2026:DHC:913

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on: 07.10.2026
Judgment delivered on: 14.10.2026

CNR No. DLHC010381262026

\+ O.M.P.(I) (COMM.) 346/2026 & I.A. 27144/2026

ENERICA INFRA 3 PRIVATE LIMITED .....Petitioner

versus

NTPC VIDYUT VYAPAR NIGAM LIMITED & ANR.....Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Jayant Mehta, Senior Advocate with Mr. Vishrov Mukherjee, Mr. Yashaswi Kant, Mr. Ameya Vikram Mishra, Mr. Vibhor Yadav, Mr. Om Shelat, Mr. Ali Ahmed Chaudhary and Ms. Aparajita Upadhaya, Advocates.

For the Respondents : Mr. Ankit Jain, Senior Advocate with Mr. Tushar Jain, Mr. Alok Shankar, Mr. Vaibhav Choudhary and Ms. Kanika Gupta, Advocates for R-1/NVVN.
Mr. Aditya K. Singh, Mr. Vinit Kumar, Mr. Mridul Gupta, Mr. Vineet Gupta, Mr. Divyansh Singh and Mr. Dalima Gupta, Advocates for R-2/UPPTCL.
Mr. Nikhil Nayyar, Senior Advocate with Mr. Divyanshu Bhatt, Mr. Pranjit Bhattacharya and Mr. Abhayaditya Singh, Advocates for R-3/UPPCL.

CORAM:
HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

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J U D G E M E N T

TUSHAR RAO GEDELA, J.

1. The present petition has been filed by the petitioner under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "*A&C Act*") seeking to restrain the respondent nos.1 and 2 , i.e NTPC Vidyut Vyapar Nigam Limited (hereinafter referred to as *"NVVN"*) and Uttar Pradesh Power Transmission Corporation Limited (hereinafter referred to as *"UPPTCL"*) from invoking, encashing or appropriating the Performance Bank Guarantee (hereinafter referred to as *"PBG"*) for Rs.27,96,25,000/- , the Viability Gap Funding (hereinafter referred to as *"VGF"*) Bank Guarantee for Rs.13,50,00,000/-, and the Connectivity Bank Guarantees (hereinafter referred to as *"Conn BGs"*) for a total sum of Rs.10,74,00,000 as also the directions to release and return the said Bank Guarantees (hereinafter referred to as *"BGs"*).

BRIEF FACTS:

2. It is stated that the Ministry of Power (hereinafter referred to as *"MoP"*) had issued guidelines for Tariff Based Competitive Bidding for procurement of Energy Storage Capacity from Grid Connected Battery Energy Storage Systems (hereinafter referred to as *"BESS"*) on 10.03.2022. Similarly, the said Ministry had also issued an Operational Guidelines for the VGF funding Scheme for Battery Energy Storage Systems (hereinafter referred to as *"Operational Guidelines"*) linking the disbursement of VGF to prescribed milestones including the requisite land position on 15.03.2024.

3. It is stated that on 12.08.2025, the respondents had issued the Letter of Award (hereinafter referred to as *"LoA"*) in favour of the petitioner in respect of 125 MW/500 MWh standalone BESS project to be established at the

400/220 kV, Garautha Substation in Uttar Pradesh (hereinafter referred to as *"Project"*). In terms thereof, the petitioner was required to furnish a PBG of Rs.27,96,25,000/- prior to the execution of a Power Purchase Agreement (hereinafter referred to as *"PPA"*).

4. On 26.08.2025, the petitioner and the respondent executed the PPA. In terms of Article 3.1(i) of the PPA, a 60 days period was stipulated for the respondents to provide the petitioner the entire 10 acres, contiguous, encumbrance free parcel of land at Garautha. It is stated that the said parcel of land was not made available to the petitioner in terms of the PPA.

5. It is stated that in the interregnum, on 25.03.2026 i.e. five months after the contractual deadline, the respondent no.2 had executed the Right of Use Agreement (hereinafter referred to as *"RoU"*) which claimed to have given access to only 9.23 acres against the entitlement of 10 acres. On 30.03.2026, the petitioner furnished PBG for Rs.27,96,25,000/- which is stated to be valid till 31.12.2027, and simultaneously furnished the VGF BG for Rs.13,50,00,000/- issued by the State Bank of India stated to be valid till 25.02.2032. It is claimed that the said Bank Guarantees were furnished despite the fact that the land forming the foundation of the project had still not been handed over to the petitioner.

6. It is stated that the petitioner was compelled to terminate the PPA executed with NVVN by its letter dated 14.08.2026 on account of the fundamental breach of their contractual obligation to hand over the entire 10 acres of contiguous, encumbrance free Project land at the Garautha Substation within 60 days of the PPA. It is the petitioner's case that the termination is lawful and valid as also that consequently no default of the petitioner had arisen which could entitle the respondent nos.1 and 2 to invoke or appropriate the BGs furnished by the petitioner.

CONTENTIONS OF THE PETITIONER:

7. Mr. Jayant Mehta, learned senior counsel appearing for the petitioner would submit as under:

7.1. At the outset, learned senior counsel would state that the entire project had got inordinately delayed on account of non-performance of the respondent no.2 in providing the parcel of land admeasuring 10 acres at Garautha. He would submit that the LoA was issued on 12.08.2025; the PPA was executed on 26.08.2025; in terms of the Article 3.1(i) of the PPA, the 60 days stipulated for the respondent no.2 to hand over the possession of the 10 acres of the land in terms of the PPA had expired sometime in the month of October, 2025.

