

No. N/56/2020

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,**No.16, C-1, Millers Tank Bed Area, Vasanth Nagar, Bengaluru-560 052.****Dated: 09.11.2021**

Shri Shambhu Dayal Meena : Chairman
Shri H.M. Manjunatha : Member
Shri M.D. Ravi : Member

O.P. No.18/2020**BETWEEN:**

M/s Abha Sunlight Private Limited,
A Company Registered under the
Companies Act,2013 having its Registered
Office at 138, Ansal Chambers II,
Bikaji Cama Palace,
Delhi –110 066.

....PETITIONER

(Represented by Sri Sanjay Sen, Senior Advocate for
Sri A.M. Shodhan Babu, Advocate for Law Offices
of Panag & Babu)

AND

1) Chamundeshwari Electricity Supply Corporation Limited,
(Wholly owned Government of Karnataka undertaking)
A Company Registered under the provisions of the
Indian Companies Act,1956 having its Registered Office
at CA-29, Vijaynagar 2nd Stage, Hinkal,
Mysore -570 001.
(Represented by its Managing Director)

2) Karnataka Renewal Energy Development Limited (KREDL),
A Company Registered under the provisions
of the Indian Companies Act,1956 having
its Registered Office at No.39, Shanti Gruha,
Bharath Scouts & Guides Building, Palace Road,
Bengaluru–560 001.

... RESPONDENTS

(Represented by its Managing Director)

(Respondent No.1 represented by Sri Shahabaaz Husain,
Advocate for Precinct Legal & Respondent No.2
represented by Sri Murugesh V Charati Advocate)

ORDERS

1. This petition filed by the Petitioner under Section 86(1)(f) of the Electricity Act 2003, praying for the following reliefs to:

- a) Declare that the delay in commissioning the Solar Power Project at Kalaghatagi Taluk was due to reasons outside the control of the Petitioners and therefore amount to Force Majeure as defined under Article 14 of the PPA;
- b) Condone the delay of 8 (Eight) days in commissioning the Solar Power Project at Kalaghatagi Taluk caused to Force Majeure event affecting the Petitioner;
- c) Grant extension of the Schedule Commissioning Date under the PPA in accordance with Article 5.7 of the PPA; and
- d) Pass such other order(s) including an order as to costs, to meet the ends of justice.

2. The brief facts set out in this petition are as under:

- a) The Petitioner Company, Abha Sunlight Private Limited, is a Special Purpose Vehicle (SPV) of ReNew Solar Power Private Limited, a Solar PV Power Project Developer with extensive experience in developing and operating renewable power projects throughout India. The Petitioner Company is a generator as defined under the provisions of the Electricity Act, 2003.
- b) The 2nd Respondent vide its Request for Proposals (RfP) dated 07.12.2017, invited proposals for establishing, operating and maintaining Solar PV Power Plants in Karnataka. The project was to be implemented in 43 Taluks. ReNew Solar Power Private Limited emerged as successful bidder in 8

Taluks in Karnataka to establish 20 MW (AC) capacity of Solar PV Ground Mount Projects in each of the 8 Taluks including Kalaghatagi Taluk. The Kalaghatagi Project was awarded to ReNew Solar Power Private Limited by the 2nd Respondent through a letter of award and allotment (Annexure-A) dated 08.02.2018. As per the terms of allotment letter, ReNew Solar Power Private Limited, was required to enter into a Power Purchase Agreement (PPA) with 1st Respondent through a Special Purpose Vehicle within 30 days of the letter of award. The present Petition pertains to the 20 MW capacity Solar Power Plant at Kalaghatagi Taluk in Dharwad District, in which ReNew Solar Power Private Limited emerged as the successful bidder and is executing the same through its SPV i.e., the Petitioner.

c) ReNew Solar Power Private Limited notified the Petitioner as the SPV vide its letter dated 16.03.2018 (Annexure-B), which shall undertake the performance of the obligations under letter of award dated 08.02.2018. Pursuant to the allotment letter the Petitioner entered into a PPA (Annexure-C) dated 24.03.2018 with the 1st Respondent. The PPA was for a period of 25 years at the Tariff of Rs. 3.21 per unit. The Scheduled Commercial Operation date under the PPA was 18 months from the effective date. The effective date of the PPA was 04.05.2018 i.e., the date on which KERC has approved as per Annexure-D.

- d) Under Article 5 of the PPA, the Petitioner unless affected by the Force Majeure events was required to commence supply of power by Scheduled Commission dated 03.11.2019 within a period of 18 months from the effective date. The PPA provided for downward revision of Tariff and liquidated damages in the event of delay in commissioning the project for reasons other than Force majeure events as provided under the PPA.
- e) There was incessant rainfall in the Northern Region of Karnataka during the monsoon season as well as post monsoon of 2019. Kalaghatagi Taluk faced heavy rainfall including floods during the months of July 2019 to October 2019 especially during the periods between the 1st July 2019 to 22 July 2019, 1st August 2019 to 25th August 2019, 4th October 2019 to 11th October 2019 and 19th October to 28th October 2019. The Government of Karnataka vide Government Order No. RD 87 TNR 2019, Bengaluru (Annexure-E) issued on 10.08.2019 declared 80 Taluks in 19 Districts in the State of Karnataka as flood affected areas between 01.08.2019 and 09.08.2019. Many areas in Dharwad District including Kalaghatagi Taluk were notified as a flood affected areas.
- f) The project site of the Petitioner is located in Kalaghatagi Taluk. Due to the heavy rainfall beginning from 01.08.2019 the project site was submerged, thereby, the Petitioner could not carry out construction work on the site. Moreover, the Project site was not accessible by road as the connect bridge to the project site was also washed away under water due to

floods. The connect bridge, connecting Hindasgiri and Madakihannal villages, on Kalaghatagi-Thadas Road located on the way to Shivanapura and Dyavanakonda Village was damaged. This was the main access point to the project. The photographs (Annexure-F) dated 05.08.2019 clearly demonstrates that the access road to the project site was damaged and could not be utilized for transport of vehicle or materials to the project site.

g) The Petitioner informed the 1st Respondent about heavy rainfall and consequent flood at the project site vide letter (Annexure-G) dated 12.08.2019. Thereby he has complied the Article 14 of the PPA with the requirement of sending a notice within 7 days from the occurrence of the Force Majeure Event. In response, the Respondent No. 1 vide its mail (Annexure-H) dated 20.08.2019 addressed to the Petitioner, sought a report from competent Authority of the Revenue Department regarding the rain damage in the project areas and also the google coordinates of the affected area.

h) The Petitioner vide its letter (Annexure-J) dated 12.09.2019 provided a copy of the report issued by Tahsildar, Kalaghatagi Taluk, Kalaghatagi, providing quantum of rainfall in the Taluk. The Petitioner provided data reports from Indian Meteorological Department which specifically stated that Dharwad region in North interior Karnataka had received "Excess" rainfall for the period between from 01.06.2019 till 09.09.2019. The Petitioner also provided Google coordinates of the project site (Annexure-K) as

sought by Respondent No.1. It was specifically pointed out to Respondent No.1 that the PWD bridge, which is the main access to the Project was severely damaged and washed away. It is submitted that at the time when Force Majeure event occurred, the project site setup work was in progress, the entire civil and electrical work was about to start. The schedule of civil and electrical work at the project site was hampered due to the Force Majeure event. The Petitioner could not transport the required heavy materials, such as Modules, MMS materials, cables, Transformer, E-house and switchyard related materials to the project site due to the primary access to the project site being inaccessible. It was also pointed out that this materially affected transport of vehicles and materials to the project site as it had come to a complete standstill. It is submitted that there is no other point of access through which the materials could be safely transported to the Project site. The Petitioner specifically stated that mitigation measures were being undertaken, and despite best efforts the project commissioning would be delayed by about 60 days i.e., from 03.11.2019 to 03.01.2020.

