

M. P. POWER MANAGEMENT COMPANY LTD.

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v.

RENEW CLEAN ENERGY PVT. LTD. & ANR.

(Civil Appeal No. 3600 of 2018)

APRIL 05, 2018

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[RANJAN GOGOI AND R. BANUMATHI, JJ.]

Contract – Termination of Contract – Appellant issued a Request for Proposal (RFP) for long term procurement of 300 MV power from Grid connected Solar Energy Sources through tariff based competitive bidding – Respondent no.1 was selected – Pursuant thereto, Power Purchase Agreement (PPA) was executed between the appellant and respondent no.1 for sale and procurement of solar power, for which, respondent no.1 submitted bank guarantee – Respondent no.1 was unable to fulfill prescribed conditions within stipulated period – Consequently, PPA terminated by the appellant and further, imposed penalty on respondent no.1 – Penalty amount was to be encashed from bank guarantee – High Court set aside the order of termination of the contract, however, maintained the invocation of bank guarantee – On appeal, held: – The termination of contract was not fair – Respondent no.1 was unable to obtain the requisite land for establishing the power plant and on its request, the State allotted land to the respondent on lease – However, land was found to be heavily encroached and there was stiff resistance every time respondent no.1 tried to approach the land – Respondent no.1 sought for change of location of the project, which was granted – Thereafter respondent no.1 purchased another land and undertook the construction activities and the project in an advance stage of synchronization – The same was notified to the appellant by communication dated 10.07.2017 stating that the commissioning of the project was in final stage – However, still appellant terminated the contract by its order dated 11.08.2017 – Respondent No.1 had spent substantial amount in development of the project in the changed location – The delay in commissioning the project was due to unavoidable circumstances like resistance faced at the allotted site and subsequent change of location of the project – These circumstances, though not a Force Majeure event,

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A *time taken by respondent No.1 in change of location and construction of the plant have to be kept in view for counting the delay – Further, since the contract permits imposition of penalty, respondent no.1 liable to pay penalty in terms of clause 2.5.1 of the PPA for delay – But the action of the appellant in terminating the contract arbitrary and rightly set aside by the High Court – Insofar*
B *as bank guarantee is concerned, Supreme Court stayed the order of the High Court subject to restitution by the appellant of the amount covered by the bank guarantee which has been invoked which is said to have been complied with by the appellant.*

C **Dismissing the appeal, the Court**

HELD: 1. Respondent No.1 was unable to obtain the requisite land, for establishing the power plant and on its request, the State Government had allotted 96.73 acres of land at district Rajgarh to the appellant on lease. According to respondent No.1, upon initiation of measurement and demarcation exercise by the
D **revenue officials, the land was found to be heavily encroached and there was stiff resistance which continued every time respondent No.1 tried to approach the said land and therefore, respondent No.1 could not access the project site and commence any construction activities. On request by respondent No.1 by**
E **its letter dated 29.09.2016, respondent No.1 sought for change of location of the project. The Board of Directors considered the request of respondent No.1 and by Resolution dated 29.12.2016 allowed change of location of the project. Thereafter, respondent No.1 purchased the land to an extent of 253 acres in village**
F **Bansara and Pipriya Rai in Ashok Nagar district within a period of about eighty three days from the date of the appellant’s approval. After acquiring the land, respondent No.1 undertook the construction activities and the project in an advanced stage of synchronization as early as on 10.07.2017. The same was notified to the appellant by communication dated 10.07.2017**
G **stating that the commissioning of the project is in final stage and that the expected date of commissioning of the project is 31.08.2017 which according to respondent No.1 is ahead of the scheduled commissioning date i.e. 07.09.2017 in terms of the PPA.[Para 10][834-H; 835-A-D]**

