

## Section 37 Court Cannot Recalculate Damages Awarded In Arbitration Absent Any Finding Of Arbitrariness Or Perversity: Supreme Court

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### Introduction

In *Saisudhir Energy Ltd. vs. NTPC Vidyut Vyapar Nigam Ltd.* [2026 INSC 103], the Supreme Court considered the limits of appellate interference under Section 37 of the Arbitration and Conciliation Act, 1996 (the "**Arbitration Act**"/ "**the Act**") where the dispute concerned quantification of liquidated damages under a power purchase agreement. The Supreme Court held that the Division Bench of the Delhi High Court exceeded the limited jurisdiction under Section 37 by re-working and recalculating "reasonable compensation" payable under Section 74 of the Indian Contract Act, 1872 after the Section 34 Court had adopted a plausible approach within the contract and within the permissible limits of modification.

The judgment is also significant for two reasons. *First*, it applies the Constitution Bench decision in *Gayatri Balasamy v. ISG Novasoft Technologies Limited* [2025 INSC 605] to uphold a limited modification by a Section 34 Court where the modification follows from applying the contract to admitted facts, without undertaking a merits re-trial. *Secondly*, it reiterates that in Section 37, the High Court's role is confined to examining whether the Section 34 Court stayed within its jurisdiction, and not to substitute its own quantification merely because it would arrive at a different figure.

### Facts

The dispute arose under the Jawaharlal Nehru National Solar Mission launched in 2010. The Ministry of Power designated NTPC Vidyut Vyapar Nigam Limited ("**NVVNL**") as the nodal agency to procure solar power from developers at fixed tariffs and to sell bundled power to distribution utilities at regulated prices.

On 24 January 2012, NVVNL entered into a Power Purchase Agreement ("**PPA**") with Saisudhir Energy Limited ("**SEL**") for setting up and supplying 20 MW solar power at INR 8.22 per unit for 25 years. The scheduled commissioning date for supply was 26 February 2013. Clause 4.6 of the PPA provided a liquidated damages regime for delay in commencement of supply, including (i) progressive encashment of performance bank guarantees for delay up to three months, proportionate to capacity not commissioned, and (ii) liquidated damages at INR 1,00,000 per MW per day for delay beyond three months for uncommissioned capacity, recoverable from payments due on account of sale of power.

On 30 January 2013, SEL sought extension of time by two months and invoked force majeure. NVVNL rejected the request on 31 January 2013 on the ground that the contractual notice requirement had not been complied with. SEL did not commission the project by 26 February 2013. It commissioned 10 MW on 26 April 2013 (about two months' delay) and the balance 10 MW on 24 July 2013 (about five months' delay).

SEL moved the Delhi High Court under Section 9 seeking restraint against encashment of bank guarantees and obtained interim protection pending consideration by the arbitral

tribunal under Section 17. Arbitration was invoked and a three-member tribunal was constituted. SEL sought restraint on encashment and claimed bank guarantee maintenance charges. NVVNL claimed entitlement to encash the bank guarantees and recover liquidated damages under Clause 4.6.

### **The Arbitral Award**

By a split award dated 21 July 2015, the majority held that there was delay in commissioning and directed SEL to pay NVVNL INR 1.2 crores, being 20% of the original performance guarantee computed at INR 30 lakhs per MW. SEL's claim for reimbursement of expenditure towards bank guarantee maintenance was rejected.

The minority award held that actual loss could not feasibly be worked out in the usual manner, treated Clause 4.6 liquidated damages as a genuine pre-estimate, and held NVVNL entitled to liquidated damages under the PPA. The minority also held NVVNL entitled to encash bank guarantees amounting to INR 49.92 crores excluding bank guarantees furnished towards earnest money deposit.

### **Section 34 Proceedings**

Both parties filed objections under Section 34 of the Act. By judgment dated 08 September 2016, the Single Judge of the Delhi High Court held that delay was established and, in substance, admitted. The High Court also recorded that NVVNL had not invested any amount in the project and did not prove actual damages in the conventional sense. Bearing in mind that the PPA duration was 25 years and the delay was for a few months, the Single Judge modified the award and granted 50% of the amount awardable towards damages under Clause 4.6, which worked out to INR 27.06 crores (50% of INR 54,12,32,000). The High Court directed recovery by adjusting INR 25 lakhs per month from 01 October 2016 from the amounts payable to SEL. The majority award was set aside.

### **Section 37 Proceedings**

Both parties appealed under Section 37 of the Act. By the impugned judgment dated 18 January 2018, the Division Bench agreed that reasonable compensation ought to be awarded, and treated the PPA as having a social object and purpose under the Solar Mission. However, it modified the Section 34 outcome and reduced the compensation to INR 20.70 crores by applying a rate of INR 1,00,000 per MW for the period of delay. It also directed SEL to pay bank guarantee renewal charges within six weeks.