- i) The Petitioner was shocked and surprised to receive a letter (Annexure-L) dated 16.09.2019 from the 1st Respondent stating that the material provided by the Petitioner does not show that the damage had occurred in the project site/area. The photographs provided by the Petitioner showing actual condition of the Project Site were sought to be discredited on a frivolous ground of not having the date on the print, when the date

and factum of the excessive rainfall commenced was widely known, reported, and acknowledged in official reports and newspapers through the state of Karnataka.

j) The 1st Respondent's letter dated 16.09.2019, was misconceived. The report from the Competent Authority about the quantum of rainfall in Kalaghatagi Taluk was branded unreliable on the ground that it does not specifically mention the Project Site. The Petitioner, during the time of a flood or otherwise, cannot request the Competent Authority to make a special visit to its site to ascertain the nature of the project site. Infact, the 1st Respondent has failed to make a site visit and has resorted to mechanically discrediting the Petitioner's bona fide contentions. Respondent No. 1 did not conduct any site inspection or site visit prior to issuing these letters. Respondent No.1 also did not deny that the entire region was flooded. Respondent No.1 also stated that he was directed to inform the Petitioner that the Project shall be commissioned within the scheduled commissioning date without specifying the authority or body that had directed the General Manager, CESC to issue such a letter.

k) The Petitioner despite the difficulty in carrying out the work at the project site issued advanced preliminary written commissioning notice (Annexure-M) dated 24.09.2019 to the 1st Respondent as required under Article 8 of the PPA. The Petitioner in the said notice under took to make all endeavors to commission the project by 30.10.2019.

- l) In the meanwhile, pursuant to the Government Order dated 10.08.2019, declaring Kalaghatagi as one of the floods affected areas, the government undertook on ground relief and repair work. Many roads in the interior parts of north Karnataka were damaged. Executive Engineer, PWD Dharwad vide his letter (Annexure-N), dated 05.10.2019, addressed to the Deputy Commissioner requested for funds for repair of Kalaghatagi Taluk Naganuru-Dyamapura-Jemu road 2 to 5 kms. Similarly, the Chief Officer of Pattana Panchayath, Kalaghatagi vide letter (Annexure-P), dated 09.10.2019, addressed to the Deputy Commissioner, provided details of roads damaged in Kalghatagi, and requested funds for repair. The Asst. Executive Engineer, Panchayathraj Engineering, Sub-division, Kalaghatagi vide letter (Annexure-Q), dated 09.10.2019, addressed to the Tahsildar, Kalaghatagi provided work plan of road / tanks / buildings (as per NDRF norms), which have been damaged due to heavy rain in Dharwad district.
- m) The MLA of Kalaghatagi Constituency held a meeting of the Task Force entrusted with dealing with repair and restoration work of government and public properties in the flood affected areas on 12.10.2019, at the office of Tahsildar, Kalaghatagi. The meeting was attended by the Tahsildar, the Executive Officer of Taluk Panchayath, the Assistant Executive Engineer of Zilla Panchayath, M.I., PWD, the Block Education Officer and officers from HESCOM and other Government Departments. The meeting was held to take review of repair works of damaged public properties. A true copy of

translated minutes of meeting, dated 12.10.2019, is produced herewith as Annexure-R.

- n) The Petitioner in the above circumstances, vide its letter (Annexure-S), dated 21.10.2019, sought extension of the Scheduled Commercial Operation Date (SCOD), due to Force Majeure event which was completely beyond its control. The reasons for delay were (a) extremely adverse weather conditions; (b) floods; and (c) damage to the roads connected with the Project site due to which construction material could not be transported. The Petitioner again provided copies of Report by Tehsildar, Kalaghatagi reporting damage due to heavy rain and also the reports from IMD showing excess rainfall in the interior parts of north Karnataka during months of June to October. Petitioner also provided photographs of flooded Project site as well photos of the bridge connecting the Project site, which was submerged under water.
- o) The Petitioner vide letter (Annexure-T) dated 01.11.2019, kept Respondent No. 1 apprised that heavy and unseasonal rainfall was still continuing at the Project Site. The fact that the Indian Meteorological Department (IMD), had reported that Dharwad District had received 150 % more rainfall than normal for the season till 30.10.2019 was communicated to the 1st Respondent. The fact that the progress of the Project was delayed and slow due to the Project Site being flooded/water logged was brought to the notice of Respondent No.1. The IMD had also categorized North Karnataka as having received "Large Excess Rainfall". The movement of persons

employed at the site and machines had become extremely slow due to severe water logging. The Project Site was also impacted by Cyclone Kyarr.

- p) The Petitioner vide a letter (Annexure-U), dated 06.11.2019, requested the Office of the Assistant Executive Engineer P.W. Port & I.W.T. Dept, sub-Dn. Kalaghatgi requesting for a report on damage to the bridge between Hindasgeri and Madakihonnali villages on the Kalaghatgi-Tadas Road. The Office of the Assistant Executive Engineer, Public Works, Ports & Inland Water Transport Department, Sub-Division, Kalaghatgi, responded to the Petitioner's letter dated 06.11.2019, vide a letter (Annexure-V), dated 12.11.2019, and informed the Petitioner that the bridge in question was damaged as a result of the heavy rains in the months of July 2019 and August 2019 and that temporary repair work was undertaken multiple times. The Petitioner was also informed that the approach to Shivanapur & Dyavanakonda village was disconnected. The bridge was damaged on 01.08.2019 and was restored on 25.8.2019 and the movement of both light and heavy vehicles was restricted during this period.
- q) The Project was commissioned on 11.11.2019, as per the Commissioning Certificate (Annexure-W) dated 03.12.2019, issued by Respondent No. 1. The Petitioner due to its diligent endeavors was able to commission the project with a minor delay of about 8 (Eight) days even with the access to the project being affected due to the damage to the bridge. The Scheduled Commercial Operation Date of the Project was 03.11.2019, and as per the Commissioning Certificate issued by the Respondent No.1, the Project was

commissioned on 11.11.2019. further it is stated that the delay is solely due to reasons outside the control of the Petitioner. The Petitioner has undertaken measure to mitigate the effects of the Force Majeure Events. The measures taken by the Petitioner include active dewatering of the flooded areas of the site, and efforts to restore connectivity by road to the project site.

r) The Petitioner sent a Force Majeure cessation Notice (Annexure-X), dated 18.12.2019, as required under Article 14.5.2 of the PPA. The Force Majeure cessation notice dated 18.12.2019 set out the dates on which the Force Majeure event ceased. The dates set out were as follows 26.08.2019, 12.10.2019, 29.10.2019. The Force majeure cessation notice also set out the steps taken by the petitioner to mitigate the effects of the Force Majeure events. The delay is due to Force Majeure conditions, which have been brought to the notice of Respondent No.1. As per Article 5.7.1 of the PPA, in case of delay in commissioning of the Solar Project due to Force Majeure Event affecting the Developer, the Developer shall commission the project and thereafter seek approval for condonation of delay before this Hon'ble Commission by filing a Petition under following grounds:

(i) The Project site of the Petitioner is in Kalaghatagi Taluk which was severely affected due to excessive rainfall resulting in floods during monsoon season and unseasonal heavy rainfall thereafter. The heavy rainfall, and the floods caused widespread damage to govt. and public property in

Kalaghatagi Taluk including affecting access to the Project Site and water logging in the Project Site.

