may in any manner be violative of any of the provisions of this Agreement.

5.7 Extensions of Time

5.7.1 In the event that the Developer is prevented from performing its obligations under Clause 5.1 by the Scheduled Commissioning Date due to:

a) any CESC Mysore Event of Default; or

b) force Majeure Events affecting CESC Mysore; or

c) force Majeure Events affecting the Developer;

the Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the limit prescribed in Clause 5.7.2 and Clause 5.7.3 for a reasonable period but not less than 'day for day' basis, to permit the Developer or CESC Mysore through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the Developer or CESC Mysore, or till such time such Event of Default is rectified by CESC Mysore.

5.7.2 In case of extension occurring due to reasons specified in Clause 5.7.1(a), any of the dates specified therein can be extended, subject to the condition that the Scheduled Commissioning Date would not be extended by more than 6 (six) months.

5.7.3 In case of extension due to reasons specified in Article 5.7.1(b) and (c), and if such Force Majeure Event continues even after a maximum period of 3 (three) months, any of the Parties may

choose to terminate the Agreement as per the provisions of Article 16.

If the Parties have not agreed, within 30 (thirty) days after the affected Party's performance has ceased to be affected by the relevant circumstance, on the time period by which the Scheduled Commissioning Date or the Expiry Date should be deferred by, any Party may raise the Dispute to be resolved in accordance with Article 18.

5.7.4 As a result of such extension, the Scheduled Commissioning Date and the Expiry Date newly determined shall be deemed to be the Scheduled Commissioning Date and the Expiry Date for the purposes of this Agreement."

16. Learned Senior Counsel relies on Article 4.4, which expressly entitles the Appellant to encash the performance bank guarantee if supply does not commence by the Scheduled COD, subject only to relief expressly available under the PPA.

17. On the State Commission's finding of Force Majeure, learned Senior Counsel submits that it is both procedurally and substantively untenable. Procedurally, Article 14.5 of the PPA makes notice a condition precedent. It requires the affected party to notify the other within 7 days, with particulars of the event, its effect, and mitigating measures. The said Article, in material part, provide as follows:

"14.5 Notification of Force Majeure Event

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

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

14.5.2 The Affected Party shall give notice to the other Party of (i) the cessation of the relevant event of Force Majeure; and (ii) the cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this Agreement, as soon as practicable after becoming aware of each of these cessations."

17.1 No such notice is ever issued by the Respondent No. 1/Developer; Force Majeure is not even a pleaded defence before the State Commission. Substantively, the delay is caused by another arm of the State, which falls within the contractual provision for extension under Article 5.7, not within the exculpatory scope of Force Majeure.

18. It is therefore contended that the Respondent No. 1/Developer neither obtained an extension under Article 5.7 nor issued a Force Majeure notice under Article 14.5 of the PPA. In such circumstances, Article 4.4 of the PPA squarely applies. The State Commission erred in treating the delay as Force Majeure in the absence of notice and specific plea. The PPA is not rendered inoperative merely because both the Appellant and Respondent No. 2/KPTCL are State instrumentalities; each has distinct contractual and statutory obligations.

19. Learned Senior Counsel further contends that the jurisdiction of the regulatory bodies does not extend to modifying the terms of a concluded commercial contract or to conferring remedies outside the framework of the agreement. The invocation of the performance bank guarantee was effected strictly in accordance with Article 4.4 of the PPA, and the amount realised thereunder cannot be undone by directions that alter the contractual allocation of risk. The PPA contemplates no

automatic extension of timelines; any relief was required to be sought and obtained under Article 5.7 or by invoking Article 14.5 of the PPA. The Respondent No. 1/Developer's omission to pursue such contractual recourse forecloses its claim in law.

20. Learned Counsel lastly addresses the events surrounding the interim application filed by the Respondent No. 1/Developer before the State Commission, wherein the State Commission, by an interim order, expressly restrained Appellant from encashing the performance bank guarantee pending adjudication. It is urged that such invocation was carried out under a bona fide belief that the Respondent No. 1/Developer's persistent failure to satisfy the CPs, coupled with the absence of demonstrable progress on site, had already crystallised the Appellant's contractual right under Article 4.4 of the PPA.

SUBMISSIONS BY THE RESPONDENT(S)

21. In reply, learned Counsel appearing for the Respondents submit that the PPA was consciously entered into with full awareness of the prevailing transmission network status and the potential timelines for completion of evacuation facilities. The CPs under Article 4 and obligations under Article 5 of the PPA are casted in absolute terms, to be fulfilled within 240 days from the Effective Date, and the Respondent No. 1/Developer assumes the commercial risk of timely completion. It must be appreciated

that the performance of the PPA is inextricably contingent upon the timely completion of the evacuation system by Respondent No. 2/KPTCL, without which synchronisation and supply of power to the grid is technically impossible.