H **2. Even when respondent No.1 has undertaken the**

construction activities in the changed location and informed the appellant that the expected date of commissioning of the project is 31.08.2017, the appellant terminated the contract by its order dated 11.08.2017. Respondent No.1 stated in its counter affidavit, that it has got sanction of the term debt facility of Rs.267.37 crores from PTC India Financial Services Limited and has spent huge amount in purchasing the land to an extent of 253 acres in Ashok Nagar district. Respondent No.1 has also spent substantial amount in development of the project in the changed location and reached an advanced stage of commissioning the project by 31.08.2017. The delay in commissioning the project appears to be due to unavoidable circumstances like resistance faced at the allotted site in Rajgarh district and subsequent change of location of the project. These circumstances, though not a *Force Majeure* event, time taken by respondent No.1 in change of location and construction of the plant have to be kept in view for counting the delay. Having invested huge amount in purchasing the land and development of the project at Ashok Nagar district and when the project is in the final stage of commissioning, the termination of the contract is not fair. [Para 11][835-E-H; 836-A]

3. The High Court observed that the delay in completing the project was only for sixteen days. But according to the appellant, respondent No.1 was granted time period of 210 days to complete the Conditions Subsequent after which the penalty was leviable for the delay and if the delay exceeded more than nine months, the appellant could terminate the contract. According to appellant, the delay was not of sixteen days; but the said delay of sixteen days is beyond the period of nine months permissible under the PPA. Suffice to note that in cases of delay, Articles 2.5 and 2.6 provide for levy of penalty. As observed by the High Court, since the contract permits imposition of penalty, respondent No.1 is liable to pay penalty in terms of clause 2.5.1 of the PPA for the delay. But the action of the appellant in terminating the contract is arbitrary and was rightly set aside by the High Court. [Para 12][836-B-D]

4. While setting aside the termination of the contract, the High Court maintained the action of invocation of bank guarantee in terms of clause 2.5.1 of the PPA. This Court has stayed the

A **order of the High Court subject to restitution by the appellant of the amount covered by the bank guarantee which has been invoked which is said to have been complied with by the appellant. Interest of justice would be met by directing respondent No.1 to pay penalty amount of Rs.11,95,54,200/- imposed upon respondent No.1 by the appellant. [Para 13][836-E]**

B CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3600 of 2018.

C From the Judgment and Order dated 18.08.2017 of the High Court of Madhya Pradesh Principal Seat at Jabalpur in Writ Petition No. 12432 of 2017.

Mukul Rohatgi, Sr. Adv., Purushaindra Kaurav, AG, Mishra Saurabh, Ankit Kr. Lal, Ms. Anuradha Mishra, Advs. for the Appellant.

D K. V. Vishwanathan, Sr. Adv., Ms. Mazag Andrabi, Ms. Vrinda Bhandari, Varun Kapur, Bharat Vinod Sharma, Advs. for the Respondents.

The Judgement of the Court was delivered by

R. BANUMATHI, J. 1. Leave granted.

E 2. This appeal arises out of the judgment passed by the High Court of Madhya Pradesh, Principal Seat at Jabalpur in and by which the High Court allowed the Writ Petition No.12432 of 2017 setting aside the order of termination of contract dated 11.08.2017 while maintaining the appellant's action on invocation of bank guarantee in terms of clause 2.5.1 of the contract.

F 3. Brief facts which led to filing of this appeal are as follows:

G The appellant-M.P. Power Management Company Ltd. initiated the process of procurement of power from Grid Connected Solar Energy through tariff based competitive bidding for meeting its Renewable Purchase obligations in the State of Madhya Pradesh. Accordingly, a Request for Proposal (RFP) dated 06.05.2015 was issued by the appellant for long term procurement of 300 MW power from Grid connected Solar Energy Sources through tariff based competitive bidding. Out of 100 bidders who participated in the bidding process, respondent No.1-ReNew Clean Energy Private Ltd. was selected on the basis of cheaper merit order rates. The appellant issued a Letter of Intent dated 23.10.2015 in

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favour of respondent No.1 allotting 51 MW capacity at quoted tariff of Rs.5.457/kwh for twenty five years which was accepted by respondent No.1 by its consent letter dated 26.10.2015. A Power Purchase Agreement (PPA) dated 10.11.2015 was executed between the appellant and respondent No.1 for sale and procurement of 51 MW solar power, for which, respondent No.1 submitted a bank guarantee from respondent No.2-Bank for an amount of Rs.15,30,00,000/- valid till January, 2018.