- (ii) The bridge which provided the main access point to the road leading to the Project site was fully damaged and washed away under water, due to which the Petitioner faced logistic issues and could not transport construction or other material to the Project Site.
- (iii) The Petitioner has duly complied with the process prescribed in Article 14.5.1 of the PPA and had notified the Respondent No.1 about occurrence of the Force Majeure event along with supported documents within time. The Government of Karnataka has acknowledged that there was heavy rainfall and floods from 01.08.2019 to 09.08.2019. The Petitioner has communicated the occurrence of the Force Majeure event for the first time on 12.08.2019, which is within the 7day period provided for under the PPA.
- (iv) The existence of Force Majeure events has also been acknowledged by the Government of Karnataka through the various reports from the Competent Authority, Revenue Department regarding the damage caused as a result of the excessive rainfall in the region.

- (v) The Petitioner, despite the obstacles faced due to force majeure event, demonstrated utmost commitment and professionalism and completed the project with a minor delay of 8 days. The delay of 8 days in commissioning the Project was a result of the Petitioner's inability to work or gain access to the Project Site due to extreme adverse weather and flood in and around the Project site. The conditions were beyond reasonable control of the Petitioner and squarely fall within the definition of Force Majeure under the PPA.
- (vi) The Petitioner has also duly served notices under Article 14.5.2 on the Respondent regarding cessation of Force Majeure Events. Without prejudice to the above, it is submitted that the Force Majeure Events in question were also not unique to the Petitioner and affected the entire North Karnataka region, and hence it is submitted that the various documents and government proceedings submitted by the Petitioner clearly demonstrate that movement across the bridge leading to the Project Site was severely restricted for a period of 25 days. The Petitioner also suffered from water logging at the Project Site and hence the Petitioner's notice obligations under Article 14.5.2 of the PPA stand satisfied.
- (vii) Article 5.7.2 and Article 5.7.3 of the PPA expressly provides for granting extension of the Schedule Commissioning Date for

Force Majeure Events. The effects of the Force Majeure Event were for more than 30 days. However, the Petitioner has commissioned the Project with a minor delay of 8 days, and hence the Petitioner is entitled to receive extension of the Schedule Commissioning Date in accordance with Article 5.7.1 of the PPA.

(viii) The Petitioner has taken steps to mitigate the effects of the Force Majeure Events as required under the PPA entered into between the Parties. The Petitioner has carried out dewatering, and taken steps to restore connectivity to the project site, without which the Project could not have been completed with a minor delay of about eight days.

(ix) Without prejudice to the Petitioner's contention that the Petitioner has met the requirements for issuing force majeure notices under Article 14.5.1 and 14.5.2 of the PPA, it is submitted that the intention behind the requirement for these notices is to ensure that the petitioner is indeed affected by the force majeure events claimed by the Petitioner. The requirement for notices as contemplated in the PPA cannot strictly apply when the force majeure event in question has affected the entire North Karnataka region and is within the common knowledge of all parties to the PPA. The existence of these force majeure events was duly recognized by the Government of Karnataka

through its officials operating in the north Karnataka region. The state machinery has certified that there was excessive rainfall leading to flooding, that the access bridge was damaged and could not be used for transport of materials or people to the project, and hence the requirement of a Force Majeure notice as contemplated under the PPA cannot be construed to be a strict requirement in the facts and circumstances of the present case.

- (x) The intention behind providing exemption from liability for Force Majeure Events is to ensure that the Developer has the benefit of the complete 18 months from the Effective Date, for developing the Project in accordance with the terms of the PPA, and the Petitioner in the present instance was prevented from working on the project site for a period of about 60 days but has managed to commission the Project with a minor delay of eight days, and is hence entitled to receive the benefit of the Force Majeure provision in the PPA.
- (xi) Article 5.7.3 of the PPA ensures that the Petitioner is provided the full time frame provided for under the PPA to meet its obligations under the PPA. In the present instance, the undisputed position is that the Petitioner did not have access to the Project for the purposes of moving materials or otherwise for more than 30 days, and the Petitioner has managed to

commission the Project with a minor delay of about 8 days. The Petitioner, is entitled, to extension of the Schedule Date of Commissioning for all 8 days of delay due to the Force Majeure Events of excessive rainfall resulting in water logging, and floods resulting in the bridge being damaged and unusable to gain access to the Petitioner's Project Site. In view of the above the Petitioner prays to allow the Petition as prayed for in the interest of justice and equity.

3. Upon notice, the Respondents appeared through their counsel, and filed statement of objections separately.
4. The 1st Respondent in his objections statement has submitted that it is true to say as stated in the Petition, that the Petitioner has entered into PPA with the 1st Respondent on 24.03.2018. As per Article 21.1 of PPA the Petitioner is under an obligation to commission the project within 18 months from the effective date. As per letter dated 04.05.2018 written by the Commission (Annexure-D) to the Petition) approval was accorded on 04.05.2018, wherefore, the SCOD of the project was 18 months from 04.05.2018 i.e., 03.11.2019. But the Petitioner was not able to commission the project within 18 months on the grounds of Force Majeure. In this regard the Petitioner has written a letter dated 12.08.2019 to the 1st Respondent as required under PPA. In response to the Petitioner's letter dated 12.08.2019, the Respondent issued a letter dated 19.08.2019, requesting the Petitioner to send a report of the Revenue Department regarding the damage caused by the rains to the project area.

Further the Petitioner was also requested to provide the Google coordinates of the affected area at the earliest. On 12.09.2019 the Petitioner sent a report of the Revenue Department to the Respondent which stated that the rainfall commenced on 01.07.2019 to and lasted until 31.08.2019. The Petitioner requested for additional 60 days to commission the project on account of relentless rains from 01.07.2019. But the Respondent issued a letter dated 16.09.2019 to the Petitioner denying such extension of time request on the grounds that: (a) The photographs enclosed were not dated; (b) the google co-ordinates were not specified to ensure that damage has been occurred in the project area itself; (c) the news article did not mention the actual location of the project site; and (d) there was no record from authorized Competent Authority to indicate that damage has occurred in the project area.

5. On 24.09.2019, the Petitioner wrote to the Respondent stating that the project would be commissioned within 30.10.2019 and that the said letter should be considered as advanced preliminary written commissioning notice. The project was further commissioned only on 11.11.2019 with a delay of 8 days. Under these circumstances the Petitioner has filed this Petition before this Commission for the declaration of rainfall as a Force Majeure event and for condonation of delay of 8 days in commissioning the project.
6. The Petitioner has averred that the SCOD could not be achieved on account of incessant rainfall in the Northern Region of Karnataka and at the project site at Kalaghatagi Taluk during the months of July 2019 to October 2019. The

Government of Karnataka vide Government Order dated 10.08.2019 declared Kalaghatagi Taluk as a flood affected area among 80 other Taluks in Karnataka. The Petitioner in its letter dated 12.09.2019 (Annexure-J to the Petition) has stated that the report of the Revenue Department states that heavy rainfall started on 01.07.2019. Wherefore, it is clear that the Petitioner had knowledge of such rainfall and floods from July 2019.