22. He contends that such delay, being beyond the Respondent No. 1/Developer's control, ought to operate as an automatic ground for extension of the timelines for fulfilment of the CPs and achievement of COD, thereby precluding invocation of Article 4.4 of the PPA. At the same time, counsel stresses that the "reasonable cooperation" contemplated under Article 4.2.1 is facilitative and cannot be construed as shifting upon the Respondent No. 1/Developer the risk of delay in transmission works which the contract itself allocates to the Appellant's sphere of responsibility. To construe otherwise would distort the contractual allocation of risk and undermine the very structure of the PPA.

23. Learned Counsel stresses that developers such as the present Respondent routinely account for external dependencies in formulating their bids, and the tariff of Rs. 8.49/kWh reflects this risk assessment. The State Commission, in granting extension and ordering restoration of the performance bank guarantee, correctly applied the agreement in a manner that avoided unjust enrichment of the Appellant.

24. Addressing Force Majeure, learned Counsel submits that the delay in commissioning the 220 kV evacuation lines is clearly beyond the Respondent No. 1/Developer's control, arising from delays in large-scale transmission works executed by Respondent No. 2/KPTCL. While a formal notice under Article 14.5 may not have been issued, the factual circumstances, including the correspondence placed on record, and the admitted position of Respondent No. 2/KPTCL are sufficient for the commission to characterise the event as Force Majeure. It is argued that absence of such notice, cannot negate the substantive defence where the facts are undisputed, and the delay is objectively established.

25. Learned Counsel further relies on the conduct of Appellant itself, which, according to him, reflects an implicit acknowledgment of the dependency upon Respondent No. 2/KPTCL's transmission works. He submits that Appellant not only entertained successive requests for extension of time but also engaged in correspondence suggesting revision of tariff from Rs. 8.49/kWh to Rs. 2.39/kWh, and actively participated in proceedings before the State Commission without ever contesting the position that commissioning of the project was contingent upon completion of Respondent No. 2/KPTCL's evacuation infrastructure. He contends that it constitutes tacit admission that the delay cannot be attributed solely upon Respondent No. 1/Developer.

26. Learned Counsel further submits that the framework of Article 4 makes it clear that invocation of the performance bank guarantee is envisaged as a remedy for performance failures during the operational phase of the project, and not for pre-COD breaches of conditions precedent, particularly where such breaches are directly caused by the Appellant's own default or that of another State agency. As to the performance bank guarantee, the Respondent(s) maintain that its encashment in the face of an express interim restraint order dated 14.11.2014 of the State Commission is per se unlawful.

27. Learned Counsel concludes by submitting that the remedial directions contained in the final order of the State Commission: i) requiring restoration of the performance bank guarantee; ii) granting extension of timelines for fulfillment of conditions precedent; and iii) permitting renegotiation of tariff are well within its regulatory powers to balance contractual obligations keeping in mind the larger public interest of securing timely commissioning of renewable energy capacity for integration into the grid. The APTEL, in affirming these directions on 21.03.2018 has committed no error of law warranting interference by this Hon'ble Court.

FINDINGS OF THE STATE COMMISSION AND APTEL

28. The State Commission, vide its final order dated 28.01.2015 in O.P. No. 24 of 2014, records that the Respondent No. 1/Developer's inability to achieve the CPs and COD within the contractual timelines is directly linked to the non-completion of the 220 kV evacuation lines by Respondent No. 2/KPTCL. The commission notes that interconnection of the project to the grid was technically impossible until such lines were commissioned.

29. Reliance is placed on the RTI reply dated 19.08.2014 from Respondent No. 2/KPTCL, which admits that the evacuation lines are likely to be commissioned only in August 2015. This, in the State Commission's view, establishes that the delay is not attributable to any act or omission of the Respondent No. 1/Developer. Therefore, as per the State Commission, the delay in completion of the evacuation system was beyond the control of the Respondent No. 1/Developer amounting to Force Majeure, thereby justifying extension of timelines.

30. In examining the terms of the PPA, the State Commission places emphasis on Article 5.7, which contemplates extension of CPs timelines where the delay is for reasons solely attributable to the Appellant. It holds that the expression Appellant must, in the present context, be construed to encompass the acts or omissions

of the State transmission utility, given its integrated role in enabling evacuation of contracted power.