7.2. Learned senior counsel would further submit that on account of the dispute as to whether a parcel of land in terms of the Article 3.1(i) of the PPA had indeed been handed over to the petitioner or not, a joint physical demarcation was conducted at site. The Demarcation Report had clearly specified that out of 10 acres only approximately 8.9 acres attributable to the project had been made available for the petitioner to commence the project work. It had also revealed that some portion of the said 8.9 acres were already in possession of an EPC Contractor who had only given an assurance to hand over the physical possession of the said parcel of the land in its possession by June, 2026.

7.3. Mr. Mehta would contend that the MoP had stepped in only after the joint physical demarcation, finding that the project was not proceeding in terms of the PPA. It was further contended that the MoP had also stepped in for the reason that representations in the month of April and March, 2026 were submitted by the petitioner stating the

difficulties faced by it on account of non-providing of the parcel of land admeasuring 10 acres at Garautha by the respondent no.2, which is stated to be the beneficiary of the entire project.

7.4. Learned senior counsel would firmly state that the provision of providing the 10 acres of land to the petitioner was intrinsically intertwined and interlinked with the progress of the project since the funding to be released by the Government was to commence only once the petitioner was handed over the physical possession of the land for it to commence its project. In support thereof, he relied upon Clauses 2.5 and 2.6 of the Operational Guidelines, which dealt with the 'Disbursement Schedule' and the 'VGF'.

7.5. Learned senior counsel would further submit that the petitioner, in order to resolve the impasse, had suggested to the respondent no.2 for an alternative site. Rather than agreeing to the alternative site, respondent no.2 proposed amendments to the existing contract in such a manner that it would have novated the original contract and brought into effect a new contract, which would be at variance with the terms, which were available hitherto before in the original Battery Energy Discharge Sale Agreement (hereinafter referred to as *"BEDSA"*) and PPA. Since the amendments would have prejudiced the case of the petitioner, such amendments were not agreed to.

7.6. He stated that only under these circumstances, the petitioner had terminated the PPA by its letter dated 14.08.2026. Thus, the violation of the contractual terms squarely lay on the respondents. He would stoutly urge that it cannot be countenanced that despite violation of the crucial term of the PPA, the respondents would get a premium by encashing the BGs in question.

CONTENTIONS OF RESPONDENT NO.1/NVVN:

8. Mr. Ankit Jain, learned senior counsel would submit as under:

8.1. Broadly, learned senior counsel would object to the maintainability of the petition on the grounds that (i) the disputes raised herein are within the domain and exclusive jurisdiction of the State Electricity Regulatory Commission (hereinafter referred to as "*SERC*") in terms of Clause 16.3.1; and (ii) the dispute raised is non arbitrable as it relates to an amount above Rs.25 crore, which is proscribed in Annexure A under Clause 16.3.1 (ii) of the PPA.

8.2. So far as the first objection regarding ouster of jurisdiction is concerned, learned senior counsel drew attention to Sections 2(4), 82, 86(f), 94(2), and finally Section 158 of the Electricity Act, 2003 (hereinafter referred to as "*the Act*"). He would contend that read harmoniously and conjunctively, it is clear that the disputes between the petitioner and the respondents are clearly within the exclusive domain and jurisdiction of the SERC. He relied upon the judgement of the Supreme Court in ***Gujarat Urja Vikas Nigam Ltd. vs. Essar Power Ltd,*** reported in ***(2008) 4 SCC 755***, particularly paragraphs 59 to 61 in support of the aforesaid submission.

8.3. Regarding the objection in respect of non arbitrability of the present dispute on the quantum, learned senior counsel invited attention to Annexure A to the PPA under Clause 16.3.1 (ii) of the PPA. Inviting attention to paragraph C of the annexure respecting 'Arbitration', learned senior counsel would contend that there is a clear proscription or bar for arbitration of disputes beyond Rs.25 crore. Since the petition seeks injunction against invocation of BG cumulatively above Rs.25 crore, i.e.,

Rs. 52,20,25,000/- , the present petition is not maintainable. In order to buttress the aforesaid submission, learned senior counsel drew attention to the prayer clause of the petition which would clearly demonstrate that the dispute raised is more than Rs.25 crore.

8.4. On merits, learned senior counsel would first submit that the petitioner has indulged in unfair practices while filing the present petition. He would submit that all this while the petitioner had corresponded with the respondent only through email, yet, while issuing the termination notice on 14.08.2026, the petitioner had sent it in a hard copy *via* Speed Post. He particularly emphasised that the day of dispatch, i.e., 14.08.2026, was a Friday, 15.08.2026 the mail could not be delivered being National Holiday on account of Independence Day, and 16.08.2026, being Sunday. Cleverly, the petition was filed on 16.08.2026, the Sunday, and got listed the matter on 18.08.2026 before this Court.

8.5. Apart from the above, learned senior counsel would submit that even the advance service was effected upon an email address, though belonging to the respondent no.1, however, was not the notified email address for any official communication as specified in the PPA. Even the affidavit of service filed on behalf of the petitioner establishes this fact. According to learned senior counsel, this was again an unfair practice to deprive the respondent no.1 an opportunity to oppose the petition on the first day. He would submit that it was only due to this Courts' insistence on the presence of respondent no.1 before passing any order, that the petitioner had no choice other than to inform respondent no.1 about the petition. He would strongly urge that in order to maintain the purity of system and procedure, this Court may pass strict and stringent orders to

curb this indulgence.