7. The Respondent No.1 has received a notice dated 12.08.2019 from the Petitioner stating that the rainfall under flooding has caused a massive impact on the project site, barring all the access points to the said site and thus hindering the labour intensive activities at the project site. The Petitioner in the said notice has claimed this to be a Force majeure notice as per Article 14 of PPA. But this contention is vehemently opposed by the Respondent No. 1 because as per Article 14.5 of PPA the notice has to be sent within 7 days from the date on which the affected party reasonably knew and should reasonably have known of the commencement of the event of Force Majeure. The Petitioner had knowledge about the alleged floods in July 2019, but has delayed by 1 month 12 days in issuing the Force Majeure Notice to the Respondent. Thereby, on this ground also the request of the Petitioner cannot be accepted on the ground that the notice being an incomplete one.

8. The Petitioner had annexed photographs of the site along with a news report from "The Hindu" dated 08.08.2019. But he failed to adduce any concrete or detailed explanation in furtherance of such notice. He ought to have

produced a report issued by Competent Authority regarding the impact of the alleged floods. Moreover, the photographs produced by the Petitioner consisted of no relevant details about the date, Google co-ordinates of the project site. Thereby, no inference could be drawn from the photographs about the rainfall impacting the project site. The contention taken by the Petitioner that requirements for issuing Force Majeure Notice as per Article 14.5 and 14.5.2 of PPA are not binding and are merely of a suggestive nature is highly misleading and false in toto. It is common knowledge that every clause of the contract is binding and mandatory in nature. The Petitioner cannot unilaterally decide to waive the requirement of Force Majeure Notice.

9. The Respondent vehemently objects to the Petitioner's claim that Article 14.5.1 and 14.5.2 need not be interpreted strictly. The fact that the PPA in Article 14.5.2 subjects any reliefs under the agreement to the Force majeure Notice clearly establishes the importance of such Force Majeure notice. The PPA explicitly provides for notice as a precondition to any relief under the Force majeure clause. This contention of the Petitioner is hit by the Doctrine of Approbate and Reprobate. The Hon'ble Supreme Court in *Shyam Telelink Limited Vs. Union of India* in 2010 (10) SCC 165 stated that a person cannot accept and reject the same instrument.

10. The Petitioner entered into the PPA with full knowledge that the project site was prone to incessant rainfall and floods. The Petitioner had taken such risks with complete knowledge of the weather conditions at Kalaghatagi Taluk, Dharwad District. In the year 2020, Dharwad was identified as region highly

vulnerable to floods by the Government of Karnataka, which fact was known to the Petitioner before entering into the PPA. Under these facts and circumstances of the case that the Force Majeure clause cannot be invoked if the Petitioner possessed knowledge regarding the weather of the project site. The rainfall at Dharwad was not an unprecedented situation and it is only just and reasonable that the Petitioner should have taken due care in commissioning the project by assessing all the probable risks associated with commissioning the project. The Petitioner had knowingly undertaken the risk of establishing a project in an area prone to flooding. In *M/s. Alopi Parshad & Sons Ltd., Vs. Union of India* the Hon'ble Supreme Court has held that the parties' obligations under the contract cannot be excused especially if the event allegedly barring them from performing any obligation under the contract could be anticipated.

11. The Petitioner had averred that 8 days' delay was on account of at the project site however, he has not produced any proofs, showcasing the refusal of labourers or transporters of construction materials from delivering the construction materials. Moreover, he has not produced any proof to indicate that the delay has not being caused on account of its own negligence in applying to various approvals with the Government Authorities. Under these circumstances the 1st Respondent prays to dismiss the Petition in its entirety in the interest of justice and equity.
12. The 2nd Respondent has filed objections to the Petition stating that, at the outset the Petitioner is not entitled for any of the reliefs claimed as the

Petitioner was aware of the stipulated time for the commencement of the project. Even otherwise the Petition is liable to be dismissed against the 2nd Respondent since there is no prayer against him.

13. The 2nd Respondent (KREDL) invited the proposals for selection of bidders for undertaking development of Solar PV ground mount power plants in Karnataka to be implemented through private sectors participation. Further stated that request for proposal for the development of 860 MW Solar Power projects to be implemented in 43 Taluks in the State of Karnataka was invited vide notification dated 07.12.2017. The RFP specifies the technical, commercial terms and the conditions for selection of the bidders. The obligation on the part of the bidders and the successful developers is also mentioned. After conducting the bid process, this Respondent KREDL issued a letter of allotment to the successful bidders for implementation of 860 MW capacity solar power projects. The 2nd Respondent has issued letter of allotment dated 08.02.2018 in favour of M/s ReNew Solar Power Private Limited for commissioning of solar power plant of 20 MW (AC) in Kalaghatagi Taluk, Dharwad District. The Petitioner is Special Purpose Vehicle to M/s. ReNew Solar Power Private Limited. Pursuant to the issuance of letter of allotment from the 2nd Respondent, the Petitioner had to execute PPA with CESC as such PPA was executed with the 1st Respondent on 24.03.2018 which is approved by KERC on 04.05.2018.

14. As per Article 4.2 of PPA the selected bidder is required to achieve financial closure and furnish the documentary evidence as per Schedule-I A in the

case of solar PV project and documentary evidence for the required land for project development as per the details set out in Appendix-I Annex-II of PPA. As per Article 8.5 of the PPA the developer shall commission the project within 18 months from the effective date. For the present case the scheduled commissioning date was 03.11.2019, the project was commissioned on 11.11.2019. it is relevant to state that the procurement of the land and seeking appropriate approval was to be done by the Petitioner only. It was not the obligation on the part of the 2nd Respondent.

15. The Petitioner is not entitled to the extension of time to commission the project for not complying with the time lines for conditions precedent and commissioning of the project as mentioned in the PPA. The Petitioner is required to pay damages for such delay as per the Articles 5.8 of the PPA. Thereby the Petitioner is liable to pay damages stipulated in the PPA. As per PPA terms and conditions the developer has not achieved commissioning of the project within SCOD. The PPA does not make a distinction between marginal and other delay. It only contemplates revision of tariff in the event of delay along with liquidated damages. Admittedly the Petitioner has delayed the execution of the project for reasons which do not fall under the Force Majeure events so far as CESC is concerned. Hence liquidated damages and applicable tariff are as per PPA terms and conditions.
16. This Respondent is not a necessary party to this petition, the other Respondents have to counter the averments made in the petition by the

Petitioner. Hence, he prays to dismiss the petition against 2nd Respondent in the interest of justice and equity.

17. The Petitioner has filed rejoinder to the statements of objection separately filed by the Respondents reiterating the contents of the Petition, and stated that despite of all the difficulties the Petitioner showed utmost commitment and professionalism and commissioned the project with a minor delay. Under these circumstances, the Petitioner prays to allow the Petition as prayed for in the interest of justice and equity.

18. Heard the arguments, perused the written submissions on both sides and the records.

19. At this stage the below mentioned Issues arise for our consideration.

Issue No. 1: Whether the Petitioner proves that he is entitled for extension of time on the grounds of Force Majeure events as claimed in the petition?

Issue No. 2: For what relief the Petitioner is entitled to?

Issue No. 3: What Order?