31. On the invocation of the performance bank guarantee, the State Commission finds that Appellant proceeded to encash the security notwithstanding the subsistence of its interim restraint order. Such invocation, it holds, was contrary both to the contractual scheme and to the authority of the State Commission. Article 4, in its view, must be harmoniously read with the extension mechanism under Article 5.7 of the PPA and the Force Majeure provisions, such that invocation is impermissible where the non-performance flows from the default of the Appellant or its instrumentalities.

32. Notedly, the State Commission takes the view that the delay in readiness of evacuation facilities falls within the definition of Force Majeure under the PPA, being an event beyond the reasonable control of the Respondent No. 1/Developer. On these findings, the commission directed: i) Restoration of the encashed security to the Respondent No. 1/Developer; ii) consideration of an extension of time for fulfilment of the CPs; and iii) renegotiation of the project tariff considering the revised commissioning schedule.

33. Likewise, the APTEL vide its judgement dated 21.03.2018 in Appeal No. 176 of 2015, affirmed the decision of the State

Commission in its entirety. The APTEL records that there is no dispute about the fact that the 220 kV evacuation lines are not commissioned within the original CP and COD timelines, and that the delay is attributable to Respondent No. 2/KPTCL.

34. The APTEL further observed that where the Appellant's contractual performance is inherently dependent on the completion of transmission works by Respondent No. 2/KPTCL, a State instrumentality, delay by such entity must, for the purposes of Article 5.7 of the PPA, be treated as delays attributable to the Appellant.

35. Qua the performance security, the APTEL concurs with the State Commission that the right to invocation of the performance security under the PPA is not absolute. It must be exercised in accordance with the contract as a whole, including provisions that provide relief where non-performance is caused by the Appellant's own default. Although a Force Majeure notice under Article 14.5 was not issued, the APTEL held that the State Commission was entitled to take judicial notice of the facts on record which show that the delay is beyond the Respondent No. 1/Developer's control. In view thereof, the APTEL dismissed Appellant's appeal, thereby upholding the directions for restoring the performance bank guarantee; extension of contractual timelines; and renegotiations of the tariff.

ISSUES FOR DETERMINATION AND ANALYSIS

36. Having heard learned Counsel(s) for the parties and upon close consideration of the record, the following questions fall for our determination: (i) the effect of Respondent No. 2/KPTCL's delay in commissioning the 220 kV evacuation system upon the timelines stipulated for fulfilment of the CPs and achievement of COD under the PPA; (ii) the entitlement of Appellant to invoke and encash the performance bank guarantee in the facts of the present case; (iii) the sustainability of the finding of Force Majeure recorded by the State Commission in the absence of the contractual notice contemplated under Article 14.5 of the PPA; (iv) the character of the PPA as a contingent contract; and (v) the competence of the State Commission and the APTEL to direct restoration of the bank guarantee, extension of timelines, and renegotiation of tariff.

37. Article 5.1 of the PPA casts upon the Respondent No. 1/Developer the obligation to complete, at its own risk and cost, all activities necessary to enable the supply of power to the Appellant. Article 5.7 provides for extension where delay is "for reasons solely attributable to the Appellant". The record discloses beyond dispute that the evacuation system, integral for delivery of power, was to be executed by Respondent No. 2/KPTCL through the construction of two 220 kV double-circuit lines. By

its communication dated 19.08.2014, Respondent No. 2/KPTCL itself acknowledged that the lines would be commissioned only in August 2015, well beyond the contractual timelines.

38. The Respondent No. 1/Developer contends that such delay, being beyond its control, automatically extended the contractual schedule. That submission cannot be accepted. The contractual framework does not operate on automaticity. Relief is conditional upon the Respondent No. 1/Developer seeking and obtaining an extension under Article 5.7 of the PPA, which was never done. In the absence of such recourse, the timelines under the PPA remained binding. Respondent No. 2/KPTCL and Appellant, being both State instrumentalities does not alter the position in law. Contractual rights and remedies must be asserted within the framework of the agreement, not dehors it.