8.6. Mr. Jain would vehemently contend that the very issuance of the termination notice is *malafide*. He would submit that the petitioner has issued such termination on account of not being able to procure electricity in terms of the PPA. Having failed to do so, it would impact the performance of the petitioner. This was probably the best method of overcoming their own lack of performance.

8.7. So far as the argument of the petitioner regarding lack of handing over of land to the extent of 10 acres is concerned, he would submit that respondent no.2 had handed over 9.05 acres to the petitioner. This parcel of land was roughly about 90% of the land which was to be handed over for the purposes of commencing the project work. This would have triggered the 1st instalment of payment as per the Clause 2.5 of the Operational Guidelines, which has set out the 'Disbursement Schedule'.

8.8. Learned senior counsel further submitted that the petitioner had sent a number of communications *vide* email, commencing from 23.05.2026 onwards to demonstrate that the petitioner sought variation in the contractual terms regarding the parcel of land. The communications also assured the respondents that no commercial or financial claims would be raised in respect to the land being arranged. On the other hand, the respondent no.1 *vide* communications dated 25.05.2026, 17.07.2026 and 22.07.2026 required the petitioner to sign the Supplementary PPA so that the project could proceed further. Learned senior counsel referred to the email communication dated 25.07.2026 of respondent no.3/UPPCL which required both petitioner as well as respondent no.1 to sign and execute both the agreements. Lastly, he referred to the email dated 27.07.2026 of respondent no.1 to petitioner requiring immediate

execution of the Supplementary PPA as it was impacting other projects being executed at Garautha. To this email, the petitioner replied by email dated 28.07.2026 seeking time till 07.08.2026 to review and then execute the Supplementary PPA. Learned senior counsel would submit that this was followed by emails dated 30.07.2026, 07.08.2026 and 10.08.2026 from respondent no.1 to petitioner. Learned senior counsel forcefully contended that no objection was intimated by the petitioner till 14.08.2026 when the illegal termination letter was issued by the petitioner. Mr. Jain emphasised that none of these correspondences were annexed to the petition which would have highlighted the delay and *malafide* on the part of the petitioner disentitling it to any interim injunction.

CONTENTIONS OF RESPONDENT NO.3/UPPCL:

9. Mr. Nikhil Nayyar, learned senior counsel appearing for respondent no.3/UPPCL states that respondent no.3 was impleaded *vide* order dated 15.09.2026. Learned senior counsel would submit as under:

9.1. He would contend that the issue of jurisdiction regarding disputes in the present petition vesting with the SERC is unequivocally clear. He would submit that Section 86(1)(f) of the Act clearly conferred jurisdiction upon the SERC for adjudication of disputes as also for reference of disputes to arbitration. According to him, the language of Section 86(1)(f) of the Act is very clear, expansive and wide. Unlike 86(1)(f), Section 79(1)(f) of the Act, is restricted to sub-clauses (a) to (d). Thus, learned senior counsel contended that not only all disputes between the parties could be adjudicated by the SERC under Section 86(1)(f), but it also had the jurisdiction to refer any dispute to arbitration. He relied upon the

judgement of the Supreme Court in ***Gujarat Urja*** (*supra*) particularly paras 27, 28 and 32 to 36.

9.2. Additionally, learned senior counsel drew attention to Section 2(4) of the Act to submit that the "Appropriate Commission" in the present case is the Uttar Pradesh Electricity Regulatory Commission (hereinafter referred to as "*UPERC*"), and the tariff is required to be approved by the said Commission. According to him, since the dispute pertains to entities falling clearly within the Act, the petitioner ought to approach the UPERC in respect of any dispute, whether adjudicated by itself or referred to arbitration.

9.3. So far as the submission of the petitioner regarding special equities is concerned, he would submit that the events and situation which have come by, is the sole creation of the petitioner itself, and thus, cannot be permitted to premise its case on "special equities". Learned senior counsel reiterated the submissions of Mr Jain regarding the handing over of 9.05 acres of land which would have permitted and triggered release of 10% funding to the petitioner as per clause 2.5 of the Operational Guidelines.

9.4. He had also relied upon the judgement of a Coordinate Bench of this Court in ***Renew Wind Energy (AP2) Pvt. Ltd. vs Solar Energy Corporation of India***, reported in ***2025 SCC Online Del 8252***.

CONTENTIONS OF RESPONDENT NO.2/UPPTCL:

10. Mr. Aditya K. Singh, learned counsel appearing for the respondent no.2 would submit as under:

10.1. He would contend that so far as the petition is concerned, (i) there is no *prima facie* case in favour of the petitioner; (ii) respondent

no.2 is not a signatory to the arbitration agreement referred to in the PPA, and thus, cannot be made party nor any prayers be sought against it; and (iii) Section 86(1)(f) of the Act confers jurisdiction only on the SERC, and thus, this petition is not maintainable. Inviting attention to prayer clause (b) of the petition, learned counsel would submit that the Conn BGs referred therein and the PPA under which the said Conn BGs were furnished, are matters within the domain of the laws respecting Connectivity Agreements.