20. Issue No. 1: Whether the Petitioner proves that he is entitled for extension of time on the grounds of Force Majeure events as claimed in the petition?

a) The Learned Counsel for the Petitioner has submitted that, the Petitioner is a Special Purpose Vehicle of Review Solar Power Private Limited, a Solar PV Power Project Developer. The Kalaghatagi project awarded to ReNew Solar Power Private Limited by 2nd Respondent KREDL. As per the terms of the allotment letter issued by the 2nd Respondent, the ReNew

Solar Power Private Limited was required to enter into a Power Purchase Agreement with Respondent No. 1 through its SPV that is the Petitioner within 30 days from the date of Letter of Award (Annexure-A). Accordingly, PPA (Annexure-C) was entered between the Petitioner and the 1st Respondent on 24.03.2018, the effective date of the PPA was 04.05.2018 i.e., the date on which KERC approved the PPA. The SCOD under PPA was 18 months from the effective date. Under Article 5 of PPA, unless affected by Force Majeure events the Petitioner was required to commence supply of power by schedule commissioned date i.e., 03.11.2019 within period of 18 months from the effective date.

b) The Petitioner submitted that the project of the Petitioner was delayed only by 8 days due to Force Majeure events such as excessive rainfall and flooding of many Taluks in North Karnataka Region including the project site at Kalaghatagi Taluk. The excessive rainfall led to flooding and damaged roads and a bridge leading to the project site making it impossible to access the project site for transport of equipment and other construction material.

c) As per PPA (Annexure C) Article 14.3 Force majeure reads as follows: -

“14.3 Force Majeure

14.3.1 A ‘Force Majeure’ means any event or circumstance or combination of events those stated below which wholly or partly prevents or unavoidably delays an Affected Party in the performance of the obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the

Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:

- a) *act of God, epidemic, extremely adverse weather conditions, lightning, earthquake, landslide, cyclone, flood, volcanic eruption, chemical or radioactive contamination or ionizing radiation, fire or explosion (to the extent of contamination or radiation or fire or explosion originating from a source external to the Site);*
- b) *an act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, riot, insurrection, terrorist or military action, civil commotion or politically motivated sabotage;*
- c) *compulsory acquisition in national interest or expropriation of any Project Assets or rights of the Developer or of the Contractors;*
- d) *any judgement or order of any court of competent jurisdiction or statutory authority made against the Developer in any proceedings for reasons other than (i) failure of the Developer to comply with any Applicable Law or Applicable Permit, or (ii) on account of breach of any Applicable Law or Applicable Permit or of any contract, or (iii) enforcement of this Agreement, or (iv) exercise of any of its rights under this Agreement by the Government; or*
- e) *unlawful or unauthorized or without jurisdiction revocation of, or refusal to renew or grant without valid cause, any clearance, license, permit, authorization, no objection certificate, consent, approval or exemption required by the Developer or any of the Contractors to perform their respective obligations under this Agreement and the Project Agreements; provided that such delay, modification, denial, refusal or revocation did not result from that Developer's or any Contractor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such clearance, license, authorization, no objection certificate, exemption, consent, approval or permit.*

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 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.

14.6 Duty of Perform and Duty to Mitigate

14.6.1 To the extent not prevented by a Force Majeure Event pursuant to Article 14.3, the Affected Party shall continue to perform its obligations pursuant to this Agreement. The Affected Party shall use its reasonable efforts to mitigate the effect of any Force Majeure Event as soon as practicable.

d) Further he submitted that all these aspects were brought to the notice of the 1st Respondent through Force Majeure notices dated 12.08.2019,

12.09.2019, 21.10.2019, 01.11.2019 and 18.12.2019. He also provided photographs of the project site, Google co-ordinates of the project site, report from Competent Authorities to demonstrate the extent of excessive rainfall over a period of 3 months and report of Competent Authority on the damage caused to the public roads and bridges leading to the project work. Further he also provided reports of Competent Authority detailing the work undertaken for repairing damaged roads and bridges. The Government of Karnataka in order No. RD 87 TNR 2019 dated 10.08.2019 notified 8 Taluks in Dharwad District including Kalaghatagi Taluk.

e) The Learned Counsel for the Petitioner has submitted that, as per Article 14.3.1 of PPA a Force Majeure event has to satisfy 2 conditions. The 1st condition is that it has to be an event which is outside the control of the parties and the 2nd condition is that it has to affect the obligations of a party under the PPA. Heavy and incessant rains are squarely covered under Article 14.3.1. The timelines specified in the PPA for notification of a force Majeure event, commence from the date on which the performance of the Petitioner's obligations were affected due to the Force Majeure event. The Petitioner has clearly stated that the excessive rains continued for a period of 3 months and resulted in flooding of the entire North Interior Karnataka Region, access roads and bridges leading to the project site and the Petitioner's project site as well. As per Article 14.5.1 of PPA the party affected by the Force Majeure event is required to give notice of occurrence of such a Force Majeure event within 7 days

of the event i.e., outside the control of the party to the PPA affecting the obligations of the party to the PPA. The Petitioner has complied with this provision by issuing Force Majeure notices dated 12.08.2019, 12.09.2019, 21.10.2019, 01.11.2019 and Force Majeure cessation notice dated 18.12.2019 to the 1st Respondent.

f) The Learned Counsel for the Petitioner has submitted that, as per Article 14 of PPA which recognizes extreme weather condition as an independent Force Majeure Event regardless of whether there were floods on the project site or not. But in the present case on hand the Petitioner was affected by both excessive rainfall and floods. The Petitioner could not have reasonably foreseen or avoided, either the excessive rainfall for a period of 3 months and the resulting floods. Therefore, the excessive rainfall and the floods both constitute the Force Majeure event as contemplated in Article 14 of PPA. Further he submitted that despite the obstacles faced due to Force Majeure event which took place over a period of 3 months i.e., monsoon season, the Petitioner demonstrated utmost commitment and professionalism and completed the project with a minor delay of 8 days.

g) The Learned Counsel for the Petitioner has submitted that, the 1st Respondent herein never contested the occurrence of excess rainfall and flood at Kalaghatagi Taluk on the other hand he did not conduct site inspection or independently verify the Petitioner's claims before dismissing contention of the Petitioner and directing it to complete the

project as per SCOD. Further he submitted that for the first time the 1st Respondent has taken contention that the photographs of the flood affected project site which are submitted by the Petitioner were without time stamp and therefore cannot be relied upon. But the 1st Respondent neither sought for photographs with time stamp during the correspondence between the Petitioner and himself during August to October 2019 nor there is such requirement mentioned in the PPA. Further he submitted the 1st Respondent, doubted the validity of the Google co-ordinates of the Petitioner's project site but he failed to deny the validity of the Google co-ordinates in his letter dated 16.09.2019 and also in their statement of objections. Thereby, he cannot take up this ground to reject the prayer of the Petitioner. Further he submitted that despite of all these difficulties faced by the Petitioner he has shown utmost commitment and professionalism and commissioned the project with a minor delay of 8 days. The Petitioner could not undertake any construction activity for a period of 60 days and took considerable time to bring the project site back to a condition in which work could be continued. The Petitioner has done its level best to mitigate the effects of the Force Majeure events. As per the Article 5.7.2 and 5.7.3 of the PPA expressly provides for granting of extension of schedule commissioning date for Force Majeure events.

“5.7. Extensions of Time

5.7.2 After hearing the Parties and considering the merits of the grounds urged, KERC may condone the delay in commissioning of the Project on any of the grounds stated by the Developer.