39. Turning then to the invocation of the performance bank guarantee, Article 4.4 of the PPA confers upon the Appellant the right to encash the performance security where the Respondent No. 1/Developer fails to commence supply by the Scheduled COD, subject to the relief(s) expressly available under the PPA, including those relating to Force Majeure. In the present case, supply did not commence within the agreed period; no formal extension was obtained under Article 5.7 of the PPA; and no notice of Force Majeure was issued under Article 14.5 of the

PPA. The preconditions for invocation of Article 4.4 of the PPA thus stood satisfied. Appellant's invocation of the bank guarantee was, therefore, an exercise of a remedy specifically conferred by the contract, and to deny it would be to disregard the allocation of risk embodied in the PPA. Pertinently, invocation of the bank guarantee by the Appellant was on 12.11.2014 and the restraining order was passed by the State Commission only on 14.11.2014. As the invocation was before the State Commission's order, the performance security of Rs. 23,40,60,000/- was transferred to the account of the Appellant on 06.12.2014, which thereafter came to be refunded by the Appellant, pursuant to the order of the APTEL.

40. The finding of Force Majeure by the State Commission cannot be sustained for the reason that Article 14.5 of the PPA stipulates that the affected party "shall" issue notice within seven days of knowledge of the event. This requirement is not merely directory; it is a condition precedent for invoking the clause. Even if the delay in completion of the evacuation system was beyond the Respondent No. 1/Developer's control, the appropriate provision for relief was Article 5.7, not Article 14 of the PPA. Significantly, Article 14.3.1 of the PPA details the events and circumstances which constitute Force Majeure and delay in the readiness of the evacuation system, even if attributable to Respondent No. 2/KPTCL, does not constitute a Force Majeure

event, as defined. The omission to pursue contractual relief under the correct clause is fatal; it cannot be remedied by recourse to a provision inapplicable on its terms.

41. As regards the submission that the PPA is in the nature of a contingent contract under the Contract Act, the contention requires careful scrutiny. The completion of the evacuation system by Respondent No. 2/KPTCL was indeed an uncertain event outside the Respondent No. 1/Developer's control, and in a practical sense, supply of power was dependent upon it. Yet, the PPA does not treat such completion as a condition precedent in law to the Respondent No. 1/Developer's obligations. It instead provides specific contractual mechanism(s) - Article 5.7 for delays attributable to the Appellant and Article 14 for events of Force Majeure. Unless relief is sought and secured under those provisions, the time-bound obligations under the PPA remain enforceable and the Appellant's remedies for default intact.

42. Reliance was also placed before us on the decision of this Court in ***Venkataraman Krishnamurthy & Anr. v. Lodha Crown Buildmart Pvt. Ltd.,*** (2024) 4 SCC 230, wherein it was observed that the explicit terms of a contract are always the final word with regard to the intention of the parties. We find the principle enunciated therein to be apposite to the case at hand. This Court has, in a consistent line of judgements, reiterated that regulatory

or adjudicatory *fora* cannot, under the guise of equity or fairness, rewrite the contractual framework or superimpose obligations alien to the agreement. The PPA, being the product of a competitive bidding process and having received regulatory approval, must be construed and enforced strictly in accordance with its express stipulations. To permit otherwise would be to allow the State Commission or the APTEL to override the parties own allocation of risk under the contract.

43. Finally, as to the competence of the regulatory *fora*, Appellant and Respondent No. 2/KPTCL, though both State instrumentalities, are parties to a commercial contract concluded through competitive bidding. Their relationship is governed not by overarching notions of equity but by the terms of the PPA. The jurisdiction of the regulatory bodies is to ensure compliance with law and to adjudicate disputes within the four corners of the contract. It does not extend to recasting the contractual framework by directing restitution of amount lawfully realised under the PPA, or by mandating alterations to tariff and timelines in a manner inconsistent with the agreement. The directions of the State Commission, affirmed by the APTEL, requiring restoration of the performance security, extension of contractual timelines, and renegotiation of tariff, transgress the limits of that jurisdiction.

CONCLUSION AND DIRECTIONS

44. In light of the foregoing analysis, this Court is of the view that Appellant's invocation and encashment of the performance security was in full conformity with the contractual framework under the PPA. The non-fulfilment of the Respondent No. 1/Developer's obligations within the stipulated time, non-seeking of extension under Article 5.7 or valid Force Majeure claim under Article 14, necessarily attracted Article 4.4 of the PPA.

45. Resultantly, the appeal is allowed and the impugned judgment dated 21.03.2018 of the APTEL passed in Appeal No. 176 of 2015, and the order dated 28.01.2015 of the State Commission in O.P. No. 24 of 2014 are set aside.

46. Pending application(s), if any, shall also stand disposed of. No order as to costs.

…….J.
[SANJAY KUMAR]

…….J.
[SATISH CHANDRA SHARMA]

NEW DELHI
August 25, 2025.