10.2. Referring to the Guidelines for Procurement and Utilization of Battery Energy Storage Systems as part of Generation, Transmission and Distribution assets, along with Ancillary Services (hereinafter referred to as the *"Guidelines"*) dated 11.03.2022 and the Request for Selection (hereinafter referred to as *"RfS"*), learned counsel invited attention to Clauses 7.1 and 7.10 to contend that the petitioner is aware that the parties are governed by the said Guidelines which provide minute details as to which law would govern their relation as also the prescribed manner in which Conn BGs are to be invoked by respondent no.2. Learned counsel also referred to various amendments to the RfS which bind the petitioner. Relying upon the above documents and Guidelines, learned counsel would stoutly submit that the present petition is not maintainable as the Conn BGs in prayer clause (b) are governed and regulated by the Guidelines, and the agreement executed between the parties and cannot be subject matter of this petition.

10.3. Learned counsel heavily relied upon the provisions of sub-section (37), (47) and (73) of Section 2 of the Act. He also referred to Section 30, and particularly, Section 39 to submit that respondent no.2 was created under the said section and only has statutory powers as

conferred by that section. His emphasis was that once it is clear that the relation between petitioner and respondent no.2 was governed by the Guidelines and the provisions of the Act, Section 86(1)(f) of the Act would govern any dispute arising therein and the petitioner has no choice other than to approach the SERC. In the same context, learned counsel also referred to Sections 173, 174 and 175 of the Act to submit that the Act is a standalone enactment not subject to or in derogation of any law for the time being in force, and hence, any dispute which may arise are to be purely guided by the provisions contained therein. Learned counsel also referred to Section 181 of the Act to submit that the SERC is empowered to make regulations consistent with the Act, and in pursuance thereto, UPERC (Grant of Connectivity to intra-State Transmission System) Regulations, 2010 (hereinafter referred to as *"UPERC 2010"*) were brought into force.

10.4. Learned counsel strenuously argued by referring to Regulations 4, 5, 6 particularly, 6.3 to submit that if there is a material change in the location of a plant, the applicant, in the present case, the petitioner, is obliged to first make an application which was required to be considered. In other words, mere statement that the petitioner has sought approval for change in location would not be sufficient as it had to be necessarily approved by the Competent Authority.

10.5. Learned counsel categorically submitted that the petitioner has still not executed the Connectivity Agreement. Moreover, while referring to Regulation 18 of UPERC 2010, he would submit that clearly as between the petitioner and respondent no.2, the prescribed mode of dispute resolution is by the SERC and no arbitration clause is available between them. Thus, in the absence thereof, the present petition under

Section 9 of the A&C Act is not maintainable. That apart, Regulation 21.1 clearly confers appropriate power and jurisdiction upon the SERC to pass necessary orders to meet ends of justice. Thus, according to learned counsel, on a harmonious and conjunctive reading of the entire gamut of the provisions of the Act, the Guidelines, the RfS, the Regulations of UPERC 2010 and non execution of the Connection Agreement between the parties, it is clear that it is the SERC alone which has the jurisdiction to adjudicate the present dispute.

10.6. Learned counsel also referred to the Gazette of the State of Uttar Pradesh dated 07.02.2024 amending the Regulations particularly, Regulations 7.3, 7.4, 8, 8.2, 8A to submit that the Regulations clearly set out and provided the manner in which the Conn BGs is to be furnished; conditions under which such Conn BGs could be encashed; and the manner in which such encashment of Conn BGs is to be treated. It is on account of the clear Regulations that learned counsel would submit that this Court may not exercise its jurisdiction and direct the petitioner to approach the SERC, in the present case UPERC which has the appropriate jurisdiction under the Electricity Act to adjudicate this dispute too.

10.7. Reliance was placed on the decisions in ***Vidya Drolia & Ors. vs Durga Trading Corporation***, reported in ***(2021) 2 SCC 1***; ***The State of Himachal Pradesh & Anr. vs JSW Hydro Energy Limited and Ors***, bearing ***Civil Appeal No. 12883/2024*** dated 16.07.2025; ***Chief General Manager (IPC) M P Power Trading Co. Ltd. Anr vs Narmada Equipments Pvt Ltd***, bearing ***Civil Appeal No. 1051/2021*** dated 23.03.2021 and ***M/s Amalgam Steels and Power Ltd. and Anr. vs Energy Watchdog and Ors.***, bearing ***SLP(C) No. 10538/2026*** dated

03.09.2026.

REJOINDER OF PETITIONER:

11. In rejoinder, Mr. Mehta, learned senior counsel would contend as under:

11.1. Contrary to the submissions of the respondents, learned senior counsel would contend that it was the fundamental duty of the respondents to provide the project land admeasuring 10 acres on which the petitioner was to set up its plant. He urged that physical possession of the entire parcel of land was imperative as it was strategically linked to the release of funds which were critical for the development of the project. In support thereof, he relied upon clause 3.3.1 of the PPA to submit that the furnishing of the BGs was conditional upon commencement of supply (injection/drawl) of power. When the land upon which such a plant was to be set up itself was not provided, the question of the right accruing to the respondent for invocation too would not be available. This was made explicitly clear in Clause 3.3.3. He emphasised that no parcel of land was handed over to the petitioner before 25.08.2025 in terms of Clause 3.1 of the PPA.

11.2. Learned senior counsel would also contend that the respondents violated the conditions stipulated in Clause 3.2.1 that the BGs could not be encashed if there was no delay attributable to the petitioner. According to him, the full parcel of land to the extent of 10 acres was never offered or handed over to the petitioner even as per the respondents. Thus, invocation of BGs is violative of clauses of the PPA.