5.7.3 *In case KERC condones the delay, the scheduled commissioning date and the expiry date shall be deemed to be extended by the period for which the delay is condoned by KERC."*

However, the Petitioner has commissioned the project with a minor delay of 8 days, hence he is entitled to receive extension of the schedule commissioning date in accordance with Article 5.7.1 of the PPA. With all these the Learned Counsel prays to allow the Petition as prayed for in the interest of justice and equity. In support of his arguments, he has relied upon the below citations: -

1. *Nabha Power Limited Vs Punjab State Power Corporation Limited (PSPCL) and Anr. (2018) 11 SCC 508.*
2. *Union of India Vs M/s D.N. Revri and Co. and Ors. (1976) 4 SCC 147.*
3. *DhanrajamalGobindram Vs Shamji Kalidas and Co. (1961) 3 SCR 1020: AIR 1961 SC 1285.*
4. *Satya jain (through LRs) Vs Anis Ahmed Rushdie (through LRs) (2013) 8 SCC 131*
5. *State of Gujarat Vs Vijay Mistry Construction & Anr. 2013 SCC OnLineGuj 1088.*

Basing on these decisions the Learned Counsel for the Petitioner prayed to allow the Petition as prayed for in the interest of justice and equity.

h) During the course of arguments, the Learned Counsel of 1st Respondent has submitted that, it is the claim of the Petitioner that there was incessant rain during the monsoon season of 2019, specifically during the period between 01.07.2019 to 22.07.2019, 01.08.2019 to 25.08.2019, 04.10.2019 to 11.10.2019 and 19.10.2019 to 28.10.2019 and that time due

to the rain many areas in the Dharwad District were allegedly flooded including Kalaghatagi Taluk. It is the claim of the Petitioner that the Force Majeure event took place on 01.08.2019. The site of the project is prone to rainfall, the lack of a time stamp, creates a reasonable doubt that the damage shown could be a result of the Petitioner's negligence in taking necessary steps and that the Petitioner is using the sudden floods in the area as veil to conceal its negligence thereby, the photographs produced by the Petitioner cannot be accepted.

- i) Apart from the photographs the Petitioner has produced rainfall reports, reports from the meteorological society and newspaper articles, these documents are not in dispute, but it is pertinent to note that the area of the site has not been specified in the documents provided by the Petitioner. The PPA clearly establishes that it is the duty of the Petitioner to provide documents to show that the Force Majeure event has occurred in the site location, but he has not produced any such documents.
- j) The Petitioner has also contended that the bridge has collapsed due to the rainfall and has provided photographs and report from the relevant authorities but he has failed to show how the damage to the bridge has directly impacted on all routes to the project site. The Petitioner cannot claim that due to the damage to the bridge/road no work was capable of being done. Further, the Petitioner has also failed to provide the

accurate Google co-ordinates to show that the project site was affected. Thereby, he has failed to discharge his duties as per PPA.

k) According to the Petitioner the Government of Karnataka vide Government Order dated 10.08.2019 declared Kalaghatagi Taluk as a flood affected area among 80 other Taluks in Karnataka. In this order the Taluks mentioned have been affected by flood from 01.08.2019 to 09.08.2019. Further the Petitioner has stated that Kalaghatagi Taluk faced heavy rainfall including floods during July 2019 to October 2019. Therefore, it is clear that the Petitioner had knowledge of such rainfall and floods from July 2019. The 1st Respondent has received notice from the Petitioner on 12.08.2019 stating that the rainfall and flooding had caused a massive impact on the project site, and the petitioner has claimed in the said notice to be a Force Majeure notice as per Article 14 of PPA. Therefore, the Petitioner possessed knowledge about the alleged floods in July 2019, therefore, he has delayed 1 month 12 days in issuing the Force Majeure notice to the Respondent.

l) The Respondent vehemently objects the Petitioner's claim that Article 14.5.1 and 14.5.2 need not be interpreted strictly. The PPA explicitly provides for notice as precondition to any relief under Force Majeure clause thereby, here the doctrine of Approbate and Reprobate comes into play as the Petitioner is seeking for a relief under the Force Majeure clause. In this regard the Learned counsel for the 1st Respondent relied upon a Supreme Court decision in Shyam Telelink Ltd V/s Union of India

reported in SCC 2010 (10) page 165 stated that a person cannot accept and reject the same instrument. Further he relied upon another decision reported in M/s Alopi Parshad & Sons Limited Vs. Union of India in which the Supreme Court held that the parties' obligations under the contract cannot be excused, especially if the event allegedly barring them from performing any obligation under the contract could be anticipated.

m) The Petitioner has stated that there is only 8 days' delay on account of flooding at the project area. But the Petitioner has not produced any proof showing the refusal of laborers or transporters of construction material from delivering the construction materials, moreover the Petitioner has not produced any proof to indicate that the delay has not been caused on account of its negligence in applying to various approvals with the Government Authorities. Therefore, the Learned Counsel for the 1st Respondent has prayed for dismissal of the Petition in its entirety in the interest of justice and equity.

n) The Learned Counsel for the 2nd Respondent has not filed written submissions before this Commission but he has orally submitted his arguments in the same lines of its objection statement and finally submitted for refusal of the petition.

o) We have gone through the relevant materials on this issue placed before us. It is not in dispute that the ReNew Solar Power Private Limited was successful bidder as its bid had been accepted by the 2nd Respondent (KREDL) for Kalghatagi project and subsequently issued allotment letter

and letter of award, executed Power Purchase Agreement and the Petitioner is the SPV of ReNew Solar Power Private Limited.

p) The contention taken by the 1st Respondent is that one of the most important conditions of the Force Majeure clause is to issue notice of Force Majeure event. Article 14 of the PPA clearly states that if a party wishes to claim protection under Force Majeure Event then such party must notify the other party within 7 days after the date on which such party knew or should reasonably have known of commencement of the event of Force Majeure. Though the Petitioner in its notice for occurrence of Force Majeure event under Article 14 of PPA dated 12.09.2019 (Annexure-J) has stated that the report of the Revenue Department states that heavy rainfall started on 1st of July 2019 but issued notice with a delay of 1 month 12 days as per Annexure-G. Therefore, he has not followed the Article 14.5.1, thereby he is not entitled for any relief.

q) On perusal of the materials placed by the Petitioner, the Petitioner himself and the 1st Respondent have entered into PPA on 24.03.2018 which is approved by the KERC on 04.05.2018, thereby the effective date is 04.05.2018. The Petitioner ought to have commissioned the project on or before 03.11.2019 i.e., within 18 months from effective date of that PPA. The defence taken by the Petitioner is that due to heavy rainfall and flooding there was delay in SCOD. The rainy season in Karnataka is from the month of June to September. According to Government Order (Annexure-E) issued by Government of Karnataka dated 10.08.2019 in

the monsoon season of 2019 from 1st of August to 9th August due to heavy rainfall in Karnataka State and due to flow of water from Krishna Dam of Maharashtra State the flood caused in various parts of Karnataka and caused heavy damage to the public properties crop and life. Thereby the Executive committee meeting held on 09.08.2019 under the Chairmanship of the Chief Secretary to the Government, has identified 80 Taluks of 17 Districts in the State of Karnataka as flood affected areas out of which Kalaghatagi Taluk is also one of them. This document is also not disputed or controverted by the 1st Respondent. The Petitioner has produced copy of the photographs (Annexure-F) of the project site and flooded areas around the site. Annexure-G is the copy of the letter written by the Petitioner to the 2nd Respondent with a request to treat the letter as a formal notice for occurrence of Force Majeure event at project site which may lead to delay in commissioning of the project. Further it is stated that the Petitioner will continue to take mitigation measures to minimize the effect of the Force Majeure Event and also keep 2nd Respondent apprised of the progress. The Petitioner has produced copy of the letter (Annexure-J) dated 12.09.2019 issued to the 1st Respondent in response to the Respondent's E-mail (Annexure-H), by providing details of the Force Majeure event. Further a copy of the Google Map image of the damaged site (Annexure-K) is produced by the Petitioner which shows Google Map image of the project site.