4. Since respondent No.1 was unable to obtain the requisite land for establishing the power plant, respondent No.1 requested assistance from the State Government. Accordingly, the Collector, District-Rajgarh by order dated 21.04.2016 allotted 96.73 acres of revenue land to MP New and Renewable Energy Department for further allotment on lease to respondent No.1. This was done by the appellant even though the land procurement was the obligation of the bidder.

5. According to respondent No.1, there were difficulties in accessing the land, because when measurement of land was taken on 29.06.2016, it was found encroached and the project team faced heavy resistance, physical attacks etc. and therefore, respondent No.1 vide its letter dated 29.09.2016 requested the appellant to allow to change of location of the project. The said permission sought for by respondent No.1 was granted by the appellant by its Resolution dated 29.12.2016. The relevant portion of the Resolution reads as under:-

“Resolved that condition for not allowing change of location after 210 days from signing of PPA be relaxed and following Solar Power developers be allowed to change the location of their respective project, subject to provision of clause 2.5 and 2.6 of the PPA.”

6. After permission was granted to change the location of the project, respondent No.1 purchased lands to an extent of about 253 acres in villages Bansara and Pipriya Rai in Ashok Nagar district and undertook the development/construction activities. On 10.07.2017, respondent No.1 wrote to appellant that “*commissioning process was in final stages and we expect to commission the plant on 31.08.2017 (tentative date), which is ahead of scheduled commissioning date of 07.09.2017.*”

7. As per clause 2.5.1 of the PPA, a maximum period of nine months beyond 07.06.2016 for achieving Conditions Subsequent enables

A the appellant to terminate the agreement if respondent No.1 failed to satisfy the Conditions Subsequent by this date along with penalty which was to be calculated as per clause 2.5.1 of the PPA. In the light of the abovesaid provisions of the PPA, the appellant by order dated 11.08.2017 terminated the PPA and imposed a penalty of Rs.11,95,54,200/- on respondent No.1. Being aggrieved, respondent No.1 filed Writ Petition B No.12432 of 2017 before the High Court praying that the appellant be directed not to give effect to termination and encashment of performance bank guarantee. The High Court *vide* impugned judgment dated 18.08.2017 partly allowed the writ petition setting aside the order of termination of the contract while maintaining the invocation of the bank C guarantee.

8. We have heard the learned counsel appearing for the parties and perused the impugned judgment and materials on record.

D 9. Clause 2.1 of the PPA required respondent No.1 to fulfil all Conditions Subsequent within a period of 210 days from the effective date i.e. 06.06.2017, failing which Article 2.5 of the PPA allowed further extension up to nine months for fulfillment of the Conditions Subsequent subject to payment of liquidated damages in terms of the PPA. Clause 2.5 of the PPA reads as follows:-

E **2.5 DELAY IN ACHIEVING CONDITIONS SUBSEQUENT**

2.5.1. In case of delay in achieving any of the Conditions Subsequent under clause 2.1 (a to h), as may be applicable, MPPMCL shall encash CPG (submitted by Seller @ Rs.30 Lakhs/MW) as under, subject to Force Majeure:

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- a) Delay from 0-3 months - 1% per week.
 - b) Delay from 3-6 months - 2% per week for the period exceeding 3 months, apart from (a) above.
 - c) Delay from 6-9 months - 3% per week for the period exceeding 6 months, apart from (a) and (b) above.
 - G d) In case of delay of more than 9 months, MPPMCL shall terminate PPA and release balance amount of CPG.