11.3. In regard to the objections raised by the respondents predicated on the provisions of Section 86(1)(f) of the Act, learned senior counsel

would draw attention to the order dated 11.03.2026 passed by the UPERC in the case of ***NVVN vs UPPTCL & Ors*** bearing ***Petition No. 2295/2025***. Drawing attention to paras 6 and 8 thereof, learned senior counsel would contend that the submissions of respondent no.1 before this Court completely contradict the stand taken before the SERC. He would contend that once the SERC itself approved the PPA, the respondents are bound to adhere to Clause 16 providing for arbitration, and cannot now contend to the contrary.

11.4. He would also contend that if the submission of the respondents that the SERC alone has jurisdiction over all disputes were to be averred to, then it would render Clause 16.3.1(ii) *otiose*. This is impermissible according to learned senior counsel.

11.5. So far as the submission regarding non arbitrability of disputes over Rs.25 crore as provided in Annexure A is concerned, learned senior counsel would submit that petitioner is not seeking recovery of any money, rather is praying for injunction from invocation of BGs, and thus, the bar in Annexure A would not apply to the facts of this case.

11.6. To the submission of the respondents that they have offered to hand over 90% of the land parcel out of 10 acres, learned senior counsel would contend that it is actually 89% only. This parcel of land would not entitle the petitioner to avail funds as per Clause 2.5 of the Operational Guidelines. Learned senior counsel would forcefully submit that even this parcel of land was sought to be handed over to the petitioner only on 24.04.2026, which is much beyond the timelines prescribed in the PPA. He would refer to the minutes of the meetings dated 11.05.2026 and 29.05.2026 which amply demonstrates that the parcel of land was still not available with the respondent themselves to be handed over to the

petitioner. In such circumstances, invocation of BGs would cause irreparable and unjustifiable damage to the petitioner. Thus, the argument that the petitioner would not suffer any financial constraint etc., is a bogey which is false to their knowledge.

11.7. In order to reiterate his arguments in the opening, learned senior counsel referred to the Operational Guidelines, particularly Clause 2.3 to submit that by 29.05.2026, a period of 12 months had already lapsed out of 24 months as stipulated. As per Clause 3.1, respondents were to hand over 100% land and not 90%. Whereas even as on 14.08.2026, land to the extent of 100%, was not handed over, constraining the petitioner to terminate the PPA.

11.8. To the argument of respondents that invariably in all cases where a party seeks injunction against invocation of BGs the party is required to establish both egregious fraud and special equities in case the party is primarily relying on the grounds of special equities, learned senior counsel would counter that such submissions are contrary to logic. According to learned senior counsel, if the grounds for egregious fraud are already established, there would be no further requirement to establish any other facet. Equally, on the aspect of special equities, if the party is able to establish such grounds, requiring the party to further prove or establish egregious fraud would render the grounds on special equities nugatory or *otiose*. Thus, the said argument is untenable.

11.9. To the argument of learned counsel for respondent no.2 that it is not signatory to the PPA, etc., and thus, not amenable to the jurisdiction of this Court, learned senior counsel would contend that the PPA refers to it and it had also participated in the proceedings before the UPERC, and thus, cannot extricate itself out from the ambit of the present

petition.

11.10. Regarding the ratio laid down in ***Gujarat Urja*** (*supra*), learned senior counsel would submit that once the UPERC has already applied its mind to the PPA and its clauses and approved the same, Clause 16.3.1 (ii) thereof ought to be given full effect to without rendering the provision otiose or nugatory.

ANALYSIS AND CONCLUSIONS:

12. This Court has heard Mr. Jayant Mehta, learned senior counsel for petitioner, Mr. Ankit Jain learned senior counsel for respondent no.1, Mr. Nikhil Nayyar, learned senior counsel for respondent no.3 and Mr. Aditya K. Singh, learned counsel for respondent no.2, perused the records and examined the judgements relied upon by the parties.

13. Having heard learned counsel for the parties at great length and on a perusal of the record, it appears that the primordial question required to be considered is as to whether this Court would have jurisdiction to adjudicate the present petition, namely on two counts, i.e., (i) in view of the provisions of Section 86(1)(f) of the Electricity Act, 2003; and (ii) if a dispute above Rs.25 crore is arbitrable or falls within the excepted category in view of Annexure A to Clause 16.3.1 (ii) of PPA?

14. In this context, it would be worthwhile to reproduce relevant paragraphs of the judgement of the Supreme Court in ***Gujarat Urja*** (*supra*) which are extracted hereunder:

> *"26. It may be noted that Section 86(1)(f) of the Act of 2003 is a special provision for adjudication of disputes between the licensee and the generating companies. Such disputes can be adjudicated upon either by the State Commission or the person or persons to whom it is referred for arbitration.* ***In our opinion the word "and" in Section 86(1)(f) between the words "generating companies" and "to refer any dispute for arbitration" means "or". It is well settled that sometimes "and" can mean "or" and sometimes "or" can mean "and" (vide G.P. Singh's***

Principles of Statutory Interpretation, 9th Edn., 2004, p. 404).