r) All these photographs and other materials establish that there was heavy rainfall and flooding in the project site area, the access roads and bridges were sub-merged under water so that the Petitioner was prevented from carrying out the construction work during the period i.e., 1st July 2019 to 22nd July 2019, 1st August 2019 to 25th August 2019, 4th October 2019 to 11th October 2019 and 19th October 2019 to 29th October 2019. Further the Petitioner has produced copy of the letter (Annexure-N) issued by Executive Engineer, PWD, Highways and IWT Department, Dharwad Sub-division, Dharwad dated 05.10.2019 showing the PWD Dharwad District has taken up repair work pertaining to the damage caused due to the heavy rain in Kalghatagi Taluk, Naganuru-Dyampur Jenu road from the funds of the Deputy Commissioner. Another copy of the letter (Annexure-P) written by Chief Officer, Pattan Panchayat Kalaghatagi to the Deputy Commissioner, District Urban Development Cell, Dharwad dated 09.10.2019 requesting for grant of funds towards repair of the roads damaged due to heavy rainfall at Kalaghatagi Pattana Panchayat limits. The Petitioner further produced copy of the letter (Annexure-Q) written by Assistant Executive Engineer, Panchayatraj Engineering Sub-Division, Kalaghatagi, to the Tehasildar Kalaghatagi submitting the work plan of the road/tank/buildings as per NDRF norms damaged due to heavy rain throughout Dharwad District in the year 2019-20. The Petitioner has produced a copy of the letter (Annexure-U) dated 06.11.2019 written to Executive Engineer, PWD Kalaghtagi Taluk with a request to provide a damage report of bridge

between Hindusgiri and Madakihonnali Villages on Kalaghatagi Thadas Road. In turn Assistant Executive Engineer, PW Port & I.W.T. Department, Sub-division Kalaghatagi has issued a reply to the Petitioner (Annexure-V) on 12.11.2019 stating that the bridge between Hindusgiri and Madakihonnalli Villages on Kalaghtagi-Thadas road is located in the way to Shivanapur and Dyavanakonda Village, due to heavy rainfall in the months of July 2019 and August 2019 the bridge was damaged and temporary repair was done several times, due to this the approach to Shivanapur and Dyavanakonda Village was disconnected, the bridge got damaged on 1st August 2019 and was restored on 25th August 2019, during these 25 days, any movement of light and heavy vehicle was restricted. All these documents and materials are not controverted by the 1st Respondent. Though the Petitioner has written letters to the 1st Respondent by providing details of the Force Majeure event on 12.08.2019 (Annexure-G), 12.09.2019 (Annexure-J), dated 21.10.2019 (Annexure-S), dated 01.11.2019 (Annexure-T), but the 1st Respondent has not chosen to visit or inspect the project site at any relevant point of time. Though the Petitioner has noticed the date in Annexure-J that the heavy rainfall started on 1st July 2019 but he could issue notice only when on the date on which Petitioner should reasonably have known of the commencement of the event of Force Majeure so that he could not complete the commissioning of project work within SCOD. Therefore, Force Majeure notice dated 12.08.2019 issued to Respondent No. 1 is in accordance with the Article 14.5.1 of PPA.

s) It is the contention of the 1st Respondent that, as per Article 14.6.1 the Force Majeure clause cannot be invoked if the Petitioner possessed knowledge regarding the weather of the project site. The rainfall at Dharwad was not an unprecedented situation and it is only just and reasonable that the Petitioner should have taken due care in commissioning the project by ascertaining all the probable risks associated with commissioning the project. And the Petitioner would have used its reasonable efforts to mitigate the effect of any Force Majeure event as soon as practicable. But this contention of the 1st Respondent cannot be accepted as because according to Annexure-V, a letter written by Assistant Executive Engineer, Public Works, Ports and Inland Water Transport Department, Sub-division, Kalaghatagi, due to heavy rainfall in the months of July 2019 and August 2019, the bridge between Hindasgeri and Madakihonalli Villages on Kalaghatagi-Thadas Road is located in the way to Shivanapur and Dyavanakonda Village was damaged and because of this the approach road of Shivanapur and Dyavanakonda Village was disconnected and because of that movement of light and heavy vehicles was restricted for 25 days. The Petitioner has taken steps to mitigate the effect of the Force Majeure event as required under PPA, has carried out dewatering, taken steps to restore connectivity to the project site, without which the project could not have completed with a short delay of 8 days. Apart from that the contents of Annexure-V are not disputed by the 1st Respondent and he

has not furnished any material to show that the contention taken by the Petitioner is false. Under these circumstances we hold that the arguments addressed by the 1st Respondent in this regard holds no water.

- t) Another contention taken by the 1st Respondent is that the photographs (Annexure-F) produced by the Petitioner consisted of no relevant details about the date or location. The Google co-ordination of the project site (Annexure-K) produced by the Petitioner not specifying the location therefore, these materials cannot be taken into consideration to grant relief to the Petitioner as prayed for. But this contention cannot be accepted as because it is not in dispute that ReNew Solar Power Private Limited emerged as successful bidder in 8 Taluks in Karnataka to establish 20 MW (AC) capacity of Solar PV ground mount projects in each of the 8 Taluks including Kalaghatagi Taluk which is known as Kalaghatagi Project, the present Petitioner is a SPV to the ReNew Solar Power Private Limited and has taken up commissioning of the project work, the project site of the Petitioner is located in Kalaghatagi Taluk and there was a connect bridge connecting Hindasgiri and Madakihannl Villages on Kalaghatagi-Thadas road located on the way to Shivanapur and Dyavanakonda Village, which was the main access point to the project site. Further the contents of Annexure-V that is the reply given to the Petitioner by the Assistant Executive Engineer, Public Works, Ports & Inland Water Transport Department, Kalaghatagi, is also not disputed or controverted by the 1st Respondent in which it is clearly mentioned that

the bridge got damaged on 01.08.2019 and was restored on 25.08.2019, during these 25 day's movement of any light or heavy vehicle was restricted. When such is the situation, the contention taken by the 1st Respondent cannot be accepted that the photographs and Google co-ordinates produced before this Commission do not assist in granting relief to the Petitioner.

- u) We have perused the citations referred by Learned Counsel for the Petitioner, he relied upon the decision reported in Nabha Power Limited Vs Punjab State Power Corporation Limited (PSPCL) and Another (2018) 11 SCC 508 in which the Hon'ble Supreme Court has observed that as: -

“BOWEN, L.J. - ... Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or an express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe [that] if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side all the failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chance.”

Further he relied upon another decision reported in Satya jain (through LRs) Vs. Anis Ahmed Rushdie (through LRs) (2013) 9 SCC 131:

1. *"The principle of business efficacy is normally invoked to read a term in an agreement or contract so as to achieve the result or the consequence intended by the parties acting as prudent businessmen. Business efficacy means the power to produce intended results. The classic test of business efficacy was proposed by Bowen, L.J. in Moorcock. This test requires that a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied ---the bare minimum to achieve this goal. If the contract makes business sense without the term, the court will not imply the same. The following passage from the opinion of Bowen, L.J., in Moorcock sums up the position:*

"... In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances."