H 10. Since respondent No.1 was unable to obtain the requisite land, on request by respondent No.1, the State Government allotted 96.73

acres of land at district Rajgarh to the appellant for being allotted to respondent No.1 on lease. According to respondent No.1, upon initiation of measurement and demarcation exercise by the revenue officials, the land was found to be heavily encroached and there was stiff resistance which continued every time respondent No.1 tried to approach the said land and therefore, respondent No.1 could not access the project site and commence any construction activities. On request by respondent No.1 by its letter dated 29.09.2016, respondent No.1 sought for change of location of the project. The Board of Directors considered the request of respondent No.1 and by Resolution dated 29.12.2016 allowed change of location of the project. Thereafter, respondent No.1 purchased the land to an extent of 253 acres in village Bansara and Pipriya Rai in Ashok Nagar district within a period of about eighty three days from the date of the appellant's approval. After acquiring the land, respondent No.1 undertook the construction activities and the project in an advanced stage of synchronization as early as on 10.07.2017. The same was notified to the appellant by communication dated 10.07.2017 stating that the commissioning of the project is in final stage and that the expected date of commissioning of the project is 31.08.2017 which according to respondent No.1 is ahead of the scheduled commissioning date i.e. 07.09.2017 in terms of the PPA.

11. Even when respondent No.1 has undertaken the construction activities in the changed location and informed the appellant that the expected date of commissioning of the project is 31.08.2017, the appellant terminated the contract by its order dated 11.08.2017. As pointed out by respondent No.1 in its counter affidavit, on 06.06.2016, respondent No.1 has got sanction of the term debt facility of Rs.267.37 crores from PTC India Financial Services Limited and has spent huge amount in purchasing the land to an extent of 253 acres in Ashok Nagar district. Respondent No.1 has also spent substantial amount in development of the project in the changed location and reached an advanced stage of commissioning the project by 31.08.2017. The delay in commissioning the project appears to be due to unavoidable circumstances like resistance faced at the allotted site in Rajgarh district and subsequent change of location of the project. These circumstances, though not a *Force Majeure* event, time taken by respondent No.1 in change of location and construction of the plant have to be kept in view for counting the delay. Having invested huge amount in purchasing the land and development of the project at Ashok

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- A Nagar district and when the project is in the final stage of commissioning, the termination of the contract is not fair.

12. The High Court observed that the delay in completing the project was only for sixteen days. But according to the appellant, respondent No.1 was granted time period of 210 days to complete the

- B Conditions Subsequent after which the penalty was leviable for the delay and if the delay exceeded more than nine months, the appellant could terminate the contract. According to appellant, the delay was not of sixteen days; but the said delay of sixteen days is beyond the period of nine months permissible under the PPA. In the light of our observations above, we are not inclined to go into the merits of this contention. Suffice to note that in cases of delay, Articles 2.5 and 2.6 provide for levy of penalty. As observed by the High Court, since the contract permits imposition of penalty, respondent No.1 is liable to pay penalty in terms of clause 2.5.1 of the PPA for the delay. But the action of the appellant in terminating the contract is arbitrary and was rightly set aside by the
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- D High Court.

13. While setting aside the termination of the contract, the High Court maintained the action of invocation of bank guarantee in terms of clause 2.5.1 of the PPA. By order dated 22.09.2017, this Court has stayed the order of the High Court subject to restitution by the appellant of the amount covered by the bank guarantee which has been invoked which is said to have been complied with by the appellant. In our view, interest of justice would be met by directing respondent No.1 to pay penalty amount of Rs.11,95,54,200/- imposed upon respondent No.1 by the appellant.

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- F 14. In the result, the appeal is dismissed. The respondent No.1 shall pay the penalty of Rs.11,95,54,200/- to the appellant within a period of four weeks from the date of this judgment. No costs.