27. ***In our opinion in Section 86(1)() of the Electricity Act, 2003 the word "and" between the words "generating companies" and the words "refer any dispute" means "or", otherwise it will lead to an anomalous situation because obviously the State Commission cannot both decide a dispute itself and also refer it to some arbitrator. Hence the word "and" in Section 86(1)(1) means "or".***

28. Section 86(1)(f) is a special provision and hence will override the general provision in Section 11 of the Arbitration and Conciliation Act, 1996 for arbitration of disputes between the licensee and generating companies. It is well settled that the special law overrides the general law. Hence, in our opinion, ***Section 11 of the Arbitration and Conciliation Act, 1996 has no application to the question who can adjudicate/arbitrate disputes between licensees and generating companies, and only Section 86(1)(f) shall apply in such a situation.***

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30. Shri Jayant Bhushan, learned counsel for one of the parties in the connected case submitted that Section 86(1)(f) is violative of Article 14 of the Constitution of India because it does not specify when the State Commission shall itself decide a dispute and when it will refer the matter to arbitration by some arbitrator. In our opinion there is no violation of Article 14 at all. ***It is in the discretion of the State Commission whether the dispute should be decided itself or it should be referred to an arbitrator****. Some leeway has to be given to the legislature in such matters and there has to be judicial restraint in the matter of judicial review of constitutionality of a statute (vide Govt. of AP. v. P. Laxmi Devi³).*

xxx *xxx* *xxx*

33. Section 175 of the Electricity Act, 2003 states that the provisions of the Act are in addition to and not in derogation of any other law. This would apparently imply that the Arbitration and Conciliation Act, 1996 will also apply to disputes such as the one with which we are concerned. However, in our opinion Section 175 has to be read along with Section 174 and not in isolation.

34. Section 174 provides that the Electricity Act, 2003 will prevail over anything inconsistent in any other law. In our opinion the inconsistency may be express or implied. Since Section 86(1)(f) is a special provision for adjudicating disputes between licensees and generating companies, in our opinion by implication Section 11 of the Arbitration and Conciliation Act, 1996 will not apply to such disputes i.e. disputes between licensees and generating companies. This is because of the principle that the special law overrides the general law. For adjudication of disputes

between the licensees and generating companies there is a special law, namely, Section 86(1)(f) of the Electricity Act, 2003. Hence the general law in Section 11 of the Arbitration and Conciliation Act, 1996 will not apply to such disputes.

35. It is well settled that where a statute provides for a thing to be done in a particular manner, then it has to be done in that manner, and in no other manner [vide Chandra Kishore Jha v. Mahavir Prasad (SCC para 17: AIR para 12), Dhanajaya Reddy v. State of Karnataka (SCC para 23: AIR para 22), etc.]. Section 86(1)(f) provides a special manner of making references to an arbitrator in disputes between a licensee and a generating company. Hence by implication all other methods are barred.

36. At first glance there is an apparent inconsistency between Section 175 and Section 174 of the Electricity Act, 2003. While Section 174 says that the said Act will prevail over other laws, Section 175 says that the said Act is in addition to and not in derogation of any other law (which would include Section 11 of the Arbitration and Conciliation Act, 1996).

xxx xxx xxx

58. In our opinion Section 174 and Section 175 of the Electricity Act, 2003 can be read harmoniously by utilising the samanjasya, badha and gunapradhana principles of Mimansa. This can be done by holding that ***when there is any express or implied conflict between the provisions of the Electricity Act, 2003 and any other Act then the provisions of the Electricity Act, 2003 will prevail, but when there is no conflict, express or implied, both the Acts are to be read together.***

59. In the present case we have already noted that there is an implied conflict between Section 86(1)(f) of the Electricity Act, 2003 and Section 11 of the Arbitration and Conciliation Act, 1996 since under Section 86(1)(f) the dispute between licensees and generating companies is to be decided by the State Commission or the arbitrator nominated by it, whereas under Section 11 of the Arbitration and Conciliation Act, 1996, the court can refer such disputes to an arbitrator appointed by it. Hence on harmonious construction of the provisions of the Electricity Act, 2003 and the Arbitration and Conciliation Act, 1996 ***we are of the opinion that whenever there is a dispute between a licensee and the generating companies only the State Commission or the Central Commission (as the case may be) or arbitrator (or arbitrators) nominated by it can resolve such a dispute, whereas all other disputes (unless there is some other provision in the Electricity Act, 2003) would be decided in accordance with Section 11 of the Arbitration and Conciliation Act, 1996****. This is also evident from Section 158 of the Electricity Act, 2003. However, except for Section 11 all other provisions of the Arbitration*

and Conciliation Act, 1996 will apply to arbitrations under Section 86(1)(1) of the Electricity Act, 2003 ***(unless there is a conflicting provision in the Electricity Act, 2003, in which case such provision will prevail).***

60. In the present case, it is true that there is a provision for arbitration in the agreement between the parties dated 30-5-1996. ***Had the Electricity Act, 2003 not been enacted, there could be no doubt that the arbitration would have to be done in accordance with the Arbitration and Conciliation Act, 1996.*** *However, since the Electricity Act, 2003 has come into force w.e.f. 10-6-2003, after this date all adjudication of disputes between licensees and generating companies can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it. After 10-6-2003 there can be no adjudication of dispute between licensees and generating companies by anyone other than the State Commission or the arbitrator (or arbitrators) nominated by it.* ***We further clarify that all disputes, and not merely those pertaining to matters referred to in Clauses (a) to (e) and (g) to (k) in Section 86(1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by it. This is because there is no restriction in Section 86(1)(f) about the nature of the dispute****.*

61. ***We make it clear that it is only with regard to the authority which can adjudicate or arbitrate disputes that the Electricity Act, 2003 will prevail over Section 11 of the Arbitration and Conciliation Act, 1996.*** *However, as regards the procedure to be followed by the State Commission (or the arbitrator nominated by it) and other matters related to arbitration (other than appointment of the arbitrator) the Arbitration and Conciliation Act, 1996 will apply (except if there is a conflicting provision in the Act of 2003).* ***In other words, Section 86(1)(f) is only restricted to the authority which is to adjudicate or arbitrate between licensees and generating companies.*** *Procedural and other matters relating to such proceedings will of course be governed by the Arbitration and Conciliation Act, 1996, unless there is a conflicting provision in the Act of 2003."*