In order to verify the veracity of facts mentioned in Force Majeure notices issued by the Petitioner and could have taken a pragmatic view in this matter, before rejecting the extension of time sought for by the Petitioner. In the instant case the Petitioner could not able to commission the project within SCOD due to heavy rainfall and flooding which led to break down of a bridge connecting to project site. Moreover, in spite of issuing notices to the Respondent, the Respondent had not chosen to visit the project site. To

this effect the Article 14.3.1 of PPA is extracted here once against for further clarity in the matter.

“14.3 Force Majeure

14.3.1 A ‘Force Majeure’ means any event or circumstance or combination of events those stated below which wholly or partly prevents or unavoidably delays an Affected Party in the performance of the obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:

- a) act of God, epidemic, extremely adverse weather conditions, lightning, earthquake, landslide, cyclone, flood, volcanic eruption, chemical or radioactive contamination or ionizing radiation, fire or explosion (to the extent of contamination or radiation or fire or explosion originating from a source external to the Site);*
- b) an act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, riot, insurrection, terrorist or military action, civil commotion or politically motivated sabotage;*
- c) compulsory acquisition in national interest or expropriation of any Project Assets or rights of the Developer or of the Contractors;*
- d) any judgement or order of any court of competent jurisdiction or statutory authority made against the Developer in any proceedings for reasons other than (i) failure of the Developer to comply with any Applicable Law or Applicable Permit, or (ii) on account of breach of any Applicable Law or Applicable Permit or of any contract, or (iii) enforcement of this Agreement, or (iv) exercise of any of its rights under this Agreement by the Government; or*

e) unlawful or unauthorized or without jurisdiction revocation of, or refusal to renew or grant without valid cause, any clearance, license, permit, authorization, no objection certificate, consent, approval or exemption required by the Developer or any of the Contractors to perform their respective obligations under this Agreement and the Project Agreements; provided that such delay, modification, denial, refusal or revocation did not result from that Developer's or any Contractor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such clearance, license, authorization, no objection certificate, exemption, consent, approval or permit.

By plain reading of Article 14.3.1 of PPA, one can understand that a Force Majeure means any event and circumstance or combination of event which wholly or partly prevents and unavoidably delays on affected party in the performance of its obligation under this agreement is covered under Force Majeure Event. Therefore, the claim made by the Petitioner cannot be discarded, hence in our opinion these citations are applicable to the case of the Petitioner.

v) During the course of arguments, the Learned Counsel for the 1st Respondent has relied upon the decision reported in M/s Alopi Parshad & Sons Limited Vs. the Union of India and submitted that the Hon'ble Supreme Court held in this decision that the parties' obligations under the contract cannot be excused especially if the event allegedly barring them from performing any obligation under the contract could be anticipated. This decision is not helpful to the case of the 1st Respondent, as because in the said decision the Hon'ble Supreme Court has referred

Section 56 of the Indian Contract Act, 1872 which provides a contract to do an Act which, after the contract is made, becomes impossible, or by reason of some event which the promiser could not prevent or unlawful becomes void when the act becomes impossible or unlawful. In the present case on hand though the monsoon season in State of Karnataka particularly in Kalaghatagi Taluk, Dharwad District was from the month of June to September 2019, but it cannot be said that the Petitioner could anticipate due to incessant rainfall, the bridge between Hindasgeri and Madakihonnalli villages and Kalaghatagi-Thadas road located in the way to Shivanapur and Dyavanakonda Village where the project site is situated gets damaged resulting movement of light and heavy vehicles will be restricted. Therefore, this decision is not helpful to the 1st Respondent.

w) The Learned Counsel for the 1st Respondent has relied upon another decision reported in Shyam Telelink Limited Vs. Union of India and submitted a person cannot accept and reject the same instrument. The Petitioner herein is seeking a relief under the Force Majeure clause but refusing to comply with the requirements of such clause. We have gone through the decision in our opinion it is not helpful to the case of the Respondent No. 1 as because the Petitioner never refused to comply with the requirements of clauses mentioned in PPA. Soon after coming to the notice of the Petitioner that the bridge which was leading to his project site area got damaged and also Government Order is issued as per Annexure-E dated 10.08.2019, immediately he has written a letter to

the 1st Respondent on 12.08.2019 narrating all inconveniences in commissioning the project within SCOD as agreed in PPA and also prayed for extension of time. Even thereafter, he has issued notices to the 1st Respondent on 12.09.2019, 21.10.2019, 01.11.2019 and also Force Majeure cessation notice dated 18.12.2019. Thereby he has complied the Article 14.5.1 and 14.5.2 of PPA.

x) Further the learned Counsel for the 1st Respondent, has also relied upon decision of Hon'ble Appellate Tribunal for Electricity in Uttar Haryana Bijili Vitran Nigam Limited and Another Vs. CERC and others in Appeal No. 100/2014 and submitted that the burden of proof is on the person asserting a fact, and further submitted in the present case on hand the burden lies on the Petitioner to prove that he could not commissioned the project within SCOD due to Force Majeure event as alleged in the Petition, but he failed in producing materials in proof of it. Therefore, the contention of the Respondent is that the Petitioner is not entitled for any relief. As already discussed above the Petitioner had written a letter on 12.08.2019 to the 1st Respondent soon after coming to know the Government Order (Annexure-E) dated 10.08.2019, that the project work could not be continued due to heavy rainfall and also damage caused to the bridge which leads to project site area. Further it is evident from the other materials placed by the Petitioner that such occurrence or circumstances were not within the control of the Petitioner. Thereby, we

are of the opinion that the decision relied by the Learned Counsel for 1st Respondent is not helpful.

y) Considering all these facts and circumstances of the case and the materials placed before this Authority, the Commission has verified all the relevant documents which related to the Force Majeure Event as stated supra and also the contents made therein has been taken into consideration along with the oral arguments submitted by the Petitioner and arrived that there is a prima facie, the Petitioner was prevented by doing his project work in spite of best efforts to mitigate the circumstances and to overcome the burden on both sides and commissioned the project only with 8 days delay. On the other hand, the Respondent has agreed that the notices issued by the Petitioner is not in contravention with the provision of Force Majeure Clause. Except that they have not taken any steps or documentary evidence to show that they have come to the conclusion that the Petitioner would have commissioned the project within SCOD in terms of the PPA. Having noticed the difficulty faced by the Petitioner and also the duty to mitigate the circumstances for completion of the project without having any jurisdiction mere averments made in objection statements of the Respondents do not hold any water.

z) Hence, we are of the opinion that Petitioner has proved Issue No.1, thereby this issue is answered in affirmative.

21. Issue No. 2: For what relief the Petitioner is entitled to?

a) As per the discussions made herein above, we are of the opinion that the Petitioner has proved that delay in commissioning the Solar Power Project at Kalaghatagi Taluk was due to Force Majeure event as defined under Article 14 of PPA, thereby he is entitled for condonation of delay of 8 days in commissioning the Solar Power Project as prayed in the petition.

b) Hence, this issue is answered accordingly.

22. Issue No. 3: What Order?

In view of the foregoing reasons, we pass the following:

ORDER

a) The Petition is allowed.

b) The delay of 8 days is condoned in commissioning of Solar Power Project in Kalaghatagi Taluk, Dharwad District. Consequently, the SCOD is extended till 11.11.2019.

sd/-

(SHAMBHU DAYAL MEENA)
Chairman

sd/-

(H.M. MANJUNATHA)
Member

sd/-

(M.D. RAVI)
Member