Cross appeals were filed before the Supreme Court. SEL sought to avoid or further reduce damages. NVVNL contended that it was entitled to higher damages in accordance with Clause 4.6 and that the Division Bench was not justified in reducing the amount.

### **Issues Before The Supreme Court**

The Supreme Court addressed three principal questions:

- (i) whether, in a PPA executed under the Solar Mission, NVVNL was required to prove actual loss as a condition for liquidated damages under Section 74;

- (ii) whether the Section 34 Court's modification enhancing the amount beyond the arbitral majority award was permissible, particularly in light of ***Gayatri Balasamy***, and
- (iii) whether the Division Bench, in Section 37, was justified in re-working the quantification of reasonable compensation arrived at by the Section 34 Court.

## Decision of the Supreme Court

The Supreme Court recorded that delay in commissioning was not in dispute. It noted that the majority award itself recorded delay and an admission of delay by SEL. The Section 34 Court had clearly held breach and delay to be admitted, and the Division Bench had affirmed this position. Accordingly, Clause 4.6 of the PPA stood attracted.

## Section 74 In Public Interest Projects

SEL relied on ***Kailash Nath Associates v. DDA*** [2015 INSC 22] to contend that proof of loss was a sine qua non for compensation under Section 74 and that the PPA was purely commercial, despite being executed under the Solar Mission. NVVNL relied on ***Construction and Design Services v. DDA*** [2015 INSC 92] to submit that where a public utility or public interest project is involved, delay itself results in loss and strict proof of quantified loss is not required in the conventional sense.

The Supreme Court rejected SEL's characterisation of the PPA as purely commercial. It held that the PPA was executed with NVVNL acting as the nodal agency to implement the objectives under the Solar Mission and that commissioning of the solar plant was in public interest with an environmental dimension. On this basis, the Supreme Court treated ***Construction and Design Services*** as applicable. It held that in such cases the burden would lie on the party committing breach to show that no loss was caused by the delay or that the stipulated amount is in the nature of penalty. The Supreme Court held that SEL did not discharge this burden.

## Section 34 Modification And *Gayatri Balasamy*

SEL contended that the Section 34 Court could not have modified the majority award so as to grant higher compensation, and relied on the Constitution Bench decision in ***Gayatri Balasamy***.

The Supreme Court rejected this submission and held that ***Gayatri Balasamy*** recognises a limited power of modification under Section 34. It held that the Section 34 Court's modification in this case was a permissible exercise because it applied Clause 4.6.2 of the PPA to admitted facts without undertaking a merits re-trial or fact-finding exercise. The Supreme Court treated this as falling within the limited modification power recognised in ***Gayatri Balasamy***.

The Supreme Court held that the Division Bench exceeded its jurisdiction under Section 37 when it proceeded to re-work and re-calculate the amount of reasonable compensation. The Section 34 Court had first determined NVVNL's contractual entitlement under Clause 4.6 (INR 54,12,32,000) and then exercised discretion to award

50% as reasonable compensation (INR 27.06 crores). The Supreme Court held that unless this determination was shown to be beyond the contract, arbitrary, or perverse, Section 37 did not permit interference.

The Division Bench recorded no finding that the Section 34 Court's determination travelled beyond Clause 4.6 or suffered from arbitrariness or perversity. Yet it substituted its own computation and reduced the amount to INR 20.70 crores. The Supreme Court characterised this as an impermissible substitution of views.

In this context, the Supreme Court relied on ***AC Chokshi Share Broker Private Limited v. Jatin Pratap Desai*** [2025 INSC 174] for the proposition that a Section 37 Court must only determine whether the Section 34 Court exercised its jurisdiction properly and within bounds, and cannot convert Section 37 into a forum for fresh merits-based recalculation.

Accordingly, the Supreme Court allowed NVVNL's appeals and dismissed SEL's appeals. It set aside the Division Bench judgment dated 18 January 2018 to the extent it re-worked the compensation, and restored the Section 34 judgment dated 08 September 2016. The parties were directed to bear their own costs.

## Comment

This judgment reinforces three settled controls in arbitral challenges involving liquidated damages. *First*, where delay is admitted and a contractual liquidated damages regime applies, the enquiry under Section 74 is centred on "*reasonable compensation*", and in public interest or public utility contexts, Courts may treat loss from delay as inherent in the breach unless the party in breach discharges the burden to show otherwise, consistent with ***Construction and Design Services***. *Secondly*, ***Gayatri Balasamy*** permits a limited modification under Section 34 where the modification follows from applying the contract to admitted facts without a merits re-trial. *Thirdly*, Section 37 is not a second quantification forum. A Section 37 Court cannot substitute its own computation for a plausible, contract-traceable determination made under Section 34, absent a finding of jurisdictional error, perversity, or arbitrariness.

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