[Emphasis Supplied]

15. A reading of the aforesaid paragraphs leave no doubt or ambiguity that the provisions of Section 86(1)(f) would clearly prevail not only over the provisions of Section 11 of the A&C Act in terms of being a Special Law, but also that any clause containing arbitration in the PPA or any other similar agreement has to concede to the said provision and cannot operate independently. The overriding nature and effect of the Act is further clear

from the interpretation and harmonious reading of Sections 174 and 175 of the Act rendered in the said judgement to the extent of conflict or repugnancy of provisions in any other Act. However, where there is no conflict, expressed or implied, then both Acts may be read together. The Supreme Court has also clarified that the words "*and*" occurring between "generating companies" and "to refer any dispute for arbitration" in Section 86(1)(f) of the Act, has to be necessarily read as "*or*" else it would lead to an anomalous situation. In other words, the SERC would have the discretion to decide whether the dispute before it can be adjudicated upon by itself or would require resolution by reference to arbitration. In either of the cases, it is the SERC alone which would have the necessary jurisdiction to decide the nature of controversy too. Otherwise, reading the word "*and*" as "*or*" as opined in ***Gujarat Urja*** (*supra*) would be rendered nugatory.

16. The principle and the proposition laid down in ***Gujarat Urja*** (*supra*) was reiterated and reaffirmed by the Supreme Court in ***Hindustan Zinc Limited vs. Ajmer Vidyut Vitran Nigam Limited***, bearing ***Civil Appeal No.9212/2019*** dated 04.12.2019, and ***NHAI vs Sayedabad Tea Company Limited***, bearing ***Civil Appeal No.6958-6959/2009*** dated 27.08.2019. These judgements were further relied upon by another three Judge Bench judgement of the Supreme Court in ***Chief General Manager (IPC) M P Power Trading Co Ltd & Anr vs. Narmada Equipments Pvt Ltd***, bearing ***Civil Appeal No.1051/2021*** dated 23.03.2021. Thus, the principles in ***Gujarat Urja*** (*supra*) are well settled and brook no ambiguity.

17. Thus, the jurisdiction to adjudicate any dispute between the petitioner and the respondents falls squarely within the domain and jurisdiction of the SERC, and this Court would be denuded of exercise of its jurisdiction under Section 9 of the A&C Act.

18. It is clear from a reading of sub-section (2) of Section 94 of the Act that the SERC has the inherent powers to pass interim orders in any proceeding, hearing or matter before it. This jurisdiction conferred upon the SERC also postulates that the Commission can pass interim protection orders in the nature of those passed by Civil Courts under Section 9 of the A&C Act. This is clear from Section 86(1)(f) of the Act, which provides the SERC the authority and jurisdiction to not only adjudicate disputes between the entities mentioned therein, but also refer disputes for arbitration. In that context SERC would be exercising power to nominate an arbitrator under the provisions of Section 158 of the Act. This section further postulates that other than nomination of an arbitrator in exercise of powers under the Act, the arbitration would be subject to the provisions of the A&C Act. Reading Section 86(1)(f) and section 158 harmoniously and conjunctively with Section 94(2) of the Act, it is unambiguous that the SERC while exercising powers under Section 86(1)(f) is empowered to pass interim orders under Section 94(2) extendable or akin to the powers of a civil court under Section 9 of the A&C Act. Read in any manner other than what has been analysed above, the power of the SERC under Section 94(2) to pass interim orders, in the context of a party similar in position to that of the petitioner, would be *otiose*. It would not only be prejudicial but also be unfair and unviable that a party, though may be referred to arbitration by the SERC, cannot avail of any urgent interim protection orders in the interregnum before the arbitrator is appointed by the SERC under Section 158 of the Act. Once a party is relegated to approach the SERC under the Act, and bearing in mind that Section 158 thereof postulates applicability of all provisions of A&C Act to the arbitration, it cannot and must not be countenanced that for urgent interim orders, of the nature provided in Section 9, the said party would have no

remedies at all. This would, in the humble opinion of this Court, be unfair and highly prejudicial. *Ergo*, the SERC must be held to be clothed with the necessary jurisdiction to entertain and adjudicate petitions/applications in the nature of or akin to a petition under Section 9 of the A&C Act.

19. That said, in respect of the second objection regarding non arbitrability of disputes which are valued more than Rs.25 crore as per Annexure A to Clause 16.3.1 (ii) of the PPA, it is observed that the cumulative value of all the BGs, whose invocation is sought to be injuncted is more than Rs.25 crore, i.e., Rs.52,20,25,000/-. To this, the learned senior counsel for the petitioner sought to contend that the petitioner is not seeking recovery thus, the bar would not be applicable. Before examining this issue on facts, it may be appropriate to reproduce paragraph 'C' of Annexure A hereunder:

> *"**C. Arbitration***
> *If the process of mutual consultation and/or ESC fails to arrive at a settlement, the Parties may, within Thirty (30) days of such failure, give notice to the other party, of its intention to commence arbitration, as hereinafter provided, as to the matter in dispute, and no arbitration in respect of this matter may be commenced unless such notice is given.* ***The mechanism of settling the disputes through arbitration shall be applicable only in cases where the disputed amount (i.e. Claim/ Counter claim, whichever is higher, excluding interest) does not exceed Rs. 25 crores.***
>
> *If the claim/ counter claim is in foreign currency, the SBI Bills Selling Exchange rate prevailing on the date of claim shall be used for the purpose of converting the claim in Indian Rupee.*
>
> ***In case the disputed amount (Claim/Counter claim, whichever is higher, excl. interest) exceeds Rs. 25 Crores, the parties shall be within their rights to take recourse to remedies as may be available to them under the applicable laws other than Arbitration after prior intimation to the other party.*** *There shall be no arbitration where the disputed amount (Claim/ counter claim, whichever is higher) is only up to Rs. 5 lakhs.*
> *The parties at the time of invocation of arbitration shall submit all the details of the claims and the counter-claims including the Heads/Sub-heads of the Claims/Counter-Claims and the documents relied upon by*

the parties for their respective claims and counter-claims. The parties shall not file any documents/details of the claims and counter-claims thereafter.

The claims and the counter claims raised by the parties at the time of invocation of the arbitration shall be final and binding on the parties and no further change shall be allowed in the same at any stage during arbitration under any circumstances whatsoever.

Any dispute in respect of which a notice of intention to commence arbitration has been given, in accordance with this clause shall be finally settled by arbitration.

It is agreed between the parties that the Arbitration proceedings ·shall be conducted as per the provisions of Fast Track Procedure as provided under The Arbitration and Conciliation Act, 1996, as amended from time to time."

[Emphasis Supplied]

20. Plainly, the first paragraph of para C of Annexure A proscribes arbitrability of any dispute which is valued more than Rs.25 crore. It is of great significance that not only is there a proscription but an abject prohibition of arbitrability of any dispute valued more than Rs.25 crore in the third paragraph of Para C of the said annexure by providing an alternate procedure. This is clear from the use of the words "*in case the disputed amount exceeds Rs.25 crores, the parties shall be within their rights to take recourse to remedies as may be available to them under the applicable laws other than Arbitration after prior intimation to the other party"*. Thus, the bar is clear.

21. Applying the aforesaid analysis to the facts of this case, this Court finds that the cumulative value of the BGs, whose invocation is sought to be injuncted is approximately Rs. 52,20,25,000/-, which unmistakably, exceeds Rs.25 crore. In this regard, para 94 of the petition, which is the valuation clause, and para 99, which is the prayer clause, may required to be seen and read thus:

"*94. The present Petition is valued at approximately Rs.52,20,25,000,*

being the aggregate value of the BGs, for the purposes of court fees and pecuniary jurisdiction, which value is comfortably within the pecuniary jurisdiction of this Hon'ble Court's commercial/original side as prescribed under Section 12(1)(a) of the Commercial Courts Act, 2015 The requisite court-fee of INR 100.00 (Rupees One hundred only) is being affixed herewith along with INR 1,000.00 (Rupees One Thousand only) towards process fee."

"***PRAYER(S)/RELIEF(S)***

99. In view of the facts and circumstances set out above, it is most respectfully prayed that this Hon 'ble Court may be pleased to:

(a) restrain the Respondent, NTPC Vidyut Vyapar Nigam Limited, from invoking, encashing, forfeiting or in any manner appropriating or acting upon the Performance Bank Guarantee dated 30.03.2026 for Rs.27,96,25,000, the VGF Bank Guarantee dated 30.03.2026 for Rs.13,50,00,000, furnished by the Petitioner, till final adjudication of the disputes between the parties;

(b) restrain the Respondent, UPPTCL, from invoking, encashing, forfeiting or in any manner appropriating or acting upon the Connectivity Bank Guarantees dated 31.03.2026 for Rs.10,74,00,000 furnished by the Petitioner, till final adjudication of the disputes between the parties; or in the alternative NVVN to secure the amount of Connectivity BG given to UPPTCL till final adjudication of the disputes between the parties;

(c) direct the Respondent to take all steps necessary to release, return and permit the discharge and cancellation of the Performance Bank Guarantee, the VGF Bank Guarantee and the Connectivity Bank Guarantees furnished by the Petitioner, consequent to the valid termination of the PPA;"

22. When read together, both paragraphs unequivocally admit the valuation of the BGs to be more than Rs.25 crore cumulatively. The argument of the petitioner that it is not seeking recovery of any monies, therefore, the cumulative valuation exceeding Rs.25 crore would not bar maintainability, does not appeal to this Court. The valuation of disputes cannot be split or categorised in the manner suggested by the petitioner as it is the very protection of the said BGs from being encashed that the petitioner is seeking relief of. The "dispute" *per se* pertains to BGs which are valued at more than Rs.25 crore and cannot be distinguished on the basis that valuation would be relevant only if the petitioner was seeking recovery and not otherwise. It is to

be noted that the petitioner has also sought for the directions to release and return the said BGs. Thus, this Court is not persuaded on this count too.

23. In view of the aforesaid affirmative conclusion reached by this Court on the lack of maintainability of the present petition, the other grounds raised by the petitioner as well as the respondents is not being addressed.

24. *Ab supra*, the petition fails and is dismissed for lack of jurisdiction.

25. Needless to observe that since the petition is held to be not maintainable purely on account of prescription of law, the learned SERC is requested to ignore any observation on merits in this order.

TUSHAR RAO GEDELA
(JUDGE)

OCTOBER 14, 2026/*anj*

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